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FISK v. PATTON.

(Supreme Court of Utah. July 1, 1891.)

RESULTING TRUSTS—CORPORATIONS—DEALING IN
LANDS—FORFEITURE.

1. Where one, as trustee for the stockholders of a corporation, purchases land for their benefit, and, with their consent, conveys the same as such trustee absolutely to another, with the understanding that it was to be for their use and benefit, a resulting trust is created, and, if such trustee disposes of any part of the land and converts the proceeds to his own use, he may be removed from such trust, at the instance of any stockholder.

2. A corporation which engages in the business of buying and selling real estate through a trustee does not forfeit its title to land acquired by such trustee, although contrary to Comp. Laws Utah 1888, § 2272, which provides that a corporation "shall not have power to enter into as a business the buying and selling of real estate," but affixes no penalty for its violation.

Appeal from district court, first district;
C. S. ZANE, Chief Justice.

Kimball & Allison, for appellant. *D. W. Eligbee, Miller & Maglunis, F. S. Schoonover*, and *L. R. Rhodes*, for respondent.

ANDERSON, J. The plaintiff brought this action against the defendant A. B. Patton, and also united with him as defendants J. R. Strayer, J. R. Holmes, J. H. Holmes, Robert Robinson, W. R. Swan, and the Interstate Land & Town Company, as co-defendants. Patton alone appeared and made a defense. The material portions of the complaint alleged, in substance, that in the year 1888 the defendants A. B. Patton, W. R. Swan, J. R. Strayer, J. R. Holmes, J. H. Holmes, and A. M. York organized a corporation, under and by virtue of the laws of the state of Iowa, called the "Interstate Land & Town Company." That the object of said company was the purchase and sale of real estate for profit. That said incorporation incurred debts to the amount of over \$50,000, and for the purpose of paying the same, and discharging the liability of the individual members of said corporation, it was agreed that land should be purchased in the city of Ogden, Utah, and laid out and platted and sold for the benefit of said corporation and its incorporators. But the incorporators being advised that, under the laws of Utah territory, the corporation could not deal in real estate in

this territory, the contracts, deeds, etc., were made in the names of the incorporators, or some member thereof, with the understanding or agreement that, after the properties were sold, as contemplated by all the parties thereto, the proceeds should be first applied to the payment of the purchase price of the property, then to the payment of the corporate indebtedness, and the balance, if any, to be divided between the stockholders of the company according to the amount of stock held by each. That the plaintiff became the holder of a large amount of the stock of said company in July, 1889. That in March, 1889, the defendant Patton purchased certain real estate in section 9, township 5, range 1 W., in Weber county, in trust for himself and associates, taking the title in his own name, which he platted into blocks and lots, a part of which has been sold, and a part of which is still unsold. But as to this tract the court held that Patton was the absolute owner in his own right, and, as no appeal is taken to the decision of the court as to this tract of land, no further notice will be taken of it in this opinion. The complaint further alleges that, on the 24th day of April, 1889, the said A. M. York, acting for and in behalf of the holders of the stock of the said Interstate Land & Town Company, as trustee therefor, contracted with Robert Robinson and Thomas Cahoon for the purchase of certain real estate in section 27, township 6 N., range 1 W., for which the said York executed his promissory note to Robinson, who acted for himself and Cahoon, in the sum of \$108,000. This contract contained the terms of sale, the time and manner of payment, etc. The complaint further alleges that on the 29th day of May, 1889, Robinson, in furtherance of the contract, deeded to York certain real estate, describing it. That York took the conveyance subject to the terms of the contract, and in trust for himself and associates. That on the 1st day of August, 1888, York assigned the Robinson contract to the plaintiff, W. R. Swan, A. B. Patton, J. R. Strayer, J. H. Holmes, and J. R. Holmes, and on the same day also conveyed the real estate deeded to him by Robinson to the defendant Patton, and withdrew from the enterprise. That at the same time, and as a consideration for the assignment of the contract, and for

the conveyance to Patton, the plaintiff and the defendants W. R. Swan, J. R. Strayer, J. H. Holmes, and J. R. Holmes entered into a written agreement with York, by which they agreed to pay the notes York had executed to Robinson; and that, as a further security to York, Patton executed his individual note to York for \$35,000, and secured it by a mortgage on the real estate deeded to him by York, which mortgage York assigned to Robinson. That Patton took said conveyance with the understanding and agreement that he held the same in trust for the plaintiff and his other associates, and with full knowledge of all the facts and circumstances and the conditions under which the conveyance to him was made. That thereafter the defendant Patton sold a portion of the land in said section 27 known as "Nob Hill" and "Nob Hill Annex" additions to Ogden city, and was about to convert the proceeds to his own use, and had already appropriated a large portion of the proceeds to his own use, and that he threatened to sell the remainder of the property, and convert the proceeds to his own use and benefit; and asking that he be removed as trustee, that he be required to account for all sales made by him, and that he be enjoined from disposing of any of the property held by him as trustee, and that a receiver be appointed to take charge of the real estate, notes, and mortgages in his hands, and for general relief. The defendant Patton, by his answer, admitted the indebtedness of the land and town company as alleged, but denied that he took the title to the real estate in controversy in the character of trustee for himself and his associates, stockholders in the Interstate Land & Town Company, or for the purpose of carrying out the provisions of the contract made by York with Robinson and Cahoon; and denied there was any understanding or agreement that the property should be conveyed or held by him as trustee; and averred that he purchased the property for himself only, and that he held the title in his own name, and in his own right, free from any trust; and that his associates in the land and town company had no interest, equitable or otherwise, in the property.

The court, in its findings of fact, found that the allegations of the complaint were substantially true. Its findings were, in substance, as follows: (1) That on the 24th day of April, 1889, A. M. York, acting for the stockholders of the Interstate Land & Town Company, a corporation organized under the laws of the state of Iowa, and as trustee therefor, entered into a written contract with Robert Robinson and Thomas Cahoon for the purchase of a part of section 27, township 1 N., range 1 W., in Weber county, for which York executed to Robinson his promissory note for \$108,000. (2) That on the 26th day of May, 1889, Robinson and Cahoon, pursuant to the contract, conveyed to York, as trustee for said stockholders, a portion of the real estate described in the contract, and in pursuance of its provisions. (3) That on the 31st day of July, 1889, York, with the advice and consent

of the stockholders, conveyed to Patton certain described lots and lands in Nob Hill and Nob Hill Annex additions to Ogden city, Utah, and being part of the premises conveyed by Robinson and Cahoon to York. (4) That at the time of the conveyance from York to Patton, and as a consideration therefor, Alexander H. Swan, Will R. Swan, J. R. Holmes, the defendant A. B. Patton, and the plaintiff, Fisk, in behalf of and as agents for the stockholders of the land and town company, entered into a contract or bond of indemnity in writing, whereby they agreed to pay to Robinson and Cahoon the notes York had executed to Robinson, and to save harmless the said York from the same. That at the time of the execution of the deed from York to Patton, and of the contract of indemnity, the defendant Patton executed to York his promissory note for \$35,000, and secured the same by a mortgage to York on the real estate conveyed to him by York, which notes and mortgage York assigned to Robinson and Cahoon as collateral security for the notes originally given by York to Robinson and Cahoon, and all being parts of one transaction. That, as a part of the foregoing transaction, York assigned the contract of April 24, 1889, made with Robinson and Cahoon to W. R. Swan, J. R. Strayer, J. H. Holmes, J. R. Holmes, the plaintiff, A. C. Fisk, and the defendant A. B. Patton, in trust for the benefit of the stockholders of the land and town company. The court further found that Patton had violated the terms and obligations of his trust, and is denying its existence, and that the interest of the stockholders of the land and town company required that the said Patton be removed from his position as trustee. As a conclusion of law the court found that a resulting trust was created upon the real estate conveyed by York to Patton for the benefit of the stockholders of the Interstate Land & Town Company in proportion to the amount of stock held by each in said company. The court decreed that Patton be removed from his position as trustee; that he convey all the real estate conveyed to him by York on the 31st day of July, 1889, remaining undisposed of at the commencement of this suit, to the receiver appointed by the court; that he make a report to the court of all sales made by him, and what disposition has been made of the proceeds of the same; and that he turn over to the receiver all moneys, notes, mortgages, and other property remaining in his hands arising from any sale or disposition of the property. It was further decreed that the receiver, out of the proceeds of the sales of the real estate, and other property which might come into his hands arising out of said trust, pay (1) the costs, expenses, and attorney's fees of his trust and receivership; (2) the purchase money due or to become due on the contract of April 24, 1889, between Robinson and Cahoon and York; (3) the debts of the Interstate Land & Town Company, if there should be sufficient for that purpose; if not, then *pro rata*; (4) the remainder, if any, to the stockholders of the land and town company in proportion to the

amount of stock held by each, the decree to be subject to modification as the equity and justice of the cause and the rights of the parties may require.

The appeal in this case is by Patton alone, he being the only defendant who answered, and the only one against whom a decree was rendered. The appeal is from the judgment of the lower court, and the record consists of the judgment roll only, and hence the conclusive presumption is that the evidence warranted the findings of fact made by the court. Counsel for appellant contend the judgment of the district court should be reversed because the findings of fact and conclusions of law are not separately stated, as provided in section 505, p. 288, 2 Comp. Laws. We think, however, there was a substantial compliance with that statute in this case.

It is next contended that the pleadings and facts found do not support the conclusions of law, nor the decree; that the complaint charged the defendant as the trustee of an express trust; and that, under the averments of the complaint, the court could not find that the defendant took the land in controversy charged with a resulting trust. The complaint does not, in terms, aver that the defendant was the trustee of an express trust, and the facts averred in the complaint, and found by the court, may well be construed to justify the conclusion reached by the court. When the plaintiff and the defendant Patton, together with certain other holders of the stock of the land and town company, on behalf of themselves and the other holders of its stock, assumed the payment of the York notes, which were executed for the purchase price of the property, they, and those for whom they acted, became, to all intents and purposes, the purchasers of the property; and when, with the advice and consent of all the parties interested, York, who then held the legal title to the property in controversy in his own name, but as trustee for the others, conveyed it to Patton to be held by him in his own name, and to be sold for the benefit of all, we think a resulting trust was created upon the real estate for the benefit of the stockholders of the land and town company. 2 Pom. Eq. Jur. §§ 1037, 1038, and cases there cited. The argument of counsel for appellant is in effect that, under the pleadings and the facts as found, the district court should have found, as a conclusion of law, that the defendant held the real estate as the trustee of an express trust, if he held it as a trustee at all.

It is not contended that the facts found were not established by the evidence,—the evidence indeed is not in the record; nor is it pretended that the decree is inequitable, nor that any injustice has been done the defendant, nor that any different decree would or should have been rendered if the court had held that the facts established an express instead of a resulting trust. If, then, it be conceded that the court should have held it to be an express, and not a resulting, trust, yet if the final result would have been the same, or sub-

stantially so, and no injustice has been done the appellant, should such an error be held to be ground for reversal in an equity case? We think not. Appellate courts do not sit for the purpose of merely theorizing about the law. Their duty is to look into the record and consider, not so much whether technical or possible errors may have been committed, as to see that substantial justice has been done. In this case the court found that the defendant Patton held in his own name property belonging to himself and certain others; that it was purchased by them jointly, and for the benefit of all, and the title taken in his name, to be disposed of by him for the common benefit of the owners; that, after getting the property in his own name, he denied the existence of any trust, claimed the property as his own, and was disposing of it, and converting the proceeds to his own use, and threatening to dispose of the remainder in the same way. It would be a reproach to the administration of the law if a court of equity should fail to administer the proper relief in such a case, or if the appellate court should set aside its action, if it is apparent and undisputed that justice has been done.

But it is contended that the court, by its judgment, sanctioned the buying and selling of real estate in this territory by the defendant corporation, and that this was error; and we are referred to section 6, p. 4, 2 Comp. Laws 1888, which provides that a corporation "shall not have power to enter into, as a business, the buying and selling of real estate." It will be observed that this statute, while it denies to a corporation the power to engage in buying and selling real estate as a business, affixes no penalty, by forfeiture or otherwise, for its violation. The buying and selling of real estate by a corporation is not a crime under this statute, nor is the business an immoral one; and, while a stockholder might by proper proceedings prevent a corporation from engaging or continuing in the business of buying and selling real estate, we do not think that the corporation forfeits its title to real estate bought in violation of the statute to one who, having obtained title as trustee, denies his trust, and converts the property to his own use. We are of the opinion that any stockholder may bring his action against such trustee, as was done in this case, for the removal of the trustee, and for an accounting, and that the court may grant such relief as equity demands. In this case the corporation did not purchase the real estate in controversy. Being in debt in the sum of \$50,000, the holders of its stock, as an association or syndicate, purchased the real estate for the purpose of paying off this indebtedness from expected profits in the sale thereof, and dividing the remainder among themselves in proportion to the amount of stock held by each. We do not think this was such a violation of the letter or spirit of the statute as to enable Patton, in whom the title was placed as trustee, to appropriate the property to his own use in fraud of the rights of his associates in

the enterprise. The judgment of the district court is affirmed.

BLACKBURN, J., concurs.

(7 Utah, 410)

SMYTH v. LAWSON *et al.*¹

(Supreme Court of Utah. July 1, 1891.)

APPEAL—FINDINGS—EVIDENCE.

Where the trial is to the court, and the evidence supports its findings, and no question of law arises thereon, the judgment will be affirmed.

Appeal from district court, third district; C. S. ZANE, Chief Justice.

Bennett, Marshall & Bradley, (W. H. Dickson, of counsel,) for appellants. Hoge & Burmester, for respondent.

BLACKBURN, J. This is a suit for money had and received by the defendants to the use of the plaintiff. Trial by court, jury waived. Findings and judgment for the plaintiff. Motion for new trial. Motion overruled, and appeal from the order overruling motion for new trial and judgment. There is no question of law that needs comment in this case. After careful examination, we think the evidence clearly and fully supports the findings of the court, and justifies the judgment. A review of the evidence would be wholly without profit. Therefore the judgment is affirmed.

ANDERSON and MINER, JJ., concur.

(7 Utah, 414)

EAST *et al.* v. MOONEY *et al.*

(Supreme Court of Utah. July 1, 1891.)

NEW TRIAL—NOTICE—TIME OF HEARING—STIPULATION.

1. Although Comp. Laws Utah, p. 295, allow 10 days after judgment for notice of motion for new trial, and 10 days thereafter to file the motion, yet, where the parties stipulate that the notice and motion may be filed within 30 days after judgment, they waive the statute, and the motion may be disposed of after that time has expired, although it may be within 10 days after formal notice of the motion was filed.

2. Notice of intention to move for a new trial stands for the formal motion, and the questions may be ruled upon, although no motion is filed.

Appeal from district court, first district; JAMES A. MINER, Justice.

Jacob S. Boreman and L. R. Rogers, for appellants. Smith & Smith, for respondents.

BLACKBURN, J. The appeal in this case is from the order overruling motion for a new trial, and the error assigned is that it was heard out of time. The first contention is that no motion for a new trial had been made, only a notice of intention had been given and filed, and hence such motion could not be heard. This court decided at this term in the case of Needham v. Salt Lake City, 28 Pac. Rep. 920, that a formal motion need not be filed, and, under the practice in this territory, the notice of intention to move for a new trial stands for the formal motion. The second contention is that the motion was heard some days before the time had expired for the hearing of the motion. This

¹Rehearing denied.

contention is based upon the provisions of the statutes of Utah, (2 Comp. Laws, p. 295.) The appellant has 10 days after notice of the decision of the court to give notice of his intention to move for a new trial, and 10 days thereafter to prepare and serve statement on motion for a new trial. The notice of intention was served and filed on the 5th day of September, 1890; and on the 11th day of the same month the order overruling the motion was made over the objections of the appellants, and duly excepted to, and before any statement was made on motion for a new trial. On the 6th of the previous August, by stipulation, the appellants were allowed 30 days from that date in which to give notice of motion for a new trial, to file and serve same, and to prepare and serve and file statement on motion for a new trial, and to take whatever steps are necessary to prepare, serve, and file said motion and statement. By this stipulation, the requirements of the statute are waived, and consequently the decision of the case depends upon the meaning to be given to the stipulation. But for the stipulation the appellants were compelled to serve and file their statement on motion for a new trial within 20 days after notice of the decision of the court, the case having been tried by the court without a jury. The notice of the decision was given to appellants on the 6th of August, 1890, so that without the stipulation the appellants' opportunity to serve and file notice of motion for a new trial would have on the 11th of August, and to serve and file statement on motion for a new trial on the 21st of same month. But the stipulation allowed them until the 5th of September. They filed a notice of motion for a new trial on the 5th of September, but no statement on the motion for a new trial. We think they having set aside the statute by agreement, all parties were bound by the agreement. The 30 days allowed by the stipulation having expired on the 5th day of September, it was the right of the respondents to call up the motion for a new trial, and have it passed upon. This they did, and in this we see no error. We find no error in the record. Judgment affirmed.

ZANE, C. J., concurs.

(7 Utah, 412)

SLATER v. CRAGUN *et al.*

(Supreme Court of Utah. July 1, 1891.)

APPEAL—CONFLICTING EVIDENCE.

Where the evidence is conflicting, the verdict of a jury or the finding of a court will not be disturbed on appeal, unless clearly wrong.

Appeal from district court, first district; H. P. HENDERSON, Judge.

Kimball & Allison, for appellant. Smith & Smith, for respondents.

BLACKBURN, J. This suit is brought to quiet title to certain claimed water-rights of Barrett Canon creek. The defendants answer, and deny specifically the claimed rights of plaintiff, and file a cross-complaint, alleging their several rights to all the waters of said creek. The defendants

set up also a final adjudication of the rights of the parties in this regard. This point we deem it unnecessary to decide. Indeed, there is not enough in the record to determine that question properly. The only question is on the evidence, whether the findings and judgment of the district court are supported by the evidence. The case was tried without a jury, and the court found the issue of fact for the defendants, and decreed accordingly. The evidence is by many witnesses, and very conflicting. The evidence furnished by the plaintiff, standing alone, would entitle him to a decree in his favor, and the evidence of the defendants, standing alone, would entitle them to a decree in their favor. The court below was controlled by the evidence of the defendants in its findings and decree, and we cannot say that they are so clearly and manifestly wrong that this court would be justified as a matter of law in reversing the judgment. The court below, seeing the witnesses on the stand, their bearing and manner of testifying, and hearing them in open court, is better qualified to determine which is the right, when there is conflict, than this court, who only sees the testimony in the record. The rule is "that the verdict of a jury or the finding of a court, where there is conflict in the testimony, is not to be set aside by an appellate court, unless the findings are clearly and manifestly against right and justice." In this case we cannot say the findings of the court below should be set aside for that reason. *Firman v. Bateman*, 2 Utah, 268. This rule is so well settled that further authority need not be cited. A review of the testimony in this case would serve no useful purpose. The judgment is affirmed.

ZANE, C. J., and ANDERSON, J., concur.

(7 Utah 416)

COOK v. OREGON SHORT-LINE & U. N. RY. CO.

(Supreme Court of Utah. July 1, 1891.)

APPEAL—FILING UNDERTAKING.

Since Comp. Laws Utah 1888, § 3636, requires an undertaking on appeal to be filed within five days after service of notice of appeal, in order to render the appeal effectual for any purpose an undertaking not filed within that time is a void, and not merely an insufficient, undertaking, and the supreme court cannot assume jurisdiction by allowing a new undertaking, under section 3650, which provides that "no appeal shall be dismissed for insufficiency of the undertaking, if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing on motion to dismiss the appeal."

Appeal from district court, third district; C. S. ZANE, Chief Justice.

P. L. Williams, for appellant. C. S. Varian and Van Meter, for respondent.

MINER, J. This action was brought in the third district court to recover damages arising from the alleged negligence of the defendant in constructing, maintaining, and leaving the rails of its track projecting above the surface of the public sidewalk and line of public travel on West Third street, in the city of Salt Lake, so that plaintiff, while walk-

ing along the said sidewalk on the evening of September 22, 1889, stumbled against the rails of such track, and broke her right arm, and was otherwise injured. On the hearing of the case the respondent's counsel contended that this court had no jurisdiction of the appeal from the order denying defendant's motion for a new trial, or from the judgment, on the ground that no undertaking on appeal was filed within the time prescribed by law. Rule 6 of this court requires the appellant to prepare and file 10 copies of a printed abstract of the record, etc., and that the abstract shall set forth the title of the cause, with the date of filing all papers in the court below embodied in the abstract, and a brief statement of the contents of each pleading and paper, and shall set forth fully the substance of the pleadings and evidence, if any, and the points relied upon for reversal of the case appealed from, and shall refer to the pages in the transcript where pleadings shall be easily found.

On an examination of the abstract in this case, we are unable to find that any notice of appeal was filed or served, or that any undertaking on appeal was filed or a deposit made, or that any motion for a new trial was made or denied, nor does it appear from what court the appeal is taken. This abstract is therefore clearly defective. On an examination of the transcript, it appears that judgment was entered October 29, 1890; motion for a new trial denied December 20, 1890; notice of appeal from the judgment, and also from the order denying defendant's motion for a new trial, was served and filed January 22, 1891; an undertaking on appeal from the judgment alone was filed January 28, 1891, six days after the notice of appeal was filed and served; and on April 22, 1891, after the transcript was filed, an undertaking on appeal from the order denying defendant's motion for a new trial was filed. The abstract and transcript are both silent as to how this second undertaking came to be filed; certainly, it cannot be claimed that it was filed within the time required by the statute; and if filed by permission of the court first obtained, and through inadvertence, it is none the less objectionable, as this court cannot confer jurisdiction upon itself by the making of a void order, and amending that which did not exist or was not capable of amendment. The first undertaking on appeal from the judgment was filed one day after the time had expired for filing the same, and was therefore ineffectual for any purpose, under section 3636 of the Compiled Laws of Utah of 1888, which provides that an "appeal is ineffectual for any purpose, unless within five days after service of the notice of an appeal an undertaking be filed or a deposit of money be made with the clerk," etc. It was the same as if no undertaking had been filed, and there was nothing to amend by. It was not sufficient under section 3650, nor defective. It referred to the judgment appealed from, and was in all respects in conformity with the statute as for an undertaking on appeal from the judgment. The giving of this under

taking within the time prescribed by the statute was necessary to confer jurisdiction on this court. The undertaking, filed April 22, 1891, on appeal from the order denying defendant's motion for a new trial, was not authorized by section 3650 of the Compiled Laws of 1888, which provides: "If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal." This section does not authorize the giving of an undertaking in this court in the first instance, only when an insufficient undertaking has been given in the court below within the time prescribed by law, and then the defect in the form or condition may be amended or remedied by filing a new amended undertaking in this court, on approval of a justice of the supreme court. This could be properly authorized as an amendment of a defective and insufficient proceeding, but no amendment of the first undertaking could be allowed here, because no undertaking had been given, and there was nothing to amend. The undertaking was not filed within the time required by the statute. It is therefore a nullity, as there was nothing for it to operate on. In this, no attempt was made to file an undertaking on appeal from the order denying defendant's motion for a new trial within five days after service of notice of appeal, nor until after the expiration of three months thereafter. The undertaking and appeal could not in any event be treated as an amendment to the undertaking on appeal from the judgment; nor does it purport to be so intended, but as an independent undertaking under another provision of the statute allowing appeals from an order denying defendant's motion for a new trial, and was filed three months after the right to appeal expired. To allow this undertaking to stand would be to allow a new appeal to be perfected after the time fixed by law, and contrary to the provisions of the statute. We are of the opinion that an undertaking on appeal must in all such cases be filed within five days after the notice of appeal is filed and served, and if this is not done the appeal is ineffectual for any purpose, and this court has no jurisdiction to hear or determine this cause on appeal, nor to allow a new or amended undertaking to be filed after the statutory time had expired for filing an undertaking on appeal, where no such undertaking has been filed within the time prescribed by the statute. This view is fully sustained by numerous decisions in the supreme court of California, under statutes like those of Utah, as well as by the courts of this territory. *Paving Co. v. Bolton*, (Cal.) 26 Pac. Rep. 650; *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. Rep. 657; *People v. Fennel*, 4 Utah, 112, 7 Pac. Rep. 525, 648; *People v. Gough*, 2 Utah, 69; *Reed v. Kimball*, 52 Cal. 325; *Franks v. Smith*, 45 Mich. 326, 7 N. W. Rep. 906; *Shaw v. Randall*, 15 Cal. 385; *Horn v. Volcano W. Co.*, 18 Cal. 143; *Berniaud v. Beecher*, 74 Cal. 618,

16 Pac. Rep. 510; *Wood v. Pendola*, 77 Cal. 82, 19 Pac. Rep. 183; *Blagi v. Howes*, 63 Cal. 384; *Craig v. Seitz*, 63 Mich. 727, 30 N. W. Rep. 347. The attempted appeal from the judgment, and from the order denying defendant's motion for a new trial, is dismissed.

ANDERSON and BLACKBURN, JJ., concur.

MARKS v. TOMKINS.

(7 Utah 421)

(Supreme Court of Utah. July 1, 1891.)

ACTION EX DELICTO—COUNTER-CLAIM—EVIDENCE—EXCEPTIONS.

1. Comp. Laws Utah 1888, § 3226, allows a defendant to set up a statement of any new matter constituting a counter-claim, and arising out of the transaction set forth in the complaint as a foundation of plaintiff's claim, or connected with the subject of the action. *Held*, in an action by a person who is forcibly ejected from premises by one who claims title to the land, for an injunction, and for damages for destruction of her buildings by defendant, that the latter cannot set off a claim for damages to buildings erected by her after her trespass, and destroyed by plaintiff on regaining possession under cover of the injunction, since the two trespasses are distinct, and evidence of plaintiff's trespass is inadmissible.

2. Nor is such evidence admissible for the purpose of showing plaintiff's animus, or as affecting her standing as a witness.

3. Where there are several requests to charge, and some of them are objectionable, an exception "to the charge as given, and to the refusal of the court to charge as requested," is too general.

Appeal from district court, first district; J. W. BLACKBURN, Justice.

Sutherland & Judd, for appellant. J. L. Rawlins, for respondent.

MINER, J. On August 5, 1889, the plaintiff filed her complaint, alleging ownership and possession of the premises described therein, together with the house and improvements thereon; and that about August 1, 1889, the defendant willfully and maliciously entered thereon, and tore down the said improvements, etc., to the plaintiff's damage of \$1,000. On filing such complaint, an injunction was obtained as prayed for, restraining defendant entering upon said premises, or in any manner interfering therewith. The defendant's answer filed September 27, 1890, denies the allegations in the complaint, and alleges, by way of counter-claim, that she is the owner and in the possession of the premises described in the complaint, and has been for 15 years, subject to the paramount title of the United States therein; and that, after the injunction was allowed and served, the plaintiff entered upon and took possession of the premises in question, demolishing the buildings and the fences thereon erected by the defendant, and thereby injured defendant in the sum of \$500, and prayed for judgment, etc. This cause appears to be the last of a series of actions between the same parties growing out of the adverse right to this land, one of which is reported in 24 Pac. Rep. 528. It appears from the testimony given on the part of the plaintiff that she built a dwelling on the land in question in 1889, and fenced it; that she

had occupied the building about eight months, when she was forcibly removed therefrom by the defendant and others on August 1, 1889, and the improvements she had made thereon were destroyed; that the defendant immediately took possession and built a building thereon, and fenced it, whereupon the plaintiff then commenced this suit, and obtained an injunction, under the cover of which plaintiff again took possession of the lot; whereupon the defendant's counsel offered to prove in her defense, under a counter-claim set up with the answer, that just after the plaintiff commenced this suit and obtained her injunction therein, and before the defendant's answer and counter-claim was filed, plaintiff took possession of the lot, and pulled down a building, previously erected thereon by the defendant, and erected one in its place, for which defendant sought to recover damages under her counter-claim in this action. The court refused the offer, and rejected the testimony, to which ruling the defendant alleged error.

Under section 3226 of the Compiled Laws of 1888, the defendant would be entitled to set up a statement of any new matter constituting a defense or counter-claim, existing in favor of the defendant, and against the plaintiff, between whom a several judgment might be had in this action, and arising out of the transaction set forth in the complaint as a foundation of the plaintiff's claim, or connected with the subject of the action, and prove the fact on the trial; but the matter set up and sought to be proven is clearly not a counter-claim, within the meaning of the statute. The facts alleged and sought to be proven was a distinct trespass, committed by the plaintiff several days after the trespass, as alleged in the complaint, was committed by the defendant, and to hold that one trespass committed by one party, under such circumstances, could be counter-claimed or set off against another trespass committed by the other party, at any other time, would be a departure from the rule governing such cases. *Patison v. Richards*, 22 Barb. 143; *Barhyte v. Hughes*, 33 Barb. 320; *MacDougall v. Maguire*, 35 Cal. 274. "Claims of damages from torts, when attempted to be enforced against causes for damages also arising from other torts, have, as a rule, been rejected;" and courts have adopted or assumed, as a general principle, that such cross-demand can never arise from the transaction set forth by the plaintiff as the foundation of the claim, especially when the trespass or torts are separate and distinct from each other, and not connected with the transaction, foundation, or subject of the action, or when the tort sought to be counter-claimed was not committed until after the cause of action was commenced wherein the counter-claim is made. *Pom. Rem. § 790*, p. 831; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Askins v. Hearn*, 3 Abb. Pr. 184. The defendant may have an independent cause of action for the alleged trespass in tearing down her building, but it does not arise out of the transaction connected with the subject or foundation of the action, as al-

leged in the complaint. Therefore there was no error in rejecting the testimony offered; nor do we think the testimony offered was competent, under this issue, for the purpose of showing the *animus* of the plaintiff, or as affecting her testimony, and standing as a witness. The plaintiff was in possession of the house at the time it was torn down by the defendant, and had been in actual occupancy of the same for several months. The fact that the defendant owned the ground or was entitled to the possession of it, or that plaintiff's possession was wrongful, would not justify her in using force in ejecting the plaintiff from the premises, or tearing down the building in which she dwelt, without legal process or warrant. If her possession was wrongful, it would have been an easy matter to have tested her right of possession by legal means. The fact that the plaintiff regained possession of the premises under cover of the writ of injunction issued in this case, and then committed another trespass upon the property of the defendant, does not protect her from the legal consequences of her wrong-doing, nor justify another wrong on the part of the defendant.

The charge of the court did not fully submit to the jury the theory of the defendant's case, but the main questions involved were substantially covered by the charge as given. The exceptions taken to the refusal of the court to charge as requested were not sufficiently specific. "An exception to the charge as given, and to the refusal of the court to charge as requested," is too general, when several requests are proposed, and it appears that some of them are objectionable. Exceptions to the charge given, or the refusal to charge as requested, should be specific enough to show what parts of it are regarded as erroneous, or how it injuriously affects the rights of the party complaining; and these exceptions should be made and pointed out before the verdict of the jury is reached, so that the judge may have an opportunity to correct any errors which he may have inadvertently fallen into during the hurry and perplexities of the trial. *Geary v. People*, 22 Mich. 220; *Pound v. Railway Co.*, 54 Mich. 13, 19 N. W. Rep. 570; *People v. Garbutt*, 17 Mich. 9; *Prescott v. Patterson*, 49 Mich. 622, 14 N. W. Rep. 571; *Tupper v. Kilduff*, 26 Mich. 397; *Hicks v. Coleman*, 25 Cal. 146; *Robinson v. Railroad Co.*, 48 Cal. 425. Upon the whole record, we find no error sufficient to justify a reversal of the judgment. The judgment of the court below is affirmed, with costs.

ZANE, C. J., and ANDERSON, J., concur.

SIMMONS v. WINTERS.

(Supreme Court of Oregon. June 24, 1891.)

WATER-COURSES—APPROPRIATION—DEED—CONSTRUCTION.

1. A water-course is a stream of water usually flowing in a particular direction, with well-defined channels and banks, but the water need not flow continuously, as the channel may sometimes be dry; but this does not include water

descending from the hills, without any definite channel, only in times of melting snow and ice.

2. Where water, owing to the hilly or mountainous configuration of the country, accumulates in large quantities from rains and melting snow, and at regular seasons descends through gullies or ravines upon the lands below, and in its onward flow cuts out through the soil a well-defined channel, which bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial during such seasons, such a stream is to be considered a water-course, and governed by the same rules.

3. To make a valid appropriation of water, there must be some actual beneficial purpose, existing at the time, or contemplated in the future, as the object for which the water is utilized. The needs of the purpose for which the appropriation is made, is the limit to the amount of water which may be taken.

4. To effect the appropriation, any gulch, dry ravine, or depression in land may be used as a part of the ditch for conducting the water; and so may the lower portion of the same channel from which the water is taken.

5. Under the maxim of the law that whoever grants a thing is supposed also tacitly to grant that without which the grant would be of no avail, the right to the use of a ditch and water existing in favor of land conveyed by deed, and without which the land would be practically valueless, pass by such deed as appurtenances.

(Syllabus by the Court.)

Appeal from circuit court, Wallowa county; JAMES A. FEE, Judge.

T. H. Crawford, for appellant. R. Eakin, for respondent.

LORD, J. This is a suit in equity, brought by the plaintiff to enjoin the defendant from diverting the waters of a certain stream commonly known as "Sheep Creek Ditch," and for damages. The waters of Sheep Creek ditch flow through the lands of the plaintiff and the defendant. The theory upon which the suit is predicated is that Sheep Creek ditch is an ancient and natural water-course, with well-defined banks and channels, to the uninterrupted flow of which the plaintiff is entitled as a riparian owner, and by the diversion of which he has already been damaged, and will be irreparably damaged, unless the defendant be restrained and enjoined. The facts alleged being denied, the defense set up was prior appropriation of the waters of Little Sheep creek by means of dam, ditches, and dry ravines, or draws, into what is commonly known as "Sheep Creek Ditch," for the purpose of irrigation, stock, and domestic uses. The legal aspect of the case involves an inquiry into (1) what constitutes a water-course; (2) the quantity of water to which an appropriation is restricted; and (3) the nature of the water-right which may pass as appurtenant to the premises conveyed.

Considering these in their order, the inquiry is, what is included within the term "water-courses?" When there is a living stream of water, within well-defined banks and channel, no matter how limited may be its flow of water, there is no difficulty in determining its character as a water-course; but when the stream is of that class which periodically or occasionally flows through ravines, gullies, hollows, or depressions in land, and by its flow assumes a definite channel, such as

indicates the action of running water, there is often some difficulty of distinction. A water-course is defined by BIGELOW, J., as "a stream of water usually flowing in a definite channel, having a bed or sides or banks, and usually discharging itself into some other stream or body of water." *Luther v. Winnisimmet Co.*, 9 Cush. 174. It is "a living stream, with defined banks and channels, not necessarily running all the time, but fed from other and more permanent sources than mere surface water." *Jeffers v. Jeffers*, 107 N. Y. 651, 14 N. E. Rep. 316. The size of the stream is immaterial, but "it must be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes; but the flow of water need not be constant." *Pyle v. Richards*, 17 Neb. 182, 22 N. W. Rep. 370. It is defined in *Eulrich v. Richter*, 37 Wis. 236, to be "a stream of water, usually flowing in a certain direction, in a regular channel, with bed and banks; but the water need not flow continually. The channel may be sometimes dry." "There must, however, always be substantial indication of the existence of a stream, which is ordinarily and most frequently a moving body of water." *Wels v. City of Madison*, 75 Ind. 253. "A water-course," says Mr. Angell, "consists of bed, bank, and water; yet the water need not flow continually, and there are many water-courses which are sometimes dry. There is, however, a distinction to be taken in law between a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water which, in times of freshets or melting of ice or snow, descend from the hills and inundate the country." Ang. *Water-Courses*, § 4. The distinction is, as HAWLEY, C. J., said, "that it is a flowing stream of water,—a water-course,—as distinguished from water flowing through hollows, gulches, or ravines only in times of rain or melting snow." *Barnes v. Sabron*, 10 Nev. 237. "Such hollows or ravines," said DIXON, C. J., "are not, in legal contemplation, water-courses." *Hoyt v. City of Hudson*, 27 Wis. 656. But, "if the face of the country is such," said WILLIAMSON, C., "as necessarily to collect in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet, and if such water is regularly discharged through a well-defined channel which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural water-course." *Earl v. De Hart*, 12 N. J. Eq. 280. "In a broken and bluff region of country," said MITCHELL, J., "intersected by long, deep gullies or ravines surrounded by high steep hills or bluffs, down which large quantities of water from rain or melting snow rush with the rapidity of a torrent, often attaining the value of a small river, and usually following a well-defined channel, * * * such streams partake more of the nature of natural streams than of ordinary surface waters, and must, at least to a certain extent, be governed by the same rules." Mc-

Clure v. City of Red Wing, 28 Minn. 186, 9 N. W. Rep. 767. In Gibbs v. Williams, 25 Kan. 214, it is held, where surface water from rains and snow in a hilly country, seeks its outlet through a gorge or ravines, and by its flow assumes a definite channel, with well-defined banks, such as will present to the casual glance the unmistakable evidence of the frequent action of running water, and through which at regular seasons the water flows, and has done so immemorially, such stream is a natural water-course. In West v. Taylor, 16 Or. 172, 13 Pac. Rep. 669, STRAHAN, J., said that "water which has accumulated from spring rains and melting snows, and which has flowed several miles between regular banks of a well-defined water-course, * * * must be deemed a water-course." The conclusion to be deduced from these decisions is that a water-course is a stream of water usually flowing in a particular direction, with well-defined banks and channels, but that the water need not flow continuously,—the channel may sometimes be dry; that the term "water-course" does not include water descending from the hills, down the hollows and ravines, without any definite channel, only in times of rain and melting snow; but that where water, owing to the hilly or mountainous configuration of the country, accumulates in large quantities from rain and melting snow, and at regular seasons descends through long deep gullies or ravines upon the lands below, and in its onward flow carves out a distinct and well-defined channel, which even to the casual glance bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, such a stream is to be considered a water-course, and to be governed by the same rules.

2. In this state the doctrine of the right to water by prior appropriation for mining and irrigating lands has not been adopted or applied, except as the parties have acquired their rights under the act of congress of 1866. Nor has there been any legislation by the state upon the subject. By the act of congress, the right to water by prior appropriation from the streams upon the public domain was recognized and established. "But the appropriation," said Mr. Justice FIELD, "is limited in every case, in quantity and quality, by the uses for which the appropriation is made." Atchison v. Peterson, 20 Wall. 514. The measure of the right of the first appropriation of the water, as to extent, follows the nature of the appropriation, or the uses for which it is taken. Ortman v. Dixon, 13 Cal. 38. The needs or the purpose for which the appropriation is made is the limit to the amount of water which may be taken. He can only appropriate so much as he needs for the given purpose. But the appropriation must be made for some beneficial purpose, presently existing or contemplated. Mr. Pomeroy says: "In order to make a valid appropriation of waters upon the public domain, and to obtain an exclusive right to the water thereby, the appropriation must be made with a *bona fide* present intention of ap-

plying the water to some immediate useful or beneficial purpose, or in present *bona fide* contemplation of a future application of it to such a purpose, by the parties thus appropriating it." Pom. Rip. Rights, § 47. There must be some actual beneficial purpose existing at the time, or contemplated in the future, as the object for which the water is utilized. If the amount of the water appropriated is within the given beneficial purpose for which it was taken, no more than is necessary to irrigate the lands contemplated to be reduced to cultivation as soon as can be reasonably done, although more than can be beneficially used for the present, it is nevertheless a valid appropriation. While a settler cannot appropriate more water from the public domain than is necessary to irrigate his land, nor any to irrigate lands which he does not intend to cultivate, nor own, or hold by possessory title, to the exclusion of subsequent *bona fide* appropriators, yet he is not required, in order to make his appropriation valid, to beneficially use, the first years of his settlement, the full amount of water appropriated, when such amount is no more than is necessary to irrigate the lands he intends to subject to cultivation. His original appropriation may be made with reference to the amount of water that is needed to irrigate the lands he designs to put into cultivation. This view is ably sustained in Barnes v. Sabron, 10 Nev. 243, by HAWLEY, C. J., who, after stating that the plaintiff's rights to the water are not dependent upon the amount beneficially used by him in the first year of his appropriation, proceeds to say: "He was only entitled to as much water, within his original appropriation, as was necessary to irrigate his land, and was bound, under the law, to make a reasonable use of it. * * * No person can, by virtue of a prior appropriation, claim or hold any more water than is necessary for the purpose of the appropriation. Reason is the life of the law; and it would be unreasonable and unjust for any person to appropriate all the waters of a creek when it is not necessary to use the same for the purposes of his appropriation. * * * What is a reasonable use depends upon the particular circumstances of each particular case. In this case the plaintiff should not be confined to the amount of water used by him in 1869 or 1870, nor his rights regulated by the number of acres he then cultivated. He did not cultivate more land because 'his team was poor,' and he 'had no money to hire help.' The object had in view at the time of his diversion of the water must be considered; in connection with the actual extent of his appropriation." As there must be an actual diversion of the water from its natural channel by means of a ditch or other structure to effect the appropriation, any dry ravine, gulch, or hollow in lands may be used for this purpose as a part of the ditch for conducting the water. Not only may these be used by the appropriator as a part of his ditch, but he may use the lower portion of the same bed or natural channel from which the water is taken. Pom. Rip. Rights, § 48. It is thus seen that, in

order to make a valid appropriation of water, it is required to be made for some beneficial purpose then existing or contemplated, and that the amount of water appropriated must be restricted to the quantity needed for such purpose.

3. Where there is no express grant or sale of a ditch or water-right mentioned in the deed of the land, other than may be included in the use of the word "appurtenances," the question is whether the interest of the grantor in such ditch, and right to the use of the water, would be conveyed or pass to the grantee by such deed. The maxim of the law is that whoever grants a thing is supposed also, tacitly, to grant that without which the grant would be of no avail. Where the principal thing is granted, the incident shall pass. Co. Litt. 152a. A grant of real estate will include whatever the grantor has power to convey which is reasonably necessary to the enjoyment of the thing granted. 3 Washb. Real Prop. *627. By the grant of a mill, or the grant of land with the mill thereon, the waters, flood-gates, and the like, which are of necessary use to the mill, pass as incident to the principal thing granted. Shep. Touch. 989. "Nor," says one text-writer of note, "is the word 'appurtenances' necessary to the conveyance of the water-right in such cases, because the incident goes with the principal thing, and that this principal is specially applicable to water privileges in grants." Ang. Water-Courses, § 153a. Where the right to the use of a ditch and water exist in favor of land conveyed by deed, and without which the land would be valueless, and constituted, perhaps, the only inducement for the purchase, they will pass by the deed without the use of the word "appurtenances." The case of *Cave v. Crafts*, 53 Cal. 135, is in point here. There the question involved the use of water for the purpose of irrigation, as appurtenant to the lands acquired, and the court say: "The word 'appurtenances' is necessary to the conveyance of the easement. The general rule of law is that, when a party grants a thing, he, by implication, grants whatever is incident to it, and necessary to its beneficial enjoyment. The incident goes with the principal thing. The idea and definition of an easement to real estate granted is, a privilege off and beyond the local boundaries of the lands conveyed." In *Tucker v. Jones*, 8 Mont. 225, 19 Pac. Rep. 571, the plaintiff Tucker only acquired whatever possessory rights and the improvements thereon his grantees, Pierce and Durham, had to the lands. As the deed conveying the lands contained no express grant or sale of the ditch or water-right, except as it was included in the use of the word "appurtenances," the question was whether the interest of Pierce and Durham in the ditch, and the right to the use of the waters of Rattlesnake creek, were conveyed in the deeds to the lands from those persons to the plaintiff, Tucker. The court say: "When Pierce and Durham conveyed their possession of the land with its appurtenances, they also conveyed their interest in the ditch and water-right, which was necessary to the cultivation, use, and enjoy-

ment of the land just as certainly and as fully as if they had described it in express terms by the deed itself." As this phase of the case may be easily disposed of upon the undisputed facts, it will be sufficient to say that the evidence shows that Clark Rowland and Joseph Cox were homestead settlers upon the public domain, to whom, in due course of time, were issued patents by the government to the lands upon which they had respectively settled in 1877; that the defendant, W. H. Winters, derives his title to the lands now owned and occupied by him, the same being the lands settled upon by the said Rowland and Cox, by deeds of conveyance from them, with the usual covenants and warranty; that before and at the time of such sale and conveyance there were important water-rights connected with such lands, and used for the purpose of their irrigation, and without which such lands were of little value; and that at the time of the appropriation of the water for uses specified by them and the defendant all the lands over and across which it was conveyed were unoccupied public lands of the government.

Upon this state of facts, it is clear, then, that when Rowland and Cox conveyed, by their deeds, the lands respectively settled upon by them with their appurtenances, they also conveyed their interests, respectively, in the ditch and water-right which was connected therewith, and necessary to the cultivation and enjoyment of such lands, as much so and as certainly as if they had so declared by express terms in their deeds. In such case, within the principle already announced, a grantor conveys by his deed, as an appurtenance, whatever he has the power to grant which is practically annexed to the land at the time of the grant, and is necessary to its enjoyment in the condition of the estate at that time. But the theory upon which the plaintiff has brought his suit for an injunction, and what he is seeking to establish by his evidence, is that Sheep Creek ditch is an ancient water-course flowing through his land in two well-defined channels; that it has so continued to flow from time immemorial, without interruption or abatement, until the spring of 1888, when the defendant diverted and appropriated all of its waters, and that as a riparian owner he has a right to have its waters continue to flow in its channels through his land without interruption or diminution. His own and other testimony of those similarly situated shows, in substance, that he purchased the land he now occupies, and through which Sheep Creek ditch runs, from the state of Oregon in 1880, and at that time its waters were flowing through his land in well-defined channels, and so continued to flow in about the same amount from year to year, varying some with the season, but at no time less than 1,000 inches, until the spring or summer of 1888, when its diversion and appropriation by the defendant, together with an exceptionally dry season, affecting its supply, caused its channels to become partially or almost wholly dry, so much so, at least, as to deprive him of water for irrigating

his land, stock, and domestic purposes, greatly to his damage, which is variously estimated, but by no witness at less than \$500 testifying in his behalf. His testimony designed to prove that Sheep Creek ditch is an ancient water-course, and that the waters flowing in its channels are its natural waters, as distinguished from waters diverted from Little Sheep creek, and turned into Sheep Creek ditch, is derived principally from the opinion of witnesses based on the appearance Sheep Creek ditch presented about the time of his purchase of his land, and subsequent thereto, with some little exception, not of much value for want of particularity and attention at the time to the subject-matter now of inquiry. These witnesses, judging from the appearance Sheep Creek ditch then presented, express the opinion that it is a natural water-course, and that the waters flowing in its channels are its natural waters, with perhaps some little diminution. At the same time, some of these witnesses testify that the willows and cottonwood growing along its course were very small eight years ago, and that the soil was materially different from that on Prairie creek, not far distant, and which is conceded to be a water-course; one of them saying that he did not know of any other creek in the whole Wallowa valley that had sod like Sheep Creek ditch, indicating by the recent growth of the willows, and the nature of the soil through which Sheep Creek ditch has cut its channels, that it is not an ancient water-course, whose waters have been accustomed to flow therein regularly or continuously from time immemorial. The plaintiff and some of his witnesses admit that they knew and understood at the time of his purchase and settlement, as well as their own, that the grantors of the defendant, and others above him on Sheep Creek ditch, claimed to have diverted the waters of Little Sheep creek by means of dams, ditches, gulches, and ravines, or dry draws, into what is now known as "Sheep Creek Ditch," and to be entitled to the use of its waters by prior appropriation. To better understand the case, we must now turn to the evidence for the defendant, which shows that the grantors of the defendant, and three other persons, in 1877, settled, respectively, upon certain lands belonging to the government, which being dry and arid and unproductive without irrigation, for the purpose of securing a supply of water for stock and domestic purposes, and the cultivation of their lands, went up to a natural water-course called "Little Sheep Creek," built a dam across it, and by digging ditches, and using gullies, ravines, or dry draws, as called by various witnesses, they diverted substantially all the waters of that stream, roughly estimated to be about 2,500 inches, which they divided into equal parts among themselves, and caused these waters to flow therein, using as much as they each needed, and letting the surplus flow on, and thereby created the stream known as "Sheep Creek Ditch." His evidence also goes to show that these ravines, depressions, or dry draws, as called which they used to convey the waters to their lands, were dry

draws, and in which no natural waters were accustomed to flow, but that they were caused by occasional bodies of surface water descending from the hills during times of melting snow and ice; that there is quite a number of such draws between Sheep Creek ditch and Prairie creek, only a mile or two apart, and that they are very similar to such as were used for Sheep Creek ditch; and that owing to the face of the country it is not possible for Little Sheep creek to have flowed through Sheep Creek ditch. It also tends to show that no willows or shrubbery ever grew along its course until the diversion of the waters had been effected, and that the sod and soil through which it flowed was not such as belonged to or was found along natural water-courses, but that the effect of the diversion was to make Sheep creek a living stream, cutting out by the force of its waters through sod and soil, except occasional spreads here and there, a definite channel, and discharging its waters into Prairie creek. There were also several other dry draws or ravines between Sheep Creek ditch and Prairie creek, which were only a short distance apart; but these, like those of which Sheep Creek ditch had been partly constructed, were without water or shrubbery or other characteristic of a natural water-course, or of the action of water, other than was produced by the mere drainage of surface water from melting snows; showing that the ravines and draws with which Sheep Creek ditch is partly made were dry and without water, as was testified to by several witnesses, and that it only assumed that character when, by dam and ditches connecting with dry draws or ravines, the waters of Little Sheep creek were diverted into them. The testimony establishing these facts is supported by several witnesses, whose opportunities were such, both before and after the diversion had been effected, and the way and means by which it was accomplished, as to give great value to their testimony, especially in the absence of any contradiction—or attempt at impeachment. It was after the waters had been turned into Sheep Creek ditch, and it had begun to assume the appearance of a natural stream in running through the ravines or draws, that the principal witnesses for the plaintiff express the opinion that it was a natural and ancient water-course; but much of their testimony in regard to the size of the willows, and the character of the sod and soil through which it had cut a well-defined channel to Prairie creek, is but a corroboration of the testimony for the defendant, and hardly consistent with the theory of an ancient water-course. It was the fact that these parties, including the grantors of the defendant, who had constructed Sheep Creek ditch, and turned the waters of Little Sheep creek into it, did not have any immediate use for the full amount of water diverted for the cultivation of their lands; that, after using such amount of it as they needed, they permitted the surplus to flow, and to create through the lands lying below a living stream, along which other persons, in course of time, settled, and used the water

for irrigating their lands, stock, and domestic purposes. Mr. Rowland, one of the grantors of the defendant, after stating by whom, how, and by what means the diversion was effected, says: "The owners (5) used all they each needed, and let the surplus flow on through the ditch, to be taken up by the settlers below as they needed it. This was our custom." While Mr. Rowland does not state exactly the full amount of water diverted, although one of the original parties, yet it is estimated at 2,500 inches, of which each party was to have 500 inches, and according to which the defendant claims he was entitled to 1,000 inches by his conveyances. As the amount of water needed for irrigation, in the first years of the settlement, was necessarily small, a large surplus, estimated variously, and varying from one to two thousand inches, was permitted to flow, and create the water-course upon which the plaintiff subsequently settled. Recognizing the force of this evidence as fatal to the contention that Sheep Creek ditch is a natural and ancient water-course, and to secure the right to the use of its waters to the extent already appropriated by him, the plaintiff, conceding that it is not a natural and ancient water-course, claims that as the defendant and others have not appropriated for the irrigation of their lands the amount of water diverted, but permitted the surplus for several years, over the amount needed for their domestic and agricultural purposes, to flow on and become a water-course, they have thereby fixed the amount of water necessary for their lands, (which is admitted to be 110 inches appropriated by the grantors of the defendant, to which he is entitled by his conveyances,) and that the plaintiff and others living below are entitled to appropriate its surplus, accustomed to flow through their lands. The law, as already stated, is that no one can by a prior appropriation claim or hold any more water than is necessary for the purposes of his appropriation. The grantors of the defendant, however much they may have diverted, could not have lawfully appropriated any more than was necessary to irrigate their lands, and for stock and domestic purposes. That much they were entitled to use, when needed or necessary for the purposes specified, and to that extent it was a valid appropriation of the waters to a beneficial use upon the lands, and that much as an appurtenance the defendant acquired by his conveyance from them, and was entitled to use. Beyond the amount of water thereby taken his rights did not go. He could not waste it, and was only entitled to as much water, within his original appropriation, as was necessary to irrigate his lands. As the grantors of the defendant and their associates, according to the evidence, had diverted more water into Sheep Creek ditch than they needed, and therefore more than they intended to use or appropriate for irrigation, stock, and domestic purposes, they permitted the surplus to flow through the ditch upon the lands of the defendant and others, to be taken up and used by them. How much there was of such surplus it is difficult to determine, but it

amounted to 1,000 inches, and at times much more, owing to its use and the season. The court below found that the amount of water used and appropriated by the defendant and his grantors did not exceed 300 inches, varying from 50 inches to that amount, as needed for the purposes of the appropriation; but in our judgment 400 inches would be nearer the amount intended to be appropriated for the uses specified; and as between the parties to this record, but no others, this should be taken as the amount of water that the defendant is entitled to use, leaving the surplus to flow on, according to the custom established by his grantors, to be appropriated by the settlers below. It is now claimed that the facts show that the defendant used or wasted this surplus upon his lands, to the damage and detriment of the rights of the plaintiff acquired in its flow through his land. The evidence indicates, without dissent, that the season was exceptionally dry, and that the snow in the mountains was scant, seriously affecting the source of Little Sheep creek's supply of water, and by reason thereof less water flowed down the ditch; that those above the defendant used the waters freely, as much as was necessary for the irrigation of their lands, within the purposes of their original appropriation; and that these causes combined to use the water in the ditch, leaving little or no surplus to flow on, causing the settlers below to complain, and a litigation to be threatened, which to avoid, they used less water, and permitted more to pass through the ditch, except the defendant, who continued to use the amount he claimed that was necessary for the irrigation of his lands, and to which he was entitled within the original appropriation. While there is some evidence indicating that the defendant used the water freely, and perhaps, on one or two occasions, more than was actually necessary, though this is contradicted, which, it may be admitted, was in excess of the amount he was entitled to use, if more than was actually necessary at the time, although within the original appropriation, yet it was plainly not these acts which caused the ditch and its channel to become dry during all the season, producing the grievances complained of. It was due to the more potential causes of a drought, aided by the other causes. Every one had a short crop those years, for they were years of drought, is the tenor of the evidence. So that, if the complaint was framed on this phase of the facts, no case is made upon which relief could be granted by injunction, much less when it is framed upon the grounds of riparian proprietorship of a natural water-course running through his lands from time immemorial, which is a different matter, and governed by different rules of law. In any view, therefore, there is a failure of proofs to justify the exercise of the jurisdiction invoked, which is always applied cautiously, and only when the right to the matter in question is clearly established, and an injurious interruption of such right ought to be prevented. The decree must be affirmed, and it is so ordered.

HINDMAN v. RIZOR.

(Supreme Court of Oregon. June 24, 1891.)

WATER-RIGHTS — PAROL TRANSFER — AMOUNT OF APPROPRIATION.

1. Where one holding a possessory right to public land appropriates water for the purpose of irrigating it, such water-right becomes a part of the improvements, and may be sold verbally and transferred with the possessory right.

2. Where, in an action to establish a water-right, the evidence shows that plaintiff had diverted 80 inches of water, but only used 50 inches thereof for about 15 years, she is only entitled to the amount used, as against a subsequent appropriator.

Appeal from circuit court, Baker county;
JAMES A. FEE, Judge.

Suit in equity to enjoin and restrain the defendant, George Rizor, from diverting the waters of Alder creek, a natural water-course which runs through the lands of both parties to this suit.

J. L. Rand, for appellant. M. L. Olmsted, for respondent.

BEAN, J. This is a suit to enjoin the defendant from diverting the waters of Alder creek, a natural water-course, which runs through the lands of both plaintiff and defendant. Both parties claim by prior appropriation. The facts are these: In 1863, the lands through which Alder creek flows were unsurveyed and unoccupied government land, and the waters thereof were free and unappropriated. In the spring of that year, J. W. Cleaver and one Peters settled upon the land now owned by plaintiff, and, for the purpose of rendering it productive and useful for agricultural and horticultural purposes, entered upon the unoccupied government land a short distance above the land occupied by them, and diverted a portion of the waters of Alder creek, and by means of a ditch conveyed the same onto their land for irrigating purposes. Cleaver and Peters continued to occupy and cultivate the land, using the waters appropriated by them, until 1865, when they sold their possessory rights and improvements. From the time of the sale by them until 1881, the land improvements and water-right passed into the possession and occupancy of several different persons, each selling his rights thereto, and delivering possession to the purchaser, but no complete chain of title by deed of conveyance to either the land, ditch, or water-right appears in the record. In 1881, the property having in this manner passed into the possession of one Rowley, he filed thereon under the pre-emption law, and, after perfecting his title conveyed the land, with its appurtenances, on September 15, 1882, by deed to plaintiff. In February, 1877, defendant settled upon the land now owned by him, above the land of plaintiff, as a homestead, and, having received his patent, claims the right to the use of 50 inches of the waters of the creek, as against plaintiff, by an appropriation made by him in 1877. He claims that because the title of the several parties occupying the land from Cleaver down to Rowley was acquired by the purchase of

possessory rights merely, and not by deed, the water-right was lost and abandoned; that a valid transfer of a ditch and water-right can only be made by deed, and a verbal sale operates *ipso facto* as an abandonment; and that consequently his appropriation, made in 1877, was prior in time and paramount in right to that of plaintiff, which, in any view, could only date from Rowley's settlement in 1881. This is the only question necessary for us to consider. If plaintiff has connected herself by a proper title with the rights acquired by Cleaver and Peters to the waters of Alder creek, her rights are unquestionably superior to those of the defendant; for whoever purchases land from the United States after the whole or some part of the water of a natural water-course, running through such land, has been appropriated by some one else, takes subject to the rights acquired by such prior appropriator. *Kaler v. Campbell*, 13 Or. 596, 1st Pac. Rep. 301; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674. If, however, her rights only date from the settlement of Rowley in 1881, the appropriation made by defendant in 1877 gives him a superior right to the quantity actually appropriated.

It is undisputed, from the evidence, that the land owned by the plaintiff has been improved, cultivated, and farmed each year, by the occupants and owners thereof, from the time of Cleaver's settlement, in 1863, to the commencement of this suit, and the waters appropriated by Cleaver and Peters has been used through the ditch constructed by them for the necessary irrigation of the land each year. In fact, without the use of this water the land would be of comparatively little value for agricultural or horticultural purposes, and the possessory rights thereto would not have sold for the several amounts disclosed by the record. It is dry and arid land, and can only be successfully or profitably cultivated by means of proper irrigation. It had been so improved that in 1881 Rowley paid to the occupant the sum of \$1,500 for his possessory rights. Each owner and occupant of the land has used and claimed to own the water-right acquired by the appropriation of Cleaver and Peters, and has delivered the possession thereof, with the other improvements on the land, to his successor in interest, as an incident to the principal thing sold. A settler upon the public land has a right thereto as against every person except the government, and, when such settlement is made with the view of obtaining title, such right is a valuable property right, which the courts will protect and enforce. *Kitcherside v. Myers*, 10 Or. 21; *Jackson v. Jackson*, 17 Or. 110, 19 Pac. Rep. 847. The right of such a settler being property, he may sell and transfer it, so as to pass his right thereto, and, except as against the government, vest the rightful possession in the purchaser. This right being a possessory one, merely, and not lying in grant, does not require a formal deed of conveyance, in order to effect a sale or transfer thereof. The settler does not acquire a title to the land

by the act of settlement, but only the right to one upon his complying with the provisions of the law governing the sale and disposition of the public lands. His occupation and improvement, with a view to pre-emption, do not confer a vested right in the lands so occupied, but do confer a preference over others in the purchase of such lands by the *bona fide* settler, which will enable him to protect his possession against other individuals. He has no interest in the land which he can convey, but only in the possessory right thereto; and any mode of sale or conveyance which effects a transfer of the possession from the vendor to the vendee is sufficient to pass his possessory title.

When such a settler appropriates water for the necessary irrigation of the land occupied by him, it becomes as much a part of his improvements as his buildings or fences, and can be sold and transferred with his possessory right in the same way. The principal subject-matter of such a sale and purchase is the possessory right to the land, and the consequent preference over others in the purchase of such land from the government, and such a sale, followed by possession taken thereunder, vests the possessory right in the purchaser, except as against the government, and he succeeds to the rights of the settler to the possession of the land and improvements. The water-right being a necessary incident to the complete enjoyment of the land, the same principle which sustains a verbal sale of the possessory right to the land will also support a verbal sale of the water-right in connection therewith, so as to enable a purchaser to maintain a suit against a stranger for interfering with the same. The water, when appropriated and used for irrigation, becomes an incident to the land, and a transfer of the possessory rights thereto carries with it the water, unless expressly reserved. The general rule is that, where a party grants a thing as it is then used and enjoyed, he, by implication, grants all those easements which the grantor can convey which are necessary to the reasonable enjoyment of the granted property, and have been and are at the time of the grant used by the owner for the benefit of the granted premises; and, if the grantor wishes to reserve any right over the easement, he must reserve it expressly. Gould, Waters, § 354; Cave v. Crafts, 53 Cal. 135. This rule, we think, is as applicable to the transfer of possessory rights to public land as to any other species of property. Thus, if a mill is erected upon public land, and water appropriated therefor, the sale of the mill and transfer of the possessory right to the land passes the water-right to the vendee. McDonald v. River, etc., Co., 13 Cal. 220. So, the fact that the owner of the lower land acquired title through purchase of possessory rights merely, and not by deed, does not affect his title to the water-rights, as they pass as appurtenant to the land. Geddis v. Parrish, (Wash. T.) 21 Pac. Rep. 314. So, if a settler upon the public lands under the homestead law constructs a ditch for the pur-

pose of conveying water onto his land for irrigating purposes, such ditches and water-right become part of the realty, and are not severable therefrom, and are exempt from sale under execution. Paull v. Cooke, 19 Or. 455, 26 Pac. Rep. 662. The fact that the settlers on this land after it was surveyed, and prior to its passing into the possession of Rowley, may have formally relinquished their pre-emption filings, does not of itself operate as an abandonment of the water-right. This was the only means of effecting a complete transfer of their possessory right to the land, and giving their successors in interest an opportunity to acquire a title from the government. To constitute an abandonment, there must be an intent to abandon. Dodge v. Marden, 7 Or. 456. Such intent may be inferred from the acts and declarations of the party, for it is only by the acts and declarations of persons that we infer their intentions; but in this case there is nothing in the acts and declarations of the occupants of the land, or of the owners of the water-right, indicating an intent to abandon it, but, on the contrary, their every act and declaration unmistakably evinces a clear intent not to do so. In fact, counsel for defendant did not claim that there was evidence indicating an intent to abandon, but he claimed that the verbal sale and transfer of this water-right operated, *ipso facto*, as an abandonment thereof, and in support of his position cited and relied on Smith v. O'Hara, 43 Cal. 371; Pom. Rip. Rights, § 89; Gould, Waters, § 234. The statements by Pomeroy and Gould are based upon the doctrine announced in Smith v. O'Hara. In that case the plaintiff claimed as purchaser from the prior appropriator of a ditch used for conveying water for mining purposes, and undertook to prove the sale by oral testimony. The court held that a ditch, being an interest in real estate and lying in grant, could only be conveyed by deed, but that doctrine has no application to the case before us. In this case there was no attempt to convey the ditch separate from the possessory right to the land, but only as an incident thereto, and as part of the improvements thereon. It was an appurtenant to the principal thing sold, and passed as an incident thereto. We do not at this time undertake to question the doctrine that a ditch or canal itself, used for conveying the water to a mine or elsewhere, is an interest in land that can only be transferred and conveyed as in the case of other real estate, but we deny its applicability to the facts in this case.

Having reached the conclusion that plaintiff has succeeded to the title of Cleaver and Peters, and that the appropriation of the water of Alder creek made by them is prior in right to that of defendant, it only remains to ascertain the quantity of water to which plaintiff is entitled. The evidence on this question is not as clear as we would like. The amount of water diverted by Cleaver and Peters in 1863, from the best impressions we can gather from the evidence, was about 80 inches. This quantity does not

seem to have been utilized by them during their occupancy of the land. They had a right to appropriate water sufficient for the present, and contemplated necessary irrigation of the land occupied by them, but the amount to which their prior right attached must be restricted to the quantity needed for that purpose. "It thus seems," says Mr. Justice Lorn, in *Simmons v. Winters*, 27 Pac. Rep. 7, (decided this term,) "that, in order to make a valid appropriation of water, it is required to be made for some beneficial purpose then existing or contemplated, and that the amount of water appropriated must be restricted to the quantity needed for the purpose." While Cleaver and Peters could rightfully appropriate water not only for the present, but also for the future, needs of the land, the water so appropriated must have been utilized within a reasonable time in the purpose for which it was appropriated, or the right thereto was lost. What constitutes a reasonable time is a question of fact, depending upon the circumstances of each particular case. From 1863 to 1877, the date of defendant's settlement, there does not seem to have been used for the necessary irrigation of the land now owned by the plaintiff to exceed 50 inches of the water appropriated by Cleaver and Peters, nor does the acreage of the land in cultivation seem to have been materially increased since that time. This, we think, was a sufficient length of time in which to make an actual application of the water to the uses intended, and the right to the surplus not so applied became lost and abandoned. So that the amount of water being utilized in 1877—50 inches—should be the limit of plaintiff's right. Although she has no property in the water of the stream flowing in its natural channel above the point of diversion, yet she has a most important right over it with respect to such water. She is entitled to have the water of the stream continue to flow in its usual manner, through the natural channel or bed of the stream, down to the head of her ditch, to the extent or amount of her appropriation, without diversion or material interruption, during the irrigation season, if she needs that amount of water for the necessary irrigation of her land. She is entitled to have in the natural bed or channel of the stream, at the head of her ditch, during the irrigating season, a sufficient quantity of water for the necessary irrigation of her land, not exceeding 50 inches. While she is entitled to 50 inches of water if necessary for the irrigation of her land, if she does not need that amount she must allow the surplus to remain in the stream, and cannot complain if it is used by the other settlers on the creek, whether above or below her. At the time of the commencement of this suit defendant was diverting all the waters of the creek, while plaintiff's grain, vegetables, fruit, and other crops were suffering for want of irrigation. The decree of the court below will therefore be reversed, and a decree entered here in accordance with this opinion.

HOTZ v. SCHOOL-DIST. No. 9, HUERFANO COUNTY.

(Court of Appeals of Colorado. June 30, 1891.)

SCHOOL-TEACHERS—LICENSE—COMPENSATION.

Though Gen. St. Colo. § 3055, prohibits the district school board from employing any teacher who shall not possess the prescribed license to teach, in force at the date of employment, and provides that any one so teaching without license shall forfeit all claim to compensation out of the school fund for the term, one who is employed by the board to teach, when, as they are aware, she has no license, but who shortly afterwards procures one, may maintain an action against the board for compensation.

Error to district court, Huerfano county.

Homer A. Cole, for plaintiff in error. *D. McCaskill*, for defendant in error.

BISSELL, J. This action was brought by Mary E. Hotz against a school-district of Huerfano county, to recover a sum which she alleged to be due her under a contract of employment entered into by the board of directors of the school-district. It was satisfactorily shown that in August of 1886 the board met and decided to employ her as a teacher for the school year next ensuing. The secretary notified the teacher of what had been done, and she accepted the terms offered. On the 5th of September following Miss Hotz went to La Veta, where the school was situate, saw the members of the board, and arranged with them for the commencement of her school on the following day, and for the procurement of a temporary certificate to entitle her to teach in Huerfano county until the time of the regular examination of teachers in November. At this time it was stated by Miss Hotz, and understood by the board, that she did not possess a certificate of the county superintendent of Huerfano county entitling her to teach in that locality, and that it would be necessary for her to procure a temporary authority to act till the November examination. This temporary certificate was procured, and, on the 6th of September, Miss Hotz commenced her school under this authority, with the knowledge and concurrence of the directors of the school-district, and continued to teach under those circumstances for the ensuing five months. In November she procured her regular certificate. At the expiration of five months the board of directors discharged her from the employment, and, as the record shows, notwithstanding diligent efforts on her part to procure another engagement, she remained unemployed during the balance of the year. This suit was brought to recover the stipulated wages as damages for the breach of the contract. Several defenses were interposed, but no proof was offered in support of them; but, upon motion for a nonsuit, the complaint was dismissed, because it appeared from the testimony that at the time of the offer of hiring by the board, and its acceptance by the teacher, she possessed no certificate from the proper authorities of Huerfano county entitling her to teach there. Upon the case made this is the only practical question before the court for consideration. Section 3055 of the General Statutes

inhibits the district board from employing any teacher who shall not possess a license to teach, issued by the proper authority, which shall be in force at the date of employment; and the statute contains the further provision: "And any teacher who shall commence teaching in any such school, without such license, shall forfeit all claims to compensation out of the school fund for the term so teaching without such license." It is thus evident that the rightfulness of the action of the court below in dismissing the case depends upon the construction to be given to this particular section. The statute is undoubtedly intended to be operative both as to the board and as to the teacher. The results of a departure from its provisions are widely different in the two cases. While it is enacted that the district board shall not employ a teacher who, at the date of the employment, is without the evidence of authority to teach, issued by one of the persons authorized to execute a certificate, no penalty is provided for a breach of the statute by the board itself. It is wholly unnecessary to determine what the consequences to the board would be in the event of its violation by them. This case only concerns the matter of the violation by the teacher, and as to the teacher a specific penalty is provided. Under these circumstances, the only legitimate construction of the statute must be that the penalty is only enforceable, and can only be held to attach in the case mentioned, and that is in the case where the teacher shall commence to teach not having obtained a certificate. Where, as here, the statute contains two provisions,—one of which is a prohibition to the board, and the other of which is a penalty enforceable against the teacher under certain circumstances,—the true construction must be that only in the event of a violation of the provision containing the penalty can it be held that the teacher is without a right of action. The evident intention of the legislature was to prevent the employment of teachers who did not possess the evidence of qualification prescribed by the statute. The prohibition to the board was simply intended to impose upon the officers of the school-district the duty of seeing to it that the teacher whom they hired should possess the requisite qualifications. It is true that at the time the board met for the purposes of employing the teacher, and when they wrote their letter containing the offer of employment, as well as at the date of the letter of acceptance, the teacher did not have the statutory evidence of her qualifications which entitled her to teach in Huerfano county. This, however, should not deprive her of the right of action, or entitle the board to break the contract into which they subsequently entered, unless they be able to assign some sufficient legal excuse for the breach. The circumstances and the facts of the case are such that it may very properly be held that the employment of Miss Hotz should be deemed

completed as of the date when the services were commenced, since she was qualified, when she entered upon the discharge of her duties, with the knowledge and concurrence of the board, which possessed full authority for employment. *School-Dist. v. Dilman*, 22 Ohio St. 194.

Should it be contended that the board entered into a contract in August which was void under the statute and unenforceable by the teacher, it may well be held that a valid implied contract arose, as between the board and Miss Hotz, when, as a duly-qualified teacher, she entered upon the discharge of her duties on the 6th of September, and continued therein for the ensuing five months. If it be said that it is impossible to ascertain what the terms of this implied contract are, it is replied that the express contract may be looked at to ascertain the terms of the implied one, which the teacher performed until she was discharged. The commencement of the school by the teacher, with the knowledge and consent of the board, after she had received a certificate of qualification, was equivalent to the making of a new contract upon the terms of the one into which they attempted to enter at their meeting held in August. *Scott v. School-Dist.*, 46 Vt. 452. This construction and these reasons are well supported by a consideration of the purposes which the legislature evidently had in view, and of the circumstances which necessarily exist in this state in its various school-districts. If it happened that the teacher did not possess a certificate issued by the state authority, the certificate must be issued by the superintendent of the county where the school is to be taught. Few of the teachers to be employed are residents of the county wherein they teach. The times fixed for the public examinations of teachers are not concurrent with the commencement of the school. Negotiations must be entered into, as between the board and the teacher, antecedent to the time of their arrival in the county in which they are to discharge their duties. The mischief to be guarded against is the teaching of a school by a teacher who does not possess the necessary qualification. A construction of the statute which guards the difficulty sought to be provided against protects both the teacher and the district. There are cases containing similar statutes which hold a contrary doctrine; but the views here expressed, which are well supported by the two cases cited, seem more in accord with the evident purposes of the statute, and to afford more equal protection to the rights of all parties concerned. It is quite possible that, upon a subsequent trial of this case, the board may be able, under the defenses which they interposed, to show a sufficient legal excuse for the action which they took. If they desire to escape the consequences of their act in discharging the teacher before the expiration of the school year, they assume the burden of proving a sufficient excuse. The judgment must be reversed.

MILLER et al. v. POTOSHINSKY.

(Court of Appeals of Colorado. June 30, 1891.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

The verdict of the jury in an action for services will not be disturbed on appeal, where the issues were submitted to it under proper instructions, and there is some evidence to support the verdict.

Appeal from district court, Arapahoe county.

W. W. Cover and Geo. C. Norris, for appellants.

BISSELL, J. This controversy grows out of an alleged contract of hiring. In 1884 Joseph Potoshinsky was a Jewish rabbi living in Chicago. Some time in December of that year the appellants, Miller and Krepitsky, opened a correspondence with the rabbi looking to his employment to render them certain specified service. The final letter, which contains the offer of employment, in substance undertakes to pay Potoshinsky \$35 per month for his services,—\$20 to kill cattle according to the Jewish law, and \$15 for the instruction of their children. Without details, this was their substantial proposition. This offer was accepted, and the rabbi came to Denver, and rendered the service for which he had been engaged. Substantially, there is no controversy as to these propositions. It may be stated that in the trial court some question was raised as to the insufficiency of the correspondence to make a legal contract, but the judge very properly held that, if the correspondence was followed by a performance under its proposition, it was ample as a contract to bind the appellants, and a breach would give a cause of action. The principal defense was rested upon the alleged performance by the promisors up to a certain date, when, according to their contention, the contract was modified, and substantially abandoned, with the consent of the rabbi, who expressly, and by his conduct, accepted the responsibility of a Jewish congregation in place of that which resulted from the letters. That there was some sort of a modification or change in the relation of the parties is evident from the verdict of the jury, who accepted neither version given as entirely accurate, and found that the engagement had been entered into, but that it had been subsequently so modified as to entitle the appellants to a reduction of the amount claimed. The appellants maintain that the verdict was not a just one, and that it is unsupported by the evidence. This is the only error alleged, discussed, or relied on. In reality, nothing else is apparent in the record upon which an argument could be predicated. This is not available for the purposes of reversal. The case, as presented, is not brought within any of the well-recognized rules which cover such cases. The employment and the performance were both established, and, under instructions which plainly and clearly expressed the law, the two remaining inquiries, whether the contract had been modified or whether it had been terminated, were left to the jury. The verdict dis-

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posed of those questions, and cannot be said to be without support from the testimony. It is wholly unnecessary to ascertain the date or the extent of the modification as expressed in the verdict. It is enough that it is sustained by the evidence to such an extent that no appellate tribunal would be justified in setting it aside. The judgment must be affirmed.

MELSHEIMER v. SULLIVAN.

(Court of Appeals of Colorado. June 28, 1891.)

VIOLENT DOGS—INJURIES BY—NEGLIGENCE OF OWNER.

Defendant kept a dog, admitted to be ferocious and accustomed to bite, tied in an alley by a chain some six or eight feet long. The alley, though private, was easy of access at one end, and frequented by defendant's employes and others, and plaintiff, a policeman in pursuit of a suspicious character, entered this alley, and, approaching the dog without seeing it, was seriously bitten by it. *Held*, that defendant is liable, it being negligence for him to keep a dog of such a disposition in such a manner, and plaintiff being rightfully on the premises when he was injured.

Appeal from district court, Arapahoe county.

Browne & Putnam, for appellant. *W. B. Felker*, for appellee.

RICHMOND, P. J. Appellee herein brought this action to recover for injuries received from being bitten and otherwise injured by a dog kept by the appellant, and which, it is alleged, appellant knew was accustomed to attack and bite mankind. Appellant answered, specifically denying the allegations in the complaint, and as an additional defense claimed that the injury received was the result of appellee's negligence. The record discloses the fact to be that appellant is the owner of a brewery, and in the alley adjoining the brewery, part of the premises belonging to him, he kept a dog chained in a kennel near the entrance to the cellar where he had stored his malt; that the length of the chain was between five and eight feet; that appellee, a policeman, was in pursuit of a suspicious character, and, believing that he had entered this alley, went into it hunting for the person, and that while so engaged he, without seeing the dog or the kennel, or having any knowledge of the fact that the dog was there, advanced near enough to the kennel to be bitten by the dog; that the alley, though private, was easy of access at one end, and frequented by employes of appellant and others. The ownership of the dog and his ferocity were confessed at the trial, and are admitted in the argument here. It is also shown that appellee received considerable medical attention for a period of 9 days, and that he was unable to do any work of any consequence for a period of 16 days. The disposition of the dog to bite mankind was not only established by the admissions of the appellant, but also by evidence of other witnesses, and especially by his former master. The appellant testified that he kept the dog chained in the same place at all times, never suffered him to go at large, and kept him for the purpose of protecting his premises from strangers and tramps,

that if a stranger should approach the kennel the dog would certainly bite him. Trial by jury. Verdict for plaintiff in the sum of \$800. On motion for a new trial, the court requested plaintiff to remit \$300, which was done, and judgment on the verdict for \$500 was entered. To reverse this judgment this appeal is prosecuted.

In the argument of the case appellant says that the true question involved is, "May the owner of property keep on his own premises a vicious dog, when constantly confined on the premises, and kept from running at large, for the protection of his property?" He answers this in the affirmative, and displays much facetiousness, ability, and ingenuity in presenting his side of the proposition. We will accept the foregoing proposition in the following language: "That one is not liable for the damages caused by his dog, though he knows he has vicious propensities, if he exercises proper care and diligence to secure him so that he will not injure any one who does not unlawfully provoke or intermeddle with him." But this principle is not applicable to the circumstances in this particular case. The appellee assumed that, in the pursuit of his duty, he had a right to enter this alley in search of the person whom he was seeking. True it is that he was there voluntarily, but he was there innocently; and, being there under those circumstances and receiving the injury which he did, we feel no hesitancy in saying that he was entitled to recover.

This question has received the attention of some of the ablest judges in this country and in England, and a careful review of the cases leads us to the conclusion that the gist of the action is in the keeping of the animal after knowledge of its mischievous disposition. In *Marble v. Ross*, 124 Mass. 44, *Morton, J.*, lays down this rule: "The law imposes a stringent responsibility upon a man who knowingly keeps a vicious and dangerous animal. He is liable to any person who, without contributory negligence on his part, is injured by such animal, and he cannot exonerate himself by showing that he used care in keeping and restraining the animal. He takes the risk of being able to keep him safely so that he shall not injure others. The owner's negligence is in keeping the animal knowing that it is dangerous." In *Muller v. McKesson*, 73 N. Y. 196, the rule is announced that, "In an action against the owner of a ferocious dog or other animal, for injuries inflicted by it, the *gravamen* of the action is the keeping of the animal with knowledge of its propensities; and, as to the latter, proof that the animal is of a savage and ferocious nature is equivalent to express notice." "The owner is bound to keep the animal secure at his peril, and, if it does mischief, negligence is presumed. This presumption cannot be rebutted by proof of care on the part of the owner in keeping or restraining it, and he is absolutely liable, unless relieved by proof of some act or omission on the part of the person injured." In *Partlow v. Haggarty*, 35 Ind. 178, it was held that "whoever keeps an animal accustomed to attack or bite mankind, with knowledge of its dangerous propensities,

is *prima facie* liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or fault in the securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous disposition." In *Sherkey v. Bartley*, 4 Sneed, 58, it is said: "The defendant knew his dog was vicious, and disposed to attack and bite persons, and was bound to have so confined him as to prevent him from doing mischief." *Brooks v. Taylor*, 65 Mich. 208, 31 N. W. Rep. 837, was an action for injuries inflicted by a bull, and it was held that "the negligence in such a case consists in keeping such an animal after notice of its dangerous habits; and whoever keeps an animal accustomed to attack and injure mankind is *prima facie* liable in an action on the case at the suit of any person injured, without any averment of negligence or default in securing and taking care of the animal. If in such a case it is shown, as a matter of defense, that the plaintiff willfully provoked the animal, or was grossly negligent in going near it, with knowledge of its vicious habits, he cannot recover." In *Earl v. Van Alstine*, 8 Barb. 630, after reviewing the various authorities, *SELDEN, J.*, says: "The authorities seem to point to the following conclusions: *First*, one who owns or keeps an animal of any kind becomes liable for any injury the animal may do, only on the ground of some actual or presumed negligence on his part; *second*, it is essential to the proof of negligence, and sufficient evidence thereof, that the owner be shown to have had notice of the propensity of an animal to do mischief; *third*, proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice." *Pickering v. Orange*, 1 Scam. 492; *Brice v. Bauer*, 108 N. Y. 428, 15 N. E. Rep. 695. The principle here contended for by appellant is most thoroughly covered in *Laverone v. Mangianti*, 41 Cal. 138. In that case *RHODES, C. J.*, delivering the opinion of the court, said: "It is insisted, on behalf of the defendants, that a person may lawfully keep a ferocious dog,—one that is accustomed to bite mankind. That position may be conceded, and it may also be conceded that he has the same right to keep a tiger. The danger to mankind and the injury, if any is suffered, comes from the same source,—the ferocity of the animal. In determining the responsibility of the keeper for an injury inflicted by either animal, the only difference I can see between the two cases is that, in the case of an injury caused by a dog, the knowledge of the keeper that the dog was ferocious must be alleged and proven, for all dogs are not ferocious, while, in the case of a tiger, such knowledge will be presumed from the nature of the animal." The circumstances in that case were that "the dog was chained under the steps leading to the defendant's house in such a manner that he could not reach any one ascending the steps; that the plaintiff, in entering the house upon a lawful business, was ascending the steps, when one of the steps, which was loose, slipped from its position, and the plaintiff's leg went through the

opening, when it was seized and bitten by the dog under the steps." This is a much stronger case for the defendant than the case at bar, for here, in an alley frequented by the employees of the defendant and by other persons, as testified to by Downing,—an alley easy of access at one end,—this dog was kept chained, but so chained that it was capable of inflicting an injury, and did inflict an injury, and its disposition to inflict such injury was well known to the defendant. One of the best-considered cases is the case of *Johnson v. Patterson*, 14 Conn. 1, wherein this language is used: "A man may not, in this country, use dangerous or unnecessary instruments for the protection of his property against trespassers. Such instruments may be used in England, but the principles on which their decisions purport to rest are not sustainable or applicable here. The true principles of the common law are recognized here, and a man may use that force which is necessary to protect his property, and no more; and he may keep and use such instruments and no other, as the same necessary degree of force will justify. A dog is an instrument for protection. A ferocious one is a dangerous instrument, and the keeping of him on the premises to protect them against trespassers is unlawful, upon the same principle that setting spring guns or concealed spears or placing poisonous food is unlawful." This case is followed and approved by the supreme court of Connecticut in *Woolf v. Chalker*, 31 Conn. 121. In the particular case at bar it is admitted that the dog was vicious,—accustomed to bite. We must, to use the language of the court in *Woolf v. Chalker*, supra, say that "the defendant had no right to keep such a dog for any purpose, unless in an inclosure or building in the night season, and cautiously, as a protection against criminal wrong-doers. Certainly he could not keep him on his premises in the day-time in such manner that a person, by accident, mistake, or a voluntary or involuntary trespass, might be exposed to his fury and be injured. In this case, if the plaintiff was a trespasser at all, he was so unintentionally, involuntarily, and by mistake." This, it occurs to us, is quite sufficient to settle the liability of the defendant to the plaintiff or appellee for the injuries sustained. It is assigned for error that the court erred in its instructions to the jury. Without giving in detail the instructions, we think it is sufficient to say that we do not concur with appellant's counsel in this view. We see nothing in the instructions not sustained by the authorities cited, and, for the same reason, the court was warranted in refusing the instructions asked by defendant. The last and only error to which our attention is called is that the damages are excessive. In view of the fact that the jury found a verdict for \$800, and that the trial court, which heard all the testimony, determined that it should sustain a verdict for \$500, we do not feel at liberty to disturb the judgment. Our conclusion is that the three allegations necessary to be made and proved in a case of this character—*First*, that the dog was vicious and ~~the~~ habit of biting mankind; *sec-*

ond, that the defendant knew it; *third*, that he bit and injured the plaintiff without any neglect or fault on his part—were fully and satisfactorily established. We think the verdict ought not to be disturbed. The judgment will be affirmed.

WHITE v. BUELL. (No. 14,077.)

(*Supreme Court of California.* July 10, 1891.)

VENDOR AND VENDEE—FORFEITURE.

A contract for the sale of land provided for a payment of \$1,000 at date of contract, \$4,000 within 30 days, and \$35,000 at a later date, and declared that, if the vendee failed to pay the \$4,000 or the \$35,000 as agreed, the contract should terminate, and the vendor need not return the \$1,000. The vendee paid the \$1,000, and the \$4,000, and then abandoned the contract, and the vendor sold the land to another. *Held*, that the vendee was entitled to a return of the \$4,000. Following *Cleary v. Folger*, 84 Cal. 316, 24 Pac. Rep. 280.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Wilbur F. George, for appellant. *W. C. Stratton*, for respondent.

BELCHER, C. C. The facts stated in the complaint in this case are as follows: On the 20th day of August, 1887, the parties to the action entered into a written contract, whereby the defendant agreed to sell to the plaintiff certain lands in Santa Barbara county for the sum of \$120,000, to be paid as follows: \$1,000 at the date of the contract; \$4,000 within 30 days thereafter; \$35,000 on or before November 1, 1887; and \$80,000 at such time thereafter as the plaintiff should on November 1, 1887, elect, not exceeding 3 years from date. The contract then says: "At the time of the payment of said thirty-five thousand dollars, the party of the first part [defendant] shall execute to the party of the second part [plaintiff] a proper deed, conveying to said party of the second part said land by good title, free from incumbrances, and at the same time the party of the second part shall either pay to the party of the first part the balance of said purchase price, or shall execute to the party of the first part a first mortgage on said property to secure the payment of said eighty thousand dollars, with interest thereon at the rate of eight per cent. per year, payable yearly. It is further understood and agreed that if the party of the second part does not pay said four thousand dollars within thirty days, or said thirty-five thousand dollars on or before the first day of November, 1887, this contract shall terminate, and the party of the first part shall not thereafter be under any obligations by reason of this contract, nor need he return said one thousand dollars, or any part of it." As required by the contract, plaintiff paid to the defendant \$1,000 at the time of the execution thereof, and \$4,000 within 30 days thereafter. Nothing further was done by either of the parties until on or about November 1, 1887, when plaintiff decided and elected to proceed no further under the contract, and to forfeit the \$1,000 first paid by him. He then so notified defend-

ant, and demanded that he repay the said sum of \$4,000, but defendant refused, ever since has refused, and still refuses, to pay the same, or any part thereof. Some time in 1888 defendant sold, conveyed and delivered possession of the property mentioned in the contract to other parties. Wherefore plaintiff prayed judgment against the defendant for the sum of \$4,000, with interest and costs. The defendant interposed a general demurrer to the complaint, and it was sustained by the court. The plaintiff declined to amend, and thereupon judgment was entered that he take nothing. From that judgment plaintiff appeals. We think the demurrer was improperly sustained. The case in all material respects is like *Cleary v. Folger*, 84 Cal. 316, 24 Pac. Rep. 280, and *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. Rep. 749; and on the authority of those cases we advise that the judgment be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with instructions to the court below to overrule the demurrer.

90 Cal. 179

BELLEGARDE V. SAN FRANCISCO BRIDGE CO.
(No. 13,215.)

(*Supreme Court of California.* July 10, 1891.)

NEGLECT—APPEAL—REVIEW.

In an action for injury to plaintiff's property caused by defendant in filling in a street, the court, in its instructions, limited plaintiff's right of recovery to the hypothesis of defendant's negligence, and the jury found for the plaintiff. *Held*, that as there was some evidence of negligence, and as the defendant asked for a reversal only in case of error in law, the judgment should be affirmed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

O'Brien, Morrison & Daingerfeld and Hepburn Wilkins, for appellant. J. D. Sullivan and Henry McCrea, for respondent.

FOOTE, C. This is an action for "willfully, recklessly, and without care or caution, dashing huge car-loads of rock and earth, weighing many tons, around and against" certain piles supporting the plaintiff's house, whereby these supports of the house were forced from their position, and that structure was pitched into the water which surrounded it, the result being, as claimed, the damages for which the suit is brought. The answer denies these allegations, and claims that what was done by the defendant was justifiable in prosecuting certain street work under its contract with the city and county of San Francisco; that the injury resulted, not from carelessness or negligence, but from the dumping of rock and earth into the mud and water across a part of the waters of the bay of San Francisco,

in order to construct a street of said city, called "Railroad Avenue," and that this dumping of rock and earth onto the soft bottom of the bay, where the mud lay very deep, had the natural and inevitable effect to force out the mud from the sides of this avenue as it was being constructed of the rock and earth, so as to impinge upon the piles supporting the plaintiff's house, and without fault of the defendant, but as the unavoidable result of the prosecution of a lawful work, caused the damage to the plaintiff. It is evident that, according to the instructions of the court, the jury, under the facts, could not have found for the plaintiff except upon the idea that the defendant was negligent in prosecuting a lawful work. The defendant seems to be of the opinion that unless the appellate court shall declare that there is no evidence in the record to support this apparent view of the matter by the jury, or unless some different statement of the law than that laid down by the trial court shall be enunciated here, it would be useless and undesirable for it to have a reversal of the judgment and orders. In its opening brief it is announced that "we prefer an affirmance to a reversal involving a heavier verdict." They ask this court "to say, in its opinion deciding this cause, that Mr. Bellegarde has proved no case against appellant, or, at least, to lay down very unmistakably the law regarding the liability of street contractors. We prefer an affirmance rather than to be handed over to the tender mercies of another anti-corporation jury, without the protection of some such intimation from this court." We cannot say that the jury had no evidence on which to base their verdict, nor do we perceive any error in the law as laid down by the trial court, and given to the jury. It was as favorable as the defendant could ask. There is no necessity to enter into an abstract disquisition as to any further principles of law applicable to street contractors in some instances, perhaps, but inapplicable to the case in hand; and therefore we recommend that the judgment and orders be affirmed.

We concur: FITZGERALD, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders are affirmed.

3 Cal. Unrep. 417

ROMINE V. CRALLE *et al.* (Nos. 13,117,
13,228.)

(*Supreme Court of California.* June 30, 1891.)

JUDGMENT — FAILURE TO FILE BRIEFS — AFFIRMANCE.

Where appellant has filed no brief showing the particular ground on which he relies for reversal, and on examination of the record no error prejudicial to him is apparent, the judgment will be affirmed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

John F. Burris, Carroll Cook, and R. M. Swain, for appellant. Laughlin & Thompson, for respondent.

BELCHER, C. C. The judgment in this case was rendered by the superior court of Sonoma county on October 1, 1888. Subsequently three appeals were taken by the defendant Hirschler. The first appeal was dismissed, without prejudice, on the ground that the transcript was not filed in time. The second appeal was from the judgment alone, on a bill of exceptions. The third appeal was from the judgment, and an order denying a new trial, and, in so far as it was from the order, was dismissed on September 30, 1889. 80 Cal. 626, 22 Pac. Rep. 296. The records on the last two appeals from the judgment are the same, and they may be disposed of together. No brief has been filed on behalf of the appellant, and we are therefore not advised on what particular ground or grounds he relies for a reversal. We have, however, examined the records, and in our opinion no error prejudicial to the appellant is therein shown. We advise that the judgment be affirmed.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

90 Cal. 122

PALMER *et al.* v. MARYSVILLE DEMOCRAT PUB. CO. (No. 14,069.)

(*Supreme Court of California.* July 2, 1891.)

APPEAL—REVIEW—NONSUIT.

A nonsuit will be set aside on appeal where it does not appear that the attention of the court and of the plaintiff was called to the grounds on which it was asked.

In bank. Appeal from superior court, Yuba county; PHILIP W. KEYSER, Judge. *Gordon & Young and E. A. Davis, for appellants. J. H. Craddock, for respondent.*

PER CURIAM. This is an action to recover possession of a certain printing-press delivered by plaintiffs' assignors to one McWhorter under a contract similar in terms to that which was under consideration in the case of *Palmer v. Howard*, 72 Cal. 293, 13 Pac. Rep. 858. When the plaintiffs rested at the trial, the defendant moved the court for a nonsuit upon several grounds. The motion was granted, and the only question for consideration is whether the court erred in its ruling. McWhorter sold the property to Holland & Crane, and they had full notice of the terms and conditions under which the former had secured possession of it. The agreement of June 27, 1887, was binding not only upon McWhorter, but upon subsequent purchasers with notice of the conditions under which McWhorter took and held the property. Assuming that the plaintiffs were required to prove that the defendant took the property with notice of the facts, the grounds of the motion for a nonsuit do not specify a failure to prove such notice; and, under the rule well established here, a nonsuit cannot be granted,

unless the ground upon which it is supported was called to the attention of the court and the plaintiffs at the time the motion was made. None of the grounds stated in the statement on motion for a new trial is well taken. Judgment and order reversed, and cause remanded for a new trial.

90 Cal. 122

RAYMOND v. McMULLEN *et al.* (No. 14,857.)

(*Supreme Court of California.* June 30, 1891.)

APPEAL—RECORD—TIME OF FILING—STIPULATION.

When the sole consideration of a stipulation allowing appellants' counsel additional time to file his transcript was his agreement to do all things necessary to the speedy determination of the appeal in another case involving the same questions, and he fails to do so, the consideration has failed, and respondent will be entitled to a dismissal for failure to file the transcript in apt time, as if no stipulation had been made.

In bank. Appeal from superior court, city and county of San Francisco.

Motion to dismiss the appeal.

R. Percy Wright, for appellants. Edward R. Taylor, for respondent.

HARRISON, J. The appeal in this case was taken January 29, 1889. At the same time, appeals were taken on behalf of the same appellants in several other actions involving the same or similar questions, one of which actions was *Hartshorne v. McMullen*; and on the 2d of February, 1889, at the request of the attorney for the appellants, the attorney for the respondent made the following stipulation: "In the supreme court of the state of California, Frances B. Raymond, Respondent, v. J. McMullen *et al.*, Appellants. It is hereby stipulated that the appellants may have ten (10) days after the filing of the *remittitur* in the superior court of the city and county of San Francisco, in *Hartshorne v. McMullen et al.*, on appeal to this court from the judgment and order denying the motion of defendants for a new trial, within which to file and serve their transcript on appeal herein. TAYLOR & HAIGHT, Attorneys for Respondent." The transcript in *Hartshorne v. McMullen* was filed in this court August 27, 1889, and the cause was placed upon the calendar of this court for the January session of the present year, and set down to be argued February 19, 1891. No points or authorities were filed on behalf of appellants, as required by rule 2 of this court; and on the 17th of February, upon the *ex parte* motion of the appellants, the appeal was dismissed. Prior to the issuing of the *remittitur* thereon, the respondent made a motion to dismiss the appeal in this cause upon the ground that no transcript had been filed in this court; and in response to the above stipulation, relied upon by the appellants in resisting his motion, contends that the consideration upon which the stipulation was given has failed, and that he is not bound thereby. In support of this contention, he presents an affidavit wherein he states "that, soon after said appeals were perfected, Mr. R. Percy Wright, the attorney for defendants and appellants, came to the office of this affiant, and represented to affiant that it

would cost a good deal of money to print and file the transcripts on appeal in all of said actions, and that it was useless to do so, as one case in each set of said cases would probably determine all of the rest; and proposed to affiant that the transcripts in two of the said cases only be printed and filed, and that the necessary points and argument be made and presented on them, so that they might be determinative of the rest, and expense be saved to each party litigant; that affiant thereupon agreed to the said proposition of said Wright upon the express condition, and no other, that the two cases in which the transcripts were to be printed and filed should be fully argued by said Wright in the regular course of business of this court, to the end that the decision in said cases should, as soon as might be, serve to advise the parties litigant as to their legal rights; that the stipulation relied upon on this motion by defendants was signed by affiant upon the aforesaid express condition, and upon no other; and that there was no consideration for affiant's entering into said stipulation save that of the benefit which would result to his clients from having the aforesaid two cases, in which the transcripts were to be filed, fully argued and decided on the merits; and affiant further says that said Wright, at the time of the signing of the said stipulation by affiant, well knew, and has always known, that affiant would not have signed the same except upon the aforesaid condition and consideration." These facts are practically conceded by the respondent, as in his affidavit in reply thereto he merely avers that "neither at the time said stipulations were signed by the attorneys for respondent, nor at any time previous thereto, was it ever stated to the appellants, or to this deponent, that said stipulations were to be, or were, given upon any condition or on any terms other than those expressed therein."

It is very evident from the foregoing history of the case, and from the affidavits offered in behalf of the respective parties, that the only consideration for the stipulation given by the respondent was that the appellant should take such steps in the case of *Hartshorne v. McMullen* as would result in a decision of this court being rendered therein which should be a guide to the parties in determining the course to be pursued in the other cases. It was not necessary that the consideration should be expressed in the stipulation. A stipulation is only an agreement, and as in the case of any other agreement, not only can the consideration for making it be established outside of the agreement itself, but it can also be shown that such consideration has failed, and, when so shown, the stipulation cannot be invoked by the party through whom the failure has occurred. In the present case it is evident that the stipulation was for the sole benefit of the appellants. By obtaining it they were relieved from paying the costs of the appeal, as well as the expenses of printing the transcript. On the other hand, unless there should be some decision by this court in the case of *Hartshorne v. McMullen* by which a rule should be laid down for guid-

ance in the other cases, the respondent gained nothing whatever, and was in reality deprived of advantages which but for the stipulation he would have enjoyed. The actions were brought for the purpose of removing a cloud from the title of the respective plaintiffs to certain land in San Francisco, caused by an adverse claim of the appellants thereto, and involved the same questions of law and fact. Judgment had been rendered in the court below in favor of the plaintiffs in the several actions, and the defendants had appealed from each of those judgments. By virtue of these appeals the operative effect of the judgments was suspended, and the adverse claim of the defendants left undetermined. The respondents were therefore deprived of the benefit of their judgment pending this appeal, and the cloud was left upon their title to the land involved in the action. The respondent would naturally be desirous of having the judgment become final at as early a day as possible, and without this stipulation would have realized this desire at the same time with the decision in the other case. The dismissal of the appeal before its presentation to this court, and the consequent failure on the part of the appellants to procure a decision of this court upon the matters in controversy, deprived the respondent of the benefit of having his judgment become final, and left it in the same condition in which it was at the time the stipulation was given, so that he failed to receive any of the benefit offered to him as the consideration for making the stipulation. We hold, therefore, that, inasmuch as the consideration for the stipulation has failed, it cannot be invoked as binding upon the respondent, and that he is entitled to have the appeal herein dismissed, and it is so ordered.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; DE HAVEN, J.

HARTSHORNE v. McMULLEN *et al.* (No. 14,358.) GOODBODY v. MERTENS *et al.* (No. 14,359.) PRESTON v. SAME. (No. 14,360.) CALIFORNIA DRY DOCK CO. v. SAME. (No. 14,361.) PROTESTANT EPISCOPAL OLD LADIES' HOME v. SAME. (No. 14,362.) HARTSHORNE v. SAME. (No. 14,363.)

(*Supreme Court of California.* June 30, 1891.)

In bank. Appeal from superior court, city and county of San Francisco.

PER CURIAM. Upon the authority of *Raymond v. McMullen*, (No. 14,357.) 27 Pac. Rep. 21. the appeals in the above-entitled actions are dismissed.

90 Cal. 15

EGAN v. EGAN. (No. 13,352.)

(*Supreme Court of California.* June 30, 1891.)

JUDGMENT—AMENDMENT—EXCUSABLE NEGLIGENCE.

Before the court's decision in a suit for divorce plaintiff entered into a stipulation to pay to defendant, whatever the decision might be, \$1,000 in consideration of the release by defendant of all claims to plaintiff's property. Before judgment defendant, through her attorney, presented the stipulation to the judge in chambers,

and asked that it be incorporated in the judgment, which request was refused by the judge. Judgment was entered for plaintiff. Defendant moved for a new trial, which was refused, but made no further request to have the stipulation included in the judgment. *Held*, that the omission of the stipulation from the judgment was a matter for which a remedy should have been sought on the motion for a new trial, or by appeal, and the court erred in subsequently amending the judgment to include it, on defendant's motion, on the ground that the omission was through inadvertence and excusable neglect.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

W. N. Barrows and J. F. Wendell, for appellant. M. L. G. O'Brien, for respondent.

HARRISON, J. A decree of divorce was rendered in this action February 6, 1888, in favor of the plaintiff, upon the ground of cruelty on the part of the defendant, and was entered of record February 8, 1888. It was alleged in the complaint that there was no community property, and that certain real estate described therein was the separate property of the plaintiff. In the decree it is recited "that all of the material allegations of the complaint are true, and all of the allegations of defendant's answer and cross-complaint are untrue, except those particulars wherein they corroborate the allegations of the complaint;" and, after decreeing a dissolution of the marriage, the court set apart and awarded to the plaintiff the said real estate "absolutely free and clear of all rights therein on the part of the defendant." February 16, 1888, the defendant served and filed her notice of intention to move for a new trial, and her statement on said motion was settled and filed June 27th. August 24, 1888, the court made and entered an order denying a new trial. Thereafter, on the 21st of November, 1888, defendant gave notice to the plaintiff of her intention to move the court for an order amending the judgment "so as to insert therein a provision awarding to the defendant the sum of \$1,000, and requiring the plaintiff to pay the same as by him stipulated and agreed by written instrument, dated February 6, 1888," and stated in her notice that said motion would be made "on the grounds that said judgment was taken, made, and entered against her through her mistake, inadvertence, surprise, and excusable neglect," and upon the further ground "that the same was not made a part of said decision, judgment, and decree through the mistake, inadvertence, surprise, and excusable neglect of defendant and her attorneys." Affidavits and oral testimony were presented to the court in support of the motion, and in opposition thereto; and after hearing the same the court, on the 29th of March, 1889, made the following order: "On motion of M. L. G. O'Brien, attorney for defendant herein, notice thereof having been duly served on plaintiff's counsel, and after hearing thereon, it is hereby ordered that the decree heretofore made and entered herein be, and the same is hereby, modified, as follows, to-wit: The following clause is hereby added to said decree:

Plaintiff is further ordered to pay to defendant the sum of \$1,000, as by him stipulated herein, said stipulation having been signed previous to the entering of judgment in said cause. March 29, 1889. WALTER H. LEVY, Judge." From this order the plaintiff has appealed.

It appears from the bill of exceptions that after the trial of the cause, and its submission to the court for decision, the parties by their attorneys entered into the following stipulation: "It is hereby stipulated and agreed that the plaintiff in the above-entitled action will pay to the defendant therein the sum of one thousand (\$1,000) dollars in full satisfaction of all right and claim of every kind whatever that said defendant has or claims to have in that certain real property described in plaintiff's complaint herein, and also in full satisfaction and release of all claims against said plaintiff for support or otherwise. Said sum of \$1,000 shall be paid to the defendant as soon as said defendant shall execute proper conveyance of her interest in, abandon homestead upon, and move out of said property. This agreement shall not be in any way affected by the decision in said action, but may be enforced by the court in the event of a divorce being granted to either party. W. H. BARROWS, Attorney for Plaintiff. GUSTAVE TOUCHARD, Jr., Attorney for Defendant."

After the stipulation had been signed by the attorneys for the respective parties, and before the decision of the cause, it was presented by them to the judge at his chambers, with the request that he would incorporate its provisions into the decree. The judge, however, declined to do so, upon the ground that, as he had no power or jurisdiction to award the defendant any of the plaintiff's separate property, he could not give any effect to the stipulation in the judgment that he might render. Thereupon, at the request of the defendant's attorney, the plaintiff's attorney caused the plaintiff himself to sign the stipulation in the following form: "I hereby consent to the above agreement, and ratify the same. MICHAEL EGAN. February 6, 1888." After having been thus ratified by the plaintiff, the stipulation was delivered to the defendant's attorney, but was never filed in the action. It also appears that the stipulation was fully explained to the defendant before its execution, and that it was made upon the understanding that it was a settlement of all property rights between the parties, and that, whatever might be the decision of the court in the cause, no appeal or motion for a new trial should be made. After the decision in the cause had been rendered, the defendant repudiated the stipulation, and, having employed another attorney, made her motion for a new trial, which was denied, as above stated, and thereafter she made the foregoing motion for an amendment to the judgment.

Section 473, Code Civil Proc., provides that the court may, "upon such terms as may be just, relieve a party, or his legal representative, from a judgment, order, or other proceeding taken against him through mistake, inadvertence, surprise,

or excusable neglect, provided that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken." Inasmuch as the motion in the present case was made more than six months after the judgment was entered, the court had no jurisdiction under this section of the Code to order the judgment to be amended. The appellant, however, contends that, inasmuch as every court has an inherent power to correct its records at any time so as to enable them to speak the truth, the court was authorized to grant the motion.

In the present case, however, it cannot be claimed that the judgment was taken against the defendant through any mistake, inadvertence, surprise, or excusable neglect. Before it was rendered her attorney had presented the stipulation to the judge, with the request that he give effect to it in the judgment, and, upon being informed by the judge that he could not do so, caused it to be signed by the plaintiff in person, presumably for the purpose of having a personal obligation against him for the amount which had been agreed upon as the sum to be paid by him in settlement of all property differences between him and the defendant. Moreover, the defendant, after the entry of the judgment, made a motion for a new trial in the action. Upon this motion she had an opportunity to present to the court any surprise or excusable neglect on her part as a ground for granting her a new trial; and, if the court had been satisfied that such was the fact, her motion would have been granted. So, too, if the court had rendered its decision without sufficiently providing for her support, or if in making its decision it had failed to give to the stipulation such weight as in her opinion it should have received, she could have presented these facts as other reasons why a new trial should have been granted. In making her motion it was incumbent upon her to present to the court all the grounds upon which she had a right to have it granted. After a motion for a new trial in a cause has been denied by the court, a party is not at liberty to make a second motion therefor, either upon any grounds on which the court has once denied it, or upon any grounds which might have been presented in the first instance. The doctrine of *res adjudicata* applies to a decision of a motion for a new trial as fully as to the judgment in the cause. Neither can a party under the form of a motion to amend the judgment obtain relief which, if proper to be granted under any circumstances, should have been sought through a motion for a new trial. Courts have the power at all times to allow amendments to judgments for the purpose of having the judgment as entered express that which was rendered, so that the record will contain the actual decision of the court; and such amendments can be made after the expiration of six months from the entry of the judgment. Where the clerk fails to enter judgment as it was pronounced, the court has always the power to correct the matter, and order the proper entry to be made. Clerical mis-

prisions can be corrected at any time by an order of the court, but judicial errors can be remedied only through a motion for a new trial or on appeal. *Freem. Jndgm. § 70; Forquer v. Forquer*, 19 Ill. 68; *Insurance Co. v. McCormick*, 20 Wis. 265; *Thompson v. Thompson*, 73 Wis. 84, 40 N. W. Rep. 671; *McLean v. Stewart*, 14 Hun, 472. It clearly appears in the present case that the matter contained in the amendment made by the order appealed from was not omitted from the judgment by reason of any neglect of the clerk in recording the same, but was intentionally excluded therefrom by the court itself at the time it rendered the judgment. If it should be admitted that the court ought to have included the provisions of this stipulation in its decree, its failure to do so was an error resulting either from a misconception of the law applicable to the facts before it, or from a failure to give sufficient consideration to those facts. In either case it was an error of law committed at the trial, which the defendant should have sought to remedy through her motion for a new trial. The order appealed from is reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.

90 Cal. 78

RAYNER *et al.* v. JONES *et al.* (No. 9,021.)
(*Supreme Court of California*. June 30, 1891.)

CONTRACTS—BREACH—MEASURE OF DAMAGES—
NEW TRIAL.

1. Where notice of a motion for a new trial is served and filed in due time, the court should either grant or deny it, though the judgment has been appealed from before the hearing on the motion; and, if the motion is dismissed, the appeal will be considered as an appeal from the judgment, and from an order denying a new trial.

2. Plaintiffs conveyed certain land to defendants, and took from them an undertaking conditioned that they should by a certain time furnish plaintiffs with Texas land-warrants for 3,200 acres of land. In an action on the undertaking for defendants' failure to furnish the warrants, the court found that, at and after the time for their delivery, warrants could have been readily obtained for \$47.50 each, locatable on 640 acres. *Held*, that the measure of damages was the value of the warrants, (\$237.50), and not the difference between the value of the land conveyed by plaintiffs to defendants, and the liens thereon, assumed by defendants as part of the purchase money.

Commissioners' decision. Department

2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

W. H. H. Hart, for appellants. Wal. J. Tuska and P. J. Morgan, for respondents.

FOOTE, C. The complaint filed in this action is in this language: "Plaintiffs above named, complaining of defendants above named, for cause of complaint aver and allege: That on, to-wit, the 8th day of February, 1881, at, to-wit, the city and county of San Francisco, state of California, the said defendants, for a valid and valuable consideration, made and executed their undertaking in writing, a copy whereof is hereto annexed and made a part of this complaint; that in and by the terms of said undertaking it is stipulated and expressed that defendant Jones

(the principal in said undertaking) agrees to furnish to these plaintiffs certain Texas land-warrants for three thousand two hundred (3,200) acres of land; said warrants to be of the nature and character more particularly specified in said undertaking, (and to be deposited by said defendant Jones on or before the 1st day of April, A. D. 1881, at the banking-house of John Bregon, in the city of Austin, in said state of Texas.) That the condition therein specified, to-wit, the deposit of said Texas land-warrants, has not been fulfilled and carried out by said defendant Jones, or by any of or either of said defendants, and said defendant Jones has wholly failed and neglected to comply with the said condition on or before said 1st day of April, 1881, or at any time, and still fails and neglects to comply with the same. That by reason of the neglect and refusal of said defendant Jones to comply with the condition of said undertaking, as aforesaid, there was and became due on, to-wit, the 2d day of April, A. D. 1881, to these plaintiffs from these defendants, under and by the terms of said undertaking, the sum of \$4,800, which sum, or any part thereof, the said defendants then, and ever since then, have wholly failed and refused to pay, and still so fail, neglect, and refuse. Wherefore plaintiffs pray for judgment against said defendants in the sum of \$4,800, and for their costs." The bond mentioned therein is as follows: Know all men by these presents, that we, C. J. Jones, and J. C. Fisk and J. C. Beatty as sureties, parties of the first part, are held and firmly bound unto Wm. Rayner and Maggie Rayner, his wife, of the city of San Francisco, state of California, party of the second part, in the sum of four thousand eight hundred (\$4,800) dollars, gold coin of the United States of America, to be paid to the executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, heirs, executors, administrators, firmly by these presents. Sealed with our seals, and dated the eighth day of February, A. D. one thousand eight hundred and eighty-one. The condition of the above obligation is such that, whereas, the party of the first part has sold to the party of the second part Texas land-warrants for three thousand two hundred (3,200) acres, and has received payment in full, except three hundred and fifteen (\$315) dollars, which is secured by promissory note made and executed by Wm. Rayner and Maggie Rayner, his wife: Now, the party of the first part agrees to furnish Texas land-warrants for the above number of acres; said warrants to be of such a series that they can be located upon any of the unlocated public lands of the state of Texas; said warrants to be free from all liens, incumbrances, and transfer fees, and deposited with the banking-house of John Bregon, in the city of Austin and state of Texas, and to be held by him until the said note of three hundred and fifteen (\$315) dollars is paid. The said warrants and note to be deposited by the party of the first part on or before the first day of April, A. D. 1881, at said banking-house, and the said Rayner to have any time there-

after, and before the first day of January, A. D. 1882, to pay said note, and secure the transfer of said warrants. Now, if the said Jones shall well and truly deliver said warrants on or before the first day of April, A. D. 1881, then the above obligation to be void; otherwise, to remain in full force and virtue." A demurrer was interposed to the complaint, and overruled. A motion for a nonsuit was made, and denied. The cause was then tried, and resulted in a judgment for the plaintiffs in the sum of \$1,350 and costs.

A notice of motion for a new trial was served and filed in due season, and upon the hearing of the motion the trial court dismissed it, upon the theory, evidently, that, as the judgment made and entered had been appealed from when the motion for a new trial came on for hearing, the court below had lost jurisdiction to determine it. This view of the matter is untenable, and the court should have heard the motion, and either granted or denied it, upon the bill of exceptions presented, which is a part of the record here on the appeal from the order of dismissal; the action of the court being, in legal effect, a denial of the motion for a new trial. Section 946, Code Civil Proc.; *Naglee v. Spencer*, 60 Cal. 10; *Hayne, New Trials*, § 2, p. 26; *Carpentier v. Williamson*, 25 Cal. 167, 168; *Hayne, New Trials*, p. 494; *Chase v. Evoy*, 58 Cal. 352. The case, then, is to be considered here as on appeal from the judgment and an order denying a new trial. As against the demurrer as filed, we think the complaint sufficient, although a special demurrer to it, as not properly alleging damages suffered, might have been sustained. After making certain findings of fact based upon evidence adduced on the trial, the court reached the conclusion of law that the plaintiffs should recover "the value of equity, over and above the mortgage, on the real estate in San Francisco, conveyed by the plaintiffs to defendant Jones, which was \$1,000; also the value of the San Diego lot, amounting to \$350,—making, in all, \$1,350,—with interest from commencement of the suit." And the judgment of the court rendered thereupon went upon the idea that Jones and his sureties were responsible to the plaintiffs, by the terms of this bond, for the non-delivery of the warrants, to the extent of the difference between the value of certain real estate not mentioned or referred to in the bond sold and conveyed to defendant Jones, and the mortgage thereon, made before that time in favor of other parties, which Jones had assumed to pay as a part of the purchase price. This contract did not assume to fix the amount of damage in anticipation of a breach of the obligation of the instrument, as condemned by section 1670 of the Civil Code; nor does it appear from it, or the evidence, that it would be impracticable or extremely difficult to fix the actual damage as allowed by section 1671 of the Civil Code.

The court below, as we think, improperly admitted evidence against the objection of the defendants, and made findings thereon upon the theory that the measure of damages recoverable for the failure to deliver the warrants at the time and place

specified in the bond was the difference between the value of certain real property which the plaintiffs had sold and deeded to the defendant Jones (which was the origin of the execution of the bond) and the amount of a certain mortgage debt existing as against a portion of the property conveyed; that is, the sum of \$1,350. It is found, upon sufficient proof, in the twelfth and thirteenth findings of fact: "That on the 1st day of April, A. D. 1881, and for several months thereafter, the market value of land-warrants specified in finding 7th have been \$47.50 each at Austin, Texas, and readily obtainable in and on the market at said city of Austin, Texas, at said price of \$47.50 each, on said 1st day of April, A. D. 1881, and at any time for and during the several months thereafter, if they had seen fit so to do." "That said warrants set out in finding No. 7 are of the same class and kind that the defendant Jones was to deliver to the plaintiffs, under the terms of said undertaking, and that they are and were free from all liens and incumbrances and transfer fees, and are and were of the character to be delivered by said Jones to said plaintiffs; that each warrant is locatable on 640 acres of land, on the conditions in said warrant specified." It would appear, therefore, that the measure of damages recoverable in the action was the value of the warrants as specified in the twelfth finding, viz., \$237.50, with legal interest on same from the time when they should have been deposited according to the terms of the bond, subject to a reduction of \$315 for amount due on the note. As it appears that the trial court erroneously measured the damages by a different rule, to the manifest prejudice of the appellants, the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

90 Cal. 25

SMITH v. DAVIS *et al.* (No. 13,319.)

(Supreme Court of California. June 30, 1891.)

TRUSTS—ENFORCEMENT—JURISDICTION—PARTIES.

1. Where a deed of trust of land in another state is executed in California by persons residing there, stipulating that, if the trustee named therein cannot act, a court of competent jurisdiction may appoint a new trustee, a court of California, having jurisdiction of the parties, may appoint a new trustee, and direct him to carry out the trust.

2. A deed of trust purporting to be signed by the trustee is not affected by his failure to sign it, if his signature formed no element of the consideration for the signatures of the other parties, and the deed expressly provides that it shall be binding regardless of the trustee.

3. A judgment rendered in one state appointing a trustee to enforce a trust for the conveyance of land situated in another state will not be reversed on the ground that a third person, to whom the donor conveyed the land after his execution of the deed, was not made a party, if it does not affirmatively appear that such party was a resident of the state in which the court had jurisdiction.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Whittemore & Sears and James G. Maguire, for appellants. James L. Crittenden, for respondent.

GAROUTTE, J. Respondent filed his complaint in equity to appoint a trustee, and to have the execution of a trust relating to certain lands in Washington Territory decreed. The complaint filed May 23, 1885, alleges that on July 27, 1881, said Smith and Davis executed and delivered each to the other a certain document, purporting to be an "indenture tripartite," whereby they purported to convey said land to the London & San Francisco Bank, Limited, (a corporation) in trust for certain specified purposes; that by the terms of its charter said bank was incapable of taking the title sought to be conveyed by the indenture, and was without power to act as trustee in the indenture specified; that defendant Davis refused to regard and carry out the conditions of the indenture; and plaintiff asks that the court appoint a trustee, and that the said trustee be directed to execute the trusts therein contained. Defendants filed a general demurrer, which was overruled, when defendant Davis answered, setting out, among other things, that after the filing of the complaint in this action he sold and transferred all his interest and right in the land described to one Margaret H. McDonald, and that since that time he has had no interest in and to said real estate. The defendant bank answered that it had no legal capacity to take the title sought to be conveyed; never consented to act as trustee, and refused so to act. The findings of the court are in consonance with the allegations of the complaint; and the court also found that defendant Davis had transferred his interest as set forth in his answer. This appeals from the judgment appointing a trustee, and directing an execution of the trust.

Appellants insist that the court had no jurisdiction or authority to appoint or constitute a trustee of land lying outside of the territorial limits of the state of California. There is no question as to the general principle of law that in respect to realty every attempt of any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory; for land is held by the laws of the country where it is situated, and the tribunals administering those laws are the proper forums in which titles to realty should be litigated. The effect of a court's decree is necessarily limited by the boundary lines of its jurisdiction. In the case of *Lindley v. O'Reilly*, 50 N. J. Law, 636, 15 Atl. Rep. 379, where a court of Pennsylvania adjudged a conveyance of land in New Jersey to be a mortgage, and canceled the same, all the parties living in Pennsylvania, the court said: "The decree cannot operate *ex proprio vigore* upon the lands in another jurisdiction to create, transfer, or vest a title. The courts of one state or country are without jurisdiction over title to lands in another state or country." While the rule

is as above stated, yet there is another rule firmly established and of universal application, and it is: "In cases of fraud, trust, or contract, the jurisdiction of a court of chancery is upheld wherever the person be found, although lands in another state may be affected by the decree." In the case of *Massie v. Watts*, 6 Cranch, 158, MARSHALL, C. J., said: "Was this cause, therefore, to be considered as involving a naked question of title,—was it, for example, a contest between Watts and Powell,—the jurisdiction of the circuit court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of the legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found; and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

In *Wimer v. Wimer*, 82 Va. 901, we find this language of the court: "But, while this is true, it is undoubtedly well settled that, in cases of fraud, trust, or contract, courts of equity will, whenever jurisdiction over the parties has been acquired, administer full relief without regard to the nature or situation of the property in which the controversy had its origin, and even where the relief sought consists in a decree for the conveyance of property which lies beyond the control of the court, provided it can be reached by the exercise of its powers over the person, and the relief asked is of such nature as the court is capable of administering." Story quotes the following language of Lord KENYON, used in a case pending before him: "These cases clearly showing that, with regard to any contract made in equity between persons in this country, respecting lands in a foreign country, particularly in the British dominion, this court will hold the same jurisdiction as if they were situated in England." Story, Eq. Jur. § 1293. Referring to trusts, Story says: "If the proper parties are within the reach of the process of the court, it will be sufficient to justify the assertion of full jurisdiction over the subject in controversy." *Barger v. Buckland*, 28 Grt. 850, was a suit of creditors to subject to the payment of their claim lands of their debtor, situate in Virginia and West Virginia, which lands had been conveyed in trust to secure other debts. The trust was created in Virginia: the parties resided in Virginia, except the trustee, who resided in West Virginia, and who neglected or refused to carry out the trust. In *Polindexter v. Burwell*, 82 Va. 514, the court, in reviewing the decision in *Barger v. Buckland*, supra, says: "Upon default of payment, there being no trustee to execute the contract of the parties to sell the land and pay the debt, under the circumstances, the court, in order to perform the contract of the parties, and to fulfill its own maxim, that a trust

shall not fall for want of a trustee, decreed that, unless the grantor should pay the debt within a prescribed period, then certain named persons should execute the trust by selling the land and applying the proceeds to the payment of the debt."

Upon principle, this case appears to be identical with the case at bar. If the London & San Francisco Bank had been competent to accept the trust, and had accepted it, and this plaintiff was here asking that the trustee execute the trust, there is no question but what a decree to that extent would be sustained by this court, for the authorities are universal to that effect. If the court has the power, and if it is its duty, to execute the trust, can it be deprived of that power and released from that duty because there is no trustee to carry out the mandate of the court? or, rather, is it not specially within the line of its duty to create an instrument whereby its decree may effect the true purpose and object intended? The decrees of courts of equity primarily and properly act *in personam*, and, at most, collaterally only *in rem*. If the parties are within the jurisdiction of the court, an injunction will be granted to stay proceedings in a suit in a foreign country. A trust will be enforced pertaining to realty, regardless of the situation of the property. Courts of equity have, as between the parties, reviewed the judgments of foreign courts, and even sales made under those judgments, when fraud or undue advantage was shown. A specific performance of a contract of sale of lands situated in a foreign country will be decreed in equity. These actions will be supported where the court has jurisdiction of the parties, and are familiar illustrations found in Story's Eq. Jur. § 1290 et seq. A decree to convey land lying in another state does not affect the title; it only operates upon the person who is to make the conveyance, and it is his act in making the deed that affects the title. This deed of trust was made and executed in San Francisco, Cal., by the plaintiff and defendant Davis, and was recorded in King county, Wash. T. It expressly provided that "the trusts hereby created shall not lapse or become void by reason of the failure or refusal of the party of the third part to accept or carry out the same;" and further provided that a new trustee should be appointed by the mutual consent of the parties, or by a court of competent jurisdiction, upon the happening of any of the foregoing contingencies. It is further provided that all the conditions and provisions of this agreement "shall apply to and be binding upon their heirs * * * or any other trustee that may be appointed in its place or stead." The defendant bank under its charter could not take the title to the realty, but the parties of the first and second part expressly guarded against such contingency defeating the trust provisions of the indenture by covenanting that, notwithstanding the happening of such event, the indenture should still remain in full force and effect as between themselves, and that a new trustee should be appointed to carry out the trusts, and that all the provisions and conditions of the agreement

should apply to and be binding upon such trustee. There can be no question but that this indenture is still alive and in full force and effect as between the plaintiff and defendant Davis, for they expressly provided that such should be the fact.

Upon a careful reading of the decree of the court we find it simply appoints a trustee, and commands him to enforce the trust; there is nothing contained therein purporting or attempting to transfer title to or vest title in the trustee appointed by the court. If title to the Washington Territory realty does not vest in the trustee, then appellant is not injured, and his contention has no support. If the title to this realty does vest in the trustee, it must be by operation of law or by virtue of the contract of the parties, for the decree does not so provide, and does not purport *ex proprio vigore* to vest a title in the trustee Brittan. In this case the trust did not fail, as between the parties, by reason of the incapacity and refusal of the original trustee to act. "The assent of the trustee is not necessary to the validity of the trust-deed. He may refuse to act, be unable to comply with the statute, or die, and in such or similar cases a court of chancery will execute it." *Furman v. Fisher*, 4 Cold. 630; *Field v. Arrowmuth*, 39 Amer. Dec. 185, and note; *Flint, Trusts*, § 132. In *Vidal v. Girard's Ex'rs*, 2 How. 188, Justice Story said: "It is true that, if the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it, but that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court possessing equity jurisdiction to enforce and perfect the objects of the trust. This will be sufficiently obvious upon an examination of the authorities, but a single case may suffice. In *Sonley v. Clock-Makers' Co.*, 1 Brown Ch. 81, there was a devise of freehold estate to the testator's wife for life, with remainder to his brother C. in tail male, with remainder to the Clock-Makers' Company in trust to sell for the benefit of testator's nephews and nieces. The devise, being to a corporation, was by the English statute of wills void, that statute prohibiting devises to corporations; and the question was whether, the devise being so void, the heir at law took beneficially or subject to the trust. Mr. Baron Eyre in his judgment said that, 'although the devises to the corporation be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise.' This is the ground upon which courts of equity have decreed in cases where no trustee is named."

The objection to the complaint that it is fatally defective in this: that it shows affirmatively that the indenture or deed of trust was intended to be signed by three parties, and was signed by only two,—cannot be sustained. The signature of the party of the third part formed no element of the consideration for the signature of the other two parties, and

they expressly agreed that the indenture should be binding as between them, regardless of the third party.

The appellant insists that the judgment should be reversed because Margaret H. McDonald is not made a party defendant in this action. If said Margaret was a resident of the state of California when the answer was filed, we are at a loss to understand why she was not joined as a co-defendant, either upon the application of one of the parties or upon motion of the court. In order for appellant to successfully maintain his position he must show affirmative error, and in this case he has not shown by the record that she was a resident of the state of California, and therefore that the court had the power to order her joined as a defendant. We are not called upon to determine to what extent Margaret H. McDonald's interests have been adjudicated in this action. Respondent's position is that, owing to the fact she had notice of the recordation of the indenture in Washington Territory, and also purchased the land from appellant after the commencement of this action, that, therefore, she is bound in all respects by the judgment, to the same extent as if she were a party defendant. In this action no *lis pendens* was filed; indeed, it is quite difficult to see how or where one could have been filed to have had any vitality or effect. In this state the act of filing a complaint is no notice to the world of the matters contained therein, and, said Margaret having no actual or constructive notice of the proceedings at the time she purchased the realty, it is difficult to discern how she is in any worse position by reason of having purchased after the filing of the complaint than if she had purchased prior to that event. Again, the fact that she purchased with notice of the indenture of trust did not give the trial court the right of jurisdiction to litigate her title to the land. Appellant in making a deed to her undoubtedly repudiated the entire theory of trust, and she has probably bought and now holds in hostility to the trust; the question of her title is *res melius sitæ*, to be hereafter considered in *locus rei sitæ*.

But, aside from all these considerations, how is the defendant injured by the fact of not having the company of this lady as a codefendant during the progress of the litigation? and, if her company, aid, and assistance were necessary to the best welfare of his interests in the cause, why did he not ask the court to have her joined with him? The court is expressly authorized by statute to make such order in a proper case. What is appellant's cause of complaint? If he has no interest in the subject-matter of this litigation, why did he not file a disclaimer in the lower court, and thus rid himself of the vexations of the law, and thereby escape a judgment against him for costs? If he has any interests which are affected by the judgment in this cause, he has had his day in court, and was held to be in the wrong. Why should he demand a new trial because a third party had interests which were not litigated? If the plaintiff has secured a judgment against the wrong party, he has

done an idle thing, and his sins rest on his own head. We think the appellant should not be heard to insist upon a reversal of the judgment upon the last ground considered. Let the judgment be affirmed.

We concur: BEATTY, C. J.; HARRISON, J.

90 Cal. 95

SMITH *et al.* v. BUTTNER. (No. 13,241.)

(*Supreme Court of California.* June 30, 1891.)

NEGLECTANCE — DEFECTIVE PREMISES — PLEADING.

In an action for personal injuries, the complaint alleged that, while plaintiff was in possession of defendant's house as tenant, he raised it, and failed to provide safe or suitable means of exit therefrom; that, by reason of his negligence in failing to provide safe and proper means of exit, plaintiff, in attempting to descend to the ground from the house, fell, and was injured. *Held*, that the complaint did not state a cause of action, since it did not show whether the cause of the accident was a latent or patent defect.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Joseph Leggett, for appellants. *Otto Tum Sudeu*, for respondent.

TEMPLE, C. This appeal is on the judgment roll from a judgment against the plaintiffs on the pleadings. The plaintiffs are husband and wife, and the action is brought to recover damages for injuries received by the wife. Plaintiffs were occupying a house belonging to defendant as a residence, being his tenants from month to month. The complaint shows that some time prior to June, 1887, while plaintiffs were in possession as tenants, defendant caused the dwelling-house to be raised some six or seven feet; that plaintiffs continued to reside in the house after it had been raised, and to pay rent to defendant as before; that after raising the house, and while plaintiffs and their family were living in it, defendant wholly failed and neglected to provide any safe and proper means of entrance to or egress from the house, and, "by reason of the negligence and failure of defendant to provide safe, suitable, or proper means of exit from said house, said plaintiff Dora Smith, on said 30th day of June, 1887, in endeavoring to descend from said house to the ground, for a proper and lawful purpose, while in the exercise of due care and diligence, and without any fault or negligence on her part, fell to the ground, and dislocated her left wrist, and broke the bone of her left arm near the wrist, and sustained other severe and painful injuries," etc. To this complaint the defendant answered, specifically denying every allegation, except as to the relation of landlord and tenant. A jury being impaneled for the trial of the cause, plaintiff Dora was sworn as a witness, and her testimony taken. Thereupon counsel for the defendant moved for judgment on the pleadings, and the motion was granted.

It is manifest from the the complaint that the injury to plaintiff Dora did not occur while the work of raising the house

was in progress. The complaint fails to show how long before the injury it was since defendant had been engaged in the work, but it is averred that they continued to occupy the house after it had been raised, and paid rent as before, and that the injury occurred after. The negligence consisted simply in failing to provide a safe, proper, and suitable means of entrance to or egress from the house, and it is alleged that this negligence caused plaintiff to fall. But no fact is averred which shows that such negligence had anything to do with the accident. How did it cause her to fall? It may have been because defendant neglected to provide any means of egress whatever, or through some patent defect in the plan of the contrivance, whatever it was. In such case plaintiff could not recover in this action. *Sieber v. Blanc*, 76 Cal. 173, 18 Pac. Rep. 260. It may have been, consistently with this general statement, because the structure was insufficiently secured, and therefore gave way, although properly used. In such case, perhaps, plaintiffs might recover. Such complaint does not state the facts constituting plaintiffs' cause of action. It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury. To illustrate: Suppose a plaintiff injured by the falling of a sign, negligently and insecurely fastened by defendant. It would not suffice for him to allege the negligence in hanging the sign; that plaintiff, in lawfully and without negligence passing under it, was thrown down and injured through such negligence. This would be a mere assertion of the cause. It would be necessary to show that the sign fell upon him in consequence of such negligence, thereby causing his injury. Such a complaint would, however, be less objectionable than this now under consideration, for there would be but one conceivable way in which the injury could be supposed to result from the negligence; but, as here, that the negligence was the cause would rest upon the naked assertion as to causality, and would not appear through the statement of a fact. In construing pleadings before judgment, it is presumed the pleader has stated his case in the most favorable manner to himself possible. As we have seen, it is entirely consistent with the allegations of this complaint to suppose the injury occurred because defendant neglected to provide any mode of egress whatever. We are not at liberty to suppose anything gave way through the latent insecurity of the structure, for it is not so alleged. The presumption is, therefore, that the accident arose from a patent defect, and that the pleader has failed to make a more specific statement, because such a statement would have weakened his case. We think the judgment should be affirmed.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

90 Cal. 64

DORE v. THORNBURGH. (No. 13,477.)

(*Supreme Court of California.* June 30, 1891.)

ACTION ON FOREIGN JUDGMENT—PLEADING—LIMITATIONS.

1. A complaint, in an action on a judgment given against defendant in a foreign court, which alleges that, in the action in which the judgment was obtained, plaintiffs signed final judgment for £3,920, "which said judgment was then and there duly given, made, and entered," is not demurrable on the ground that it does not aver that the court ever made or gave the judgment.

2. Code Civil Proc. Cal. § 339, requiring to be brought within two years an action upon a contract, obligation, or liability, founded upon an instrument of writing "executed" out of the state, does not apply to actions on a foreign judgment, but such action is within section 343, providing that "an action for relief not hereinbefore provided for must be brought within four years after the cause of action shall have accrued."

Commissioners' decision. Department 2.
Doyle, Galpin & Zeigler, for appellants.
T. I. Bergia, for respondent.

FITZGERALD, C. Appeal from a judgment of the superior court of the city and county of San Francisco. This action was commenced by plaintiff on the 4th day of October, 1888, to recover upon a judgment given against the defendant on the 9th day of May, 1885, in the queens' bench division of the high court of justice in England. The complaint is demurred to on the grounds: (1) That it does not state facts sufficient to constitute a cause of action; (2) that the alleged cause of action is barred by the provisions of section 339 of the Code of Civil Procedure. The demurrer was sustained by the court below, and, upon plaintiff failing to amend the complaint, judgment final was rendered in favor of defendant. The appeal is taken upon the judgment roll alone.

The objection raised under the first ground of demurrer—that there is no averment in the complaint that the court ever made or gave the alleged judgment—is not well founded. The complaint alleges "that thereafter, to-wit, upon the 9th day of May, 1885, the said plaintiffs signed final judgment in the said action for the said sum of £3,920, in accordance with the terms of the said order, and which said judgment was then and there duly given, made, and entered." This allegation we think sufficient, as against a general demurrer.

Under the second ground of demurrer, the question presented for our determination is whether this action, which is founded upon a judgment rendered by an English tribunal, is barred by the statute of limitations within two years. Subdivision 1, § 339, Code Civil Proc., upon which respondent relies in support of her contention that the action is barred within that time, reads as follows: "An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state." That the judgment herein is not such an instru-

ment in writing (*Patten v. Ray*, 4 Cal. 287) is evident from the use here made of the word "executed," which must be construed to apply to the act of the party sought to be charged. But it is a contract in writing in the full sense of the term "contract or obligation," as employed by our statute, (*Stuart v. Lander*, 16 Cal. 375; *Reed v. Eldredge*, 27 Cal. 346; *Wallace v. Eldredge*, Id. 498; *Bean v. Loryea*, 81 Cal. 152, 22 Pac. Rep. 513;) and, as such, is not embraced in the two-years limitation prescribed by the provisions of that subdivision of the section. Section 343, Code Civil Proc., ("An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.") was construed by this court in *Piller v. Railroad Co.*, 52 Cal. 42, (which was an action for damages for injuries caused by the alleged negligence of the defendant,) to apply "to all suits in equity not directly of concurrent cognizance in law and equity," and that the two-years limitation found in the first clause of the first subdivision of section 339 is applicable to all actions at law not specifically mentioned in other portions of the statute." In *Lux v. Haggin*, 69 Cal. 269, 10 Pac. Rep. 674, which was an action for equitable relief, its meaning was extended so as to embrace "all suits in equity as well as at law." And, while we do not think that the construction put upon this section was necessary to the decision of either case, we are satisfied with the reasoning and the conclusion reached in the latter, and regard it as the correct interpretation of the intention of the legislature as there expressed.

We are therefore of the opinion that this action, which is not specifically provided for by any other section of the statute of limitations, falls within the meaning of section 343; and, as it was commenced within the period of time therein prescribed, it follows that the court below erred in sustaining the demurrer. We advise that the judgment be reversed, with directions to the court below to overrule the demurrer.

We concur: **FOOTE, C.; VANCLIEF, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with directions to the court below to overrule the demurrer.

ALLEN v. ALLEN et al. (No. 13,005.)

(*Supreme Court of California.* June 30, 1891.)

MORTGAGES—REDEMPTION—CONFLICT OF LAWS—LIMITATIONS—PLEADING.

1. Appellant caused land in California to be conveyed absolutely to respondents as security for a loan made in New York, of which state all were residents. After respondents' right to sue for the money loaned was barred in New York, appellant sued in California to redeem. Held that, as respondents' right of action for the loan was barred in New York, a suit by them to foreclose the mortgage was barred in California, under Code Civil Proc. Cal. § 361, which provides that when a cause of action has arisen in another state, and by the laws thereof an action cannot be maintained by reason of the lapse of time, an

action cannot be maintained against him in California, except in favor of one who has been a citizen of California. The right to foreclose being barred in California, the right to redeem was barred also.

2. The time for redemption from a mortgage is fixed by the laws in force at the time the mortgage is given, and cannot be extended by subsequent legislation.

3. Persons entering into a contract, relying on a decision of the supreme court, are bound in the performance thereof by the law as declared by a subsequent decision of the same court overruling the former decision as erroneous.

4. Under Code Civil Proc. Cal. § 458, providing that in pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be generally stated that the cause of action is barred by a certain section of the Code, and, if such allegation be controverted, the party pleading must establish the facts showing the bar, a plea of the statute of limitations to a cause of action which arose in another state need not allege facts to show that the cause of action arose in that state, and under the laws of that state is barred by the statute of limitations.

Department 1. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

J. N. Gillett and E. W. Wilson, (Stanley, Stoncy & Hayes, of counsel,) for appellant. Chamberlin & McGowan and S. M. Buck, for respondents.

PATERSON, J. Appellant received from the state a certificate of purchase for the lands described in the complaint on March 28, 1860, and in August following assigned the same to one Collins to secure an indebtedness of \$30, and thereafter a patent was issued from the state to Collins. Appellant paid Collins the amount due him; and the latter, by request of appellant, conveyed the land to John H. Allen, who paid no consideration therefor. Respondents thereafter advanced to the appellant certain sums of money for the payment of taxes which had become delinquent, and, to secure the repayment to them of said sums the appellant, on June 12, 1869, caused said John H. Allen to convey the lands to them as security for the repayment of the money they had advanced. This deed was absolute in form. John H. Allen received no consideration for the deed. Neither of the parties has ever been in actual possession of the land. The contract of loan was oral, and no time was fixed in which appellant was to make repayment. Plaintiff never made any demand for an accounting, or any offer to redeem, prior to the year 1885, and defendants did not prior to that time assert any claim of title to the lands adverse to plaintiff's right to a reconveyance upon payment of the indebtedness. This action was commenced March 15, 1887. The court below rendered judgment for the defendants. A motion for a new trial was denied, and plaintiff appealed from the order, and from the judgment.

1. The court below held that plaintiff's cause of action was barred by the provisions of section 361, Code Civil Proc. That section provides: "When a cause of action has arisen in another state or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained

against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued." It is claimed by appellant that under that section it was incumbent on respondents to set out the facts upon which they rely, to show that the cause of action arose in the state of New York, and that under the laws of that state it was barred by the statute of limitations. A complete answer to this contention is found in section 458, Id., which provides: "In pleading the statute of limitations, it is not necessary to state the facts showing the defense, but it may be generally stated that the cause of action is barred by the provisions of section [giving the number of the section and subdivision thereof, if it is so divided, relied upon] of the Code of Civil Procedure; and, if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred." The rule thus established was intended to simplify the form of pleading such defenses, and is one which the court cannot depart from on a conjecture that the legislature intended to except from its operation cases of this kind. The contract was made in New York, where all the parties resided, and neither of them was in this state thereafter until the year 1885; and it is claimed by appellant that under sections 346, 351, Id., and 2903, Civil Code, the respondents' right to foreclose their mortgage was not barred at the date of the commencement of this action; that appellant remained the equitable owner of the property, and his right to redeem was kept alive. Those sections read as follows: "Sec. 346. An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage." "Sec. 351. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action." "Sec. 2903. Every person, having an interest in property subject to a lien, has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed." Civil Code. In support of this contention, counsel for appellant say, in substance: "Respondents' action to foreclose could have been brought only in this state. The word 'return,' as employed in section 351, supra, is applicable to persons coming from abroad, as well as to citizens who have left the state for a temporary purpose, and returned thereto. The statute had not commenced to run in 1885, because the respondents had never been in the actual occupancy of the premises. Section 2903, Civil Code, and section 346, Code Civil Proc., provided

rules of limitation different from those which had previously been followed by the courts of this state, and those new rules are applicable to mortgages made before, as well as those made after, the adoption of the Codes, unless the remedy was extinguished at the time the Codes took effect. Respondents were not only mortgagees, but trustees, of appellant; and the statute could not commence to run in their favor until an offer to redeem was made by appellant. There could be no laches on the part of appellant, because the legal title remained in him, and no adverse claim was made by respondents." These contentions cannot be lightly passed over. They deserve to receive, and they have received, our careful consideration.

In the solution of the question presented as to the effect of the deed, we must read as a part of the contract the laws of this state existing at the time the contract was made, (*Klinck v. Price*, 4 W. Va. 4; *U. S. v. Crosby*, 7 Cranch, 115.) although the nature and construction of the contract of loan, which was made in New York, are determined by the laws of the latter state, (*De Wolf v. Johnson*, 10 Wheat. 367.) It is true, an action to foreclose must be brought where the property is situated; but it does not follow that respondents could have maintained an action to foreclose at the time this suit was commenced. Both parties resided in the state of New York, where the contract was made, and either could have maintained an action there on the contract. The plaintiff could have enforced his right to redeem, and the defendants could have recovered the amount for which they held the land as security. *Montgomery v. Spect*, 55 Cal. 352; *Kanawha Coal Co. v. Kanawha & O. Coal Co.*, 7 Blatch. 415; *Gardner v. Ogden*, 22 N. Y. 327; *Williams v. Fitzhugh*, 37 N. Y. 444. In this state, when an action on a promissory note, secured by mortgage of the same date upon real property, is barred by the statute of limitations, the mortgagee has no remedy upon the mortgage. *Lord v. Morris*, 18 Cal. 482; *Heinlin v. Castro*, 22 Cal. 100. The debt is regarded as the principal, and the mortgage as a mere incident. When the debt is barred, the remedy upon the mortgage is also barred. *McCarthy v. White*, 21 Cal. 495. If, therefore, respondents could not maintain an action in New York for the recovery of the money due, they could not maintain an action in this state to foreclose the mortgage. Section 361, Code Civil Proc. At the time the conveyance was made by John H. Allen to the respondents, a deed absolute in form, but intended as a mortgage in this state, transferred the legal title, and there was left in the person executing it a mere equity of redemption; and whenever the debt, to secure which the deed was made, became barred by the statute of limitations, the right to redeem was barred. *Hughes v. Davis*, 40 Cal. 117; *Espinosa v. Gregory*, Id. 58. The right to redeem and the right of the creditor to sue on a contract were reciprocal. Where one was lost, the other could not be enforced. *Cunningham v. Hawkins*, 24 Cal. 403; *Arrington v. Liscom*, 34 Cal. 366; *Grattan v. Wiggins*, 23

Cal. 35. No subsequent legislation could change the rights or obligations of the parties, or extend the time for action. The right and time to redeem were fixed by the laws in force at that time. *Bronson v. Kinzie*, 1 How. 316; *Walker v. Whitehead*, 16 Wall. 318; *Heyward v. Judd*, 4 Minn. 483, (Gil. 375.); *Phinney v. Phinney*, 81 Me. 450, 17 Atl. Rep. 405. Under the decisions just cited, section 346, Code Civil Proc., is inapplicable, because it would effect a material change in the rights and obligations of the parties. *Phinney v. Phinney*, 81 Me. 450, 17 Atl. Rep. 405; *Heyward v. Judd*, 4 Minn. 483, (Gil. 375.) And for the same reason *Raynor v. Drew*, 72 Cal. 307, 13 Pac. Rep. 866, and other and later cases declaring the rule stated in that section are not in point. They are based upon that section of the Code, and it was passed posterior to the time the parties entered into the contract.

That plaintiff's cause of action was barred by the laws of New York at the time this action was commenced there can be no doubt; and it is immaterial whether the court below based its conclusion upon the proper section of the statute of limitations of that state or not. It was shown that both of the parties resided in the state of New York for 16 years after the contract was entered into before they came to this state, and during that time no action was taken by either of them to put the other in default; and, if it be conceded that the section of the statute of New York which was put in evidence has no bearing upon the question at issue, it must be presumed that the laws of that state are the same as our own. *Marsters v. Lash*, 61 Cal. 624; *Tolman v. Smith*, (Cal.) 24 Pac. Rep. 744; *Oshorn v. Blackburn*, (Wis.) 47 N. W. Rep. 175.

It is claimed that at the time the contract was entered into it was the established rule in this state that a conveyance absolute in form, but intended merely as security, did not pass the legal title to the grantee. It is true, there had been decisions to that effect; but, in the year following, it was held (*Espinosa v. Gregory*, and *Hughes v. Davis*, supra) that a deed absolute in form, intended as a mortgage, did convey the legal title. These decisions did not change the law; they simply declared what was the law. Every one is conclusively presumed to know the law, although the ablest courts in the land often find great difficulty and labor in finally determining what the law is. The courts cannot make or repeal a law. "They can say what a law means; and if, afterwards, they see that they have made a mistake, they can correct their error by an overruling of a former decision; the consequence of which overruling is that the blunder is thenceforward deemed never to have been law." *Bish. Cont.* § 569; *Boyd v. Alabama*, 94 U. S. 649. It has been held here that, although it appears the parties have entered into a contract relying upon a previous decision of the supreme court, they will not be relieved from the obligations thereof because of a subsequent decision by the same court overruling the former one, and declaring a different rule upon the same subject. *Kenyon*

v. Welty, 20 Cal. 637. There are some cases in which the supreme court of the United States has held that the construction given to a statute by the highest tribunal in the state, whether sound or not, must be taken as correct, so far as contracts made under the act are concerned, and no subsequent decision altering the construction can impair their validity. The construction becomes a part of the statute; as much so as if it were an amendment made by the legislature. *Gelpcke v. Dubuque*, 1 Wall. 175; *Louisiana v. Pilsbury*, 105 U. S. 294; *Douglass v. Pike*, 101 U. S. 677; *Thomson v. Lee*, 3 Wall. 327. These cases, however, all involved the question as to the validity of negotiable securities, and in one of them a distinction is made between cases of that kind and cases like the one at bar in which the court had previously applied the doctrine stated above. *Gelpcke v. Dubuque*, supra, 214. We think the court below held the right view of the case, and the judgment and order are therefore affirmed.

WE CONCUR: HARRISON, J.; GAROUTTE, J.

STEVENS v. LOVEJOY. (No. 13,825.
(Supreme Court of California. July 2, 1891.)

SWAMP LAND—APPLICATION BEFORE SURVEY.

The swamp lands granted to the state by Act Cong. Sept. 28, 1850, are not subject to application for purchase until they have been segregated to the state by a United States survey, and an application filed prior to such segregation confers no rights on the applicant, though it is subsequently approved, and a certificate of purchase issued after segregation. Following *Buchanan v. Nagle*, (Cal.) 26 Pac. Rep. 512.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by Stevens against Lovejoy to determine a contest arising in the state land-office as to the right to purchase from the state certain swamp and overflowed lands granted to the state by Act Cong. September 28, 1850. The court below found, among other things, that defendant's application to purchase was made before the land was surveyed and segregated to the state by the United States, and that no rights attached by reason of the application or its subsequent approval, and the issuance of a certificate of purchase based thereon. Judgment for plaintiff, new trial denied, and defendant appeals.

N. O. Bradley and G. E. Lawrence, for appellant. *W. B. Wallace, T. McNamara, and Mickie & Irwin*, for respondent.

PER CURIAM. Upon the authority of *Buchanan v. Nagle*, (Cal.) 26 Pac. Rep. 512, (No. 13,705, opinion filed April 4, 1891,) the judgment and order denying a new trial are affirmed.

(30 Cal. 126)

SWIM v. WILSON. (No. 12,634.)

(Supreme Court of California. July 1, 1891.)

STOCKBROKERS—INNOCENT SALE OF STOLEN STOCK—LIABILITY TO OWNER.

A stockbroker is liable to the owner for the value of mining shares received for sale from one who had stolen them, although he acted in

good faith, without notice, and paid the proceeds to the thief, relying on his representations of ownership. *BAATZ, C. J.*, and *PATERSON, J.*, dissenting.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Wilson & Wilson, for appellant. *Tilden & Tilden*, for respondent.

DE HAVEN, J. The plaintiff was the owner of 100 shares of stock of a mining corporation, issued to one H. B. Parsons, trustee, and properly indorsed by him. This stock was stolen from plaintiff by an employe in his office, and delivered for sale to the defendant, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession, the thief represented himself as its owner, and the defendant relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. Thereafter the plaintiff brought this action to recover the value of said stock, alleging that the defendant had converted the same to his own use, and, the facts as above stated appearing, the court in which the action was tried gave judgment against defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals. It is clear that the defendant's principal did not by stealing plaintiff's property acquire any legal right to sell it, and it is equally clear that the defendant, acting for him and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property. "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title." *Kimball v. Billings*, 55 Me. 147; *Coles v. Clark*, 3 Cush. 399; *Koch v. Branch*, 44 Mo. 542. In *Stephens v. Elwall*, 4 Maule & S. 259, this principle was applied where an innocent clerk received goods from an agent of his employer, and forwarded them to such employer abroad; and, in rendering his decision on the case presented, Lord ELLENBOROUGH uses this language: "The only question is whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under the authority of another, who had himself no authority to dispose of it." To hold

the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of every-day experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one whom it now appears was a thief, and, relying on his representations, he aided his principal to convert the plaintiff's property into money, and it is no greater hardship to require him to pay to the plaintiff the value of this property than it would be to take it away from the innocent vendee who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner, and this rule has been applied in this court to the innocent purchaser of shares of stock. *Barstow v. Mining Co.*, 64 Cal. 388, 1 Pac. Rep. 349; *Sherwood v. Mining Co.*, 50 Cal. 413.

The precise question involved here arose in the case of *Berlich v. Marye*, 9 Nev. 312. In that case, as here, the defendant was a stockholder who had made a sale of stolen certificates of stock for a stranger, and paid him the proceeds. He was held liable, the court in the course of its opinion saying: "It is next objected that, as the defendant was the innocent agent of the person for whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defense to an action of trover, to which the present action is analogous." The same conclusion was reached in *Kimball v. Billings*, 55 Me. 147, the property sold in that case by the agent being stolen government bonds, payable to bearer. The court there said: "Nor is it any defense that the property sold was government bonds payable to bearer. The *bona fide* purchaser of a stolen bond payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a *bona fide* holder. * * * The rule of law protecting *bona fide* purchasers of lost or stolen notes and bonds payable to bearer has never been extended to persons not *bona fide* purchasers, nor to their agents." Indeed, we discover no difference in principle between the case at bar and that of *Rogers v. Hule*, 1 Cal. 571, in which case, *BENNETT, J.*, speaking for the court, said: "An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring

the auctioneer to account for the value of the goods than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them." It is true that this same case afterwards came before the court, and it was held, in an opinion reported in 2 Cal. 571, that an auctioneer, who in the regular course of his business receives and sells stolen goods, and pays over the proceeds to the felon, without notice that the goods were stolen, is not liable to the true owner as for a conversion. This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled in the later case of *Cerkel v. Waterman*, 63 Cal. 34. In that case the defendants, who were commission merchants, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over to him the proceeds of the sale before they knew of the claim of the plaintiff in that action. There was no fraud or bad faith, but the court held the defendants there liable for the conversion of the wheat. In this case it was the duty of the defendant to know for whom he acted, and, unless he was willing to take the chances of loss, to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a liability by the conversion of property not belonging to such principal. Judgment and order affirmed.

WE CONCUR: GAROUTTE, J.; McFARLAND, J.; SHARPSTEIN, J.

WE DISSENT: BEATTY, C. J.; PATERSON, J.

(90 Cal. 90)

GILLASPIE v. HAGANS *et al.* (No. 13,037.)

(Supreme Court of California. June 30, 1901.)

LANDLORD AND TENANT — ACTION FOR RENT — PLEADING — HARMLESS ERROR — EVIDENCE — APPEAL.

1. Where a counter-claim for damages for breach of covenant by a landlord to build a laundry on the premises was set up in an action for rent, and that issue tried, the overruling a demurrer to the complaint, on the ground that it neither alleged performance nor excused non-performance of the covenants, was error without prejudice, where it appears that the tenants agreed to use other portions of the building as a laundry, and that the verdict for plaintiff for rent was diminished by more than the amount of damages shown to have been sustained by the breach.

2. Where a complaint contained a count for rent due on a lease, and one for damages for breach of covenant by the tenant to restore the property to its former condition, error in overruling a demurrer on the ground of misjoinder is without prejudice, where the count for damages was abandoned on the trial, and the court so charged, and the verdict was for less than the rent claimed.

3. Questions as to the monthly value of the use of a laundry attached to the leased building, or one like it, do not correctly state the rule of damages for breach of covenant to build a laundry on the premises, and are properly disallowed.

4. Error in excluding competent evidence is cured by afterwards admitting.

5. Where counsel fail to indicate the particular objections to a charge, errors assigned thereon will not be considered on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

T. L. Carothers, for appellants. J. A. Cooper, for respondent.

FITZGERALD, C. This action is brought by plaintiff against the defendants to recover the sum of \$1,002.93 for rent alleged to be due and unpaid on certain leased premises, described in the amended complaint as the "Capitol Hotel," and for damages in the sum of \$200 for breach of covenant to restore the property in the condition provided for by the terms of the lease. The amended complaint, which is unverified, separately states two independent causes of action, in both of which the contract of lease, which is in writing, is pleaded *in hæc verba*. In the first count it is substantially alleged that on the 13th day of May, 1884, plaintiff let to the defendants upon the terms and conditions set forth in the lease the property known as the "Capitol Hotel," and described therein as the hotel then in the possession of one Fairbanks. The second cause of action, after adopting paragraphs 1 and 2 of the complaint, sets up the covenant in the lease to restore the property, and aver damages in the sum of \$200 for breach thereof. The instrument in writing executed by the parties hereto, and set out as stated in each of the foregoing causes of action, contains, as we think, two independent contracts of lease of separate and distinct properties, with the rent specifically fixed for each, and the terms commencing at different periods of time, as will be seen from the terms and conditions thereof, which are substantially as follows: One of the properties referred to is the building in course of construction at the time of the execution of the lease, and afterwards known as the "Palace Hotel." The lease of this property was for the term of five years from the date of its completion, at a monthly rental of \$150, payable on the first day of each month, plaintiff agreeing to finish the building within a reasonable time, according to the original plans and specifications, except as varied by consent of parties, and to build on the premises a laundry and wood-shed of rough boards. It was further agreed that all improvements made upon the property during the said term should be enjoyed by defendants without further rent. "But that the storehouse under the hotel was no part thereof." The other piece of property, designated as the "Capitol Hotel," plaintiff "also leases" to defendants for the term of five years from the date of the expiration of the lease of one Fairbanks, then in the possession thereof, at a monthly rental of \$25, payable on the first day of each month, defendants agreeing to yield up the premises in as good condition as when leased, reasonable wear thereof and damages by the elements excepted. But it is immaterial, in the view that we take of this case, whether this instrument in writing is construed as one contract of lease for both properties, or as separate contracts of lease for each piece thereof. Defendants demurred generally to each cause of action stated, and specially on the

ground that the amended complaint improperly unites in one action a claim for money due on a written contract with a claim for unliquidated damages for waste and injury to realty. The demurrer was overruled by the court, and thereupon defendants answered by a general denial, and as a separate defense set up as counter-claim damages in the sum of \$6,137.50, for breach of covenants to complete the Palace Hotel according to plans and specifications, and to build a laundry upon the premises thereof, and pray judgment therefor and costs of suit. The case was tried by a jury, and a verdict rendered and judgment entered thereon in favor of plaintiff for \$833.73, from which judgment and the order refusing a new trial this appeal is taken.

Defendants base their contention in support of the first ground of demurrer on the failure of the complaint to allege performance, or excuse non-performance, of the terms and conditions of the lease, out of which it is alleged this action arose. The amended complaint alleges the execution of the lease, which is set out in full therein, possession of the premises thereunder, and the non-payment of the rent alleged to be due and unpaid thereon. The covenants, the breach of which are set up as counter-claim for damages, are contained in and apply only to the lease of the Palace Hotel property. There are no such covenants in the lease of the Capitol Hotel property. But, conceding that the amended complaint should have alleged performance or excused non-performance of these covenants, they are set up in the counter-claim, and the breach thereof alleged, and, as the case was tried upon those issues, we fail to perceive in what way the defendants were injured thereby.

It is further contended that the court erred in overruling the demurrer to the amended complaint on the ground of misjoinder of causes of action. As to whether the second cause of action is in tort, or for breach of covenant to return the property in good condition, we are not called upon, in view of what transpired at the trial of the case, to decide. Admitting, however, that the causes of action were improperly united, and that the court erred in overruling the demurrer, it appears that this cause of action was wholly abandoned by plaintiff at the trial of the case, and no evidence offered thereon, and that the court so charged the jury. It is therefore evident that the jury could not have considered the question of damages claimed thereunder in the rendition of their verdict, which position is further strengthened by the verdict itself, which was for a sum less than the amount claimed to be due for rent. It therefore follows that the ruling of the court on this ground of demurrer, if erroneous, is affirmatively shown by the record to be error without injury. Code Civil Proc. § 475; Hayne, New Trials, § 286; Campbell v. Water, etc., Co., 85 Cal. 682; Reynolds v. Lincoln, 71 Cal. 184, 9 Pac. Rep. 176, and 12 Pac. Rep. 449.

It is further claimed that the court erred in granting plaintiff's motion to strike out the testimony of the witness Tanner,

as to the value of the use of the laundry to the Palace Hotel. Admitting that the evidence was competent for this purpose, and that the court erred in striking it out, the error was cured by this witness being subsequently recalled, and giving substantially the same testimony without objection.

The other rulings of the court excepted to and assigned for error are, save one, upon questions as to the value of the use per month of a laundry attached to the Palace Hotel, or to an hotel like it. The objections to these questions were properly sustained, as they failed to correctly state the rule of damage in such cases. It is indisputably shown by the evidence that the building of the laundry was waived by the defendants, and that they agreed to use the west wing of the Capitol Hotel as such, and that, after plaintiff had prepared it by making the necessary improvements at his own expense for that purpose, it was so used by the defendants during the remainder of the time they were in the possession thereof. The witness Hagans, one of the defendants, testified that such a laundry as the one referred to would be worth from \$8 to \$15 per month; and by the witness Tanner, that, in connection with the Palace Hotel, it would be worth \$20 per month. The evidence shows, and it is nowhere contradicted, that the amount of rent due was \$1,002.98. The verdict was for \$833.73, thus allowing the defendants the very liberal sum of \$169.20 for the three months that they had the washing done elsewhere.

It is lastly claimed that the court erred in its charge to the jury, but counsel for appellant has failed to point out what particular part of it he objects to. We have, however, carefully gone over the charge, and, if any objection can be urged to it, it would come, it seems to us, more appropriately from the other side. We therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

90 Cal. 110

PACIFIC FACTOR CO. v. ADLER (No 13,354.)

(Supreme Court of California. July 1, 1891.)

ILLEGAL CONTRACTS — MONOPOLIES — LIQUIDATED DAMAGES — PLEADING — MOTION TO STRIKE OUT.

1. Where a contract for the sale of grain-bags provides that the vendee shall have the exclusive sale of the same to the amount of 187,500, and the vendor agreed not to sell or offer the same for sale to any other person, and, if the vendee failed to sell the full amount, the vendor agreed to accept the sale of a *pro rata* amount, and such contract is a part of a scheme to gain a monopoly, it is void, as against public policy, and there can be no recovery for a breach thereof.

2. Civil Code Cal. § 1670, provides that "every contract by which the amount of damages to be paid * * * for a breach of an obligation is determined in anticipation thereof is to that extent void, except as expressly provided in next section." Section 1671 provides that "the parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof when,

from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages." *Held*, that a contract for the sale of grain-bags, which provides that the vendor shall pay the vendee three cents for each bag which he refuses or neglects to deliver as liquidated damages, is void, although it recites that, from the nature of the case, it will be extremely difficult to determine the damages.

3. Where, in an action for a breach of contract, the answer is in avoidance, alleging that contracts were made as part of a scheme to gain a monopoly, but fails to allege that the contract sued upon was a part of the scheme, the defect cannot be taken advantage of by motion to strike out such allegation. The proper practice would be to demur.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Henry K. Mitchell, for appellant. Naph-taly, Freidenrich & Ackerman, for respondent.

GAROUTTE, J. This is an action upon a contract to recover liquidated damages. The portions of plaintiff's complaint necessary to consider in the decision of this cause are: "That plaintiff is a corporation, incorporated in this state for the purpose of conducting and carrying on the business of buying, selling, and otherwise dealing in goods, wares, and merchandise, either in its own behalf or as agent for others on commission; that on the 16th day of May, 1888, in consideration of one dollar, defendant entered into an agreement in writing with plaintiff, whereby he agreed to give it (plaintiff) the exclusive sale of all grain-bags or burlaps amounting to one hundred and eighty-seven thousand and five hundred bags, which was or would be under his control prior to January 1, 1889; and defendant further agreed to accept for said bags or burlaps the average price the plaintiff might obtain for all grain-bags or burlaps it might sell between the date of said contract and January 1, 1889. And, in case plaintiff should fail to sell said one hundred and eighty-seven thousand five hundred bags, defendant agreed to accept the sale of a *pro rata* amount of grain, bags or burlaps as 187,500 is to the entire number of grain bags and burlaps which plaintiff should sell from this date until the 1st day of January, 1889; and defendant agreed to deliver to said company, or on their order, whatever number of grain-bags or burlaps, up to 187,500, the said company should call on him to deliver between this date and the 1st day of January, 1889, on payment to him, when such bags were delivered, (less one per cent. commission,) of seven and one-half cents for each bag or burlap delivered; and in case defendant should receive more money or deliver more bags or burlaps than his *pro rata* of the whole number sold by plaintiff between this date and the 1st day of January, 1889, the defendant would refund the excess of money received, and accept other bags in lieu thereof; and defendant agreed not to sell or offer for sale said 187,500 bags or burlaps to any one other than to the plaintiff or upon its order; and defendant further agreed to pay plaintiff one per cent. on all sales of said bags, or any part thereof; and defendant

further agreed to pay plaintiff three cents for each bag or burlap which he refused or neglected to deliver on demand as liquidated damages; and the said plaintiff agreed to sell and draw on defendant from time to time, as sales were made, as near as in its judgment it could determine, a *pro rata* amount of said 187,500 bags or burlaps as 187,500 is to the entire number of bags that are placed in its hands for sale between this date and January 1, 1889." The complaint further alleges that plaintiff, in pursuance of the covenants in said agreement, demanded of said defendant prior to January 1, 1889, said 187,500 bags, and defendant at that time had said bags in his possession, but neglected and refused to deliver them to plaintiff.

The answer of defendant practically admits the allegations of the complaint, and sets out certain matters in avoidance, as a special defense, to the effect that plaintiff, through its board of directors, about the 16th day of May, 1888, devised a scheme to control the sale and supply of all or the greater portion of the grain-bags and burlaps which were then within the state of California, or to arrive prior to January 1, 1889, for the purpose of increasing the price of bags and burlaps, and of limiting the number of dealers from whom such bags could be obtained, and compelling the farmers of this state to purchase said bags from plaintiff at a price in excess of their real value; that the demand in this state for such bags and burlaps, for the purpose of sacking the grain, amounts annually to between 32,000,000 and 35,000,000 bags; that plaintiff calculated that the quantity of grain-bags and burlaps which were then within this state, and which were to arrive prior to January 1, 1889, amounted to 42,000,000 bags, and that, if plaintiff could make contracts with the holders and owners of said bags whereby it could secure the exclusive right of making sales thereof, thereby competition for the sale of said bags among said owners and dealers would be removed, and the plaintiff would be enabled to fix a larger price therefor, and compel the parties who required said bags, to remove the grain raised on the Pacific coast, to purchase the same from plaintiff, and pay therefor the price which plaintiff might demand; that in pursuance of said scheme plaintiff entered into contracts with other holders and owners of grain-bags and burlaps, in all respects similar to the contract made with defendant; that the entire quantity of said grain-bags and burlaps, covered by all the contracts of plaintiff, aggregated 30,000,000 bags, or thereabouts; that all of said contracts, including the contract with defendant, are contrary to public policy, and void. The foregoing matters, in addition to others not necessary to note at this time, are set out in detail by defendant.

At the trial plaintiff introduced the contract in evidence, and rested. Defendant made a motion for a nonsuit, which motion was granted. This is an appeal from that judgment. Appellant insists that his motion to strike out the affirmative matter in the answer should have been grant-

ed, and also that the court erred in not granting his motion for judgment upon the pleadings. The affirmative defense of the answer is defectively pleaded, and should not be allowed to stand if attacked by demurrer. It fails to allege that the contract under consideration in this cause was entered into as a part of, and in pursuance of, the scheme or plan set out; and if the contract relied upon by plaintiff to recover formed no part of the general "plan" to make a "corner" of the bag and burlap market of the state, then such plan was outside of the questions involved in this litigation, constituted no defense to this suit, and should have been stricken out as surplusage. But it is quite apparent from the pleadings, taken as a whole, that the defendant intended by this defense to claim that the contract embraced in the complaint formed part of this "scheme" or "plan," and was therefore void, as being against public policy.

A defective pleading cannot be stricken out by reason of its defects upon the ground of surplusage. In this case a demurrer would have been the proper means to have tested the sufficiency of the answer, and the motion to strike out was properly denied. Without passing upon the question as to whether any of the allegations of the complaint were denied by the answer, we think the affirmative defense relied upon by defendant was sufficient to defeat the motion of plaintiff for judgment upon the pleadings, when considered in the light of the construction just placed upon it. While it is clear that public policy favors the utmost freedom of contracts within the limits of the law, and requires that business transactions should not be fettered by unnecessary restrictions, yet agreements in restraint of competition, that threaten the public good, entered into with the object and view of controlling, and, if necessary, suppressing, the supply, and thereby enhancing the price of articles of actual necessity, that embrace in their evil effects all the territory and practically all the people of this great state, become a grave menace to the best interests of the commonwealth, and therefore are opposed to sound public policy. The entire number of bags in the state on the 16th day of May, 1888, and which would arrive prior to January 1, 1889, amounted to 42,000,000. The annual demand for bags was 32,000,000. The plaintiff entered into this "scheme" or "plan" to obtain the control of these 42,000,000 bags, and in pursuance of said plan by contract, did actually secure the control of 30,000,000 of these bags from the owners and holders thereof. The plaintiff did not purchase the bags; at the same time, by the rigor of its contract, it prevented the owners from selling them. It is clear this "scheme" or "plan" was devised, and these contracts entered into, for the purpose of removing all competition, and thereby compelling the farmers to purchase bags from plaintiff at a price in excess of their real value. Plaintiff controlled three-fourths of all the bags which were in the state, or which would arrive within the ensuing six months. It held the bag market in its

hands, for competition was gone, and the price demanded must be paid. These agreements were not entered into for the purpose of aggregating capital, nor for greater facilities in the conducting of their business, nor for the protection of themselves by a reasonable restraint upon active competitors, but for the purpose of regulating, controlling, and withholding the supply of bags, and thereby to take an unjust advantage of the farmers' necessities, by disposing of the fruits of its unlawful labors at an unreasonable advance in price.

The supreme court of the state of Ohio, in speaking upon this question, said: "The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." *Salt Co. v. Guthrie*, 35 Ohio St. 672. In considering the question as to what is a reasonable restraint of trade, Chief Justice TINDAL in *Hornor v. Graves*, 7 Bing. 743, used the following language: "We do not see how a better test can be applied to the question * * * than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public; * * * whatever is injurious to the interests of the public is void on the ground of public policy." *Craft v. McConoughy*, 79 Ill. 346; *Arnot v. Coal Co.*, 68 N. Y. 558. It is difficult to distinguish upon principle the case of *Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. Rep. 391, from the case at bar. "Plaintiff, being a manufacturer of lumber, entered into contracts with various manufacturers of lumber to purchase so many thousand feet from each during the year 1881, and said parties agreed not to manufacture during said time any other lumber to be sold in the four counties where plaintiff was doing business. The sole object and consideration in entering into these contracts was for the purpose of increasing the price of lumber, limiting the supply, and giving the plaintiff control of the lumber market within the territory specified." Chief Justice SEARLS, in holding one of the contracts void, said: "With the results naturally flowing from the laws of demand and supply, the courts have nothing to do; but when agreements are resorted to, for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties there-to."

After plaintiff had introduced the contract in evidence and rested, defendant was granted a nonsuit upon two grounds: (1) That no proof of actual damage was of-

fered, and the clause of the contract fixing liquidated damages is void, under sections 1670 and 1671 of the Civil Code. (2) That the contract is void, as being in restraint of trade and against public policy. Section 1670 of the Civil Code provides: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." Section 1671: "The parties to a contract may agree there-in upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage." The allegation of the complaint that "it was understood and agreed between plaintiff and defendant at the time of making the contract that, owing to the nature of the case, it would be impracticable and extremely difficult to fix the actual damage," added no merit to the pleading, and its denial in the answer was unnecessary labor. Whether a contract is such that, "from the nature of the case," it would be impracticable or extremely difficult to fix the actual damage sustained by a breach thereof, is a question of fact, which must be determined in each particular case; and for the purpose of determining this question the court must examine the attendant and surrounding circumstances under which the contract was entered into, as well as the terms of the contract itself. Parties cannot by their arbitrary agreement preclude such examination by the court, or avoid the provisions of the statute. *Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. Rep. 890; *Eva v. McMahon*, 77 Cal. 472, 19 Pac. Rep. 872. In the present case we think that, when the plaintiff rested, the "nature of the case," as presented by the terms of the contract, and its breach as admitted by the answer, was such that the court could decide as a fact that it was neither extremely difficult nor impracticable to fix the actual damage sustained by the plaintiff by reason of the defendant's breach of the contract. The refusal of the defendant to deliver the bags may have deprived the plaintiff of its commissions for selling, and under certain circumstances it may have suffered other damage; but we can imagine no case where any damage could have resulted to the plaintiff by reason of a breach of this contract, and which the plaintiff would have been entitled to recover in a court of law, where it could be said that it was impracticable or extremely difficult to fix the actual damage. Is the contract void as being in restraint of trade and against public policy? This question, when the motion for a nonsuit was made, was to be determined by an examination of the terms of the contract itself. We have already decided that it was so corrupted by the bad company with which it associated, as set forth in the answer of defendant, as to be beyond the pale of the law at that time; but at an earlier age, when it appears in the complaint, no stain or blemish is found to discolor it. The plain-

tiff contracted to sell the bags and burlaps of defendant at a certain commission. Defendant agreed to accept for them the average price it received for all bags it sold, plaintiff had the exclusive sale of the bags, and was bound to sell a certain portion of them. Standing alone, a total stranger to the "scheme" or "plan" set out in the answer, this contract must be considered good, for no illegal object appears; no transgression of the law is apparent; no public interest is injuriously affected. It follows from the foregoing views that the judgment should be affirmed. It is so ordered.

We concur: BEATTY, C. J.; HARRISON, J.

90 Cal. 181

ONTARIO LAND & IMP. CO. v. BEDFORD
et al. (No. 13,692.)

(Supreme Court of California. July 10, 1891.)

MORTGAGE—RELEASE—FORECLOSURE SALE.

1. A mortgage of property that had been platted into lots and blocks provided that the mortgagor should be entitled to a partial release of the mortgage on payment of a certain sum for each lot released. The blocks contained 82 lots each, but a few of the blocks had not been subdivided into lots. *Held*, that such unsubdivided blocks were not "lots," within the meaning of the release provision of the mortgage.

2. Code Civil Proc. Cal. § 694, which provides that at execution sale the judgment debtor may direct in what order the property shall be sold applies also to foreclosure sales where the decree does not specify any order of sale.

In bank. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Chas. J. Perkins and H. C. Rolfe, for appellants. Waters & Gird, for respondent.

DE HAVEN, J. There are appeals in this case from a judgment in favor of plaintiff, foreclosing a mortgage, from an order refusing defendants' motion for a new trial, and also from an order of the court denying the motion of defendants to set aside a sale of the mortgaged premises made under an execution in the action. The mortgage covers separate parcels of land in what is known as "Ontario Colony," and contains a provision by which the mortgagees agree to "release from the lien of this mortgage those parts, portions, or subdivisions of said mortgaged premises designated on said plat of said town of Magnolia, as fronting on Euclid avenue, upon the payment to said parties of the sum of two hundred dollars for each of said lots. All lots fronting on First, Second, and Third streets, north of D street, upon the payment to them of one hundred and twenty dollars for each of said lots; all lots fronting on First, Second, and Third streets, north of D street, upon the payment to them of one hundred and forty dollars for each of said lots; all lots fronting on Fourth street, upon payment to them of ninety dollars for each of said lots; and all lots fronting on Fifth and Sixth streets, and Camper's avenue, upon the payment to them of eighty dollars for each of said lots." The map referred to shows that the town of Magnolia is laid off into streets and

blocks; the latter, with the exception of blocks 33 and 25, being subdivided into lots. The lots are of different sizes; some of the blocks being divided into a greater number of lots than others. Appellants claim that the unsubdivided blocks 33 and 25 are "lots," within the meaning of that part of the mortgage above quoted, and so subject to release, in accordance with its terms.

1. The word "lot" may undoubtedly be so used in a conveyance as to mean the entire premises conveyed, whether such premises consist of a farm or even a block in a city. But the ordinary meaning of this word, when used with reference to town or city property, is a subdivision of a block according to the map or survey of such town or city; and there is nothing upon the face of this mortgage to indicate that it was used in any different sense by the parties thereto. The map of the town of Magnolia is expressly referred to, and, for the purpose of construing the mortgage, must be deemed a part of it. This map shows that there are town lots fronting upon all the streets named in that part of the mortgage relating to releases, and, as these answer or satisfy the description given to the parcels subject to release, the mortgage must be construed as referring to them; and the amount to be paid for the release of each lot refers to a town lot, as designated on the map, and not to an entire block. To hold that block 33 is a lot would enable the defendants to secure its release upon payment of the same sum as is provided for the release of the one thirty-second part of the adjoining block 34; and, while it would have been competent for the parties to have made such an agreement, the intention to do so is not to be inferred from the use of a word which, in ordinary acceptation, as applied to town property such as this, conveys a different meaning.

2. The judgment in this case did not mention the particular manner or order in which the several parcels of the mortgaged property should be sold. The record shows that the attorneys for the defendants directed the officer making the sale to sell the lots separately, and also the order in which they should be sold. Those directions were disregarded, and the defendants subsequently moved the court to set aside the sale because of the failure of the officer to follow such instructions. The motion was denied. This ruling of the court was erroneous. The process under which the judgment in this class of cases is enforced is provided for in section 684 of the Code of Civil Procedure, and the subsequent section 694,¹ which is a part of the same chapter dealing with the general subject of the execution of judgments, is applicable to sales of real property under judgment of foreclosure; and when, as in this case, the judgment is silent as to the manner or order in which the separate parcels shall be sold, the judgment debtor

¹ Code Civil Proc. Cal. § 694, provides that at execution sales "the judgment debtor, if present, may also direct the order in which property real or personal shall be sold, * * * and the sheriff must follow such directions."

has the right to require that separate lots or parcels shall be sold separately, and may also direct the order in which they shall be sold. The practice act in force prior to the adoption of the Code of Civil Procedure contained a chapter relating to the execution of judgments in civil cases substantially the same as the one upon the same subject in the Code of Civil Procedure; and in the case of *Leviston v. Swan*, 33 Cal. 480, it was held that a decree of foreclosure need not contain any special directions as to the mode or place of sale, because such matters are regulated by law, and that, by virtue of process to enforce such a judgment, the sheriff is required "to sell the mortgaged property in the mode and manner, and at the place, designated in the practice act for the sale of real estate under judicial process, and make a return of his proceedings, as in the case of an execution upon a money judgment." Judgment and order denying motion for new trial affirmed. The order refusing to set aside the sale of the property directed by the judgment to be sold is reversed.

We concur: MCFARLAND, J.; PATERSON, J.; HARRISON, J.; GAROUTTE, J.

90 Cal. 49

REDINGTON V. CORNWELL. (No. 13,008.)

(Supreme Court of California. June 30, 1891.)

CORPORATIONS — PAYMENT OF DEBTS BY STOCKHOLDERS — SUBROGATION — PLEADING — AMENDMENTS — LIMITATIONS.

1. Civil Code Cal. § 5322, provides, among other things, that each stockholder of a corporation is individually and personally liable only for such proportion of any corporate debt as the amount of his stock bears to the whole subscribed capital stock. Held that, where one stockholder and director pays more than his proportionate share of such debt, the payment is not voluntary, and he is entitled, as against a co-director who knew of and acquiesced in such payment, to contribution, and to be subrogated to the rights of the creditor, since he has a beneficial interest in the property of the corporation, which is answerable for the debt, and from which the other stockholders' proportion must be paid, if not paid by them individually.

2. Where, in such action, the stockholder asks to be subrogated to the rights and remedies of the creditor, the period of limitation is that defined by Code Civil Proc. Cal. § 359, providing that actions against a stockholder of a corporation to enforce a liability created by law must be brought within three years after the creation of the liability.

3. Although an amended complaint is filed after the cause of action is barred, it is not demurrable on this ground when it does not show upon its face when the original was filed, or that the cause of action is different from that set up in the original.

4. The original complaint is not superseded by an amendment which alleges substantially the same cause of action, and it remains a "pleading" within the meaning of Code Civil Proc. § 670, subd. 2, which makes the pleadings part of the judgment roll, and it may also be brought up by bill of exceptions, under Code Civil Proc. §§ 647, 648, providing that "documents on file in the action" may be incorporated therein.

5. Where the original complaint declares on two notes, alleging that they were given "for value received," and were assigned by indorsement, and also alleges facts from which an equitable assignment would result, an amended complaint which omits the allegation of indorse-

ment, and alleges that the debt was for money loaned, and for a balance due on account, sets up substantially the same cause of action; the averment as to value received being equivalent to the more specific allegations of the items of money loaned and due on account.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Action in equity by John H. Redington against George N. Cornwell. The amended complaint alleged that plaintiff, who was a stockholder in a corporation, had paid the whole of a certain debt owed by it, and asked to be subrogated to the rights and remedies of the creditor, and for contribution from another stockholder. Civil Code Cal. § 5322, provides, among other things, that each stockholder of a corporation is individually and personally liable only for such proportion of any corporate debt as the amount of his stock bears to the whole subscribed capital stock. Code Civil Proc. Cal. § 359, provides that actions against a stockholder of a corporation to enforce a liability created by law must be brought within three years after the creation of the liability. It was claimed by defendant that under these statutes the payment by plaintiff of more than his proportion was voluntary, and that he had no right of contribution or subrogation, and also that the action was barred. A demurrer to the amended complaint was sustained, and plaintiff appeals.

Olney, Chickering & Thomas, for appellant. *F. E. Johnston*, for respondent.

VANCLIEF, C. This appeal is from a final judgment in favor of the defendant, rendered on demurrer to plaintiff's third amended complaint in two counts, and presents for decision the general question, should the demurrer have been sustained? The facts alleged in the first count of the complaint are substantially as follows: During a period of time embracing all the transactions alleged, the plaintiff and defendant were stockholders and directors of the Redington Quicksilver Company, a California corporation, and the plaintiff was president of the board of directors. During the same period the subscribed capital stock of the corporation consisted of 1,260 shares, of which the defendant owned 461 shares. From September 1, 1879, until June 1, 1882, the corporation had "a mutual, open, and current account" with Redington & Co., a copartnership. At divers times during that period the copartnership received from the corporation consignments of quicksilver, which it sold and disposed of for the corporation, and collected the proceeds thereof, advanced and loaned money to the corporation, and paid out money for its use, and also received partial payments from the corporation on the account. In this account the corporation was debited with all moneys loaned and advanced to it, and with all sums paid out and expended for its use by the copartnership, and was credited with all proceeds of sales of quicksilver, and with all payments made on the account. On June 1, 1882, the copartnership and the corporation had

an accounting, by which it was found that there was a balance of \$64,126.24 due from the latter to the former, for which the corporation then made its promissory note, of which the following is a copy: "\$64,126.24. San Francisco, June 1st, 1882. On demand, for value received, the Redington Quicksilver Company hereby promises to pay to Mess. Redington & Company, or order, at its office in San Francisco, sixty-four thousand one hundred and twenty-six 24-100 dollars, with interest thereon at the rate of eight (8) per cent. per annum until paid. Interest payable monthly, and, if not so paid, to become a part of the principal, and bear a like interest. [Signed] THE REDINGTON QUICKSILVER COMPANY, JOHN H. REDINGTON, President. [Corporate Seal.] GEORGE PENLINGTON, Secretary." After formally alleging the above facts, the complaint proceeds as follows: "(6) That thereafter, to-wit, on or about the 7th day of June, 1882, said firm of Redington & Co. pressed for and demanded of the said corporation the collection and payment of the balance of the indebtedness aforesaid and of said promissory note; that at the time of said demand said corporation was wholly without funds wherewith to pay the same; that thereupon, to-wit, on or about the said last-named day, at said city and county of San Francisco, this plaintiff, in good faith, and for the honor, use, and benefit of the said the Redington Quicksilver Co., advanced and paid the said sum of \$64,126.24 to said firm of Redington & Co. in full satisfaction and discharge of the said balance, and of the said indebtedness evidenced by the said promissory note; that thereby all of the indebtedness of said corporation then subsisting to said Redington & Co., and all claims and demands of said firm upon said corporate note, were fully paid and extinguished; that said Redington & Co. thereupon surrendered and delivered said promissory note to this plaintiff. (7) That no payments have been made by said corporation, or on its behalf, or at all upon said account, or the said balance thereof, or upon said indebtedness evidenced by said promissory note, or upon or on account of said sum so advanced by said plaintiff, except the sum of \$24,126.24, which was repaid to plaintiff thereon, on or about the 31st day of May, 1884, and that on said 31st day of May, 1884, there remained and was, and that there now is, due and wholly unpaid from said the Redington Quicksilver Co. to this plaintiff of the said balance, and of the said indebtedness, and of said sum advanced by plaintiff as aforesaid, the sum of \$40,000, with interest thereon from said last-named day, together with interest upon the sum of \$24,126.24 from the 7th day of June, 1882, up to said 31st day of May, 1884. (8) That at all the times and dates aforesaid the said defendant was one of the directors of the said the Redington Quicksilver Co.; that, as such director, he acted for said corporation in and about the execution of said promissory note, and also in incurring the indebtedness evidenced thereby, and in making the payments that have been made on account of the same as

aforesaid; that said defendant, as such director, and also individually, had at all times and dates aforesaid full notice and knowledge of the facts hereinabove alleged, and of each and every one thereof; that he has at all the times, and with notice and knowledge as aforesaid, acquiesced in, confirmed, and ratified all and singular the acts of said corporation, and of said firm of Redington & Co., and of this plaintiff hereinabove mentioned and averred. * * * (10) That by reason of the premises defendant is, and at all the times since the said 31st day of May, 1884, has been, liable and holden to plaintiff for 461-1260 of the said sum of \$40,000, and of the interest remaining due to plaintiff from said corporation as aforesaid, to-wit, the sum of \$14,635, together with interest thereon from the said 31st day of May, 1884, at the legal rate, together with 461-1260 of the interest at the legal rate upon the said sum of \$24,126.24 from the 7th day of June, 1882, to the 31st day of May, 1884. (11) That, though frequently requested so to do, the said defendant has hitherto wholly failed, neglected, and refused to pay to plaintiff the said last-mentioned sum, or the said interest, or any part thereof. (12) That upon receiving from defendant payment of his proportionate part of the balance and indebtedness aforesaid due from said corporation to this plaintiff, and of the moneys so as aforesaid advanced and paid by plaintiff, and of said interest, this plaintiff is ready and willing, and now here and hereby offers, to discharge and satisfy, to the extent of such payment, the said obligation of the said corporation, or of its stockholders to this plaintiff, and otherwise to abide by and perform the judgment of this court touching the same." The second count is upon another promissory note of the corporation to the same copartnership firm for the sum of \$14,800.43 dated December 31, 1883, for a balance of the account running to the date of this second note. In all other respects the second count is like the first. The grounds of the demurrer are (1) that neither count states facts sufficient to constitute a cause of action; and (2) that both counts appear to be barred by the first subdivision of section 338 of the Code of Civil Procedure.

1. It is contended by counsel for respondent that the payment of the debt of the corporation by the plaintiff, in excess of that part for which he was individually liable as a stockholder, was purely voluntary, and extinguished the debt as to all other stockholders; and, therefore, that plaintiff cannot be subrogated to the rights or remedies of Redington & Co. against the stockholders. It is true that the doctrine of subrogation "is not to be applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay," nor where "it would work injustice to the rights of others." *Sheld. Subr. § 1*. It is also true that the plaintiff was not directly liable to pay defendant's proportion of the debts of the corporation, but, as a stockholder, he had a common, well-de-

financed beneficial interest, with all other stockholders, in the fund (the property of the corporation) from which defendant's proportion of the debts must have been paid if not paid by defendant; and that fund was answerable for the debt. *Ditch Co. v. Zellerbach*, 37 Cal. 591; *San Diego v. Railroad Co.*, 44 Cal. 116. There can be no doubt that the plaintiff was entitled to contribution from the defendant to the extent of defendant's proportion of the debt paid. *Cook, Stocks*, § 27, and authorities there cited; *Larrabee v. Baldwin*, 35 Cal. 156. From which it follows that his payment was not voluntary since contribution no more than subrogation, is allowed in favor of a mere volunteer. But in this case the plaintiff, in addition to contribution, asks to be subrogated to the rights and remedies of *Redington & Co.* against the defendant "for the purpose of compelling contribution." *Sheld. Subr.* § 45; *Lamb v. Montague*, 112 Mass. 353. Should he be thus subrogated, he will be entitled to the same remedy that *Redington & Co.* were entitled to, as to which the statute of limitations is three years. (*Green v. Beckman*, 59 Cal. 545; *Moore v. Boyd*, 74 Cal. 167, 15 Pac. Rep. 670;) whereas, if he simply sought contribution upon an implied *assumpsit*, his remedy would be barred in two years, (*Chipman v. Morrill*, 20 Cal. 131.) This seems to be all he can gain by subrogation, as it does not appear that *Redington & Co.* held any securities for the debt except the promissory note of the corporation, which added nothing to their remedy against the stockholders, so far as the statutes of limitation are concerned. *Larrabee v. Baldwin*, 35 Cal. 168; *Stilphen v. Ware*, 45 Cal. 110; *Hyman v. Coleman*, 82 Cal. 650, 23 Pac. Rep. 62. In *Mosler's Appeal*, 56 Pa. St. 76, *Thompson, C. J.*, said: "I regard the doctrine [of subrogation] as applicable in all cases where a payment has been made under a legitimate and fair effort to protect the ascertained interests of the party paying, and where intervening rights are not thereby jeopardized or defeated. Such payments, whatever their effect might be at law in extinguishing the indebtedness to which they apply, will not be so regarded in equity, if contrary to equity to regard them so." See, also, *McCormick v. Irwin*, 35 Pa. St. 111; *Heart v. Bryan*, 2 Dev. Eq. 147; *Wall v. Mason*, 102 Mass. 316; *Robinson v. Leavitt*, 7 N. H. 99. The case of *Guy v. Du Uprey*, 16 Cal. 198, recognizes the principle that a payment is not voluntary when made by a party who is interested in having the payment made. In the first section of *Sheldon on Subrogation*, the author, by way of definition, gives the following, which, so far as it goes, seems to be well sustained by the authorities cited: "It is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. The substitute is put in all respects in the place of the party to whose rights he is subrogated. It is derived from the civil law, from which it has been adopted by courts of equity. In this country, under the initial guidance of Chancellor Kent, its principles

have been more widely developed, and its doctrines more generally applied, than in England. It is treated as the creature of equity, and is so administered as to secure real and essential justice without regard to form, and is independent of any contractual relations between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter; but it is not to be applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay; and it is not allowed where it would work any injustice to the rights of others."

The complaint is unnecessarily verbose, and perhaps uncertain and ambiguous as to some material matters; but I think it shows that plaintiff was interested in having the debt to *Redington & Co.* paid, and that he made the payment "under a legitimate and fair effort to protect" his own interest in the fund which was liable for the whole debt; and, therefore, that the payment was not voluntary in that legal sense which would preclude his right to contribution from the defendant, or his right to be subrogated to the remedies of *Redington & Co.* as a necessary means to enforce such contribution. Counsel for respondent insists, however, that the complaint shows that the debt of the corporation to *Redington & Co.* was extinguished, and that it necessarily follows that the debt of the stockholders was also extinguished. After sufficiently alleging the payment of the indebtedness on the account and the note, the complaint adds, as a conclusion from those facts, "that thereby all of the indebtedness of said corporation then subsisting to said *Redington & Co.*, and all claims and demands of said firm upon said corporate note, were fully paid and extinguished." Even if the averment had been that the debt of all the stockholders was extinguished by the payment, it would have been only an erroneous conclusion from the facts stated, and evidently contrary to the intention of the pleader, whose sole object, plainly expressed, was to recover a stockholder's proportion of the debt. The word "extinguished" was probably used as synonymous with "paid and satisfied." But it is not alleged that the debt of the defendant or other stockholders was "thereby extinguished." As to what will so extinguish the debt that the party paying cannot be subrogated to the rights and remedies of the creditor, see *Mosler's Appeal*, 56 Pa. St. 76, and *Lamb v. Montague*, 112 Mass. 353.

2. It is contended that both causes of action appear to have been barred by section 338 of the Code of Civil Procedure at the time the third amended complaint was filed. But it does not appear on the face of the third amended complaint when the original complaint was filed, nor that the third amended complaint states a cause of action substantially different from those stated in the original complaint;

and therefore it does not appear on the face of the third amended complaint that either of the causes of action therein stated were barred. *Ord v. De la Guerra*, 18 Cal. 75; *Farris v. Merritt*, 63 Cal. 118; *Kramer v. Halsey*, 82 Cal. 209, 22 Pac. Rep. 1137. For aught that appears on the face of the third amended complaint, the original complaint may have been filed on the 8th day of June, 1882, and within the period prescribed by section 388 of the Code of Civil Procedure, and may have stated, or imperfectly stated, a cause of action substantially the same as that stated in the first count of the complaint demurred to.

The original complaint, however, which was filed October 7, 1884, has been brought up as a part of the judgment roll, and also by a bill of exceptions; but the respondent contends that it is improperly here, that it does not belong to the judgment roll, and that, as there was no trial of any issue of fact, there was no proper occasion for a bill of exceptions. By the second division of section 670 of the Code of Civil Procedure, which is applicable to this case, "the pleadings" are made a part of the judgment roll. But counsel for respondent contends that the original complaint has been wholly, and for all purposes, superseded by the third amended complaint, and, therefore, that it is not to be considered a pleading in the case, and consequently no part of the judgment roll. It has been said in a number of cases that an amended pleading supersedes the original, but I think a careful examination of those cases will show that it was only intended to decide that the amended pleading superseded the original for certain specified purposes, and only to the extent of the amendment. Beyond this, whatever may have been said is mere *dictum*. But in none of the cases has it been even said that the original is not a part of the judgment roll; nor has it been decided that an original complaint is superseded for the purposes of showing when the action was commenced, and whether or not a new or different cause of action was introduced by the amendment. For the purpose of determining these questions, and perhaps others that may arise which often become material on appeal, the amended complaint can by no possibility supersede the original. Unless otherwise required by the court, an amendment to a complaint, whether it consists of a mere additional averment, or effects a change in the original, may be filed by itself, without being incorporated in the original by engrossment of the complaint as amended, (Code Civil Proc. 432,) in which case it could hardly have been contemplated that the original should not become a part of the judgment roll. It is certainly always included as such by the clerk in making up the roll.

Is not the original complaint, though defective or imperfect, a pleading in the case? The trial court certainly was authorized to consider it as a part of the record of the pleadings in this case, for the purposes of ascertaining when the action was commenced, and determining whether a new cause of action was stated in the third

amended complaint; otherwise, that court could not have disposed of the questions of law raised by the demurrer as to the effect of the statute of limitations, since there was no opportunity to introduce evidence on the trial of pure questions of law which must be tried on the pleadings alone. If the trial court was authorized to consider the original complaint as one of the pleadings of record without the introduction of it in evidence, I think it should be regarded as a part of the judgment roll. If, however, the original complaint is not a part of the judgment roll I think it is properly brought up by the bill of exceptions. By section 647 of the Code of Civil Procedure an order sustaining a demurrer is deemed excepted to, and in drafting his bill of exceptions the appellant was entitled to incorporate therein "documents on file in the action," and such other available matter as was necessary to explain it. Code Civil Proc. § 648. The original complaint was a document on file in the action, and it is necessary to explain the exception to the order sustaining the demurrer, and is, therefore, properly incorporated in the bill of exceptions. The objection that a bill of exceptions is allowable only upon the trial of an issue of fact is answered by the case of *Tregambo v. Mining Co.*, 57 Cal. 501, and by numerous other authorities. The word "trial," in section 650, Code Civil Proc., means a trial of an issue of law as well as the trial of an issue of fact. *And. Law Dict.*, and numerous authorities there referred to.

I think the third amended complaint does not state a cause of action substantially different from those stated in the original complaint. The original complaint is upon the same two promissory notes set out in the third amended complaint, alleging that they were made for value received by the corporation, and that for value received the corporation assigned the same to plaintiff by indorsement, and delivered the same to the plaintiff. It does not state that the value received for the making of the notes was money loaned to and paid for the corporation at divers times between September 1, 1879, and June 1, 1882, nor that it was the balance of a "mutual, open, and current account," running from September 1, 1879, to June 1, 1882, as stated in the third amended complaint; but the substance of these more special, yet indefinite, statements is included in the general averment of the original complaint that the notes were made "for value received." Had the original complaint merely added to the phrase, "for value received," the words, "to-wit, moneys loaned to and paid for the corporation at divers times between September 1, 1879, and June 1, 1882," it would have been quite as specific as to what was the consideration of the notes, as is the third amended complaint. The amendment, in this respect, only made the general averment in the original complaint, that the corporation received value for the notes a little more specific, still leaving it indefinite as to the dates and amounts of the several loans and payments. The averment as to the mutual open account in the third amended com

plaint is of doubtful sufficiency to extend the period of limitation, even against the corporation. As to the stockholders it can have no effect whatever, even though sufficiently alleged. The corporation had no more power to extend the period of limitation, as against the stockholders, by a mutual open account, than by making its promissory note. The liability of the stockholders is created and exists by statute. It arises when a debt is contracted by the corporation. It is limited to three years from the time it arises; and it is well settled in this state that the corporation has no power to extend that limitation without direct authority from the stockholders. The original complaint alleges an assignment of the notes by indorsement and delivery, and also states facts from which an equitable assignment and subrogation would result in the absence of a legal assignment. The amended complaint omits the legal assignment by indorsement, this being the only difference. The effect of each mode of assignment against the defendant would be the same. I think each count of the third amended complaint, subject to some degree of uncertainty and perhaps ambiguity, states a cause of action not substantially different from those defectively stated in the original complaint; and that so much of the alleged indebtedness as accrued after the 7th day of October, 1881, does not appear to have been barred by the statute of limitations at the time of the commencement of the action. Unless the payments made by the corporation were otherwise specially applied by either party, they should be applied to the items of indebtedness in the order in which they were contracted, as to time. I think the judgment should be reversed, and the cause remanded, with direction to the court below to overrule the demurrer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with direction to the court below to overrule the demurrer.

(90 Cal. 121)

EXCELSIOR WATER & MIN. CO. v. PIERCE.
(No. 12,973.)

(Supreme Court of California. July 1, 1891.)

CORPORATIONS — WRONGFUL PAYMENT OF DIVIDENDS — DIRECTORS' LIABILITY — INVESTMENTS AND PROFITS.

1. Civil Code Cal. § 309, provides that "the directors of a corporation must not make dividends except from the surplus profits arising from the business thereof," and for a violation thereof the directors are personally liable "to the corporation and the creditors, in the event of its dissolution, to the full amount of the capital stock so divided." *Held*, that the directors of a hydraulic mining corporation, which became indebted by acquiring incumbered property, and making improvements on the mine, are not liable to the corporation for dividends declared and paid out of the net profits of the mine before paying the whole of such debt, when a sinking fund has been provided, sufficient to extinguish the debt before the mine shall be exhausted.

2. It was not a violation of the above statute to borrow money temporarily with which to pay

dividends, when the corporation had used the current profits to make improvements.

3. Where investments of the corporation have resulted in loss because of an injunction restraining the company from washing dirt into a stream to the injury of riparian owners, which action could not reasonably have been anticipated, such loss must be treated as a loss of capital, and the directors are not liable because such expenditure was not converted *ex post facto* into a working expense.

In bank. Appeal from superior court, Santa Clara county; T. K. WILSON, Judge.

D. M. Delmas, (W. S. Goodfellow, of counsel,) for appellant. Olney, Chickering & Thomas, for respondent.

BEATTY, C. J. This is an action by a California corporation against one of its former directors to recover the amount of certain dividends declared and paid to its stockholders with the concurrence of the defendant while a director. It is alleged by the plaintiff that such dividends were not paid out of the surplus profits of its business, and the action is based upon the provisions of section 309 of the Civil Code, which reads as follows: "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase the capital stock, except as hereinafter specially provided. For a violation of the provisions of this section the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen) are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such directors for any sums for which they are made liable by this section. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution or the expiration of its term of existence." The complaint counts upon 19 separate dividends, aggregating about \$266,000, but, it appearing that the defendant had ceased to be a director before the last dividend was paid, plaintiff limits its claim to the first 18. As to these there is but one question to be decided here: Were they or were they not paid out of the surplus profits of the plaintiff's business? To this issue the attention of the superior court seems to have been confined, and in reviewing its decision it will not be necessary for us to consider any question relating to the special defense interposed by defendant to some of the separate counts upon particular dividends. Aside from this special defense, the only matter put in issue by the pleadings of the parties was that above stated; and, the superior court

having found that all the dividends were in fact paid out of surplus profits, its judgment was given in favor of the defendant upon that ground alone. The plaintiff appeals from the judgment and from an order denying its motion for a new trial.

The record upon which the decision of the superior court is to be reviewed is exceedingly voluminous, and consists in great part of tabulated statements and accounts intended to show the gross earnings, the current and other expenses, of the plaintiff, the amount and nature of its assets and indebtedness, and, in short, the exact condition of its affairs at the date of each of the 18 dividends in question. We are, however, spared the labor of deducing for ourselves the results of these involved and conflicting statements by reason of the fact that counsel for both parties have agreed to accept the results stated by the learned judge of the superior court in an opinion filed by him in connection with his decision of the cause, and which has been included in the transcript of the record. It appears therefrom that the plaintiff was incorporated in March, 1877, with a nominal or share capital of \$5,000,000, divided into 50,000 shares of \$100 each. The object of the incorporation was to carry on hydraulic mining, etc., and the defendant was, from the beginning down to September, 1879, a stockholder and director in the company. In April, 1877, plaintiff acquired all the property of the Excelsior Water Company, consisting of mining ground, farm, ditches, flumes, store, and merchandise, stock in other mining companies, bills, notes, bullion in flumes, etc., giving in exchange 36,732 shares of stock; and shortly afterwards it obtained a like conveyance and transfer of all the property of the Pactolus Mining Company in exchange for 8,000 shares of its stock. These, with a few others, amounting in all to 39,809 shares, were the only shares ever issued by plaintiff. The Excelsior Water Company and Pactolus Mining Company were largely indebted at the time they transferred their property to plaintiff, and this indebtedness was assumed by plaintiff as a part of the purchase price of the property. Its net amount, over and above the solvent credits transferred by the two companies, was \$173,710.80, which was paid during the directorship of the defendant. During the same time the sum of \$233,723.60 was expended by plaintiff in the purchase of other mining property, the construction of ditches, tunnels, permanent improvements on farm, machinery on mine, procuring United States patents for mining ground, and in assessments on stock in other companies. During the same time the plaintiff was carrying on its mining and other multifarious business, and it received from sale of bullion and water, and as profits of its store and farm and other investments, the gross sum of \$1,095,719, while its outlay for operating its mines, salaries, taxes, interest, and other strictly current expenses was \$638,303, leaving a balance of earnings of \$457,416. The amount of the 18 dividends declared and paid during this time was only \$241,629, or \$215,724

less than the net earnings. But the plaintiff contends that the surplus profits were only about \$98,000, and that about \$143,000 over and above the surplus profits were divided, while the defendant claims that much less than the surplus profits was divided. This difference between counsel for plaintiff on the one side and the superior court and counsel for the defendant on the other arises out of a difference of theory as to what constitutes surplus profits of a mining corporation. Counsel for plaintiff contends that the payment of the debts which plaintiff assumed as part of the price of the property acquired from the Excelsior Water Company and the Pactolus Mining Company, as well as most of the items of expenditure for construction of tunnels, levees, ditches, etc., should be rated as current expenses, and charged against its gross earnings, in order to ascertain the actual surplus profits of its business; while counsel for defendant contends, on the contrary, that the payments of the principal of its indebtedness, and its investments in what are called "betterments of its property" should not be charged to current expenses of the business. As to the payment of the debt assumed by the plaintiff when it commenced business, or that incurred in making improvements, we do not understand its counsel to contend that it was necessary to pay them off before any dividends could be declared, but merely that whenever any part of its gross earnings was applied to the payment of a debt it was unlawful thereafter to replace such sum with the proceeds of a loan, and thereupon declare a dividend. The fact is not disclosed by the opinion of the judge of the superior court, but it seems to have been proved, that in several instances money was borrowed by the plaintiff in order to any dividends, and it seems to have happened in this way: The debts assumed by the plaintiff became due from time to time, and the permanent improvements on its property were made from time to time, so that large payments on both accounts were constantly occurring. Instead of borrowing money to make such payments at the time of making them, any money that happened to be on hand in the company's treasury was used as far as it would go, and afterwards replaced by the proceeds of bonds, overdrafts, or notes of the company, which, to the extent necessary, were used to pay the regular dividends. It is in this course of proceeding that counsel claims that defendant was clearly guilty of a violation of section 800 of the Civil Code, irrespective of any difference of views as to what are and what are not current expenses justly chargeable against the gross receipts of a mining corporation, in order to determine its net or surplus earnings or profits. To determine the question presented by this aspect of the case it will be necessary, in the first place, to lay down some general propositions which we think are clearly established by the authorities to which we shall refer.

The term "capital stock" has a double meaning as applied to corporations. In

one sense it is the sum mentioned in the articles of incorporation as the amount of the capital stock; in other words, it is the share capital or nominal capital, and does not necessarily represent a corresponding amount of actual capital. In case of mining corporations it is always arbitrary, and generally extravagant in amount. The capital stock referred to in the statute, however, (Civil Code, § 309,) is the actual property of the corporation contributed by the shareholders of the nominal capital. In this case the nominal or share capital of the plaintiff was \$5,000,000. Its actual capital was its mining and other property (less the debt with which it was incumbered) received in exchange for the shares which it issued, and this actual capital was what it was forbidden to divide. This inhibition, however, did not extend to the net proceeds of its mining operations; for a mining corporation, like any other corporation organized for the purpose of utilizing a wasting property—a property that can be used only by consuming it—as a mine, a lease, or a patent, is not deemed to have divided its capital merely because it has distributed the net proceeds of its mining operations, although the necessary result is that so much has been subtracted from the substance of its estate. *Mor. Priv. Corp. § 442; Lee v. Asphalte Co., 41 Ch. Div. 24.* It may distribute its net earnings, although the value of its mine is thereby diminished. But it may not sell the mine, or any part of it, and distribute the proceeds. In this sense, and in this sense only, provisions of law similar to those of section 309 of our Civil Code have been held to apply to mining corporations. If the mine belonging to a mining corporation when it commences operations is free from debt, and provided with all the necessary openings and appliances for its convenient working, the problem of ascertaining the amount of its surplus profits from time to time would be very simple, and would consist in merely deducting the gross outlay from the gross receipts; and the balance, less a reasonable reserve to meet contingencies, would be the legitimate subject of a dividend. But when the mining property has been taken subject to a debt, or when, as a preliminary operation, it becomes necessary to incur a debt in running an expensive tunnel, or sinking an expensive shaft, the problem becomes complicated. Must the whole of such debts be paid out of the first earnings before making a dividend, or must only a part be paid, and, if so, what part? We do not think it would be necessary to pay, in the first place, the whole of such debts, but it would be necessary to pay accruing interest, and to provide a sinking fund sufficient to extinguish the principal before the mine was exhausted. There can be no doubt, we think, that this is a correct theory; but in case of a property of such uncertain, fluctuating, and precarious value as a mine, it would undoubtedly be extremely difficult in most cases to practically apply it. Fortunately, however, the right of the creditors to insist upon

payment of their demands as they fell due, and the prudence of capitalists to whom the company would be compelled to resort for loans with which to extend the payment of its maturing indebtedness, would always furnish a sure corrective for any disposition of the directors of a corporation to provide an inadequate fund for the extinguishment of its indebtedness, and it may be safely assumed that in the cases supposed, unless the debts of the corporation were paid at a rate satisfactory to its creditors, they would put a stop to the payment of dividends by the means within their power. At all events, we are clear that the directors of a mining corporation which has become indebted either by acquiring its property incumbered with debt, or by making permanent improvements for the thorough and systematic working of its mines and other property, are not guilty of an infraction of section 309 of the Civil Code merely because they declare and pay dividends out of the net proceeds of their mine without first paying the whole of such debts. On the contrary, if they have fairly and honestly applied towards the payment and extinguishment of the debts of the company a share of the net earnings satisfactory to its creditors and reasonably proportioned to the amount of its indebtedness, the extent and permanence of its mine, or the rate at which it is being exhausted, they may properly and safely pay out the remainder in dividends, because such remainder may in such cases be justly regarded and treated as surplus profits of the business.

Now in this case it appears that out of the net earnings, amounting to \$457,000, (I use round numbers for the sake of brevity,) only \$241,000 were paid in dividends, while \$216,000, or nearly one-half, was applied in payment of the debts of the corporation, originally assumed in the acquisition of its capital stock, and afterwards incurred in making permanent improvements thereon. It further appears that a large and valuable part of plaintiff's capital consists of property other than its mining ground, which will remain after the mine is exhausted; and there is evidence in the record, though there is no finding to that effect, that the mine itself has been but slightly encroached upon. It does not appear that any creditor has been defrauded, or his claim even endangered; and, in short, there is nothing to show that the capital of plaintiff has been impaired. True, its debt has increased, but not in an amount equal to the value of its betterments. The fact, however, remains, that money was borrowed to pay some of the dividends, and the question remains whether such a course admits of justification. We think there are circumstances which do justify it. A mining company is working its mines at a profit, but discovers that they can be worked to better advantage by constructing a new tunnel; that is to say, it will be wise economy to incur an expense of say a hundred thousand dollars to construct such a tunnel; that it will in fact add more than that sum to the value of the

property. Clearly, we think, the corporation would be justified in incurring a debt to that amount to carry out the object, and that it could go on declaring dividends after providing for the payment of the accruing interest, and for the gradual extinction of the principal of such debt. But suppose, instead of borrowing in advance to meet payments on the tunnel, it makes some of the payments out of the current profits of its mining operations,—profits justly applicable, at its option, to the payment of dividends, but not presently needed to meet a declared dividend. Afterwards it borrows money,—no more than it might have borrowed originally on account of the tunnel,—and out of the money so borrowed replenishes the fund applicable to dividends. In such a case the result is precisely the same as if the money had been borrowed sooner, and the identical money borrowed paid out on the tunnel. Nothing has been accomplished beyond what the directors had a right to do, and surely the mode in which it has been done can make no difference. In fact the transaction may be regarded as a temporary borrowing from the dividend fund of a sum necessary to meet an immediate demand, with the advantage to the corporation of keeping its money employed, and saving it the payment of interest.

If the general results stated by the superior judge in his opinion and accepted by counsel are correct, the defendant in this case did nothing more than borrow from the fund applicable to the payment of dividends in the manner outlined above; or if it was the earlier, rather than the later, dividends that were paid with borrowed money, then such borrowed money was finally repaid out of the dividend fund; for, taking the whole period covered by the declaration of the 18 dividends, it appears that no more than the legitimate surplus profits were divided. We say that this fact appears, but we do not lose sight of the fact that counsel for appellant insists upon his contention that \$143,000 in excess of surplus profits was divided, and it is proper that we should state more specifically the ground of our contrary opinion. To make up this sum of \$143,000, counsel for plaintiff in his estimate of net earnings or surplus profits includes in his current expense account a number of large items, which we think are improperly there; or, to speak more accurately, there is evidence to sustain the finding of the superior court (implied in its general finding) that they are improperly there. We need specify only two of these items, viz.: Assessments Deer Creek tunnel, \$113,295.55; machinery and Blue Gravel branch tunnel, \$43,962.85; making a total of \$157,258.20; which more than overbalances the \$143,000 which plaintiff claims to have been paid out of capital or borrowed money. Plaintiff was a stockholder in the Deer Creek Company, and paid its assessments for the construction of its tunnel run for the purpose of working its mines. Clearly this was an investment of capital, and not a current expense. The other item

mentioned stands on similar grounds, and so do a number of others, aggregating a large amount, which we have not mentioned. It is argued by plaintiff that a number of these investments turned out to be unprofitable in the end, and reference is made to the fact disclosed by the evidence in his case, and otherwise notorious, that all these hydraulic mines have been shut up by injunction, sued out by the riparian proprietors on the streams into which they were washing their earth. This is undoubtedly a serious misfortune to the present stockholders in the various companies, including the plaintiff; but the defendant is not responsible for the losses they may have suffered in consequence of the injunctions, nor is the wisdom or the prudence of his investments to be measured by a result which at the time few persons anticipated. When the expenditures were made they were no doubt considered judicious, and, if the event has proved the contrary, the result must be treated as a loss of capital, and the expenditures must not be converted *ex post facto* into a current working expense.

It is proper, in conclusion, to refer to some of the authorities which support the positions herein assumed. For a definition of net earnings used in the sense of surplus profits, we refer to Railroad Co. v. U. S., 99 U. S. 420, note to Goodwin v. Hardy, 99 Amer. Dec. 762. The case in 99 U. S., and Park v. Locomotive Works, 40 N. J. Eq. 114, 3 Atl. Rep. 162, and Minot v. Paine, 99 Mass. 101, are also authority for the proposition that the apportionment of net earnings to the payment of cash dividends, stock dividends, increase of capital, reserve or contingent fund, or to provide for future obligations, is largely one of policy, intrusted to the discretion of the directors, which, when honestly and intelligently exercised, will not be lightly overruled. See, also, Stringer's Case, L. R. 4 Ch. App. 490, and Williams v. Telegraph Co., 93 N. Y. 187. The case of Minot v. Paine, supra, is cited by counsel for plaintiff to sustain his proposition that money of a corporation, when once expended in the purchase of new capital, or in improvements, can never be reclaimed for the purpose of paying dividends. We do not think it sustains the proposition. It goes only to the extent of holding that a trustee of shares for the purpose of paying the income to A. during life, and the principal to B. on the death of A., holds additional shares issued as a stock dividend subject to the same disposition. It rests upon the ground that such is the only safe rule for a trustee, rather than upon the justice of the rule, which is very questionable. But, conceding its correctness upon the point decided, it does not hold that surplus capital cannot be used for making cash dividends; but, on the contrary, expressly holds that, while it can never be regarded as income of the stockholders until converted into a dividend, it may nevertheless be income to the corporation, and as such the subject of a dividend in the discretion of the directors. We find no error in the record. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATTERSON, J.

The other justices of the court, not having heard the argument, did not participate in the decision.

90 Cal. 48

JACOBS V. WALKER. (No. 13,049.)

(Supreme Court of California. June 30, 1891.)

SCHOOL LANDS—APPLICATION TO PURCHASE—FINDINGS—AGRICULTURAL LANDS.

1. In a contest for school land, a finding that defendant made an application and affidavit, as required by the California statute, on the 23d day of February, 1883, and that the affidavit was true, and on the 3d day of June, 1883, a certificate of purchase was issued accordingly, and that on the 18th day of April, 1884, plaintiff made an application and affidavit as required, which was not true, is sufficient to sustain a judgment that plaintiff is not entitled to patent.

2. Under Const. Cal. art. 17, § 8, which provides that "lands belonging to this state which are suitable for cultivation shall be granted only to actual settlers," the fact that land was heavily timbered, and more valuable for timber than agricultural purposes, did not render it "unsuitable for cultivation," although it would not produce ordinary agricultural crops in average quantities, and patent will not issue where there has not been an actual settlement.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

T. L. Carothers, for appellant. J. A. Cooper, for respondent.

BELCHER, C. C. This is an action to determine a contest between the plaintiff and defendant as to which of them is entitled to purchase certain school lands. The court below gave judgment for the defendant, and the plaintiff appeals therefrom on the judgment roll. The court found the facts of the case to be, in substance, as follows: On the 23d day of February, 1883, the defendant filed in the office of the state surveyor general his affidavit and application to purchase the N. E. $\frac{1}{4}$ and the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of a certain thirty-sixth section of land in Mendocino county. He was at the time qualified to purchase school lands, and his affidavit was in the form then prescribed by section 3495 of the Political Code, and all the facts set forth therein were true. On the 3d day of May, 1883, the application was duly approved by the surveyor general; and thereafter, on the 16th day of June following, defendant paid 20 per cent. of the purchase money and the first year's interest on the balance, and received from the register of the land-office a certificate of purchase for the land, in the usual form. On the 23d day of February, 1884, the plaintiff went upon the land in dispute, and began to build a cabin thereon for himself, and ever since has been and now is an actual settler on the land. At the time of his settlement there was no one in the adverse possession of the land, or any part thereof; but about the 27th of the same month one Thomas Dingwall went upon a portion of the land, and commenced erecting a cabin thereon. He completed the cabin, and moved into it, with his family, prior to the 18th of April, 1884, and continued to

live in it with his family till about the middle of June following. Dingwall claimed the land, and offered to sell out his claim to plaintiff, and plaintiff knew of his possession, and that his family were in the cabin prior to April 18th. While Dingwall was on the land, he was engaged a part of the time getting out redwood timber for the defendant. On the 18th day of April, 1884, plaintiff made an affidavit and application to purchase the whole of the N. $\frac{1}{4}$ of the said section 36, and on the 6th of May following filed the same in the office of the surveyor general. He was also qualified to purchase school lands, and his affidavit was in proper form, and all the facts therein set forth were true, except the statement that there was no adverse occupation of the land, which at the time of making and filing the affidavit was untrue.

The land in controversy "is situate on the top and sides of a high ridge, and is covered heavily in most places with redwood timber and brush, and is now chiefly valuable for its timber. The surface is broken, cut up with deep ravines in places, and steep, while in places there are a few acres level enough that it could be plowed if it were cleaned of timber. The soil is poor and rocky in places. There are two or three of the 40's in dispute that, if the timber was moved therefrom, the greater part thereof would be suitable for cultivation, but would not produce ordinary agricultural crops in average quantities, and is more valuable for timber than for agriculture." The conclusion drawn from the facts was that the plaintiff take nothing by his action, and that the defendant was entitled to a patent for the land applied for by him, upon his surrendering his certificate of purchase, and paying the balance due for purchase money and interest. That the judgment was properly entered against the plaintiff appears to be clear. He stated in his affidavit that there was no occupation of the land applied for by him adverse to any that he had, and this statement was found by the court to be untrue, so far as regards the land in controversy. It is contended that this finding was not justified by the probative facts found as to Dingwall's occupation, but we think it was. Dingwall built a cabin on the land, and was living in it with his family. He claimed the land, and offered to sell his claim to the plaintiff; and the plaintiff knew of his residence and claim when he made his application. But, even if these probative facts were not sufficient to justify the finding, still the evidence is not before us, and we cannot say that that did not justify it. It results that, under the well-settled rule in such cases, the plaintiff acquired by his application no rights to the land in contest which can be enforced in the courts. *McKenzie v. Brandon*, 71 Cal. 209, 12 Pac. Rep. 423; *Mosely v. Torrence*, 71 Cal. 318, 12 Pac. Rep. 430; *Plummer v. Woodruff*, 72 Cal. 29, 11 Pac. Rep. 871, and 13 Pac. Rep. 51; *Harbin v. Burghart*, 76 Cal. 119, 18 Pac. Rep. 127.

It is further contended that judgment should at least have been entered in favor of the plaintiff for the 80 acres applied for

by him, and not included in the application of defendant. But there was no contest as to that 80-acre tract, and the court had therefore no jurisdiction to determine the plaintiff's rights to it. The judgment was necessarily limited to the land in contest, and could determine nothing in regard to land not in contest.

The only remaining question is as to the rights of defendant. The rule is settled that, when one seeks to purchase land from the state, he must state in his affidavit, and state truly, all the facts required to be stated therein; and, when a case is brought into court for the determination of conflicting claims to the land, each party must set forth in his pleadings, and show by his proofs, that he has strictly complied with the law, and by such compliance has become entitled to make the purchase. If he fails to do this, judgment will be entered against him. *Gilson v. Robinson*, 68 Cal. 543, 10 Pac. Rep. 198; *McKenzie v. Brandon*, 71 Cal. 211, 12 Pac. Rep. 428; *Harbin v. Burghart*, 76 Cal. 119, 18 Pac. Rep. 127. The constitution provides that "lands belonging to this state which are suitable for cultivation shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law." Article 17, § 3. The statute in 1883 (Pol. Code, § 3495) provided that an applicant to purchase any portion of a sixteenth or thirty-sixth section must state in his affidavit, among other things, "that he is an actual settler thereon," without regard to the character of the land. This section was amended in 1885, so as to read: "The affidavit must also state whether the land is or is not suitable for cultivation; and, if it is, that the applicant is an actual settler thereon." The defendant stated in his affidavit that he was an actual settler on the land applied for, and the court found that the affidavit complied with the law, and all the facts set forth were true. The affidavit was therefore sufficient at the time it was made, and it was not rendered insufficient by the subsequent change in the statute. He alleged in his answer that he was an actual settler on the land when he filed his application, and when the certificate of purchase was issued to him, but as to this averment there was no finding. He also alleged that the land was not suitable for cultivation, and the only finding as to the cultivatable character of the land was that above quoted. Now, as there was no finding that defendant was an actual settler on the land when he obtained his certificate of purchase, it must be presumed that he was not. It follows, if one-half or more of any legal subdivision was suitable for cultivation, that as to such subdivision the certificate was improperly issued, and the defendant acquired no rights thereto under it.

The question, then, is, was the land or some portion of it suitable for cultivation? The finding is of somewhat doubtful import, but, as we construe it, we think the question must be answered in the affirmative. The language used is: "There are two or three of the forties in dispute that, if the

timber was moved therefrom, the greater part thereof would be suitable for cultivation, but would not produce ordinary agricultural crops in average quantities." The fact that the land in most places was heavily covered with redwood timber and brush did not render it unsuitable for cultivation, within the meaning of the constitution. *Manley v. Cunningham*, 72 Cal. 286, 13 Pac. Rep. 622. Nor did the fact that it would not, when cleared, produce ordinary agricultural crops, in average quantities, render it so. To make an average, some lands must necessarily produce less than the average, while others produce more; and it would seem absurd to say that all lands producing less than the average must, for that reason, be held unsuitable for cultivation. Nor do we think the fact that the land was more valuable for timber than for agriculture decisive of the question. Land may be very valuable for the timber upon it, and also be valuable for agricultural purposes after it is cleared; and this may be true of the land in question. It follows that, if any of the 40's were suitable for cultivation, within the meaning of the constitution, they should not have been included in the judgment for defendant. We advise, therefore, that the judgment, in so far as it is against the plaintiff, be affirmed; and that, in so far as it is in favor of the defendant, it be reversed; and the cause remanded to the court below for a new trial.

We concur: TEMPLE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment, in so far as it is against the plaintiff, is affirmed; and, in so far as it is in favor of the defendant, it is reversed; and the cause remanded to the court below for a new trial.

80 Cal. 101

AGASSIZ *et al.* v. SUPERIOR COURT. (No. 14,050.)

(*Supreme Court of California*. June 30, 1891.)

PROHIBITION — ATTACHMENT AGAINST NON-RESIDENT — REMEDY BY APPEAL.

Where, in an action against non-residents to enforce payment of subscription to the capital stock of a corporation, an attachment was issued against land in this state belonging to defendant, a writ of prohibition will not lie to restrain plaintiff from proceeding in the cause upon the ground that it is not a cause wherein an attachment would lie, since there is a plain, speedy, and adequate remedy, in the ordinary course of law, by appeal.

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Edward J. Pringle, for petitioners.
Pillsbury & Blanding, for respondent.

McFARLAND, J. This is an application for a writ of prohibition, commanding the respondent to refrain from entering default or judgment against petitioners in a certain action in which Charles Kohler, assignee in insolvency of the California Land & Timber Company, a corporation, is plaintiff, and these petitioners and others are defendants. It appears from

the petition that the petitioners are stockholders in said corporation above named, which was organized under the laws of California, for the purpose of doing business here, and are also, individually, the owners of certain lands in this state; but that they are citizens and residents of Massachusetts, and absent from California, and have been served only by publication of summons. One purpose of the said action of Kohler, assignee, against said corporation, was to collect from the defendants (petitioners here) certain moneys alleged to be due from petitioners to said corporation upon subscriptions to the capital stock thereof; and, upon the proper statutory affidavits being made, a writ of attachment was issued by virtue of which certain lands of petitioner were attached, —the said lands being in this state. Petitioners specially appeared in said action for the purpose of moving to discharge said attachment. They made such motion, and it was denied by the court. Whereupon they commenced the present proceeding in this court, and ask that respondent be prohibited from proceeding further in said action against petitioners, because, as they say, respondent has no jurisdiction so to do, for the reason that petitioners are non-residents. They concede that there would be such jurisdiction if the writ of attachment was properly issued and levied; but they contend that, no matter how sufficient the affidavits for attachment may have been, the complaint itself shows the action to be one in which no attachment could be legally obtained. On the surface said action seems to have been "an action upon a contract, express or implied, against a defendant not residing in this state," within the meaning of subdivision 2 of section 537 of the Code of Civil Procedure, and therefore one in which an attachment would lie; but we do not propose to examine or determine that question, because, in our opinion, prohibition is not a remedy which petitioners in this instance can invoke. Petitioners had the right to appeal from the order refusing to dissolve the attachment, and would have an appeal from any final judgment in the case; and such appeal, being a "plain, speedy, and adequate remedy in the ordinary course of law," within the meaning of section 1103 of the Code of Civil Procedure, prohibition does not lie. A remedy does not fail to be speedy and adequate because, by pursuing it through the "ordinary course of law," more time would probably be consumed than in the proceeding here sought to be used. And it makes no difference that in this instance a question of jurisdiction incidentally depends upon the validity of an attachment. If that were so, then, in every ordinary civil action, whenever a defendant chose to raise a point of jurisdiction, either of the person or of the subject-matter, he could, by prohibition, stop the ordinary progress of the action towards a judgment, until this court had passed upon the intermediate question; and thus this tribunal would, in innumerable cases, be converted from an appellate to a *nisi prius* court. Petitioners com-

plain of the hardship which they would suffer if obliged to pursue ordinary remedies, but their complaint really is that further special privileges and advantages are not added to those which, as non-residents, they already possess. Owing to our particular system of government, and certain judicial decisions, residents of other states, although doing business and owning property in California, are not compelled, in most instances, to submit themselves to the jurisdiction of our courts when our citizens seek to enforce rights against them, although they may seek the aid of our courts when desirous of enforcing their own rights. But with respect to the question before us they are in no different position from that of a resident defendant who chose, in the ordinary course of a civil action, to raise a question about the validity of an attachment, or the jurisdiction of the court. In either case, the remedy is by appeal, and whatever hardship that remedy might impose would be common to both. The substantially correct rule is stated in High's Extraordinary Legal Remedies as follows: "Like all other extraordinary remedies, prohibition is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress; and it is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law." Section 770. And, further, the same author says: "Thus, where the defendant, in an action instituted in an inferior court, pleads to the jurisdiction of such court, and his plea is overruled, no sufficient cause is presented for granting a prohibition, since ample remedy may be had by an appeal from the final judgment in the cause. Nor will the writ go to restrain an inferior court from proceeding with certain attachments, upon the ground of the insufficiency of the affidavit on which the attachments were issued, since the court itself may afford relief, or the party aggrieved may resort to an appeal." Section 771. Moreover, the point was directly decided by this court, and applied even to a criminal case, in *Strouse v. Police Court*, 85 Cal. 49, 24 Pac. Rep. 747. In that case the petitioner for the writ had pleaded to the jurisdiction of the police court; but the court here, *PATERSON, J.*, delivering the opinion, said: "If the petitioner should be convicted in the police court, he will have a plain, speedy, and adequate remedy at law by an appeal to the superior court. Application for writ denied." See, also, *Murphy v. Superior Court*, 84 Cal. 598, 24 Pac. Rep. 310; *Levy v. Wilson*, 69 Cal. 105, 10 Pac. Rep. 272; *State v. Cory*, 35 Minn. 178, 28 N. W. Rep. 217. The demurrer to the application is sustained, and the proceeding dismissed.

We concur: BEATTY, C. J.; PATERSON, J.; HARRISON, J.; DE HAVEN, J.; SHARPSTEIN, J.; GAROUTTE, J.

90 Cal. 150

MILLER, (McCoy, Intervenor,) v. BYRD.
(No. 13,879.)

(Supreme Court of California. July 2, 1891.)

SWAMP LAND—PURCHASE BY COUNTY TREASURER.

Since, under the laws of California, the duties of the county treasurer in respect of swamp lands are merely to receive payment of the purchase money, whose amount and the conditions of whose payment are fixed by statute, and report the same to the register of the land-office, he is not disqualified to apply for and purchase such land himself.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Brown & Daggett, for appellant. *N. O. Bradley and Lambertson & Taylor*, for respondent.

BELCHER, C. C. The plaintiff, E. O. Miller, brought this action against five defendants, to determine a contest as to which one of the parties thereto was entitled to purchase from the state a certain tract of swamp and overflowed land in Tulare county. The court below found that all of the applications to purchase the land were null and void, and accordingly gave judgment that neither of the parties to the action was entitled to purchase the land, or any part thereof. From this judgment the defendant Byrd alone appeals, and the case is brought here on the judgment roll.

The only question presented for consideration and decision is as to the rights of the appellant. The facts, as shown by the pleadings and findings, may be briefly stated as follows: During the year 1873 the appellant was the duly elected, qualified, and acting treasurer of the county of Tulare. He desired to purchase the land in controversy, and, for the purpose of doing so, on the 3d day of January, 1873, made an affidavit in the form prescribed by section 3443 of the Political Code; and all the facts and matters therein stated were true. On the same day the affidavit was filed in the office of the surveyor of the county, and within 30 days thereafter the surveyor made a survey of the land, and completed the survey, plat, and field-notes thereof, and recorded them in a book kept in his office, and forwarded duplicate copies thereof, together with a copy of the application, to the surveyor general of the state for approval. These papers were received by the surveyor general, and filed in his office, on the 25th of January, 1873, and on the same day he duly approved the survey and application. On the 15th day of March, 1873, the appellant paid to the county treasurer of Tulare county, in gold coin of the United States, 20 per cent. of the purchase price of the land, and interest on the balance thereof at the rate of 10 per cent. per annum from January 25, 1873, to January 1, 1874, together with \$3 for the certificate of purchase. The county treasurer reported to the register of the state land-office the fact of the payment of these sums, and thereafter, on the 8th of April, 1873, the register issued to and in the name of the appellant a certificate of purchase for the land, signed by him and attested by his official seal. At that time no other ap-

plication to purchase the land, or any part thereof, had been made. When appellant made his application, on the 3d of January, the land had been segregated as swamp and overflowed land, under authority of the United States, for more than six months. At the time of the trial the land was suitable for cultivation. It will be observed that the court found all the facts necessary to show that the land in controversy was subject to sale by the state, and that the appellant was qualified to purchase the land; and his proceedings to accomplish that end were regular and effective, unless the fact that he was county treasurer at the time debarred him of the right. It seems clear, therefore, that in making its decision that appellant's application was null and void the court below must have acted on the theory that, because appellant was county treasurer, he was an agent of the state for the sale of swamp lands in his county, and hence was disqualified to purchase the land in question. In *Edwards v. Estell*, 48 Cal. 194, it was held that a county surveyor, in receiving an application to purchase swamp lands, and making a survey of them, was an agent of the state for the sale of such lands, and therefore could not himself become the purchaser; and incidentally it was said that a county treasurer, in receiving the purchase money for swamp lands, was an agent of the state for the sale of the lands.

It is a settled rule that one acting in a fiduciary capacity cannot deal with himself as an individual, for the reason that an opportunity would thereby be presented for the commission of frauds. Under the provisions of the Code in 1873 the rule thus declared was clearly applicable to a county surveyor. He received the application to purchase, surveyed the land applied for, if a survey had not already been made, and then forwarded the survey and application to the surveyor general for approval. It would have been possible for him, after an application had been presented and a survey requested, to have made another application for himself, and to have forwarded his own application with the survey to the surveyor general first; or he might, in making a survey for himself, have included more acres within the lines surveyed and marked out than appeared and were reported; thus committing a fraud upon the first applicant or the state. But does the rule apply to a county treasurer? He had no duties to perform until after all the preliminary steps to effect the purchase had been taken and approved by the surveyor general. Then he was simply to receive from the purchaser, if offered within 60 days after the approval, 20 per cent. of the purchase money, with interest on the balance till the 1st of January following, and \$3 for a certificate of purchase, and to report these payments to the register of the land-office. The money was to be placed to the credit of the "Swamp Land Fund" of the county. The statute fixed the price of the land, the rate of interest to be paid, and the terms and conditions of payment. The treasurer had, therefore, no opportunity to commit frauds upon the state unless he

did so by misappropriating or stealing the money. But such a fraud might have been committed as well by misappropriating any other money paid into the treasury. If the theory suggested be true, it would seem to follow that, if appellant had applied to purchase the land, and his application had been approved, before he became county treasurer, he could not have completed the purchase by the payment of the money after he became county treasurer, because he would then have been the agent of the state to sell the land and receive the purchase money; or, if he had applied to purchase the land, and his application had been approved, and he had made the first payment of principal and interest, and a certificate of purchase had been issued to him, and thereafter he had become county treasurer, he could not have completed the purchase by paying the interest and balance due the state, because he would have been compelled to make such payment to himself, and, being the agent of the state for the sale of the land, his agency would have disqualified him in the premises; and, as a consequence, he would have forfeited his rights under the certificate of purchase if the state had proceeded against him on account of his non-payment. But this would be giving the law an absurd construction, and one never contemplated or intended by the law-makers. We see no practical difference between the duties of a county treasurer in the sale of swamp lands and those of registers and receivers in the sale of government lands at private entry. It is, however, well settled that registers and receivers may purchase government lands at private entry at the price fixed by the government. *Lester, Land Laws*, pp. 337, 338. The practice has been sanctioned by the land department of the general government, and it has not been suggested that the practice has violated any rule of public policy, or that the government or any citizen has been defrauded by means thereof. In our opinion, therefore, the decision as to the validity of appellant's application to purchase the land in question was erroneous.

It is further suggested in the brief filed by the intervenor that appellant was not entitled to have judgment entered in his favor, because it appeared that the land had become suitable for cultivation, and it did not appear that he was or had ever been an actual settler thereon. We see no force in this suggestion. When appellant made his application and obtained his certificate of purchase the land was not suitable for cultivation, and there was no provision of the constitution or statutes at that time that state lands suitable for cultivation could only be sold to actual settlers thereon. The certificate of purchase as *prima facie* evidence of legal title in the holder, (Pol. Code, § 3514; Code Civil Proc. § 1925;) and it must be presumed that the new constitution did not, and was not intended to, impair the obligation of contracts already made. The validity of the certificate must therefore be determined by the law in force at the time it was issued, and it cannot be affected by law subsequently passed. The

case of *Dillon v. Saloude*, 68 Cal. 267, 9 Pac. Rep. 162, is not in conflict with what has been said. That case simply held that where one had only made application to purchase land suitable for cultivation before the adoption of the constitution in 1879, he could not, after its adoption, complete the purchase unless he was an actual settler on the land. It results, in our opinion, that the judgment against defendant Byrd should be reversed, and the cause remanded, with directions to the court below to enter judgment in his favor on the findings.

We concur: TEMPLE, C.; VANOLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment against defendant Byrd is reversed, and the cause remanded, with directions to the court below to enter judgment in his favor on the findings.

90 Cal. 1

BRADY v. BURKE *et al.* (No. 13,207.)

(*Supreme Court of California*. June 29, 1891.)

STREET ASSESSMENTS—PRIORITY OF LIENS—FORECLOSURE—PARTIES—APPEAL—TIME OF TAKING—BILL OF EXCEPTIONS.

1. Where findings and an order for judgment are filed, but the judgment is not formally entered, an affirmance on appeal does not divest the trial court of jurisdiction to afterwards enter it, since an appeal, before formal entry, is premature and unauthorized, under Code Civil Proc. Cal. § 999, providing that an appeal from a final judgment may be taken within one year after entry thereof.

2. A judgment foreclosing a prior lien for street assessments conveys a superior title to one foreclosing a junior lien, although the latter judgment was first entered; and, although the junior lienholder had no notice of the pendency of foreclosure proceedings, the purchaser of such superior title may show, in an action to determine adverse claims, that the junior liens were invalid.

3. The purchaser, under foreclosure of such subsequent assessment, has no equitable right to require a sale of the property for the satisfaction of liens in the order of their priority, where the liens under which he claims have expired.

4. One who, without notice, takes title under foreclosure of a street assessment pending a suit to foreclose junior assessment liens, is a necessary party to the latter suit, since he holds the legal title, and, if not so made, he is not bound by the decree.

5. Where the bill of exceptions does not set out the evidence, but merely states that it was sufficient to justify certain findings, insufficient of themselves to establish the validity of a street assessment, it will be assumed that the evidence was sufficient to establish such validity, and the omission of the necessary findings, without which the assessment would be invalid, is not ground for reversal.

Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

J. M. Wood and J. C. Bates, for appellants. Sawyer & Burnett, for respondent.

DE HAVEN, J. This is an action under section 738 of the Code of Civil Procedure to determine adverse claims to two lots in the city of San Francisco. All of the parties claim under a common source of title. The plaintiff, who is the respondent here

claims title to both lots upon sales made under judgments foreclosing certain street assessments, recorded November 14, 1870, and deeds executed by the sheriff on October 3, 1885, in pursuance of such sales. The defendants claim an interest in the lots in controversy, based upon various street assessments against said lots made and recorded subsequently to the commencement of the foreclosure suits under which plaintiff claims, and prior to the rendition of final judgment therein. Defendant Diggins claims the legal title to lot 5 by virtue of a sheriff's deed, under a judgment foreclosing one of these assessments, and the defendant Wood the legal title to lot 6 by virtue of two deeds, based upon judgments foreclosing two of said assessments. These deeds were executed during the pendency of the foreclosure proceedings under which plaintiff claims. These defendants also claim to hold the legal title in trust for certain of their co-defendants, to the extent of their interest, under street assessment liens. It is argued here by the appellants that the plaintiff acquired no title to lot 6 by the execution sale under which he claims; that the court erred in allowing plaintiff to show that the assessments resulting in the judgments upon which deeds of defendants depend, were invalid; and that, in any event, the defendants are entitled to have the lots sold, and the proceeds applied to the satisfaction of the several liens of all the parties in the order of their priority.

1. The ground upon which defendants attack the deed under which plaintiff claims title to lot 6 is this: Findings and an order for judgment were filed in plaintiff's action against Louisa Page, the owner of this lot, on March 21, 1878, but no judgment was ever entered until January 7, 1882. On March 20, 1878, plaintiff's attorney in said action served upon defendant therein notice of the rendition of judgment, and in November, 1878, said defendant appealed from said judgment to this court, and the judgment was affirmed. There is among the papers in said action a formal decree entitled in that action, dated March 19, 1878, and signed by R. F. Morrison, then judge of the district court in which the action was pending. This formal decree was never entered as the judgment therein, and on January 7, 1882, in the same action, a judgment and decree, signed by O. P. Evans, a judge of the superior court of San Francisco, was entered. On appeal to this court from such judgment, taken by the defendant therein, it was affirmed. 5 Pac. Rep. 108. Upon the return of the *remittitur* execution was issued upon this judgment, and it is upon the sale thereunder that plaintiff claims title to lot 6. The appellants contend that the judgment so entered on January 7, 1882, was void under the rule announced in *Mulford v. Estudillo*, 82 Cal. 139. We do not think that the case cited is in point. It may be conceded that, after a final judgment of the trial court has been affirmed on appeal to this court, the court from which such appeal was taken would be without jurisdiction to retry the case, and render another judgment, and that, consequently, such subsequent judgment

would be void. The reason which supports this rule is that by a valid appeal the case is removed from the jurisdiction of the lower court, and final judgment in the case is rendered in the appellate court. This, of course, terminates the litigation. But such a rule has no application here, because this court never acquired jurisdiction of the first appeal. Under section 939 of the Code of Civil Procedure, which was in force at the date of the first appeal in the case of *Brady v. Page*, no appeal could be taken to this court until after the entry of the judgment in the trial court, and it has been uniformly held here that an appeal taken before such entry is premature. It has also been held that the trial court can at any time before its judgment is entered change its conclusions of law, and order a different judgment. *Condee v. Barton*, 62 Cal. 5. Until the judgment is entered, such court retains complete jurisdiction of the case, of which it cannot be divested by any unauthorized appeal to this court. If the attention of this court had been called to the fact that it had before it an appeal from a judgment which had never been entered, and which was still within the control of the lower court, the appeal would have been dismissed. But, whether this was done or not, the appeal was ineffectual, and this court was in fact without jurisdiction to entertain it. The appeal was futile, and the case remained in the lower court undisturbed. *Home for Care of Inebriates v. Kaplan*, 84 Cal. 488, 24 Pac. Rep. 119. It follows that the superior court had jurisdiction to enter the judgment of January 7, 1882, and that the execution sale thereunder, under which plaintiff purchased, was not void.

2. The judgments under which plaintiff claims were conclusive as against the owners of the lots in controversy, as in each of said actions the owner of the lot upon which the lien was foreclosed was a party defendant, and therefore the execution sales transferred the legal title of such owners to the plaintiff; and, although the sheriff's deeds made to defendants Wood and Diggins antedated those of plaintiff, and are based upon judgments rendered prior to those under which plaintiff claims, yet, as the liens under which plaintiff's title has its origin are older than the liens to which the deeds of defendant relate, plaintiff has the superior legal title. *Littlefield v. Nichols*, 42 Cal. 874. The most that defendants can claim is that, as they were without actual or constructive notice of the pendency of plaintiff's foreclosure suits, he took such legal title incumbered with all valid liens thereon held by them at the date of his judgment. Assuming that defendants were without this notice, which is the most favorable view for appellants, the court did not err in allowing the plaintiff to show that the liens foreclosed in the actions, which resulted in the sheriff's deeds to defendants, were invalid. The plaintiff was not a party to said actions. He was not in privity with the defendants therein, within the meaning of the rule which makes those in privity with parties to an action bound by the judgment therein, because his title relates back to the date of the original liens

foreclosed by the judgments under which he claims, which liens were prior in point of time to the origin of defendants' alleged title under their deeds. *Shay v. McNamara*, 54 Cal. 169; *Chester v. Association*, 64 Cal. 42; *Horn v. Jones*, 28 Cal. 203; *Campbell v. Hall*, 16 N. Y. 575. In this latter case will be found a very full and satisfactory discussion of the rule which makes those in privity with parties to a judgment also concluded by it. As to two of the deeds relied upon by defendants, it is found that the work for which the assessment underlying said deeds was made was not completed within the time fixed by the contract, and that the order of the board of supervisors granting an extension was not made until after the expiration of the time allowed by the contract for its completion. This being so, it has been repeatedly held that the contractor never acquired any valid lien upon the property. *Beveridge v. Livingston*, 54 Cal. 54; *Ralsch v. City and County of San Francisco*, 80 Cal. 1, 22 Pac. Rep. 22; *Fanning v. Schammel*, 68 Cal. 428, 9 Pac. Rep. 427. As to the other deed to defendant Wood, the court finds that the board of supervisors failed to publish for the length of time required by law the resolution of intention to do the street-work, which resulted in the subsequent assessment, foreclosure, and deed. This failure to publish rendered the assessment void. *Richardson v. Tobin*, 45 Cal. 32. Upon the facts found by the court, the alleged liens, upon which defendants' deeds depend for their validity, were void, and defendants acquired no interest in said lots as against plaintiff by said deeds.

3. The point, however, most earnestly insisted on by appellants, is that the court should at least have directed the lots to be sold, and the proceeds applied in satisfaction of all liens which were originally valid, in the order of their priority. The argument seems to be that, as plaintiff is asking for relief from a court of equity, the court may require him to do equity. All of the liens asserted by defendants are creations of the statute, and most of them have long expired by the lapse of time given for their enforcement by the statute in which they have their origin. As to some, no steps whatever have been taken to enforce them, while others were foreclosed more than six months before the commencement of this action, and no execution issued on the judgments of foreclosure, and by the express language of the statute the lien obtained by recording the assessment expires at the end of six months after the final determination of the action foreclosing it. Upon this state of facts, to say that in equity the liens still exist, and to refuse plaintiff a judgment to the effect that they do not exist, would be for the court to give the statute, which authorized their creation, an effect in direct conflict with its terms. The maxim that he who asks equity must do equity cannot be made rightfully to support such a conclusion. We have examined the cases cited by appellants on this point, and we do not think that any of them support their position. Liens of this class are purely statutory, and only exist for the

term given by the statute. In their creation and enforcement they are at every step adverse to and against the consent of the owner of the property affected thereby, and he may, without violating any rule of equity, insist that the claimant shall find his right to enforce them in the statute which authorized their creation.

4. Two of the judgments foreclosing the asserted liens were rendered October 12, 1886, after the commencement of this action, and less than six months prior to the filing of the answer herein. The plaintiff was not a party to either of them, and it does not appear that he had any notice, actual or constructive, of their pendency, and is therefore not bound by them. On the day of their rendition the defendant was not the owner of the lots upon which the liens were decreed to exist, and plaintiff's deeds, showing title in him, were duly recorded. It is true that at the time of the commencement of these actions the plaintiff was not a necessary party, but he became so when he acquired the legal title, and should then, by proper proceedings, have been made a party thereto. The statute which authorized the enforcement of the liens contemplates that the legal owner, at the time of the rendition of the judgment, shall be a party, unless he is a purchaser *pendente lite*, affected with notice of the action. It follows that these judgments are ineffectual for any purpose, as against the title of plaintiff.

5. In regard to the pending suits for the foreclosure of the liens asserted by defendants, if it should be assumed that the defendants may yet make the plaintiff a party thereto, it is sufficient to say that the findings do not disclose that any of these alleged liens are valid. The substance of the findings on this point is that the superintendent of streets made, recorded, and issued an assessment, with a warrant and diagram thereto annexed, for the cost of the street-work named, under a contract which had been before that awarded to the contractor by the board of supervisors. All that is said in the findings may be true, and still the proceedings prior to the making and recording of the warrant, assessment, and diagram have been invalid. The board of supervisors may not have had any jurisdiction to award either of the contracts upon which the assessments were made. It was incumbent upon the defendants, asserting such liens, to show the facts establishing their validity.

As no objection was made to the answer, and the case seems to have been tried upon the theory that it was sufficient, it must be deemed here as sufficiently alleging the validity of these liens. But the court should have found the facts in regard to their creation. The bill of exceptions does disclose that evidence was introduced on this point, but there is nothing therein to indicate how the facts should have been found from such evidence. It is simply stated that the evidence was sufficient to justify certain findings named, but these findings do not assert that any of the steps required by the statute to be taken prior to the awarding

of the contracts were taken. The omission of these necessary findings is not, therefore, a ground for the reversal of the judgment. *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. Rep. 1098; *Winslow v. Gobransen*, (Cal.) 26 Pac. Rep. 504. The opinion of HARRISON, J., in the latter case, applying the rule of *Himmelman v. Henry*, supra, in which opinion it was assumed that evidence had been given in relation to a matter upon which the findings were silent, is satisfactory, and leaves nothing to be added by way of argument in support of our conclusion that the judgment ought not to be reversed because of this defect in the findings. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

90 Cal. 105

GARNIER *et al.* v. PORTER. (No. 14,171.)

(*Supreme Court of California.* July 1, 1891.)

SETTING OUT PRAIRIE FIRES—NEGLIGENCE—TREBLE DAMAGES—CRIMINAL ACT.

One who burns stubble on his own land to prepare it for the plow does not commit an unlawful act within the meaning of Penal Code Cal. § 384, providing that every person who willfully or negligently sets on fire any woods, prairies, or grasses on any lands is guilty of a misdemeanor; and, where due care and diligence are exercised in building the fire, and in endeavoring to control it after it has spread to adjoining land, there is no liability for the treble damages imposed by Pol. Code Cal. § 3844 upon one who negligently sets fire to his own woods, or who negligently permits it to extend beyond his own lands.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Camille Garnier and Leon Garnier against George K. Porter for damages for setting out a fire. A jury was waived, and the cause tried to the court, which found for the defendant. Plaintiffs appeal. Affirmed.

Glassell, Smith & Patton, Smith, Howard & Smith, and Smith, Winder & Smith, for appellants. *Graves, O'Melveny & Shankland and Chapman & Hendrick*, for respondent.

TEMPLE, C. Appeal from judgment and order refusing plaintiffs a new trial. This action is for damages for the destruction of the hay, grasses, and pasture on 2,880 acres of land. It is charged that defendant "willfully and negligently kindled a fire on his land, and set fire to grasses growing thereon in the vicinity of the plaintiffs' land, and so negligently watched and tended the said fire that it spread over the immediate space and came to and spread over the plaintiffs' land, and consumed the hay, grass, and pasture," etc. Plaintiffs claim that they were damaged in the sum of \$40,000, and that by reason of section 3344 of the Political Code they are entitled to judgment for treble that sum. The answer contained a general denial. A jury having been waived, the action was tried by the court, which found for the defendant, specifically negating all the material allegations of the complaint, and also finding that "said fire

did not come upon the lands so occupied by the plaintiffs, or any portion thereof, by reason of any negligence on the part of the defendant whatever." We think the findings sufficient, and there is undoubtedly evidence to sustain them. But the plaintiffs contend that the act of defendant in setting fire to the stubble on his own lands, although an ordinary agricultural process, was unlawful, and therefore the defendant is liable for the natural consequences, irrespective of the question of negligence. This is supposed to be the effect of section 384 of the Penal Code, which is as follows: "Every person who willfully or negligently sets on fire, or causes or procures to be set on fire, any woods, prairies, grasses, or grain, on any lands, is guilty of a misdemeanor." The section is similar to section 142 of the act concerning crimes and punishments, passed April 16, 1850. That contained, however, a proviso excepting fires set by any one near his own farm for the necessary preservation thereof, after giving notice to his neighbors. St. 1850, p. 247. In 1872 an act was passed making it a misdemeanor to set fire to any wooded country or forest belonging to the state or the United States. Section 3344 of the Political Code provides that any one negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own lands, is liable in treble damages to the party injured. These citations show that from the very beginning similar penal statutes have existed in this state; and yet it has always been the policy of the state to encourage settlement of the country, the clearing of lands, and reducing them to a condition in which they would be suitable for cultivation. We all know that fire has always been one of the most common and efficient agencies in clearing and subduing wild lands; and in this state burning stubble has been from the first an ordinary agricultural process in annually preparing lands for the plow. It is not to be believed that it was intended by these penal laws to prohibit common farming operations. When the law was first enacted the lands of this state were generally uninclosed and unoccupied save for grazing purposes. Frequent fires spread over the country, destroying timber, grass, and other property. Nor are such fires very uncommon now. Unquestionably the law was designed to prevent such calamities as far as possible. To construe the statute literally, so as to interfere with ordinary farming processes, would evidently be giving it an effect not intended. Nor is such construction necessary. If one sets fire to the weeds or brush on his own land, so as to prepare it for the plow, intending to limit and control the fire, and actually does so, he has not set fire to the prairies within the meaning of this statute. If, under such circumstances, the fire gets out of his control, he has set fire to the prairie, but not willfully, although it may be negligently. It is premised that such fire is set for a lawful purpose, and there can be no doubt that agriculture constitutes such lawful purpose. If, on the other hand, a hunter, or one designing to camp upon the land

of another, were to set such fire, he would perhaps be civilly liable for the natural consequences of his act, although using the greatest diligence to control the fire he had set. And there is much in the statutes cited, besides this general presumption, which favors this conclusion. The act of 1872 (St. 1871-72, p. 96) implies that one may lawfully set a forest fire on his lands, and makes it a misdemeanor to allow such fire, though "made for a lawful purpose," to spread. Section 3344 of the Political Code, in pursuance of which plaintiffs claim the right to treble damages, seems to imply that the act of setting the fire was not criminal; for it makes the liability depend upon negligence in setting the fire, or in permitting its spread. In this case the defendant, when the fire got away from him and spread over the lands of the plaintiffs, was engaged in back firing, as the custom of the farmers in that vicinity is, preparatory to burning the stubble upon his own lands in order that it might be plowed, and the evidence is that such burning was necessary to fit the land for that purpose; that in fact it could not be plowed by the ordinary means without such preparation of the land. And there was evidence which tended to show due care in setting the fire, and due diligence in endeavoring to control it after it had spread from his own land. We think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

89 Cal. 636

HUNT V. MALDONADO. (No. 14,350.)
(*Supreme Court of California.* June 27, 1891.)

GUARDIANS—LIABILITY FOR ATTORNEY'S FEES.

A guardian is primarily liable for a debt incurred in the performance of his duties upon his contract with an attorney for professional services, and no action can be maintained thereon against the ward.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Dooner & Bardett, for appellant. J. M. Damron, for respondent.

TEMPLE, C. Appeal on judgment roll from judgment on demurrer. The demurrer was properly sustained. The action is to recover an attorney's fee for services rendered to the guardian of a minor in pursuance of a written contract. The action is against the minor. If the guardian made a valid contract with the attorney, he may be held liable, and, if he pays it, and the probate court shall deem the expenditure reasonable and necessary to protect the interests of the ward, it may be allowed from the ward's estate. But it is an expense incurred by the guardian in the performance of his duties for which he is primarily liable. If an attorney's fee could ever be in the nature of a necessary for which the ward could contract, the

complaint shows that the service here was not of that character. We notice that the transcript fails to show that the ward appeared by guardian, as required by section 872, Code Civil Proc. The judgment should be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

90 Cal. 75

COSGROVE V. FISK. (No. 13,364.)

(*Supreme Court of California.* June 30, 1891.)

MISJOINDER OF ACTIONS—PLEADING—AVERMENTS OF FRAUD.

1. Under Code Civil Proc. Cal. § 427, providing that only those causes of action can be joined in the same complaint which all belong to one only of the classes therein enumerated, claims for breach of covenants of warranty of lands, for costs expended in another suit between the parties, and for fraud, malice, and oppression, cannot be joined, since they do not all belong to any one of the enumerated classes.

2. A complaint alleging a cause of action based on fraud, which does not aver the facts constituting fraud, is demurrable.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Ida M. Cosgrove against Asa Fisk. Demurrer sustained, and complaint dismissed. Affirmed. Code Civil Proc. Cal. § 427, provides that the plaintiff may unite several causes of action in the same complaint, where they all arise out of (1) contracts, express or implied; (2) claims to recover specific real property, with or without damage, for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; (3) claims to recover specific personal property, with or without damages, for the withholding thereof; (4) claims against a trustee by virtue of a contract, or by operation of law; (5) injuries to character; (6) injuries to person; (7) injuries to property. The causes of action so united must all belong to one only of these classes.

J. C. Bates, for appellant. Daniel Titus, for respondent.

FOOTE, C. The plaintiff, going by the name of Ida M. Carroll, when a certain agreement, marked "Exhibit A," to the amended complaint herein, was entered into, which affected certain of her rights and interests, brought this action against the defendant, Fisk, under her present name of Ida M. Cosgrove. The complaint was demurred to upon several grounds, and the demurrer sustained. Thereupon, the plaintiff declined to amend the complaint, leave having been given her to do so, judgment was made and entered that she take nothing by her action, and that the same be dismissed. From that this appeal is taken.

The complaint contains but one count, and has united therein and mingled together a cause of action based upon the incurring by the plaintiff of \$60 costs, etc., in having to bring suit against the defend-

ant to force him to comply with his agreement in writing to reconvey certain lands and premises to the plaintiff, which she had before that conveyed to him, which sum of money, claimed to be reasonably due the plaintiff by the defendant, it is alleged he refuses to pay; with a cause of action based upon the alleged fraud, malice, and oppression of the defendant, which omits to state the facts showing such fraud; and a cause of action arising from the breach of the defendant's covenant contained in an instrument (Exhibit B) made by him to the plaintiff, which covenant, it is claimed, binds him that the property he has conveyed is free and clear of all incumbrances and liens made, done, or suffered by him. It will readily be perceived, from an examination of the pleading objected to, that it mingles together several distinct causes of action, not all belonging to any one of the classes mentioned in section 427 of the Code of Civil Procedure, which rendered the complaint obnoxious to the demurrer, that several causes of action were improperly united. Section 430, Code Civil Proc. subd. 5; Canal Co. v. Kidd, 43 Cal. 184; White v. Cox, 46 Cal. 170; Watson v. Railroad Co., 41 Cal. 17.

Furthermore, the cause of action, based upon the alleged fraud of the defendant, failed to aver the facts showing the fraud, and comes within the fourth ground of the demurrer, which is well taken. *Payne v. Elliott*, 54 Cal. 340; *Pehrson v. Hewitt*, 79 Cal. 598, 21 Pac. Rep. 950. For these reasons we advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(39 Cal. 638)

KUBLI *et al.* v. HAWKETT *et al.* (No. 13, 197.)

(Supreme Court of California. June 29, 1891.)

PRACTICE IN CIVIL CASES—DISMISSAL—LACHES—APPEALABLE ORDER.

1. It is not an abuse of discretion to dismiss a cause for want of prosecution where a demurrer to the complaint had been on file for nearly three years and a half without being called up for determination by the plaintiff, and the evidence as to a stipulation for delay is conflicting, and by the neglect of plaintiffs' counsel the attention of the court was not called to an order, previously entered by consent, continuing the cause for trial at a time to be agreed between counsel.

2. The supreme court will not entertain an appeal from an order refusing to vacate a judgment which is itself appealable.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action by Casper Kubli and others against A. W. Hawkett, E. C. Robinson, and J. Robinson. Judgment dismissing the action as to the two defendants Robinson. Plaintiffs appeal therefrom, and from an order refusing to vacate such judgment. The appeal from the order dismissed. Judgment affirmed.

Geo. M. Shaw, for appellants. Edw. C. Robinson and W. R. Davis, for respondents.

FOOTE, C. The appeals here are from a judgment dismissing the action as to two of the defendants, E. C. Robinson and J. Robinson, for the want of prosecution thereof, and from an order refusing to set aside and vacate that judgment.

It has been decided by the appellate court that it will not take jurisdiction of an appeal from an order refusing to set aside a judgment or order which is itself appealable. *Railroad Co. v. McGrath*, 74 Cal. 51, 15 Pac. Rep. 360; *Larkin v. Larkin*, 78 Cal. 323, 18 Pac. Rep. 396; *Goyhinech v. Goyhinech*, 80 Cal. 409, 410, 22 Pac. Rep. 175. The judgment of dismissal in this action was appealable, hence the appeal from the order just mentioned must be dismissed.

From the record it appears that the action was instituted against the defendants here and one Hawkett on the 3d of November, 1883. On the 8th of July, 1885, the default of Hawkett was duly made and entered. After admission of service of summons the two defendants here concerned filed demurrers to the complaint on the 18th of July, 1885. On the 10th of December, 1888, a motion was made by them to dismiss the action, which, upon being heard upon affidavits on both sides, was granted, and a judgment of dismissal of the action made and entered. It was set up in the affidavits for the appellants that the delay in speeding the cause to a hearing upon the issue made by the demurrers to the complaint arose from an agreement by stipulation between the parties, made at the instance of one of the defendants, which delay at his instance this defendant denied in his affidavit, as also that any such stipulation existed. Upon this state of facts the trial court dismissed the action. It appears, however, that a minute order had been made in the action, which appeared upon the minutes of the court in volume 4, at page 587 thereof, as follows: "Upon motion and consent of respective counsel it is ordered that the above cause be continued and set for a time to be agreed upon by counsel, or upon five days' notice of either." But this order was never called to the attention of the court on the hearing of the motion to dismiss the action, but was made the basis of the motion to set aside the judgment of dismissal. The court below, as is readily perceived, decided the motion to dismiss, and ordered judgment upon the facts as then presented, and did not have the benefit of this order being called to its attention, which, by an inspection of the records of the court, might easily have been done by the attorney for the appellants here, especially since the affidavit of R. A. Redman had asserted the existence of a stipulation that such action as the minute order contemplated had been entered into by him with one of the appellants, an attorney of record in the case also. The point to be decided, then, is whether the trial court was guilty of an abuse of discretion in dismissing the action, upon the facts as then presented. The affidavits were conflicting in some respects, and the

facts that could have been shown by the presentation of this minute order were not before it. The appellants' attorney could have found the order, and presented it. He knew that Redman's affidavit set up the existence of such a stipulation as would perhaps excuse the delay in speeding the cause to hearing. Should the appellants now be successful in maintaining the abuse of discretion of the trial court when they or their representative failed to inform the court of the existence of this order? As it seems to us, the neglect of the appellants was the cause of the court not being fully informed in the premises, and their contention should not prevail. But it is said that it was not the duty of the appellants to have urged the hearing of the demurrer; that this should have been done by the respondents, who filed it; and hence that the court was wrong in assuming that the laches of the appellants justified a dismissal of the action. The appellants brought the action. It would seem that upon them rested the burden of prosecuting it to a finality, and that, as a step in that direction, from the facts then appearing to the court, they should have taken measures to have the demurrers determined, so that the action could progress. *Simmons v. Keller*, 50 Cal. 39. So that we perceive no abuse of the discretion vested in the court as to this part of the transaction. *Grigsby v. Napa Co.*, 36 Cal. 589. Again, it is argued, notwithstanding the admission that the decisions of the appellate court are to the contrary, that the trial court possesses no power to dismiss an action for the want of prosecution. As this has been declared to be within the power of the superior court, we do not concur in appellant's view. See *Pardy v. Montgomery*, 77 Cal. 327, 19 Pac. Rep. 530; *Cowell v. Stuart*, 69 Cal. 525-527, 11 Pac. Rep. 57. For these reasons we advise that the appeal from the order refusing to set aside the judgment be dismissed, and the judgment affirmed.

We concur: VANOLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the order refusing to set aside the judgment is dismissed, and the judgment affirmed.

(90 Cal. 84)

CARRIE V. CLOVERDALE BANKING & COMMERCIAL CO. (No. 13,201.)

(Supreme Court of California. June 30, 1891.)

PARTNERSHIP—ABSENCE OF PARTNER—UNAUTHORIZED SALE—INSOLVENCY—PREFERENCES.

1. Under Civil Code Cal. § 2430, providing that a partner has no authority to do any act which would make it impossible to carry on the business unless his copartner has abandoned the business to him, or is incapable of acting, the fact that one partner is temporarily absent from the state does not render him incapable of acting, nor of itself constitute an abandonment of the business, and a sale by his copartner of a flock of sheep which constituted the entire property of the firm does not pass his interest therein.

2. In an action by the assignee in insolvency of the firm against the purchaser, such sale is valid as to the interest of the partner making it,

when it was made in payment of a firm debt, and not fraudulent as to creditors.

3. A complaint, in an action by the assignee of an insolvent firm against a purchaser, alleging that a sale of firm property by one partner was void for preferences under Insolvent Act Cal. 1880, § 55, may be amended by adding a count alleging that it was also void, as having been made in excess of the authority of the partner.

Appeal from superior court, Sonoma county; JOHN G. PRESSLEY, Judge.

Action in trover by Carrie, as assignee of the insolvent firm of Scott & Staley, against the Cloverdale Banking & Commercial Company. Trial to the court. Judgment for plaintiff for the full amount claimed, and defendant appeals. Reversed. The complaint alleged that the sale by one of the partners to defendant of the entire property of the firm was in violation of Insolvent Act Cal. 1880, § 55, providing, among other things, that if a person, being insolvent or in contemplation of insolvency, within one month before the filing of a petition against him, with a view to give a preference to any creditor, makes any transfer of any part of his property to one having reason to believe such person to be insolvent, such transfer is void, and the assignee may recover the property, or its value, as assets of the insolvent. An amendment to the complaint alleged in another count that the sale had been made by one of the partners during the temporary absence from the state of the other, who had not abandoned the business to his copartner, and that the sale, covering all of the property, was invalid, under Civil Code Cal. § 2430, providing, among other things, that a partner, as such, has no authority to do any act which would make it impossible to carry on the ordinary business of the partnership, or to dispose of the whole of the property at once, unless it consists of merchandise, unless his copartners have wholly abandoned the business to him, or are incapable of acting. The court found that the sale was not void under section 55 of the insolvent act, and that the sale was in satisfaction of the firm indebtedness, and was not fraudulent as to creditors.

McGee & Barham, for appellant. A. B. Wade and W. E. McConnell, for respondent.

DE HAVEN, J. This is an action brought by the plaintiff, as assignee in insolvency of the firm of Scott & Staley, to recover the value of certain sheep, alleged in one count of the complaint to have been sold to defendant by said firm, in violation of section 55 of the insolvent act of this state. The second count of the complaint charges the sale of said sheep to have been made by only one of the partners, Staley, and that, as the sheep constituted the entire stock owned by the partnership, the sale made it impossible thereafter to carry on the ordinary business of said firm, and that the business of said firm had not been abandoned to the partner making this sale, nor was the surviving partner incapable of acting, and further alleges a conversion of the sheep by the defendant. This second cause of action was

not in the original complaint, but was added by way of amendment during the trial. The court, in its finding of facts, negatived the first cause of action stated in the complaint, and found the above facts alleged in the second count. It also found the full value of the sheep to be \$5,157, and gave judgment against the defendant for that sum.

1. The court did not err in permitting the complaint to be amended by adding thereto the second cause of action, and thus to attack the contract under which defendant claims, upon the grounds therein alleged as well as upon those stated in the original complaint. In both the original and amended complaints the plaintiff bases his right to maintain the action upon the alleged invalidity of the said contract of sale, and it was certainly proper for the court to allow the complaint to be so amended as to state all of the grounds upon which it is claimed that such contract is invalid.

2. The fact that Scott was temporarily absent from the state at the time of the sale did not render him incapable of acting, within the meaning of section 2430 of the Civil Code, nor of itself constitute an abandonment of the business of the firm to his copartner, and the sale of the sheep made to defendant by Staley was therefore in excess of his authority as a member of the firm of Scott & Staley, (Civil Code, § 2430,) and did not pass Scott's interest in the sheep.

3. The court below, in rendering judgment in favor of the plaintiff for the full value of the sheep, proceeded upon the theory that this sale was absolutely void, and that the defendant acquired no rights thereunder which it can assert against the plaintiff. We cannot concur in this view. The sale, though ineffectual to pass the title of Scott, was binding upon Staley, and transferred his interest in the sheep, and neither he nor the firm of Scott & Staley, represented by plaintiff, can maintain an action for their conversion upon the ground that Staley had exceeded his authority in making the sale. This is the rule which is laid down by the best-considered cases, in passing upon the rights of a copartnership growing out of an unauthorized sale of partnership property by one of its members in payment of his private indebtedness. *Homer v. Wood*, 11 Cush. 68; *Farley v. Lovell*, 103 Mass. 387; *Craig v. Hulschizer*, 34 N. J. Law, 364. Such an act of a partner is neither more nor less in excess of his authority as such than was the sale by Staley in this instance, and we see no reason why the remedy for the unauthorized act should not in this, as well as in that class of cases, be confined to the non-consenting partner. This must be so, because he is the only person wronged, and he only to the extent of the value of his interest in the property sold. A sale of partnership property made by one partner, under the circumstances found by the court in this case, is valid as against every person, except such non-consenting partner, or one who has succeeded to his right of action therefor. The creditors of the firm of Scott & Staley have no ground for com-

plaint which can be asserted through plaintiff as the successor of Scott, or as assignee of Scott & Staley, the court having found that the sale was made in satisfaction of an indebtedness of the firm, and that such sale was not fraudulent, nor made for the purpose of giving the defendant a fraudulent preference. The judgment in favor of plaintiff for the full value of the whole property cannot, therefore, be justified upon the claim that Scott's right, as a partner, to have the property applied to the payment of the firm debts was violated by such sale, and we know of no ground upon which the judgment can be sustained upon the facts as alleged and found. It cannot be assumed, without either allegation or proof, that Scott owned more than an undivided half of the sheep, or that upon a settlement of the accounts between himself and partner it would appear that he had a lien upon the other half, for a balance due him as a partner, and therefore a special interest therein to that extent. The sale was, as to Scott, a conversion of his interest in said property, and he had a right to so treat it as against the defendant claiming title to the whole property under it; or, in a proper action, he could have enforced against the whole property transferred, or its value in the hands of defendant, a lien for any balance which might be found due him from his copartner upon a settlement of the partnership accounts, and, these being vested rights of action relating to property, passed to the plaintiff as assignee of the insolvent firm of Scott & Staley.

Plaintiff does not ask for an accounting between the partners, for the purpose of ascertaining the interest of each in the property sold after the satisfaction of any partnership liens to which in equity it is subject, but has elected to sue for a conversion; and, we think, the amount of damages he is entitled to recover, in this form of action, is measured by the value of the undivided half of the sheep sold, without any reference to the state of the partnership accounts between Scott & Staley. This is the rule that was applied in the case of *Walsh v. Adams*, 3 Denio, 125. That was an action of trover, brought by one partner against a sheriff, who, on an execution against another member of the firm, had seized and sold the whole of certain property belonging to the partnership. It was contended for the defendant in that case that the plaintiff was only entitled to recover what the value of his interest in the property would appear to be on an accounting with his copartner. The trial court refused to so instruct the jury, and the supreme court of New York, on appeal, *Jewett, J.*, delivering the opinion of the court, affirmed this action, and said: "As to the question of damages, I entertain no doubt but that the general rule must control the question in this case. Under the rule the plaintiff was entitled to recover the value of his undivided share in the property converted by the defendant, irrespective of the question whether the partnership was or was not solvent, and without regard to the state of the partnership accounts." We

find no error in the record for which a new trial should be ordered, and will therefore remand the case, with directions to enter the proper judgment upon the facts as found. Judgment and order reversed, with directions to the court below to enter judgment on the findings in favor of plaintiff for one-half of the value of the sheep as found, and interest on that amount from the date of the conversion, and for the costs of the trial in the court below.

We concur: SHARPESTEIN, J.; MCFARLAND, J.

90 Cal. 22

FIRST BAPTIST CHURCH OF SAN JOSÉ V. BRANHAM, Sheriff, et al. (No. 13,376.)

(Supreme Court of California. June 30, 1891.)

ACTIONS BY CORPORATION DE FACTO—REAL PARTY IN INTEREST.

1. The trustees of a corporation *de facto* can sue in its corporate name until its existence is questioned by a direct proceeding on information of the attorney general.

2. A corporation, to the trustees of which property is conveyed for its use and benefit, has sufficient interest to protect the same by suit in its own name.

Department 1. Appeal from superior court, Santa Clara County; F. E. SPENCER, Judge.

Laine & Hatch, for appellants. *J. B. Lamar*, for respondent.

GAROUTTE, J. The plaintiff, claiming to be the owner and in the possession of certain church property, consisting of real estate, the church building situate thereon, and personal property used therein and belonging thereto, brought this action to restrain the defendants from interfering with said property, and to quiet its title thereto against said defendants other than the said Branham, sheriff of Santa Clara county. The defendants deny that the plaintiff is a corporation, and also deny that the plaintiff is seised and possessed of the property. Judgment in the trial court went for the plaintiff, and this is an appeal from an order denying defendants' motion for a new trial. The motion of respondent to dismiss the appeal is denied.

Appellant relies upon two propositions to sustain his position: *First*, that the plaintiff has no legal existence as a corporation; *second*, that it is not seised and possessed of the property involved in this litigation. As far as the present proceeding is concerned, it is immaterial whether the plaintiff is a corporation *de jure* or not. It is at least a corporation *de facto*, and as such its trustees can maintain suits in its corporate name until its existence is called in question by a direct proceeding upon information of the attorney general of the state. In *People v. La Rue*, 67 Cal. 530, 8 Pac. Rep. 84, the court says: "A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the paramount au-

thority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious." *Association v. Chester*, 55 Cal. 99; 4 Amer. & Eng. Enc. Law, p. 197; *Tayl. Corp.* §§ 145-153. It seems the plaintiff, under sanction of the court, has mortgaged this property for \$4,000, which debt is still due and unpaid. Unquestionably the plaintiff could be sued in its corporate name to foreclose this mortgage, and it is equally clear that it can maintain this suit in its corporate name to protect the property secured by the mortgage. As to the second proposition contended for by appellant,—that the plaintiff was not and is not seised and possessed of the property in dispute,—the trial court found that "plaintiff, ever since its incorporation, had been seised and possessed of said property, and that said property is under the management and control of a board of five trustees, and is used for the purposes of said corporation. That the defendants do not constitute the 'First Baptist Church of San José,' but are members thereof." Upon September 1, 1858, Marshall D. Young, by deed of grant, bargain, and sale, conveyed this realty to Bird, Gish, Easley, and Pierce, their heirs and assigns. At this time these last-named parties were the trustees of the First Baptist Church of San José. In January, 1866, the plaintiff was incorporated, elected five trustees, and upon each succeeding January elected their successors. In September, 1869, Bird, Gish, and Easley, not as trustees, but as individuals, quitclaimed all their interest in the property to the trustees of plaintiff, naming them, and their successors in office. Shortly afterwards Pierce quitclaimed in the same manner. By the deed from Young the title to this property vested in these four parties, their heirs and assigns, not as trustees of plaintiff, but personally and individually; and their quitclaim deeds clearly divested them of all title they held. It was not necessary that their deed should be the joint act of all. They were not trustees of the church at this time. Neither was the property deeded to them in the capacity of trustees in the first instance. Counsel for appellants say that "if the deeds conveying this property had run to the trustees of the church without naming them, it is probable that the church, as a corporation, would have been the party to sue." It is highly improbable that the present trustees of the plaintiff were the grantees in the aforesaid quitclaim deeds, and appellant's concession works against him upon this contention. While the dry, naked, legal title to the property may not be in plaintiff, yet its trustees hold it in trust for the uses of plaintiff, and their ownership and possession is the ownership and possession of the plaintiff. We cannot understand how it is material to the interests of defendants in the action whether the plaintiff or its trustees is technically seised of the legal title to this realty. The plaintiff

has certainly sufficient interest to bring this action. Let the order be affirmed.

We concur: BEATTY, C. J.; HARRISON, J.

90 Cal. 37

SCHMIDT *et al.* v. MARKET ST. & W. G. R. Co. (No. 13,337.)

(Supreme Court of California. June 30, 1891.)

STREET ASSESSMENTS—COLLECTION—NOTICE OF IMPROVEMENT—PLEADING.

1. Under the authority of Civil Code Cal. § 497, a city granted to defendant railroad company authority to lay tracks in its streets by an ordinance which provided that when any street over which its road should pass should be ordered improved by the city, defendant should be held for the payment of its proportion of the cost, to be collected in the manner provided for the collection of other street assessments. *Held*, that defendant, in accepting the ordinance, agreed to pay its proportion of the cost of improving any street occupied by its tracks, whether the improvement should be ordered under its then existing charter or under legislative authority subsequently granted, and that the same could be collected in any manner subsequently provided by the city.

2. Notice of a proposed street improvement, containing the whole of the resolution for the improvement, and stating its date, and the fact of its passage, is sufficient.

3. Mere defects in the mode of alleging a cause of action will not impair the validity of a judgment rendered after a trial on the merits, unless taken advantage of by special demurrer.

Department 1. Appeal from superior court, Santa Clara county; JOHN REYNOLDS, Judge.

T. H. Laine and Laine & Hatch, for appellants. C. T. Bird, for respondents.

HARRISON, J. Section 497 of the Civil Code provides that "authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained for a term of years not exceeding fifty from the trustees, council, or other body to whom is intrusted the government of the city or town, under such restrictions and limitations, and upon such terms and payment of license tax, as the city or town authority may provide." The ordinance of the city of San José, passed March 7, 1876, under which the defendant obtained the right to construct and maintain a street railroad in said city, contained the following condition: "Whenever any part of any street over which this road shall run shall be ordered improved or reImproved, and the work of improving such street shall be let by contract, the part of said street occupied by said track or tracks, and two feet on either side thereof, shall be let together with the rest of the street or streets; and the grantee herein named, or its successors and assigns, shall be held for the payment of the cost of said improvement, which cost shall be assessed in the proper proportion of the width of the track and two feet on either side thereof, to the whole width of the street or streets so improved, and collected in the manner provided for the collection of other street assessments, and shall become a lien upon the road-bed, rolling stock, and franchise of said road." On the 19th of May, 1887, in pursuance of proceedings therefor taken

in accordance with the provisions of the act of March 18, 1885, entitled "An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers, within municipalities," (St. 1885, p. 147,) the plaintiffs entered into a contract with the commissioner of streets of the city of San José for certain improvements upon a portion of Market street over which the defendant had constructed its road, and, after the completion of the work, received an assessment for the expenses incurred for said work, together with a warrant for its collection. By said assessment the defendant, and the road-bed and space between the rails, and two feet on each outer side of the railroad track upon said portion of Market street, was assessed in the sum of \$957.50, as its proportion of the cost of the improvement of said street. This action was brought to recover the amount of the assessment, and is defended upon the ground that by the aforesaid act of March 18, 1885, no liability whatever can be created against the defendant for work done under its provisions. Section 7 of the act of March 18, 1885, provides that "the expenses incurred for any work authorized by section 2 of this act, which shall not include such portion of any street as is required by law to be kept in order or repaired by any person or company having railroad tracks thereon, shall be assessed upon the lots and lands fronting thereon." No mode is provided in the act for collecting from a street-railroad corporation whose road occupies a portion of the street any portion of the expense of improving the street. It may also be observed that the original act under which the city of San José was reincorporated (St. 1874, p. 395) is equally devoid of such provision. The amendatory section referred to by counsel for appellant (St. 1876, p. 627) has reference only to the special condition therein expressed, that the street or any portion thereof is "dangerous, or in a condition to cause great public inconvenience;" and does not apply to the general provision for improvements of streets. It was doubtless in view of this fact that, when the common council of San José, under the authority given it by section 497, Civil Code, granted the defendant its franchise, it attached thereto as one of the "terms," which by said section it was authorized to impose, a condition that the defendant would bind itself to pay the cost of any improvement of that portion of the street occupied by it. The acceptance by the defendant of its franchise under this condition was equivalent to an express agreement for the payment by it of its proportion of the cost of whatever improvement of the street the city should at any time order. This liability was not limited to such improvement as the city should order under its charter as it then existed, nor was the collection of the amount confined to the mode then provided for the collection of other street assessments. The language of the condition is general in its terms, and embraces all work of improving the street, under whatever statute it may be ordered, and every mode which may be provided for the

collection of other assessments. The contention by the appellant that, by the terms of the condition contained in the ordinance it can be held liable for the payment of the assessment only to the city of San José, cannot be sustained. By accepting this franchise with the terms and conditions which were made a part thereof the defendant agreed that it would be "held" for the payment of its proportion of the cost of this improvement, and that the amount of this assessment might be collected in the manner provided for the collection of other street assessments, and should become a lien upon the road-bed, rolling stock, and franchise of said road. The only reasonable construction to be given to its agreement is that it would be "held" for the person entitled to make the collection. The manner of collecting other street assessments provided by the act of 1885, under which this improvement was made, is by a suit brought by the contractor in his own name, (St. 1885, § 12, p. 157;) and this mode was pursued in the present case.

The objections made by the appellant to the sufficiency of the proceedings taken by the city officers for the improvement of the street cannot be sustained. The notice of street work which was published by the superintendent contained the whole of the resolution for the improvement, and stated the date and fact of its passage. Inasmuch as there were no "further particulars" in the resolution, it would have been idle to make a formal reference thereto in the notice, and an omission to make such reference cannot be considered a defect. The other objections refer to the absence of certain averments from the complaint, and should have been presented by special demurrer. Mere defects in the mode of alleging a cause of action will not impair the validity of a judgment rendered after a trial upon its merits. The judgment is affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.

90 Cal. 41

PEOPLE v. BARRY. (No. 20,757.)

(Supreme Court of California. June 30, 1891.)

ROBBERY—ASSAULT—EVIDENCE—INSTRUCTIONS.

On a trial for assault with intent to commit robbery, the prosecuting witness testified that he was assaulted on the street by defendant and two others, who, after taking from him a dog which he held by a chain, attempted to take money from his pocket; that an officer came and took hold of defendant, who at the time had his arm around witness' neck, the other assailants having fled. Defendant testified that he saw witness assaulted, and in trying to help him became entangled in the dog-chain. *Held*, that a verdict of guilty was right, and that an instruction to find guilty of simple assault was properly refused, as inapplicable.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

J. D. Sullivan, for appellant. W. H. H. Hart, Atty. Gen., for the People.

FITZGERALD, C. The defendant was accused, by information, of an assault with

intent to commit robbery, and two previous convictions of petit larceny. Upon arraignment he pleaded not guilty to the charge, and admitted the prior convictions. He was then tried and found guilty as charged, and sentenced to imprisonment in the state-prison for the period of six years. The evidence upon which he was convicted is substantially as follows: On the night of March 2, 1890, between the hours of 7 and 8 o'clock, as the prosecuting witness, George Engert, was walking along Harrison street, in the city of San Francisco, he was violently seized by the defendant and two others, by whom he was severely beaten and choked. One of the parties making the assault forcibly took from his possession a dog which he held by a chain, while the other two, one of whom was the defendant, attempted, by means of force and violence, and against his will, to take from his possession the sum of two dollars in money, which he at the time had in one of the pockets of his pants; that during the struggle the police officer whose attention was attracted to the place by Engert's cries for help came upon the scene, and took hold of the defendant, who at the time had his right arm around the neck of Engert; the others, on the approach of the officer, made good their escape by flight. The defendant, who was a witness in his own behalf, testified as follows: "I was coming down Harrison street on the night in question. I did not rob this man or attempt to rob him. I saw two men have hold of him and his cries made me go to him. He appeared to be fighting the other men. I tried to help him, and as I got close the dog-chain got around my legs, and I was trying to disengage myself when the policeman came up." The only error complained of, which we deem it necessary to notice, relates to the refusal of the court to instruct the jury, upon the request of the defendant, "that under the charge they might find him guilty of simple assault." We are of the opinion that this request was properly refused, for the reason that the evidence upon which he was convicted tended to show that he was guilty of the crime charged, or of no offense at all. The instruction asked was not applicable to the facts of the case, and, as the verdict is manifestly right on the evidence, we advise that the judgment and order be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

90 Cal. 68

CUMMINGS v. ROSS *et al.* (No. 13,304.)

(Supreme Court of California. June 30, 1891.)

APPEAL—SPECIFICATIONS OF ERROR—CONTRACTS—PAROL EVIDENCE—SETTING ASIDE JUDGMENT.

1. Under Code Civil Proc. Cal. § 659, subd. 3, providing that, where the motion for a new trial is on the ground of the insufficiency of the evidence to sustain the verdict or other decision, the statement shall specify the particulars in which the evidence is alleged to be insuffi-

sient, specifications of error, in a suit in equity, in that the evidence is insufficient to sustain the judgment, which are not directed at any one of the numerous findings of fact on the various issues involved, but at all of them, at a verdict of the jury on a particular issue, adopted by the court, and the court's finding thereon, and at the judgment, are insufficient.

2. In a suit on a certain contract it is competent for plaintiff to show that he signed a written contract, introduced in evidence by defendant, through the misrepresentation of defendant, and supposing he was signing one which had been before drawn up in lead-pencil, the contract sued on being the latter, and its execution being denied by defendant in his answer.

3. A judgment in a suit in equity, entered through inadvertence by the clerk on a special advisory verdict, while other issues of fact remain to be determined by the court, may be set aside, and a new judgment entered after adoption of the special verdict by the court and its findings on the other issues.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Code Civil Proc. Cal. § 659, subd. 3, provides that, when a motion for a new trial is made on the ground that the evidence is insufficient to sustain the verdict or other decision, the statement on which the motion is made shall specify the particulars in which the evidence is alleged to be insufficient.

George Lesinsky, for appellants. Langhorne & Miller, for respondent.

FOOTE, C. This action is to foreclose a mechanic's lien, and the complaint sets forth two counts,—the first for the recovery of \$163.72 unpaid under a contract for \$525, and the second for recovery on a *quantum meruit* of a balance of \$213.83 unpaid of the sum of \$567.55. Attorney's fees for \$100, and costs are also claimed. The defendant Ross, in his answer, among other things, admitted the contract for \$525, and claimed to have paid all he owed thereunder, and alleged another contract to have been made between the parties for \$325, which included all of the work done and performed as to the second cause of action stated; and further alleged that the whole sum due the plaintiff by defendant upon any ground was the sum of \$109.50, of which tender of payment had been made to, and refused by, the plaintiff. The question as to what amount was due for all the work done was by consent of both parties, upon a suggestion of the court, submitted to a jury, who upon that special issue found for the plaintiff in the sum of \$239.15. By inadvertence the clerk entered up a judgment upon this verdict, when the other issues as to the existence of a mechanic's lien, amount of attorney's fees due, counter-claim set up by defendant, etc., remained undetermined by the court. Upon this being brought to its attention within a reasonable time the judgment was set aside, and evidence had as to the other matters involved. Thereupon the court adopted the advisory verdict of the jury, upon the specific matter therein involved, and made findings as to the other issues, upon which a decree and judgment was duly given, made, and entered, enforcing the lien, etc. From that

and an order denying a new trial this appeal is taken.

The first point made for a reversal of the judgment and order is that the evidence is insufficient "to sustain the judgment." The reason given in the appellants' points and authorities being (at page 4) that each cause of action was based upon work performed in constructing a different story of the building; that the evidence did not show the extent of extra work done upon each story; and, as the defendant claims no extra work under the contract was to be allowed as to the work performed on one of the stories, the judgment cannot stand. The particulars in which the evidence was stated in the first specification of the insufficiency of the evidence to sustain "the verdict, findings, and judgment," does not contain anything which points to the question raised, and hence it was not fairly called to the attention of the trial court, and was therefore not to be considered. It nowhere appears therein that the evidence was alleged to be insufficient to show that any specific part of the work was unperformed, or that the value of any specific part thereof remained unproved. It is thus stated: "The evidence is insufficient to sustain the verdict, findings, or judgment for the reason that there is no testimony proving what was the value of said work, or that the same was ever performed as alleged in the amended complaint." This could only have reference to the whole work claimed to have been performed under both counts of the complaint,—that performed by virtue of the contract; that under a *quantum meruit*; and that claimed for extra work under both contracts. The only other respect in which the evidence is specified to be insufficient is thus stated: "The evidence shows that the entire amount due to the plaintiff was not more than the sum of \$850, and that all of such sum had been paid." This certainly does not intelligibly assert that the evidence was insufficient to show upon which story of the building the extra work was proved to have been done. The party moving for a new trial for insufficiency of evidence must specify in the statement the particulars wherein the evidence is alleged to be insufficient, in order that the trial court and counsel may have their attention directed to the particulars relied on by the moving party, to the end that the evidence bearing on the specifications of error might be inserted in the statement and considered by the court. *Eddelbuttel v. Durrell*, 55 Cal. 279; Code Civil Proc. § 659, subd. 3. Besides, the specifications as to the insufficiency of the evidence to sustain the decision are not directed at any particular one of the numerous findings of fact upon the various issues involved here, but at all of them, at the verdict which was adopted by the court, and a finding made thereon, (the case being one in equity,) and at the judgment. This renders the specifications, as set out in the statement and relied on to show error, insufficient, under the rule declared by the appellate court of this state. *Coveny v. Hale*, 49 Cal. 555; *Hayne*, New Trial & App. § 150.

It is further contended that the court below erred in allowing the plaintiff to show that a certain written contract, introduced by defendant, was signed by the plaintiff through the misrepresentation of the defendant, and that the plaintiff had never intended to sign that contract, but supposed he was signing one which had before that been drawn up in lead pencil. The action was brought on a contract such as the lead-pencil draft contained; and the defendant, in the answer, denied the performance of the contract as sued on. When he introduced the written contract to show the real nature of the transaction, as he claimed, it was competent for the plaintiff, in support of the issue made, to show that in point of fact he had made no such contract as defendant had brought forward in evidence. One cannot be made to stand on a contract he never intended to make. If the defendant had sued the plaintiff, and sought to charge him on such a contract, it would certainly be competent, in defense, to show that the instrument was fraudulent. The evidence admitted was in effect to accomplish just such a purpose. The verdict rendered by the jury was, upon a special issue advisory to the court, submitted by consent of all the parties, and it was not error on the part of the court to instruct the jury as it did.

The setting aside of the judgment upon the verdict in an equity case, which judgment had been inadvertently entered by the clerk without judicial sanction, and when other issues of fact remained yet to be determined by the court, and the trial of those issues upon the evidence introduced, the adoption of the advisory verdict and finding thereon, and the other issues, was proper; and, as no error appears in the record, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(90 Cal. 72)

GILL v. DRIVER *et al.* (No. 13,204.)
(Supreme Court of California. June 30, 1891.)

APPEAL—FINDINGS OF FACT.

When ultimate facts are found which support the judgment appealed from, they cannot be overcome by the finding of probative facts tending to establish that the ultimate facts were found against the evidence.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

T. L. Carothers, for appellant. J. A. Cooper, for respondents.

BELCHER, C. C. This is an action to recover the possession of certain personal property or its value, alleged to be \$1,000, and damages for its detention. The complaint is in the usual form in such cases. The defendants, by their answer, deny all the averments of the complaint, and allege that at the time of the commencement of the action, and at all times since, they were and have been the owners and entitled to the possession of the property

described in the complaint; that the value of the property was \$1,000; and, while the defendants were the owners and entitled to the possession thereof, the plaintiff, under and by virtue of the proceedings in this case, unlawfully, and without their consent, took the property from their possession, and has ever since detained the same, to their damage in the sum of \$10 per day. The case was tried by the court, and judgment given for the defendants, from which the plaintiff appeals, without any statement or bill of exceptions. The court found certain probative facts, and then found as follows: "(6) That plaintiff was not at the time of the commencement of this action the owner, nor entitled to the possession of the property described in the complaint, but that defendants were the owners thereof, and entitled to the possession of the same. (7) That defendants never took the said property from the possession of plaintiff at any time, but that plaintiff did at the time of the commencement of this action take the said property from the possession of the defendants without their consent, under a writ of replevin, and plaintiff ever since has withheld, and now withholds, the possession of said property from defendants. (8) That the value of the use of said property during the time plaintiff has so withheld it from defendants is the sum of \$25, and defendants have been damaged by reason of the taking in the sum of \$25, besides the value of the said property. (9) That the value of the property described in the complaint is the sum of \$1,000. (10) That defendants never unlawfully took or withheld said property from plaintiff, or damaged him in any manner." The conclusions of law were that the defendants were entitled to judgment for a return of the property, and, if a return could not be had, for the value thereof, and \$25 damages; and judgment was so entered. Only two points are made for a reversal of the judgment. They are—*First*, that the probative facts were wholly without the issues raised by the pleadings, and hence could not support the judgment; and, *second*, that if within the issues, they were insufficient to support the judgment. Conceding, without deciding, that these points are well taken, still they do not aid the appellant. Ultimate facts were found which do support the judgment; and they are not questioned, nor could they be, without bringing up the evidence in a statement or bill of exceptions. The rule has long been settled that, "when the ultimate fact is found, no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence, can overcome the finding of the ultimate fact." *Smith v. Acker*, 52 Cal. 217; *Pio Pico v. Cuyas*, 47 Cal. 174. We think the judgment should be affirmed, and so advise.

We concur: FITZGERALD, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

89 Cal. 643

GOLDEN STATE & MINERS' IRON-WORKS v.
ANGELL *et al.* (No. 13,208.)

(Supreme Court of California. June 29, 1891.)

CONTRACTS—EVIDENCE—CONSIDERATION—FRAUD-
ULENT TRANSFERS—RIGHTS OF CREDITORS.

1. One A., who was superintendent and a stockholder of plaintiff, a manufacturing corporation, and who had in mind certain improvements in dredging-machines, agreed on behalf of plaintiff with W. to make the latter a machine, and to give him and plaintiff each a half interest in patents if they could be obtained on the improvements, in consideration that W. should pay for making the machine, and to this agreement plaintiff assented. Plaintiff and W. each paid half the expense of procuring the patents, which were issued to A., who never claimed any interest in them, though he did not assign them to plaintiff. *Held*, that there was sufficient evidence of a contract between A. and plaintiff, by which the latter was to own half the patents.

2. There was sufficient consideration for said contract in the fact that A. was a stockholder in plaintiff corporation, and that plaintiff paid half the costs of procuring the patents.

3. In an action by plaintiff against a receiver appointed at the instance of a creditor of A., and given possession of the patents to establish its title to a half interest therein, the creditor cannot object that there was no consideration for the contract between A. and plaintiff to give the latter one-half the patents when procured.

4. Nor can the creditor object that no formal action was taken on the contract by plaintiff's board of directors.

5. Nor can he object that the contract, being made before the patents were procured, was about property that was uncertain, and not *in esse*, and was unfair and unjust.

6. Nor can the creditor in such action object that the contract was in fraud of A.'s creditors, when such fraudulent intent is not alleged in his answer.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

S. W. & E. B. Holladay, for appellants.
Gray & Haven, (*David Bixler*, of counsel,) for respondent.

MCFARLAND, J. In July, 1880, the defendant A. F. Collins obtained a money judgment against the defendant Horace B. Angell and one Cyrus Palmer, and in September of that year an execution which had issued on the judgment was returned wholly unsatisfied. In May, 1884, the said Collins and the defendant Elizabeth A. Risdon, to whom an interest in the judgment had been assigned, instituted proceedings supplementary to execution against said Angell, which resulted in an order of the superior court made May 23, 1884, commanding him to assign to one Forbes, a receiver appointed for that purpose, all the right, title, and interest which he, the said Angell, had in four letters patent for improvements in dredging-machines, to be sold in satisfaction of said judgment. A further order was made permitting all persons or corporations claiming an interest in said letters patent to commence and prosecute any action against said receiver to determine and enforce such interest. Whereupon the plaintiff herein, a corporation, commenced this present action, averring in its complaint that it is the real owner of one undivided half of said letters patent, and praying that it be decreed to be such

owner; that said defendants Collins and Risdon be enjoined from proceeding further against the same; that said receiver be ordered to make an assignment of the same to plaintiff; and for other relief, etc. The court rendered judgment for plaintiff substantially as prayed for; and from the judgment and an order denying a new trial the defendants Collins and Risdon appeal.

The main history of the case, as shown by the findings and evidence, is briefly this: In May, 1880, the plaintiff was, and for many years before then had been, engaged in manufacturing various kinds of machines; and the defendant Angell was then its superintendent, and was also a director and owner of stock in the corporation. Williams & Bixler were then owners of large bodies of swamp land which they were endeavoring to reclaim and protect by levees; and, a large break having occurred about that time on the line of their works, one of their employees was told by said Angell that he thought his company (plaintiff here) could construct a dredging-machine, with certain improvements, by which levees could be constructed more cheaply than by any other method. Afterwards interviews were had upon the subject between Angell and Gen. Williams, of the firm of Williams & Bixler. At Williams' request, Angell sketched out on paper his proposed improvements, and set the draughtsman of the plaintiff to work on a drawing. When the drawing was finished Williams was somewhat pleased with it, but when an estimate of the cost was made he thought it would cost too much for an experiment. Williams & Bixler were to advance the money to pay for the construction of the machine. Angell then stated to him that he thought "there were some valuable patentable improvements there that might be worth something, and, in case there should be, that in consideration he would put the money in to build the machine and try it; that he would be entitled to one-half, and the Golden State & Miners' Iron-Works the other half, of such improvements, whatever there was that could be secured by patent." On his return to the iron-works of plaintiff he told Palmer, the president of the company, the statement he had made to Williams, and Palmer said it was "perfectly satisfactory." This report was made by Angell, as superintendent, to Palmer, as president, of plaintiff. After considering the matter a day or two, Williams & Bixler gave Angell an order employing plaintiff to go on and complete the machine according to the drawings. The machine was built by plaintiff, for which Williams & Bixler paid plaintiff \$17,000. It was put into operation by Williams & Bixler at their expense, and proved a success, and was called the "Hercules Dredger." Afterwards "Gen. Williams and Mr. Palmer, the president of the plaintiff, decided it was time to secure by patent these improvements;" and Angell gave to W. Knox, the secretary of plaintiff, a rough idea of what he (Angell) thought was patentable, and requested Knox to examine the patent-office reports, and learn if they had been covered by pre-

vious patents; it not being certain at the time which, or how many, of the improvements were new. After thorough investigation, it was learned that some of the improvements were new; and rough specifications were given of them to Dewey & Co., patent solicitors, who prepared the papers necessary for applications for patents. Angell signed the applications as required by law; but the entire expense of procuring the patents was paid one-half by plaintiff, and one-half by Williams & Bixler; and, with the full knowledge and consent of Angell, they were to have the patents. Angell did not pay anything whatever towards procuring them, and the money was not paid for Angell, but by and for plaintiff and Williams & Bixler. Angell claimed no interest in the patents whatever, and when they were received he turned them over to Palmer, president of the plaintiff. In this way three patents were procured, viz.: No. 246,362, issued August 30, 1881; No. 268,977, issued December 12, 1882; and No. 278,482, May 29, 1883. Afterwards, under similar arrangements, plaintiff was employed to make certain alterations and improvements on another dredger called the "Atlas;" and another patent, No. 293,932, issued February 19, 1884, was procured. All these patents were issued to Angell, except No. 268,977, which was issued one-half to Angell and one-half to Williams & Bixler. Angell in his testimony says: "I have never in any way claimed or asserted any interest in these patents, or the improvements described therein. * * * I took the situation in this way: Here was a certain job of work to be done, for which the foundry and machine works, when represented, would probably be able to procure the job and make some money, and I was there in their employ, and I considered it a duty to do all I could towards fulfilling the wants of these parties, customers of that concern, and I started in to get up something to accomplish that particular object." The court finds that no assignment of the patents was made by Angell to plaintiff, but that he held the same in trust for plaintiff. On November 13, 1884, said Angell made application to the superior court to be discharged from his debts as an insolvent debtor; and on March 13, 1885, a decree so discharging him was entered. He was actually insolvent at the time the foregoing transactions took place, but he testified that he did not then know of his insolvency, and considered his financial condition good.

We have alluded to some extent to the evidence in the case, because the main point made by appellants, and reiterated at nearly every stage of their argument, is that there is no proof of any contract between Angell and plaintiff by which the latter was to own one-half of the patents. But we think that there was ample proof of such contract. Angell expressly stated to the president of plaintiff that the latter was to have one-half of the patents, and his conduct afterwards was a continuous and complete ratification of that statement. He allowed plaintiff to expend its own money for its own benefit in obtaining the patents, and expressly disclaimed

any interest therein for himself. Certainly there was no want of assent on his part.

It is contended that there was no consideration for the contract; but Angell was interested, not only as superintendent, but also as a stockholder in plaintiff to procure the contract with Williams & Bixler; and the "prejudice suffered" by plaintiff in paying for the patents was a sufficient consideration. Civil Code, § 1605. Moreover, it is difficult to see how appellants are interested in that question. And the same may be said of the point that there was no formal action taken on the matter by the board of directors of plaintiff; neither the corporation nor any of its stockholders are making any objection. Something is said in the briefs about defrauding creditors; but, in the first place, there is no evidence of any intent to do so, and, in the second place, there is no averment in the answer that the transfer of the improvements and the right to patents therefor to plaintiff and Williams & Bixler were made with intent to defraud creditors. As to the other points made, as that the contract was about property that was uncertain and not *in esse*, that it was unfair and unjust, etc., while we think that they are not well taken on their merits, it is sufficient to say that they refer to matters in which third parties, whether creditors or not, are not concerned. If plaintiff, through carelessness, had not neglected to have Angell make a formal assignment of the patents as they were received, which Angell was always willing to do, all trouble in the premises would have been avoided. The inchoate right which Angell had to apply for patents for certain improvements to dredging-machines which he thought he had discovered, "schemes which he had in his head," was nothing that could have been reached by a creditor. Curt. Pat. §§ 174, 175. It was merely a privilege dependent for its exercise upon his own volition. We do not know of any process by which he could have been compelled by a creditor to procure a patent. This right he transferred to plaintiff and Williams & Bixler under the circumstances above stated. He chose to perform his contract, and to allow them to procure the patents in his name by the expenditure of their own money; and we think that the court below was right in holding that one-half of the patents thus procured was in justice and equity the property of plaintiff. The judgment and order denying a new trial are affirmed.

We concur: SHARPSTEIN, J.; DE HAVEN, J.

89 Cal. 597

NEWMAN V. DUANE. (No. 13,282.)

(Supreme Court of California. June 26, 1891.)

TRIAL BY JURY—ACTION TO RECOVER REAL PROPERTY.

In an action for the possession of land defendant is entitled to a trial by jury, under Code Civil Proc. Cal. § 592, giving the right to a jury trial "in actions for the recovery of specific real or personal property," and plaintiff cannot deprive him of this right by framing his complaint so as to make the action an equity case, under

Code Civil Proc. Cal. § 738, providing that an action may be brought by any person against another who claims an interest or estate in real property adverse to him, for the purpose of determining such adverse claim.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Code Civil Proc. Cal. § 738, provides that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

Moses G. Cobb, for appellant. *Olney, Chickering & Thomas*, for respondent.

MCFARLAND, J. The plaintiff, in his complaint, merely alleges that he is owner in fee "and in possession" of certain described land; and that defendant, without any right whatever, claims an interest or estate in said land, adverse to plaintiff. The complaint, as to the real issues between the parties, is quite child-like and bland, and does not contain any intimation that defendant was in the actual possession of the land, and that what plaintiff mainly wanted was to put defendant out. The prayer does not suggest that plaintiff would like to have a writ of restitution. But the answer denies all the allegations of the complaint, and sets up that defendant has been in possession of the land for more than fifteen years; and the court finds that he had been thus in possession for at least four years before the commencement of the action. Judgment was rendered for plaintiff, which, among other things, decrees that "plaintiff do have a writ of possession of said premises as against the defendant and all persons claiming under him." From the judgment, and from an order denying a new trial, defendant appeals.

Before the commencement of the trial defendant duly demanded a trial by jury; "but the court refused to grant him the same, on the ground that the case was an equity case, in which he, said defendant, was not entitled to a jury trial as a matter of right." Defendant duly excepted and the first point made by appellant is that the court erred in refusing his demand for a jury. We think that the appellant was clearly entitled to a jury; not only upon the principles discussed and determined in *Donahue v. Meister*, (Cal.) 25 Pac. Rep. 1096, but in accordance with the specific language of section 592 of the Code of Civil Procedure, which expressly gives the right to a jury trial "in actions for the recovery of specific real or personal property." In the case at bar, where the defendant was in possession, claiming adversely to plaintiff, the obviously proper action to have been brought was what we call an "action of ejectment,"—that is, an action "for the recovery of specific real property,"—in which case the defendant would have been clearly entitled to a jury. Plaintiff has endeavored to accomplish the same result—that is, the restitution of possession—in the form of a statutory action under section 738 of the Code of Civil Procedure. Assuming that said section contemplates a case where the plain-

tiff is out of possession and the defendant in possession, still it is evident that the plaintiff herein, by simply framing his complaint in a particular way, could not deprive the defendant of a jury trial of the issues raised by his answer. For the error committed in refusing the appellant a jury the judgment must be reversed, and it is unnecessary to notice the other points made by the appellant. Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; DE HAVEN, J.

89 Cal. 632

HEALD v. HENDY. (No. 13,094.)

(Supreme Court of California. June 27, 1891.)

PRINCIPAL AND AGENT—ACTION ON ACCOUNT—INTEREST.

1. In an action to recover for provisions furnished to a third person on defendant's account it appeared that defendant owned a mine, and that the provisions were furnished to a boarding-house keeper, where the miners boarded, under an agreement between plaintiff and defendant's superintendents at the mine that defendant would pay for them. The superintendents had purchased provisions from other persons for the use of the boarding-house, and defendant had paid for them to plaintiff's knowledge. *Held*, that the superintendents had authority to make the agreement for defendant as his ostensible agents, under Civil Code Cal. § 2300, providing that "an agency is ostensible when the principal, intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."

2. When it is necessary to the operation of a mine that provisions be furnished to the keeper of a boarding-house at which the miners live, the superintendent of the mine has authority to order the provisions to be furnished, and to bind the operator of the mine to pay for them, but not to bind him to pay for articles not necessary for the use of the boarding-house.

3. Civil Code Cal. § 3337, providing that "every person who is entitled to recover damages certain or capable of being made certain by calculation, and the right to recover which is vested in him on a particular day, is entitled also to recover interest thereon, from that day, except during such time as the debtor is prevented by law or by the act of the creditor from paying the debt," does not apply to an action for the price of goods delivered on account.

4. Civil Code Cal. § 1917, authorizing the recovery of interest on "moneys lent or due on any settlement of accounts," does not authorize the recovery of interest on an account for goods sold and delivered, until the account has been settled, and the balance due ascertained.

Department 1. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Civil Code Cal. § 3287, provides that every person who is entitled to recover damages certain or capable of being made certain by calculation, and the right to recover which is vested in him on a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law or by the act of the creditor from paying the debt.

Wm. H. H. Hart, (Aylett R. Cotton, of counsel,) for appellant. *G. G. Blanchard, Philip Teare, A. C. Adams, Irwin & Irwin, and A. C. Adams*, for respondent.

GAROUTTE, J. This is an action to recover \$2,370.48 on account of goods, wares, and merchandise sold and delivered by plaintiff to defendant at his special instance and request, and also for money paid and expended for the use of defendant, in the sum of \$827.47 on a balance of account. Plaintiff asks judgment for the amounts and interest upon the items of the account from the time they became due. Defendant admits a certain amount of the indebtedness and denies the balance. At the trial judgment went against him, and he appeals from the judgment and the order denying his motion for a new trial.

The plaintiff is the owner of a store at Nashville, Eldorado county. Defendant resides at the city of San Francisco, and owns a mine near plaintiff's store. The goods, wares, and merchandise upon account of which this action was brought were furnished by plaintiff to one Stein-König, who kept a boarding-house at this mine for the purpose of boarding the men therein employed. The evidence was quite contradictory in many respects, and in those particulars must be held to support the judgment. Stein-König, it appears, had neither capital nor credit; and, in order that he might continue in business, so that the miners would have a place to board, Templeton and George W. Hendy, the respective superintendents of the mine, told the plaintiff to furnish him all goods necessary for the use of the boarding-house, and the defendant would pay for the same. As near as can be ascertained from the brief of the respondent's counsel, they rely upon an ostensible agency in these superintendents, and also upon a special authorization direct from the defendant to the superintendents to incur this indebtedness. The evidence of Stein-König and Templeton tends quite strongly to indicate a special authority from defendant, and the evidence also seems to be amply sufficient to support a finding of ostensible agency. "An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him." Section 2300 Civil Code. The evidence shows beyond any doubt that the superintendents of the mine were purchasing meat, flour, milk, etc., from various parties for the use of the boarding-house, which articles were paid for by the defendant, and with the knowledge of plaintiff. From these facts it is safe to say that the defendant intentionally or by want of ordinary care caused the plaintiff to believe that these mining superintendents were his agents in the purchase of these articles from plaintiff. The record discloses the fact that it was absolutely necessary that provisions should be furnished this boarding-house, in order that the mine might continue in operation; and it would seem that, aside from any express authority from the defendant to purchase these articles, and regardless of the question of ostensible agency, the respective superintendents of the mine, by virtue of their positions alone, had the power to bind the defendant for the payment of these goods.

Jones v. Clark, 42 Cal. 180; **Stuart v. Adams**, (Cal.) 26 Pac. Rep. 970. Viewing the case from any of the foregoing standpoints, we are unable to affirm the judgment to the extent of \$81.74, that being the value of articles delivered clearly not for the necessary use of the boarding-house. The plaintiff is not entitled to interest under the first count of his complaint. Section 3287 of the Civil Code has no application to this character of actions. Section 1917 of the Civil Code limits the recovery of interest to "moneys lent or due on any settlement of accounts, from the day on which the balance is ascertained." These accounts were never settled and a balance ascertained. The Statutes of 1869-70, p. 699, was similar to section 1917 of the Civil Code; and in a case analogous to this it was said: "The court below erred in rendering a judgment for interest on the account sued upon." **Bank v. Northam**, 51 Cal. 387. See, also, **Brady v. Wilcoxson**, 44 Cal. 245.

Let the judgment be reversed and the cause remanded, with directions to the trial court to modify the judgment by striking therefrom the sum of \$81.74, and also the amount of interest computed upon the sum found due under the first count of the plaintiff's complaint.

We concur: PATERSON, J.; HARRISON, J.

PER CURIAM. It is ordered that the opinion filed herein on the 27th day of June, 1891, be amended (and the same is hereby amended) by striking therefrom the last paragraph thereof, and inserting in lieu thereof the following: "Let the cause be remanded, with direction to the trial court to modify the judgment by striking therefrom the sum of \$81.74, and also the amount of interest computed upon the sum found due under the first count of the plaintiff's complaint; the judgment, thus modified, to stand affirmed as of its date."

90 Cal. 169

In re MISAMORE'S ESTATE. (No. 14,024.)

(*Supreme Court of California.* July 3, 1891.)

ADMINISTRATORS—SETTLEMENT OF ACCOUNT—LIABILITY FOR RENTS AND PROFITS—LACHES.

1. The probate court can make an administrator responsible for rents and profits of his decedent's land, where he occupies and uses it as his own.

2. Where an administrator has taken possession of property as part of the estate, the time before the settlement of his account is not to be considered in determining whether the heirs have been guilty of laches in not asserting their claim thereto.

Commissioners' decision. In bank. Appeal from superior court, Yuba county; **PHILIP W. KEYSER**, Judge.

Forbes & Dinsmore, for appellants. *Wm. G. Murphy* and *E. A. Davis*, for respondent.

FOOTE, C. This is an appeal from an order settling and allowing the final account of an administrator. The contestants and appellants are the children and heirs at law of the decedent. The principal matter at issue is the responsibility

the administrator for rents, issues, and profits derived from the possession and occupation of a certain tract of land, a possessory claim left by his decedent. The contestants claim that the administrator should be charged "with this land, and with the reasonable value of the rents, issues, and profits thereof; and during the periods when he has farmed it himself, and made a profit in excess of the reasonable value of the rents, issues, and profits, then with the profit made by him out of the land." In opposition to this, the administrator claimed, and endeavored to show, that the decedent had no title to the land; that it was a mere possessory or "squatter's claim;" that he only took possession to take off the growing crop of the year 1866, that in which his decedent died; that he surrendered the land under title paramount to other parties, and that he afterwards bought it from the true owners, and never held possession, except adversely to his decedent's estate, save during the year 1866; that he became the owner by paramount adverse legal title, and has always held it as such since 1873, and never held possession as administrator since 1867.

As to the point made that the probate court cannot make an administrator responsible for rents and profits of decedent's land, it is settled that it can do so, where he occupies and uses it as his own. *Walls v. Walker*, 37 Cal. 431.

So far as the finding of laches on the part of the contestants is concerned, we do not see how it is supported by the evidence. The administrator, as trustee, presents his final account, the estate being open and unsettled, for allowance; and as to all property and matters over which he has control, and about which he acts in that capacity, he asks that they may be settled in this proceeding. To say then that as to these matters which pertain to his final account as trustee, and for which he seeks judicial sanction, the contestants shall not be heard, because the administrator has chosen to neglect the final settlement of the estate, hardly comports with the doctrine of courts of equity in such cases. It might be, as to the span of horses, claimed to be exempt, that, under a certain state of facts, the administrator would not be responsible for them to the contestants in this action. But the state of facts, viz., that there was an order of the court settling them aside as exempt, and thus taking them out of the estate, does not appear satisfactorily to have existed. Hence, as the administrator took them as estate property, the contestants are not prevented by laches from having him to account for them. With reference to the other principal matter,—that is, the alleged responsibility of the administrator for the rents, issues, and profits of his decedent's land,—it may be said that, if the evidence and findings showed that no damage resulted to the estate from his surrender of the land, or that his surrender was to a paramount adverse title asserted by another, then he would not be responsible for rents, issues, or profits. But neither the evidence nor the findings sufficiently show such a state

of facts. It becomes unnecessary to make special mention of any of the other points made, but, for the reasons stated, we are of opinion that the judgment and order should be reversed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

90 Cal. 163

NUTTALL v. LOVEJOY *et al.* (No. 13,666.)
(*Supreme Court of California.* July 2, 1891.)

SWAMP LANDS—APPLICATION TO PURCHASE—INCONSISTENT FINDINGS—NEW TRIAL.

1. No right to swamp and overflowed land, granted by the United States to the several states by Act Cong. Sept. 28, 1850, could attach by reason of an application to purchase, made before the land was segregated and set apart to the state.

2. In an action to establish title to swamp and overflowed land, in which the adaptability of the land to cultivation was a material issue, the court found that the land was subject to periodical overflow, and not suitable for cultivation, but further found that it was in cultivation, and other facts inconsistent with the finding that it was unfit for cultivation. Held that, as the suitability of the land for cultivation was not determined, and was a material issue, a decision based on the finding of the ultimate fact that it was unfit for cultivation was a decision against the law, and a new trial was properly granted.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge. *N. O. Bradley, G. E. Lawrence, and W. A. Gray*, for appellants. *Lamberson & Taylor*, for respondent.

PATERSON, J. A contest arose in the office of the surveyor general as to which one of the parties hereto had the better right to purchase the land in controversy, and on March 28, 1888, an order was made referring the contest to the superior court of the county of Tulare for a final determination of the conflicting claims. That court found that the land in controversy was on September 28, 1850, and ever since has been, swamp and overflowed land, and as such became the property of the state by virtue of the act of congress passed September 28, 1850; that the land was segregated and set apart to the state of California on October 14, 1884, and on December 1st following a certified copy of the township plat, duly approved, was filed with the register of the state land-office: that on December 31, 1883, the defendant Lovejoy filed an affidavit and application in due form for the purchase of the land in the office of the surveyor general, which application was approved by said surveyor general on October 15, 1885; that on December 9, 1885, the register of the state land-office issued and delivered to defendant Lovejoy a certificate of purchase in due form, and said certificate has never been annulled or canceled; that the defendant Hall filed his application in due form to purchase the land September 9, 1887; that the plaintiff, Nuttall, filed his affidavit and application in due form to purchase the land on January 12, 1888. The defendant Stevenson made no appearance at the trial, and judgment went

against him by default. The court rendered judgment in favor of the defendant Hall; and the plaintiff, Nuttall, and the defendant Lovejoy both moved the court for a new trial. The plaintiff's motion was granted, and the motion of the defendant Lovejoy was denied. The defendant Lovejoy appealed from the judgment and from the order denying her motion for a new trial, and the defendant Hall appealed from the order granting plaintiff a new trial, but did not appeal from the judgment.

The defendant Lovejoy's application to purchase having been filed before segregation by the United States to the state, no right attached by reason of such application, nor by reason of the subsequent approval and certificate of purchase issued to her. *Buchanan v. Nagle*, (Cal.) 26 Pac. Rep. 512. The court, therefore, properly decided against her claim, and, as no errors of law occurred at the trial, her motion for a new trial was properly denied. Her appeal from the judgment is also without merit. She alleged in her answer that the lands were unfit for cultivation. The defendant Hall alleged the same thing. She is the only party who has appealed from the judgment. If the findings show that the land is unfit for cultivation, she cannot complain; it is a finding in her favor. If they show that the lands are unfit for cultivation, it is a finding outside of the issues between her and the defendant Hall, who has not appealed from the judgment. *Estate of Doyle*, 73 Cal. 564, 15 Pac. Rep. 125; *Bulwer Con. Min. Co. v. Standard Con. Min. Co.*, 83 Cal. 589, 23 Pac. Rep. 1102. In any event, a finding as to the character of the land could in no way affect the right of the defendant Lovejoy, because, as stated above, no right could attach by reason of an application filed before the lands were segregated.

We think the court did not err in granting the plaintiff's motion for a new trial. The plaintiff alleged that he was an actual settler on the land, and that said land was suitable for cultivation. The findings of the court on the issue as to the character of the land are uncertain and contradictory. The court found that at all time stated the land had been, "and yet is, subject to periodical overflow, and is not suitable for cultivation;" but afterwards found that the land was formerly a portion of the bed of Tulare lake, and "was first uncovered by the receding waters of said lake in the summer of 1883, and the waters of said lake rose again and covered said land in the spring of 1884; that ever since the fall of 1884 said waters have been gradually receding, and in the fall of 1887 said land was again wholly uncovered, and since said time such waters have so receded that at the time of this trial they were at least four miles from any portion of said lands; * * * that the said land is level, and of good quality, of sandy loam, and can be readily plowed, seeded, and cultivated by the ordinary processes of tillage; that the plaintiff Nuttall, plowed a few acres of said land in March, 1888, and sowed the same with barley and alfalfa; that the land was so

dry at that time that for lack of moisture but a small portion of the seed then sowed by him germinated, and that portion which did so germinate soon died for lack of moisture, there having been no rain, after said seeds were sown, sufficient to wet up the ground where they were sown; that more than one-half of said seed remained in the ground where sown until the rains came in the month of November, 1888, when such seeds germinated, and the alfalfa and barley plants coming therefrom are now growing on said land; that the country surrounding said lake was formerly used as a vast pasture for the raising of stock, but of recent years it has been entered upon by persons who have broken it up and plowed and farmed the land, and constructed numerous irrigating ditches for the purpose of taking water from the several streams hereinbefore named, and conducting it upon their said lands for the purposes of irrigation, and by such means a great quantity of the waters of said streams is being each year taken therefrom for said purpose and conducted upon said lands; that in the year 1862, said year being an exceptionally wet season, the waters of said lake suddenly raised to a great height; and again in the year 1867, said year being an exceptionally wet season, the waters of said lake again suddenly raised to a great height, and, should a season again occur such as either the season of 1862 or the season of 1867, the land mentioned in finding 1 would be entirely covered by the waters of said lake; and the numerous ditches leading out of said rivers and creeks, and the large body of land used for agricultural purposes, and irrigated by waters drawn from said streams, would not prevent the sudden rise of said lake and the overflow of said land by the waters thereof." While the finding of the court that the land is unsuitable for cultivation is the finding of an ultimate fact, it is inconsistent with the other facts found and quoted above; and for this reason the court below properly set aside the findings and granted a new trial.

It is claimed that the plaintiff was not entitled to a new trial on the ground that the decision is "against law," and in support of his contention appellant Hall cites cases holding that a new trial cannot be granted upon the ground that the conclusions of law are not supported by the findings of fact. This may be conceded. The question here is not whether the court below erred in its conclusions of law, but whether the findings fall to dispose of some material issue. As between the plaintiff and the defendant Hall, the question as to the character of the land—whether it was suitable or unsuitable for cultivation—was a material issue. That issue has not been disposed of, because the findings are so inconsistent and contradictory that it is impossible to tell therefrom whether the land is or is not suitable for cultivation. Where the findings do not determine all the issues raised by the pleadings with respect to which evidence was introduced, the decision is against law, and a new trial may be granted on that ground. *Knight v.*

Roche, 56 Cal. 15; Hayne, New Trials & App. § 99. The judgment and the orders are affirmed.

We concur: MCFARLAND, J.; HARRISON, J.; SHARPSTEIN, J.; DE HAVEN, J.

90 Cal. 157

BARNHART v. FULKERTH *et al.* (No. 13, 682.)

(Supreme Court of California. July 2, 1891.)

ESTOPPEL—PLEADING—REPLEVIN.

In an action of replevin against a sheriff, the defendant justified under an execution against a third person, and pleaded that before levying on the goods in plaintiff's possession plaintiff stated to him, in answer to his inquiries, that the goods belonged to the execution debtor, and that plaintiff held possession as pledgee. The answer further stated "that the levy was made in sole reliance upon the statement of plaintiff." *Held*, that the answer sufficiently pleaded an estoppel, under Code Civil Proc. Cal. § 1982, subd. 3, which provides that, "whenever a party has deliberately led another to believe a particular thing true, and to act upon such belief, he cannot be permitted to falsify it."

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

Wright & Hazen, for appellant. *W. E. Turner*, for respondents.

FITZGERALD, C. This is an action brought by plaintiff against the defendants to recover the possession of 4,255 bags of wheat, alleged to have been wrongfully and unlawfully taken by the defendants from the possession of plaintiff, or for the sum of \$8,260, the alleged value thereof, in case delivery cannot be had, and for the further sum of \$2,000 as damages for the detention thereof. The answer specifically denies the material allegations of the complaint, and justifies under writs of attachment and execution. Plaintiff demurred generally to the answer, and separately, upon the same ground, to that part of it setting up matter by way of an affirmative defense. The demurrer was overruled, and the case tried by the court, without a jury, and judgment rendered in favor of plaintiff in the sum of \$2,540, and costs. This appeal is taken by plaintiff, on the judgment roll alone, from that part of the judgment which denies to him a portion of the relief claimed and demanded by him in this action. The case has been here before on appeal, and is reported in 73 Cal. 526, 15 Pac. Rep. 89. All the questions necessary to the decision of the case were then decided, and are now the law of the case, with the single exception of the matter by way of estoppel *in pais*, pleaded for the first time in the answer as amended, after the case was reversed on the former appeal, but which was sought to be proved and was relied upon as a defense at the previous trial. As to whether the matter set up by way of estoppel was necessary to be pleaded, we are not called upon, in view of the amended answer, to decide. But this court on the former appeal also considered and disposed of the questions of estoppel raised by the evidence in the case, and relied on as matters of defense,

against the objections made and urged by plaintiff, upon the ground that such defense was not available because it was not set up in the answer. The facts necessary for a proper understanding of the case, as now presented for decision, are substantially as follows: In November, 1878, H. O. Matthews and his wife commenced an action in the district court of Stanislaus county, against one J. T. Davis, to recover on his promissory note made in their favor for \$3,500. After the filing of the complaint a writ of attachment was issued at their instance against the property of Davis, and placed in the hands of the defendant Fulkert, the sheriff of the county, who executed the same by levying upon and taking into his possession, as the property of Davis, the wheat in controversy. This wheat was, at the time of the levy, in the possession of the plaintiff, Barnhart, as pledgee, to whom it had been previously delivered, by transfer and indorsement of the warehouse receipt by Davis, as collateral security for the payment of the sum of \$2,500 and interest, theretofore loaned by him to Davis. Immediately upon the service by the sheriff of a copy of the attachment and the notice in writing, usual in such cases, upon the plaintiff, Barnhart, he, Barnhart, in answer thereto and in response to inquiries made at the time by the sheriff and the attorney of Matthews and wife, claimed and represented to them that he held possession of the wheat as pledgee of Davis; that Davis was the owner thereof; and that all he wanted was his money. The object of this inquiry, as the plaintiff knew, and in response to which he made the foregoing statement, was for the purpose of ascertaining whether Davis was the owner of the wheat in question, and whether it was subject to be levied upon as such. The sheriff then immediately tendered to plaintiff, in manner and form as required by law, the sum of \$2,600, which sum was in excess of the amount due. This, after admitting its sufficiency, Barnhart refused to accept. The sheriff then deposited the money with the county treasurer to the order of plaintiff, and notified him to that effect, but plaintiff gave him notice that he would not accept it. The sheriff and the attorney of Matthews and wife having no knowledge differing from the representations and information given by the plaintiff in relation to the ownership of the wheat in question, and believing and relying solely thereon, as plaintiff knew they would, the sheriff then, in obedience to the instructions of the attorney of Matthews and wife, given after the money tendered was deposited with the county treasurer to plaintiff's order, and immediately preceding the levy, executed the writ of attachment by levying upon and taking into his possession, as the property of Davis, the wheat in controversy, which he afterwards placed in the possession of his co-defendant, Perley, for the safe-keeping and protection thereof. After this action was commenced, and during the detention of the property in question by the sheriff under the writ of attachment, Matthews and wife recovered judgment against Davis for

the amount claimed, with interest and costs, and thereupon execution was duly issued and levied by the defendant Fulkerth, as sheriff, upon this wheat, as the property of Davis, and he sold 250 tons of it, leaving 25 tons which he released from execution, notifying plaintiff at the time thereof. After the sale, defendant Fulkerth again tendered to plaintiff the full amount due from Davis, which he refused to accept. The defendant Fulkerth then withdrew the deposit from the county treasurer, and placed it in a solvent bank, but in his own name, where he has ever since kept it, with the full knowledge of the plaintiff, and being at all times ready and willing to pay it over, with interest up to the date of the tender. It further appears that the plaintiff applied for and received from Davis other security which was amply sufficient to pay Davis' indebtedness to him, and that the wheat which is the subject of this action was not the property of Davis at the time he delivered the possession of it to plaintiff.

These are substantially the facts as shown by the findings, and, as none of the evidence taken at the trial was brought up by the record, they must be presumed to be supported by the evidence. The questions in relation to the ownership of the grain and the sufficiency of the tender were settled adversely to plaintiff by the decision of this court on the former appeal, so that they are not now proper subjects for discussion. This case is therefore narrowed down to the question whether the plaintiff is estopped from denying the truth of the statements intentionally and deliberately made by him to the defendant Fulkerth and the attorney of the attaching creditors, which he led them to believe were true, and upon which belief they acted solely in making the levy referred to. It is contended by appellant that the demurrer should have been sustained on the ground that the matter of estoppel relied on as a defense is not sufficiently pleaded in the answer; and, further, that neither the pleadings nor findings are sufficient to support the judgment based upon an estoppel. Section 1962, subd. 3, Code Civil Proc., provides: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Conceding, but not deciding, that this estoppel is not embraced within that class of estoppels *in pais* necessary to be pleaded, we are of opinion that the answer is in all respects sufficient, and that the matter pleaded by way of estoppel meets fully the requirements of the above section of the Code of Civil Procedure. We think the demurrer was properly overruled. Mr. Justice THORNTON, who delivered the former opinion in this case, uses the following language with reference to the question of estoppel involved here: "We do not think this estoppel made out, for the reason that it does not appear that the levy was made in sole reliance upon the statements made by Barnhart." The answer avers, among

other things, by way of estoppel, and the court so finds, "that the levy was made in sole reliance upon the statement of the plaintiff, Barnhart." As the estoppel herein was sufficiently pleaded, and the findings follow and support the allegations of the pleadings, we are of the opinion that the plaintiff is estopped from denying the truth of the statements out of which this action arose, and which were made by him at the time and under the circumstances referred to; also from setting up title to the property in question in any one but Davis; and, further, that the judgment based thereon, and upon which this appeal is taken, should be affirmed, and we so advise.

WE CONCUR: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

90 Cal. 174

PEOPLE V. BROOKS. (No. 20,772.)

(Supreme Court of California. July 6, 1891.)

CRIMINAL LAW—NEW TRIAL—DISCRETION OF TRIAL COURT.

A motion for a new trial in a criminal case is largely addressed to the discretion of the trial court; and a motion granted upon the ground that the verdict is not sustained by the evidence will not be reversed, except where there is no evidence which conflicts with that upon which the verdict rests.

In bank. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

W. H. H. Hart, Atty. Gen., and Frank P. Kelly, Dist. Atty., for the People. C. C. Stephens and J. A. Donnell, for respondent.

PER CURIAM. A motion for a new trial in a criminal cause is very largely addressed to the discretion of the court before which the trial was had; and, when one of the grounds upon which it is asked is that the verdict is contrary to the evidence given in the cause, the action of that court in granting the motion will not be reversed by this court, unless the record clearly shows that there was no evidence which conflicted with that upon which the verdict rested. In the present case the action of the court in granting the motion is fully sustained by the matters contained in the bill of exceptions, both upon the foregoing ground, and also upon the ground of newly-discovered evidence contained in the affidavits offered upon the motion on the part of the defendant. The order is affirmed.

90 Cal. 175

YOUNG V. AGUIRRE. (No. 14,036.)

(Supreme Court of California. July 10, 1891.)

APPEAL—SUFFICIENCY OF EVIDENCE.

Where the evidence is sufficient to support the verdict the judgment will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Action by W. H. Young against M. G. Aguirre to recover possession of personal

property. Verdict and judgment for plaintiff, and new trial denied. Defendant appeals. Affirmed.

John Haynes and Jesse F. Waterman, for appellant. *H. H. Appel*, for respondent.

VANCLIEF, C. The action is for the recovery of the possession of personal property alleged to have been wrongfully taken from the plaintiff by the defendant. The defendant, being sheriff, justifies the taking of the property by virtue of a writ of attachment against one Cooke, alleging that the property belonged to Cooke, and was subject to the attachment. Trial by jury, verdict and judgment for plaintiff. Defendant appeals from the judgment and from an order denying his motion for a new trial. The plaintiff claims the property by purchase from Cooke, made 40 days prior to the attachment. The appellant makes two points: (1) That the evidence does not justify the verdict of the jury, in that it fails to show that the alleged transfer of the property from Cooke to plaintiff was accompanied by an immediate delivery, and followed by an actual and continued change of possession; and (2) that the verdict is against law, for the reason that the jury must have disregarded an instruction of the court as follows: "If you find that there was no actual, open, unequivocal change of possession, carrying with it the usual marks and indications of ownership, manifested by such outward signs as would render it evident to the world that the possession of Cooke had wholly ceased, and that the claims of the vendee were absolute, then you shall find for the defendant." The two points are substantially the same, and present only the single question: Does the evidence justify a finding that the transfer was accompanied by an immediate delivery, and followed by an actual and continued change of possession? This question should be answered affirmatively, and appellant's claim to the contrary is not sufficiently plausible to justify a statement of the evidence here. I think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

HANSON *et al.* v. TOMPKINS.

(Supreme Court of Washington. July 1, 1891.)

VENDOR AND VENDEE—MISREPRESENTATIONS—ACTION ON DEBT NOT DUE—RECORD ON APPEAL.

1. In an action on a note given in part payment of a tract of land, which the vendor represented to contain 36.50 acres, but which in fact contained only 26.50 acres, he can recover only for the actual acreage; and it is immaterial whether the representation was made knowingly or by mistake.

2. Where, in an action on a note not due, the complaint alleges that defendants were about to leave the state without making provisions for its payment, and the allegation is denied by answer, a failure to prove the allegation is fatal to a recovery.

3. The supreme court will not consider a statement of facts which has not been certified to by the trial judge.

Error to superior court, Snohomish county.

Action by George E. Tompkins against Ole Hanson on a note. Judgment for plaintiff. Defendant appealed. Reversed.

W. P. Bell, L. F. Hart, and *Andrews & Burnes*, for plaintiff in error. *Craddock & Miller*, for defendant in error.

DUNBAR, J. This was an action brought upon a promissory note for \$350 not yet due, and for \$50 attorney's fee, with an allegation that defendants were about to remove from the state of Washington and the United States, refusing to make arrangement for securing the payment of said debt, with prayer for judgment, and for the issuance of a writ of attachment. Affidavit for attachment was filed. The answer admits the execution of the note, and alleges want of consideration; alleges the fact to be that plaintiff sold defendant a certain tract of land for \$1,350, \$1,000 of which was paid down, and the note for \$350 was given for the balance of the purchase price of said land; that the number of acres bought was understood to be 40, at an agreed price of \$33.75 per acre. This land was composed of lot No. 2, and a small portion of the N. W. $\frac{1}{4}$ of section 22, township 29 N., of range 6 E. of Willamette meridian. That plaintiff, intending to cheat the defendant and co-defendant, falsely and fraudulently represented to them that said lot 2 contained 36 $\frac{1}{2}$ acres, when in truth and in fact it contained but 26 $\frac{1}{2}$ acres; and that, wholly and solely relying on the said fraudulent and false representations of plaintiff, defendant and co-defendant, believing there were 40 acres in said tract of land, signed the said note for \$350. That the plaintiff agreed with and promised defendant, on the 12th day of December, 1889, to deed to them a sufficient amount of land off of the east side of the north-west quarter of said section 22 to make, when added to lot 2, 40 acres. That in the following February, 1890, the defendant first learned that lot 2 contained but 26 $\frac{1}{2}$ acres of land, whereupon they went to plaintiff, and offered and demanded of him to deed them 10 acres more land off the east side of the north-west quarter of the north-west quarter of said section 22, or to rescind said contract; and demanded of him their money, viz., \$1,000, and their note, for which they offered to deed said land back to plaintiff; and plaintiff refused to return to defendants their note and money, or any part thereof. All of the allegations in the answer were denied in the reply, and on these issues the cause was tried. Other matters were alleged in the answer, but their consideration is not necessary to the determination of this cause. Two statements of fact came up with the record, but this court can only consider the statement certified to by the trial judge. Both plaintiff and defendant testified that it was the intention to convey 40 acres of land; the real contention being whether or not 40 acres of land had really been conveyed. There seems little, if any, doubt from the testimony that

lot 2, instead of containing $36\frac{1}{2}$ acres, actually contained only $26\frac{1}{2}$ acres.

Several instructions were presented and requested by defendants, which, we think, correctly stated the law; but, as the reverse of such instructions was given by the court, we will notice it. Among other instructions the court gave the following: "If you should find that as a matter of fact said plaintiff did represent said tract to contain 36.50 acres when as a matter of fact it only contained 26.50 acres, you must still find a verdict for the plaintiff, unless you further find by a preponderance of the evidence that the plaintiff knew at the time he made such representations that the same were false, and made them with the intent thereby to deceive the defendants, if the mistake (if you find there was a mistake) was a mutual one, and innocently made by the plaintiff, he cannot be charged therefor in this action." This instruction was plainly erroneous. If the defendants relied upon the representations of the plaintiff, and were led to believe by such representations that lot 2 contained $36\frac{1}{2}$ acres, when in fact it only contained $26\frac{1}{2}$ acres, and were induced by such representations to purchase said lot as a lot of $36\frac{1}{2}$ acres, it makes no difference whether plaintiff knew such representations to be false or not, he is liable. If he knew the lot did not contain $36\frac{1}{2}$ acres, and represented to defendants that it did, he would be guilty of fraud and deceit; but if he did not know it, and believed that the representations he made were true, and defendants, acting upon such representations, were damaged because it eventuated that they were not true, the liability of the plaintiff would be the same. In neither case will he be allowed to retain the benefit flowing from his misrepresentation. Mr. Justice Story thus states the rule: "Whether a party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false." 1 Story, Eq. Jur. § 193, and note. See, also, *Page v. Bent*, 2 Metc. (Mass.) 371; *Stone v. Denny*, 4 Metc. (Mass.) 151; *Milliken v. Thorndike*, 103 Mass. 382; *Bennett v. Judson*, 21 N. Y. 238; *Litchfield v. Hutchinson*, 117 Mass. 195. In fact this view of the law is so well established that we think it not necessary to comment further upon it.

There is another phase of this case which is fatal to the judgment. This action was brought upon an alleged debt not yet due. The complaint alleged that the defendants were about to depart from the state without making any provision for the payment of the note, and also that the defendants had disposed of their property with intent to delay and defraud their creditors. These allegations were denied by the answer, and no proof was offered at the trial in support of them. These are material allegations to the complaint, and the facts therein set forth must be proven, like any other fact, to authorize judgment. See *Cox v. Dawson*, 26 Pac. Rep. 973, (decided

by this court at this term.) Judgment is reversed, and the cause remanded to the lower court, with instructions to proceed in accordance with this opinion.

ANDERS, C. J., and SCOTT, STILES, and HOYT, JJ., concur.

(2 Wash. St. 451)

SEATTLE LAND CO. v. DAY.

(Supreme Court of Washington. June 17, 1891.)

BROKER—COMMISSION—EVIDENCE.

1. Where a broker agrees to sell land upon condition that the owner shall first make \$500 out of the sale, the broker to have the rest of the profit as his commission, he is not entitled to commission for merely finding a purchaser, where the sale to such purchaser falls through on account of a defect in the title.

2. Where a party is testifying as to a conversation between himself and the opposite party, he may relate a statement he made in such conversation as to the provisions of a certain written instrument, especially where testimony has been introduced tending to show that such instrument was lost.

Appeal from superior court, King county, T. J. HUMES, Judge.

V. H. Fabin and Geo. D. Blake, for appellant. McClure, Wheeler & Thompson, for appellee.

SCOTT, J. Appellant brought this suit to recover \$1,500 from appellee, as a commission due for finding a purchaser for certain real estate. The controversy was in relation to the contract between the parties to the action. Appellant claimed that appellee listed the property in the ordinary manner with it for sale, and agreed to pay appellant such sum as it could sell it for in excess of \$16,500; that it found a purchaser ready and willing to buy the property, and pay \$18,000 for it, but that upon investigation the title proved to be defective, by reason whereof the sale was prevented. Appellee disputed that the contract was as claimed by appellant, and contended that the agreement was in the nature of a joint speculation between the parties, by the terms of which appellant was to receive nothing unless the sale was actually made. He also insisted that the title was not defective, but admitted that the party procured by appellant refused to take the property on account of what he alleged and was advised was a defect therein. Appellant claimed, further, that if the title was not defective, and if the contract was as claimed by appellee, it was his duty to have entered into a contract with the proposed purchaser at the first opportunity, thereby binding him so that he would have been compelled to take the property, and as appellee did not do so, appellant was entitled to recover. The jury found a verdict for the defendant. Appellant claims that there was no evidence to sustain this verdict, and that it was entitled to recover upon appellee's own showing. It seems that appellee had only a bond for a deed to the property, which was about to expire. This, however, was not the defect complained of. C. B. Holman, appellant's secretary, and who was acting for appellant in the premises, said in his testimony that, in making

the contract, the defendant, Day, stated to him that he had a piece of land under bond, which he was willing to sell for \$16,500 net to him, and asked him if they could procure a purchaser; that he told him he believed they could, and that thereupon Day listed the property with them at the price mentioned, agreeing to give them all over that price they could sell it for, and assured him that the title was all right; that they sold the property through L. H. Griffith & Co. to a Mr. Blewett for \$18,000, and took a check thereon for \$500, which he gave to the defendant at the depot of the Lake Shore & Eastern Railway as he (Day) was about to leave for home; that Day made no objection to the sale, and assured him that it was all right; that a day or so after that—the next day he thought—the defendant was down again, and they went to the office of Griffith & Co., and there met Mr. Blewett, who then again said he was willing to pay the price for the land. Witness did not purport to give all the conversation that took place there, but admitted that Day urged Blewett to take the property "before some little preliminaries of the title were straightened out," which Blewett refused to do. On cross-examination, witness also admitted that he had tried to get the Guaranty Title & Insurance Company to insure the title to the property, and that he failed to effect such insurance. He said he did not understand the failure was due to any defect in the title, but rather to delay upon the part of the company in acting upon the proposition. There was testimony to show that the attempt to insure was prior to the negotiations with Blewett. Edward Blewett, the person to whom the sale had been made, testified that he had no conversation with Mr. Day until he had bought the land from Mr. Griffith, and then went to see Day about the title. Day said he would clear the title up or give him the money back; that he asked him how long it would take to clear it up; Day told him, and he said he would take his money back; that by the terms of the proposed purchase, as he understood them, the title was to be made satisfactory to him. The defendant testified that, at the first conversation he had with Holman in regard to selling the land, he said to Holman that he had the property, under a bond for \$16,000, from J. H. McGraw; that the bond would expire in 10 days, and that, if they could sell the land within that time, he would give them half of what they (the plaintiff and Day) could make out of it; that they made an effort, and failed, and when the bond was about to expire he again saw Holman, and told him he was going to be bothered to raise the money to take the land, and that, if they could make him \$500 out of it, he would rather have that than nothing, and that they could have all they could sell it for over \$16,500; that he did not discuss the matter of title with him; that he never said to them that the title to the land was good; that he did not pretend to have any title; that Holman saw the bond, and also an abstract of the title, which he got and gave to him, and

that Holman knew all about it; that at one time he had some talk with him about getting the title insured; that Holman at that time was trying to make a pool with other parties to take the land, and was afraid something might come up, and suggested that they get it insured, each of them to pay one-half of the cost. Holman testified that he made no effort to sell the property after the negotiations with Blewett.

Appellant moved to strike out the testimony of defendant as to the time the bond had to run, on the ground that it was not the best evidence. Testimony had been introduced tending to show the subsequent loss of the bond, which appellant claimed was not sufficient to admit parol proof of its contents. The court remarked that the witness had been allowed to testify to the length of time the bond had to run without objection, and denied the motion, to which appellant excepted. There was no error therein. The testimony was not offered to prove the contents of the bond, but was given in showing the defendant's version of the contract he entered into with the appellant, and as a part of the conversation which took place at the time between the defendant and Holman. The defendant further testified that he accepted the \$500, and, when Mr. Blewett refused to take the property, he gave it back to him; that the bond had then expired, but that Mr. McGraw took no advantage of the lapse, and at his request executed a deed to Blewett, which he (Day) tendered to Blewett, and which Blewett refused to accept. Witness testified that he always believed the title to be good, and believed so now. The deeds showing the chain of title were not sent up, but it appears from the testimony that the defect complained of was that the deed to McGraw ran to "John H. McGraw, trustee," and a question was made as to the effect of such a description. The character of the defect, however, or whether there was any defect, is immaterial, if the contract was as claimed by the defendant, and the jury must have adopted his view of it. It is not contended that there was any unreasonable delay upon the part of Day in procuring and tendering the deed to Blewett, or in undertaking to carry out his part of the agreement. It is not claimed that any demand was made by appellant at the time Holman gave Day the check, or at any time that he should enter into a contract with Blewett. Had there been such a demand, and an unreasonable delay or failure upon the part of appellee, appellant's position would be well taken; and this would be true, in the absence of a demand, had there been any neglect or failure of the defendant to undertake to fulfill his part of the agreement. But there was no evidence of such a failure. On the contrary, there was testimony by appellant that on the next day after defendant was notified of the bargain, he returned to town, and proceeded to perform his part of it, and that at this very time—the first meeting between Blewett and Day—Blewett objected to the condition of the title, and refused to take the property, which Day was urging him to

do, or to allow Day time to remove or correct the alleged defect. Undoubtedly, if the facts were according to appellant's contention that the contract with Day was the ordinary one to sell upon commission, and that Day represented that the title was all right, or if nothing was said about the title, and appellant had no knowledge of any defect therein which would be likely to cause a non-completion of a sale it might negotiate, appellant was entitled to recover. There was substantially no controversy over the law applicable to such contracts, but the jury found that the contract was as claimed by the defendant; that appellant's pay was contingent upon the fact that the sale should be completed; and that he (Day) should first receive \$500 in excess of the \$16,000 he was to pay McGraw; this was a condition precedent, and there was evidence to support the verdict, and that the circumstances connected with the property were known to appellant, and the contract between it and Day was made with reference thereto; that appellant as well as Day took chances upon the sale being completed and the money received; that it was a joint speculative undertaking, by which the profits were to be divided; that the second conversation was had in the light of the prior talk upon the subject, and was connected therewith; and also in the second conversation, according to the defendant's testimony, it was stated and made a condition that he was to first make \$500 out of any sale appellant might arrange for or negotiate. How could Day make anything unless the sale was completed? The subsequent conversation, according to Day's version of it, simply provided for a different recompense to be paid appellant in case of a sale, from that which was first agreed upon, and did not change the previous understanding, except as to the price appellant was to receive; nothing was said by either party tending to show anything otherwise different. Appellant also claims that the instructions given to the jury were erroneous, but it does not appear that any exceptions were taken thereto, and consequently no point is raised as to them. Judgment affirmed.

ANDERS, C. J., and STILES and HOYT, JJ., concur.

SCHETTLER v. VENDOME TURKISH BATH CO.
(Supreme Court of Washington. June 17, 1891.)

MECHANIC'S LIEN—FIXTURES—LANDLORD AND TENANT—PERSONAL PROPERTY.

Code Wash. 1881, c. 138, which gives mechanics lien on real property, has no application to work done for a tenant on his machinery and appliances used by him on the demised premises, but not so attached to the realty as to become part of it.

Appeal from superior court, King county.
Kilgen, Kelleher & Emory, for appellant.
I. M. Hall, for appellee.

SCOTT, J. Appellant was a tenant occupying certain rooms in a building known as the "Kilgen Block," in the city of Seattle, and was conducting a bathing estab-

lishment therein. Appellee did some work for appellant in the way of repairing, moving, and refitting various steam and soil pipes, and in changing some of the other appliances used in carrying on said business, and furnished certain materials used in performing said work. Appellee's claim being disputed, he filed a notice of a lien purporting to cover appellant's leasehold interest in said rooms, and the engine, boilers, machinery, water-works, and all of the appliances used in said establishment, and sought to foreclose such lien in this action. Appellant claimed that the work was not performed, and the materials were not used in the construction, alteration, or repair of the building, or of any structure; that it was all done or used upon personal property not attached to the building, so as to become a part of it; and that no lien could be had thereon under such circumstances; and appellant moved for a nonsuit upon this ground when the appellee's case was closed. The court reopened the case, to allow further proof by appellee of the nature and character of the work, and appellee introduced testimony in relation thereto, which, however, fully sustained appellant's claim that the things upon which the work was performed, and for which the materials were furnished, were all independent of the building and there was no testimony or proof to the contrary. Nevertheless, the court rendered a judgment and decree for the plaintiff. A further point is made by appellant that it was entitled to a trial by jury to ascertain the sum, if any, which it was owing, the amount claimed being disputed, and a trial by jury demanded. That there can be no lien obtained upon personal property, under the provisions of chapter 138 of the Code of 1881, relating to "liens of mechanics and others upon real property," under which the lien here is claimed, we have, in effect, decided since this case was tried in the superior court, (see Kellogg v. Manufacturing Co., Wash., 25 Pac. Rep. 461,) and there was no law authorizing such a lien. There is nothing in the case of which equity could take cognizance, and appellant's points are well taken. The case is reversed, and remanded to the court below, with instructions to dismiss the suit, without prejudice, however, to an action at law to recover the amount claimed.

ANDERS, C. J., and DUNBAR, HOYT, STILES, JJ., concur.

VAIL v. TILLMAN et al.

(Supreme Court of Washington. June 19, 1891.)

SPECIFIC PERFORMANCE—CONTRACT—MUTUAL MISTAKE—PLEADING.

A complaint for specific performance of a contract to convey one acre of land "off of the north-west corner" of a certain lot, for which the buyer is "to give his note, payable nine months from date," is sufficient on demurrer, when it alleges that it was intended to convey "one acre, to be taken in a square form out of the north-west corner" of such lot, the buyer to pay "one dollar in cash at this date, and the balance nine months from date," and that by mutual mistake these elements were omitted from the contract.

Appeal from district court, Clallam county.

Action by George W. Vail against Charles Tillman and others for specific performance of a contract to convey lands. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

Finch, Snook & Glasgow, for appellant.

HOYT, J. Appellant by his complaint filed in the lower court sought to secure the specific performance of a contract for the purchase of certain lands therein described. The memorandum of the contract, reduced to writing, and signed by the appellees, was as follows: "This is to certify that we have this day sold to George W. Vail the following acre of land, to-wit, off of the north-west corner of suburban lot or block thirty-one, (31.) located on the town-site established by the U. S. government at Port Angeles, Washington Territory, for which we agree to make a warranty deed to George W. Vail and his heirs at our earliest convenience, and for which George W. Vail is to give his note, payable nine months from date, and a mortgage on the land purchased to secure the payment of the note." The complaint alleged that after the making of said contract the appellees put the appellant in possession of the land in question; that appellant, with the knowledge and consent of appellees, had fenced the same, and made certain improvements thereon, and was still in the open possession thereof. It will be seen, by an examination of said memorandum, that some of the elements necessary to a perfect contract are omitted, but I am inclined to the opinion that such omissions are not sufficient to invalidate said contract, when taken in connection with such possession and improvements, as the complaint alleges on the part of the appellant. But, be this as it may, the allegations of the complaint sufficiently show that the omissions in said memorandum occurred through the mutual mistake of the parties thereto, and that the contract which was in fact agreed to by the parties, and which was intended to have been embodied in said writing, was as follows: "This is to certify that we have this day sold to George W. Vail the following acre of land, to-wit, one acre, to be taken in a square form out of the north-west corner of suburban lot thirty-one, (31.) located in the town-site established by the United States government at Port Angeles, Washington Territory, for which we agree to make a general warranty deed at our earliest convenience, and for which George W. Vail is to pay us one hundred dollars, as follows: One dollar in cash at this date, and ninety-nine dollars nine months from date, with ten per centum per annum interest from date; and the said George W. Vail agrees to give us his note for said deferred payment, and to secure the payment of said note by a first mortgage on the said premises." I think the memorandum thus intended to have been executed is clearly within the principles of the case of *Langert v. Ross*, (decided by this court,) 24 Pac. Rep. 443, and must therefore be held to be sufficient.

The demurrer to the complaint, of course, admitted all the allegations as to mistake, possession, etc.; and, as the contract alleged to have been the contract of the parties as intended by them is sufficient, it follows that the demurrer to the complaint should have been overruled; and that, for the error of the court in sustaining it, the judgment must be reversed, and the cause remanded to the court, with instructions to overrule the demurrer, and proceed in said action in accordance with the principles of this opinion.

ANDERS, C. J., and STILES, SCOTT, and DUNBAR, JJ., concur.

MEESMAN v. STATE INS. CO.

(*Supreme Court of Washington*. June 17, 1891.)

FIRE INSURANCE—ACTION ON POLICY—LIMITATIONS.

Where a policy of fire insurance provides that no action upon the policy "shall be sustained unless commenced within six months after the fire," an action cannot be brought on the policy after the lapse of six months and three days after the fire, even though the policy also provides that no action shall be begun until certain examinations have been made, which examinations were not made nor waived by the company until 13 days after the fire. DUNBAR, J., dissenting.

Appeal from superior court, Clarke county.

E. F. Coover and *R. & E. B. Williams & Carey*, for appellant. *Gilbert & Snow*, for respondent.

ANDERS, C. J. This is an action upon a fire insurance policy issued by appellant to appellee to recover a loss amounting to \$221, alleged to have been sustained by appellee by reason of the destruction by fire of the property insured. The complaint was filed February 3, 1890, and service duly made. Defendant appeared and answered, setting up as a defense false representations made by plaintiff to defendant in his application for insurance, concerning his title to the land upon which the insured buildings were situated; and that, by the terms of the policy, action should be commenced thereon, if at all, within six months after the date of the fire. Plaintiff, in his reply, denied making any false representations, or that he knew that any statements or representations contained in his said application were false or untrue; and alleged that at the time of making application for the policy of insurance he fully and truly explained to the agent of the defendant, who received said application, the true nature of his right and title in and to said land; and that said agent thereafter filled out said application, and plaintiff signed the same in good faith, and relying upon and believing the statement of said agent then and there made to plaintiff that the said application was right and in proper form. Plaintiff further alleged that his loss was adjusted by and between himself and the defendant on the 8th day of August, 1889, at \$221. The issues having been thus joined, the case was tried by a jury, who returned a verdict in favor of the plaintiff for the sum claimed in the complaint. A

motion for a new trial having been denied, judgment was entered in favor of the plaintiff and against defendant for the amount specified in the verdict. Defendant brings the case to this court for review, and seeks a reversal of the judgment for errors duly assigned.

Counsel for appellant contend that the action is barred by limitation fixed in the policy for bringing the action; and, in order to determine that question, it becomes necessary to examine the contract as made by the parties thereto. Among the provisions in the policy are the following: "It is hereby expressly covenanted and agreed by the parties hereto that no suit or action against this company for the recovery of any claim under and by virtue of this policy shall be sustained in any court of law or chancery unless such suit or action shall be commenced within six months after the time the fire shall have occurred; and in case any such suit or action shall be commenced against this company after the expiration of the aforesaid six months the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding. * * * All persons having a claim under this policy for loss or damage shall proceed at once to put the property saved or damaged in the best order possible, separating the damaged from the undamaged, and shall give immediate notice, and render a particular account thereof, in writing, to the company, stating the time, origin, and circumstances of the fire, the occupancy of the building insured or containing the property insured at the time of the loss, the whole value and ownership of the property insured, and all incumbrances; all of which shall be verified by the affidavit of the assured and claimant. If required, the assured and claimant shall be examined and re-examined under oath by any person appointed by the company, at such time or times and place or places, in the county where the loss occurs, as the company or such persons may require, touching all questions relating to the claim, and shall subscribe to the same; and until such examination (if required) shall have been submitted to, subscribed, and verified as herein specified, the company shall not be called upon to consider such claim or loss, nor shall the same become due and payable: * * * provided, further, that it shall be optional with the company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention so to do within sixty days after receipt of proofs herein required; and, in case the company elect to rebuild, the assured shall, if required, furnish plans and specifications of the buildings destroyed. * * * In case of any differences of opinion as to the amount of loss or damage, such differences may be submitted to the judgment of two disinterested and competent men mutually chosen (who, in case of disagreement, shall select a third.) whose award shall be conclusive and binding on both parties as to the amount

only." The fire occurred on July 31, 1889. On August 8, 1889, the agents of the company went to the plaintiff to determine the amount of his loss. The plaintiff testified, "My loss was adjusted at \$221.00;" and this was not disputed by the agents themselves when called as witnesses on the part of the defendant. They did not agree that the loss would be paid, but at most only promised to do the best they could for plaintiff. On August 13, 1889, however, the secretary of the insurance company wrote a letter to the plaintiff, in which he said: "We cannot see that you have any claim against this company for your loss, and must therefore decline to give the matter further consideration." As before stated, plaintiff commenced this action on February 3, 1890, which was six months and three days after the fire occurred. It is not claimed by counsel for appellee that the limitation of time expressed in the policy for the commencement of an action for the loss sustained is invalid, and, so far as we have been able to ascertain from an examination of adjudicated cases, such stipulations have been uniformly held valid and binding. But counsel contend that plaintiff could not have maintained an action against the company until August 13, 1889, at which time the company refused to pay the loss, and that the action was therefore commenced in time, although more than six months had elapsed since the happening of the fire. In other words, appellee claims that the time of limitation did not commence to run at the date of the fire, but at the time when the cause of action accrued, and that all of the provisions of the policy, taken together, warrant that construction. Numerous authorities are cited in support of appellee's contention. The decisions in these cases are based upon the assumption that the provision in the policy postponing a right of action until proof of loss is made, or until a certain number of days thereafter, is in conflict with the provision limiting the time within which an action may be commenced, and that these stipulations must therefore be harmonized by judicial construction. We cannot assent to this doctrine. The most careful reading of the provisions and stipulations in the policy now before us will fail to disclose any conflict therein. In the case at bar every stipulation in favor of the company was waived, excepting that providing for the proof of loss. After adjustment of the loss, and the waiver of all other conditions, appellee still had five and one-half months of the stipulated time remaining. No excuse or reason is given by him for his procrastination; and yet we are now called upon to sustain the action, notwithstanding the delay in bringing it until after the contract limitation had expired, upon the ground that the contract really means something different from what it says. The parties stipulated that no action upon the policy "shall be sustained unless commenced within six months after the time the fire shall have occurred," and that "the lapse of time shall be taken and admitted as conclusive evidence" against the validity of any claim against the com-

pany. This language is certainly plain and unambiguous. The other stipulations simply provide that no action shall be commenced until certain things therein specified shall have been done; and the evident meaning of the whole contract is that no action shall be commenced before the doing of these things, nor, in any event, after the lapse of six months. This construction gives full force and effect to every stipulation and provision in the policy, and does violence to none. But it is urged by counsel for appellee that, inasmuch as the company has secured itself against being sued immediately on the occurrence of the loss, it must be presumed not to have been the intention of the parties to suspend the remedy, and at the same time to provide for the running of the period of limitation. We are unable to perceive, however, how any such presumption can arise without, in effect, substituting another and different contract for the one made by the parties. It was but natural and reasonable for the insurance company to protect itself against the cost and annoyance of an action until it could have an opportunity to investigate the circumstances attending the fire by which the loss occurred, and ascertain its liability, and determine whether to replace the property or pay the loss, or to refuse to pay it, if satisfied of the unjustness of the claim; and appellee, having consented to such a stipulation, should not now, in our opinion, be heard to object that the company thereby waived or extended the limitation of time for bringing an action. It is proper to remark, in passing, that this policy differs essentially in the provision respecting the limitation of actions from most, if not all, of those in controversy in the cases cited by appellee. In most of those cases a period of 60 days was reserved after proof of loss, before the expiration of which no action could be commenced. And in the leading case of *Steen v. Insurance Co.*, 89 N. Y. 315, cited by appellee, *DANFORTH, J.*, says: "No doubt the appellant could have stipulated that the time of the fire should be taken as the event from the happening of which the limitation should run, but it would require distinct language to show that such was the intention of the parties. It is not used here. It is found in *Schroeder v. Insurance Co.*, 2 Phila. 286, one of the cases cited by appellant." In the policy before us we have almost identically the same "distinct language" that was used in the policy in the *Schroeder Case*, and it is impossible to give it any different construction from the one there adopted. The following cases also support the view we take of this question: *King v. Watertown Ins. Co.*, 47 Hun, 1; *Travelers' Ins. Co. v. California Ins. Co.*, (N. D.) 45 N. W. Rep. 703; *Bradley v. Insurance Co.*, 28 Mo. App. 7; *Johnson v. Insurance Co.*, 91 Ill 92; *Fullam v. Insurance Co.*, 7 Gray, 61; *Thompson v. Insurance Co.*, 25 Fed. Rep. 296; *Insurance Co. v. Wells*, 83 Va. 736, 8 S. E. Rep. 349; *Tasker v. Insurance Co.*, 58 N. H. 469. Holding, as we are constrained to do, that the action is barred by the lapse of time, it is not necessary to exam-

ine the other objections raised by appellant. The judgment of the court below is reversed, and the action dismissed.

SCOTT, HOTT, and STILES, JJ., concur.

DUNBAR, J., (*dissenting*.) I am unable to agree with the majority opinion in this case, either in its logic or its conclusion. Of course, if the provisions in regard to limitation were considered without reference to any other provisions in the policy, there is no room for construction, and this action would have been barred upon the 30th of July; but courts should not construe conditions in a contract as independent propositions segregated from the rest of the contract. This contract, like every other, must be construed with reference to all of its provisions, and especially must this provision be construed with reference to other provisions on the same subject. The subject of this provision is limitation, or the time within which the company should be sued or should not be sued. But there is another provision in the policy,—that the company shall not be liable after the fire occurs until an examination is made of the loss, at such time or times as the company may require. This provision in the policy is on the same subject as is the provision relied upon by appellants. It is the subject of limitation, and prescribes the time during which the company cannot be sued for the loss. And the two provisions must be construed together, and the intention of the contracting parties must be gathered, not from any one express condition, but from the whole contract. Let us look further at the provisions of this policy. The time within which this proof must be made is not limited, but the time shall be at such time as the company shall require; and the law will probably construe this to be a reasonable time. But there is another provision which gives the company 60 days more after the receipt of the proof to make up its mind whether it will rebuild or pay the money. During this 60 days additional the company cannot be sued, and if at the end of that time it concludes not to pay at all, probably one-half of the time allowed the insured has expired. And, as the fallacy of a position is best shown by distorting it, I will presume that two more provisions granting additional time to the company are injected by them into the policy, and the time of the insured in which to seek his remedy shall be exhausted, and yet the language of the first provision in reference to the six-months limitation is perfectly plain and unambiguous. The general rule in regard to limitation is that it does not begin to run until after the right of action accrues. The very essence and central idea of the law is that the party shall have the right during all the time within the statute to bring his action, and, if anything occurs to prevent the exercise of this right, the statute in the mean time is not running. It is true that this is so by provision of the statute, but it is a provision so common, so generally understood, and so universally acted upon, that

parties may well be supposed to have contracted for a shorter limitation with reference to conditions universally surrounding and attaching to statutes of limitation. The provision limiting the right of action to six months is inserted for the special benefit of the company. It is a restriction of the legal rights of the insured; and, if there are any doubts as to its proper import, those doubts should be resolved most strongly in favor of the insured, against whom it was intended to operate. *Ames v. Insurance Co.*, 14 N. Y. 253; *Mayor, etc., v. Insurance Co.*, 39 N. Y. 45; *Hay v. Insurance Co.*, 77 N. Y. 235; *Steen v. Insurance Co.*, 89 N. Y. 315; *Chandler v. Insurance Co.*, 21 Minn. 85; *Killips v. Insurance Co.*, 28 Wis. 472; *Martin v. Insurance Co.*, 44 N. J. Law, 485; *Ellis v. Insurance Co.*, (Iowa,) 20 N. W. Rep. 792; *Vette v. Insurance Co.*, 30 Fed. Rep. 668. It is true that in many of the cases cited the language of the provision is "within six months [or twelve months, as the case may be] after the loss shall have occurred," but those cases cannot be distinguished in principle from those where the language employed is "six months from the time of the fire." The time of the fire is the time of the loss, as a matter of course, and it is idle to multiply words in trying to show a difference where it does not exist. It is true the court in *Steen v. Insurance Co.*, 89 N. Y. 315, undertook incidentally to distinguish the language, but the attempt was a failure, and the courts generally, in holding in favor of the view urged by appellee, have placed their decisions squarely upon the ground that all the conditions of the policy must be construed together, and that, construing them together, the intention was gathered that the limitation did not begin to run at the date of the loss, but at the time when the right to sue accrued. In *Vette v. Insurance Co.*, cited above, the court says: "And when does the period of limitation begin to run, in view of other stipulations in the policy? It would seem reasonable to so construe the stipulations as to give the insured the full term of six months in which to sue after the right to sue has accrued; and this, I think, was the intent of the parties to the contract. The loss is not payable until sixty days after proofs are furnished, and by a further provision the assured is deprived of a right to sue until an award has been made, fixing the amount of the claim. In the mean time, according to this theory, the limitation prescribed by the policy is running against the demand, and barring plaintiff of his remedy, although the time has not arrived when it is possible for him to maintain an action. Ordinarily a statute of limitations does not begin to run until a right of action has accrued,—that is to say, until the plaintiff has full liberty to sue if he is so inclined; and I see no good reason for construing the special statute of limitations imported into this contract in such way as to make it operative during a period when by virtue of other stipulations in the contract the right of action is suspended." To the same effect is *Spare v. Insurance Co.*, 17

Fed. Rep. 568; Chandler v. Insurance Co., 21 Minn. 85; *Mayor, etc., v. Insurance Co.*, 39 N. Y. 45; *Ellis v. Insurance Co.*, 64 Iowa, 507, 20 N. W. Rep. 782; *Miller v. Insurance Co.*, 70 Iowa, 704, 29 N. W. Rep. 411; *Hay v. Insurance Co.*, 77 N. Y. 235; *Barber v. Insurance Co.*, 16 W. Va. 658; 2 May, Ins. § 479; *Mix v. Insurance Co.*, 9 Hun, 397; *Killips v. Insurance Co.*, 28 Wis. 472; *Murdock v. Insurance Co.*, 33 W. Va. 407.¹ In *Friezen v. Insurance Co.*, 30 Fed. Rep. 352, the policy provided, just as this one does, that the action to recover upon the policy should be commenced within six months after the fire occurred, with a similar provision with regard to the time of payment, and the court held that these provisions should all be construed together, and the six-months limitation bereckoned, not from the occurrence of the fire, but from the time the loss was due and payable. "In any other construction," said the court, "the insured's right of action might be barred before it had occurred." Also in *Case v. Insurance Co.*, 83 Cal. 473, 23 Pac. Rep. 534, the provision is that there shall be no recovery unless suit or action shall be commenced within 12 months next after the fire, and provides also that no suit shall be commenced until after the loss is appraised. It was held that the limitation did not run from the time of the fire, but from the time the right of action accrued. Other courts, notably *Johnson v. Insurance Co.*, 91 Ill. 92; *Glass v. Walker*, 66 Mo. 32; *Fullam v. Insurance Co.*, 7 Gray, 61; *Bradley v. Insurance Co.*, 28 Mo. App. 7,—have held that the letter of the limitation clause must govern, and that the period begins from the loss; but I think that the contention of the appellee is based both on the weight of authority and right reasoning. The courts must construe the contract so as to give force to all its provisions, if possible, and make them all operative and harmonious. It was the evident intention of the contracting parties that the statutory time of limitation should be shortened to six months, and that six months should be substituted instead of six years, as it would be under the law. Under that provision, standing by itself, the insured would have had six months from the date of the fire during any time of which he could have brought his action to recover his loss. But the company, for its own protection, imposed other conditions having indirect reference to and modifying the provisions giving the party the right to sue any time within the six months, so that it will be seen that, even for the benefit of the company, the subsequent condition of immunity from suit for a certain time must have been made with reference to the first provision in relation to the limitation, and this provision must not be construed relatively in favor of the interests of one party and independently against the interests of the other. It seems plain to me that the provisions depend one upon the other, and must be construed together; that the parties understood that the company was not to be harassed with

¹ 10 S. E. Rep. 777.

a suit until it had had ample opportunity to adjust the loss; and that the insured was to have the benefit, not of three months, or of four months, but of six months, to bring his action.

On the proposition that Meesman made misrepresentations in his application in regard to the ownership of the land, that question was raised by the pleadings, and went to the jury, and the jury found for plaintiff under the instructions of the court, which correctly stated the law. It was not a question of varying a written contract by parol testimony; it was simply a question of whether the insured or the agent of the company was responsible for certain answers to certain questions in the application. One or two other points were made, but they are of trifling importance; and, even if errors were made, it was evidently without prejudice, and would not justify a reversal of the case. I think the judgment should be affirmed.

(7 Utah, 428)

BRERETON v. MILLER *et al.*

(Supreme Court of Utah. July 1, 1891.)

FORECLOSURE OF MORTGAGES—PERSONAL JUDGMENT—EQUITY.

Comp. Laws Utah 1888, § 3460, provides that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage, and the court may by its judgment direct a sale of the incumbered property, and if it appear that the proceeds are insufficient, and a balance still remain due, judgment can then be entered for such balance against defendant. The organic act of Utah (Rev. St. U. S. § 1863) declares that "the supreme court and the district courts, respectively, of every territory, shall possess chancery as well as common-law jurisdiction. *Held* that, where a mortgagor has conveyed the premises to another by warranty deed, who is made co-defendant in foreclosure, the court has power to enter a personal judgment against the former, and require execution to be issued thereon before selling the mortgaged lands.

Appeal from district court, first district; J. W. BLACKBURN, Justice.

This was an action brought by Richard Brereton against Charles H. Miller and M. M. Kellogg, administrator of the estate of John M. Drake, deceased, to foreclose a mortgage given by defendant to plaintiff. Comp. Laws Utah, 1888, § 3460, provides: "There can be but one action for the recovery of any debt, or the enforcement of any right, secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property, or so much thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court, and the expenses of the sale, and the amount due to the plaintiff; and sales of real estate, under judgments of foreclosure of mortgages and liens, are subject to redemption as in case of sales under execution, and if it appear from the return of the officer making the sale that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it

becomes a lien on the real estate of such judgment debtor, as in other cases, on which execution may be issued." Judgment for plaintiff, and defendant Miller appeals.

King & Houtz, for appellant. *E. E. Corfman*, for respondent.

MINER, J. It is alleged in the complaint in this cause that on the 21st day of June, 1888, the appellant, Charles H. Miller, made and delivered to the plaintiff his promissory note for the sum of \$200 and interest, which note he secured by mortgage on real estate, and that the same was due and unpaid on the 26th day of June, 1890, at which time this action was brought to foreclose the mortgage; that on December 31, 1889, the defendant John M. Drake purchased the mortgaged premises from Miller, paying him the purchase price in full, and receiving from Miller and wife a full covenant warranty deed therefor; that Drake died before the commencement of this action, and M. M. Kellogg, the defendant, was appointed administrator of his estate. Plaintiff also asks in his complaint a personal judgment against defendant Miller, who is claimed to be personally liable for the debt in question; and that a general execution issue against him to satisfy said judgment and costs; and that on the return of such execution, if it shall appear that such personal judgment cannot be satisfied, then said mortgage be foreclosed, and said mortgaged premises be sold, and the proceeds be applied to the satisfaction of the personal judgment, and payment of any deficiency remaining unpaid on such personal judgment. After the return of such general execution against Miller, the default of all the defendants was duly entered, after which a judgment against Miller and a decree of foreclosure were entered substantially in accordance with the prayer of the complaint. The findings of fact support the allegations in the complaint. The defendant Miller appeals, and alleges as error: (1) A personal judgment is rendered against him for \$238.40 when the debt is secured by a mortgage, and without a judgment of foreclosure and sale of the mortgaged premises first had. (2) An execution is adjudged against defendant Miller to satisfy the judgment. (3) That the mortgage is adjudged and ordered foreclosed, and the premises sold, only in the event that the judgment remains unsatisfied, in whole or in part, on the return of the execution against Miller. (4) That the judgment of foreclosure and sale is uncertain, and depends upon the contingency of there being a deficiency remaining unpaid on the return of the execution against Miller. (5) The judgment requires sale of all the property of Miller liable to execution before the mortgaged property can be sold to pay the debt remaining to be paid, which is contrary to law.

It is contended by counsel for the appellant that, under the provisions of section 3460 of the Compiled Laws of 1888, there is but one action for the recovery of any debt, or the enforcement of any right secured by mortgage or lien upon real or personal property, which action, must be in accord-

ance with the provisions of that chapter; and that, if any personal judgment is rendered, it must be accompanied with an order of sale of the mortgaged premises; and that a judgment so rendered is, and must be, held in abeyance by force of the statute until the mortgaged property is sold, and the proceeds applied on the judgment. We think the first part of the section referred to above has reference to the action, and not to the remedy or form of judgment or decree that a court of equity may be called upon to render in the action, for this must depend upon the rights and liabilities of the parties over whom the court has jurisdiction under the facts proved or found by the trial court. The organic act (Rev. St. U. S. § 1808; 1 Comp. Laws Utah 1888, p. 57, provides that "the supreme court and the district courts, respectively, of every territory, shall possess chancery as well as common-law jurisdiction." The mode of procedure in an action in the territorial courts is governed by the law of the territory. *Hornbuckle v. Toombs*, 18 Wall. 648. But the jurisdiction of the supreme and district courts, under the section last referred to, cannot be abridged or legislated away by the territory. "The jurisdiction thus conferred upon the district and supreme courts of the territory is such jurisdiction, at common law and in equity, as was exercised by the common-law courts of England." *People v. Clayton*, 4 Utah, 421, 11 Pac. Rep. 206; *Enright v. Grant*, 5 Utah, 340, 15 Pac. Rep. 268; *Bank v. County of Yankton*, 101 U. S. 129; *Stevenson v. Moody*, (Idaho,) 12 Pac. Rep. 902; *Dunphy v. Kleinsmith*, 11 Wall. 610. And the jurisdiction of the district courts extends to all civil actions for relief formerly given in courts of equity, (1 Comp. Laws, 1888, p. 103;) and this common-law and chancery jurisdiction, as conferred by act of congress passed April 7, 1874, (1 Comp. Laws Utah, p. 99,) may be exercised jointly in the same proceeding or action. The uncertainty that once prevailed as to the general common-law and chancery jurisdiction of courts in the same proceeding is made certain by this act of congress; and in ordering judgment against the defendant Miller, who was personally liable for the debt, (and in justice between the parties was bound to pay it,) the court had ample power to order execution issued upon it, and, if it was returned unsatisfied in whole or in part, to authorize the sale of the property covered by the mortgage. This would be within its power, and the statute referred to could not abridge that right.

In this case it appears that the appellant, Miller, gave this note and mortgage to the plaintiff, and afterwards sold the land covered by the mortgage to John M. Drake by a full covenant warranty deed, receiving the full value of such land without making any provision for the payment of the note and mortgage he had given thereon, and without any agreement on the part of Drake to assume and pay the note and mortgage, and, so far as it appears, without Drake's knowledge of the existence of the mortgage. Miller, then, was simply using Drake's land as securi-

ty for his individual debt without Drake's assent, and in violation of the express covenant in the deed. Under the general chancery power possessed by the court, it could do no less than adjudicate and pass upon the rights of all the parties before it, so as to mete out substantial justice to all in the same proceeding, and thus prevent a circuitry of action on the part of the Drake estate. If the contention of the appellant should be carried out, the plaintiff must proceed with his foreclosure, and sell the land first, and then resort to his execution against Miller for the residue of his claim upon the judgment, if any; and this course would make it necessary for the Drake estate (though an innocent and possibly a defrauded party) to resort to its separate action against Miller on his covenant of warranty,—a proceeding entirely unnecessary under the practice and statute of this territory. In this territory parties are at liberty to adopt in the foreclosure of mortgages the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises and application of the proceeds upon the decree, and then apply for an ascertainment of any deficiency, and for an execution for the deficiency, if any; or they may take their judgment at law, and also a decree in equity, for the sale of the property, as in this case; and then the plaintiff may proceed to enforce either, as the court may order, but he cannot proceed upon both at the same time. The assumption by the appellant that because Miller gave to Brereton his promissory note, and secured the note by a mortgage, therefore Brereton agrees to look to the land as a primary fund for the payment of the debt, and that Miller has a right to insist that he do so against the rights and equities of the Drake estate, cannot be acceded to. The mortgage was made for Brereton's security, and not for Miller's protection; and, as between these two and the Drake estate, it was competent for a court of equity to direct in what manner the claim should be collected, so as to protect the party that has been seemingly injured by Miller, or who might be seriously damaged, if compelled to resort to a suit upon the covenant in the deed, and rely upon the uncertainty of Miller's personal responsibility at the end of the litigation for the satisfaction of his claim; and when, as in this case, it is conceded that a personal judgment may be rendered in a foreclosure case, and a decree for foreclosure at the same time, the right to execution upon a judgment is necessarily within the power of the court to grant, as a judgment is not such unless it can be enforced, and the satisfaction of this execution upon the judgment is a satisfaction of both judgment and decree. If the execution be returned by the sheriff unsatisfied, in whole or in part, such return is a sufficient showing of the fact to justify the further proceedings to foreclose and sell the mortgaged premises under the decree, and the court may make such further order as may be deemed necessary in the premises, as affecting the sale upon the

decree. As a court of equity, it has full power and control over the matter in controversy, and may so shape its further action as to protect the rights of each party, and at the same time effectually dispose of all the contention in this one action, as justice may demand. *Englund v. Lewis*, 25 Cal. 337, 357; *Budd v. Long*, 13 Fla. 301. The judgment, order, and decree of the lower court is affirmed, with costs.

ZANE, C. J., and ANDERSON, J., concur.

(7 Utah 433)

HIRSCHBERG OPTICAL CO. v. DALTON, NYE & CANNON CO.

(Supreme Court of Utah. July 1, 1891.)

SALE—FRAUDULENT REPRESENTATIONS—EVIDENCE.

In an action to recover for optical goods sold and delivered to a company engaged in selling books, stationery, and toys, it appeared that plaintiff's salesman represented that it held a patent on the goods, and that they were superior to any in the market, and that he would guaranty the prices to be right; and that defendant had told the salesman that it knew nothing about spectacles or their current prices; that the salesman was an expert in his line, and defendant relied upon his representations. It was shown that the same quality of goods could be bought of other houses. *Held* error to exclude evidence tending to show that the price named in the order was above current prices.

Appeal from district court, first district; JAMES A. MINER, Justice.

N. Tanner, Jr., and Evans & Rogers, for appellants. Smith & Smith, for respondents.

ZANE, C. J. This suit was brought for the price of optical goods delivered upon the order of the defendant and returned to the plaintiff upon the ground that the order was obtained upon fraudulent representations. It appears from the record that the traveling salesman of the latter, a company located at St. Louis, Mo., and engaged in the sale of optical instruments, induced the former, a company engaged in selling books, stationery, and toys at Ogden City, Utah, to deliver the order in question upon the following representations: That the plaintiff held a patent for the manufacture and sale of the goods; that it had the exclusive right to manufacture and sell them; that they were far superior to any in the market; and that the prices named in the order were right, and that he would guaranty them to be right. It also appears that the defendant's agents, before making the order, told plaintiff's salesman that they knew nothing about spectacles or their current prices, and it appears that the salesman was an expert in that line of goods, and that he knew the current prices of them; and the evidence authorizes the inference that the defendant's agents relied upon such representations. It was also shown that the same kind and quality of spectacles could be bought of other salesmen and of other houses, and that the spectacles in question were not superior to others in the market; and the defendant offered to prove the current prices of such goods, for the purpose of showing that the price

named in the order was above such current prices. The defendant excepted to the ruling of the court overruling its offer to prove current prices, and to the charge of the court to the jury to return a verdict against defendant for the amount sued for, and to the order of the court denying defendant's motion for a new trial, and also to the judgment on the verdict; and appealed from such orders and judgment, and assigns error upon such rulings and such order and judgment.

The question presented is, was the defendant authorized to rely upon the representations stated? In other words, were they fraudulent? The statement that the plaintiff held a patent for the manufacture and sale of the goods, and the sole and exclusive right to sell them, and the representation that the price agreed upon was the current price, were statements of facts by the salesman to the defendant. And the further representation that their quality was greatly superior to any in the market was made by an expert to men who informed him that they knew nothing about that line of goods; and he must have known that the statement was false, and the inference is that he intended that it should be relied upon as inducement to the purchase. The exclusive right of the plaintiff to sell, and that the price agreed upon was the market or current price, and that the quality was greatly superior to any to be had in the market, were material facts to the defendant, who was buying to sell again on the market. The experience and observation of the parties with respect to the subject matter of the representations were not equal. The salesman knew whether his statements were true or false. The purchaser, because of his inexperience and lack of information, could not know whether they were true or false. He could only rely upon the representations of the former, or act upon mere surmise. Assuming that there was a current price, the statement of the salesman that the price agreed upon was right, or was the current price, was not the mere expression of an opinion. It requires special knowledge and skill to discover superior qualities in optical instruments, and because the salesman possessed that knowledge and skill, and the purchaser did not, the latter had a right to rely on the representations of the former as to quality. "The general praise of his own wares by a seller, commonly called 'puffing,' for the purpose of enhancing them in the buyer's estimation, has always been allowed, provided it is kept within reasonable bounds; that is, provided the praise is general, and the language is not the positive affirmation of a specific fact affecting the quality, so as to be an express warranty, and is not the intentional assertion of a specific and material fact known to the party to be false, so as to be a fraudulent representation. * * * Wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact, and rely and

act upon it as such, then the statement clearly becomes an affirmation of fact, within the meaning of the general rule, and may be a fraudulent misrepresentation." 2 Pom. Eq. Jur. § 878; Picard v. McCormick, 11 Mich. 68; Simar v. Canaday, 53 N. Y. 298; McClellan v. Scott, 24 Wis. 81. We are of the opinion that the court below erred in its ruling excluding evidence of the current prices of goods similar to those in question in this case, and in excluding evidence that such goods could be bought of other salesmen, or at retail at Ogden and elsewhere, and in its charge to the jury, and also in overruling defendant's motion for a new trial, and in giving judgment thereon. The judgment of the court below is reversed, and the cause remanded.

ANDERSON and BLACKBURN, JJ., concur.

(7 Utah, 437)

UNITED STATES v. WEST.

(Supreme Court of Utah. July 1, 1891.)

BIGAMY AND ADULTERY—INDICTMENT—VERDICT—JUDGMENT—PRACTICE.

1. An indictment charging bigamy in one count, and adultery with the same woman in another, is good under Rev. St. U. S. § 1024, which provides that when there are several charges against a person for the same act or transaction, or for two or more acts or transactions committed together, the whole may be joined in one indictment in separate counts.

2. Such an indictment is also good at common law. The prosecutor could enter a *nolle prosequi* as to one count and proceed under the other, or the court could compel him to elect which count to proceed under.

3. Where the proceedings at the trial are not preserved by a bill of exceptions, nor a motion made for a new trial or in arrest of judgment, the appellate court cannot consider an assignment of error in that the court received and entered a verdict on both counts of an indictment charging bigamy in one count and adultery in the other.

4. It is not error, on such a verdict, to enter a judgment and sentence for both crimes.

5. Where bigamy and adultery are committed on the same day with the same woman, the two offenses may be charged in separate counts in the same indictment.

Appeal from district court, third district; T. J. ANDERSON, Justice.

Rev. St. U. S. § 1024, provides that "when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts."

H. V. A. Ferguson and Baldwin & Tattock, for appellant. C. S. Varian, U. S. Atty.

BLACKBURN, J. The defendant was indicted for two offenses, to-wit, bigamy and adultery, in one indictment in two counts. He did not demur to the indictment. He was convicted on both, and sentenced

on both charges. He appeals from the judgment, and assigns for error:

1. The uniting of two offenses in one indictment. This is untenable if the territorial statute is applicable. It provides that this defect, if any, in the indictment must be taken advantage of by demurrer. 2 Comp. Laws Utah, § 4972, subd. 3. If the territorial statute is inapplicable, this indictment would be good under section 1024, Rev. St. U. S. It is good at common law. The prosecutor could *nolle* one count and proceed under the other, or the court could compel him to elect which count he would proceed under. Whart. Crim. Pl. § 290; U. S. v. Nye, 4 Fed. Rep. 888.

2. The court erred in receiving and entering a verdict on both counts of the indictment. The proceedings at the trial are not preserved by a bill of exceptions, nor was a motion made for a new trial or in arrest of judgment, so that the errors at the trial, if any, cannot be reviewed by the appellate court. We only infer from the verdict that the appellant was tried on both charges. At common law, a defendant could be convicted on two distinct felonies at one trial if they were of one general nature, and subject to like punishment, (Carlton v. Com., 5 Metc., Mass., 532,) and several judgments may be rendered on the same, (Kroer v. People, 78 Ill. 294; Fletcher v. People, 81 Ill. 118.)

3. The court erred in imposing judgment and sentence upon two crimes and two convictions upon the verdict. This is no error. Authorities as above.

4. That the court erred in splitting upon act so as to constitute two offenses, as appears from the face of the indictment. This contention is based on a false assumption. The indictment contains two counts: (1) For bigamy; (2) for adultery, —both alleged to have been committed on the same day with the same person. What the evidence was at the trial we do not know, for it is not preserved in the record; but it makes no difference, if the two offenses were committed on the same day, and with the same person. The bigamy was completed when the appellant, having a wife, married another in accordance with the forms and ceremonies and provisions of the statutes of the territory; and we are bound to presume that the evidence showed this, or the verdict would not have been "Guilty,"—the evidence not appearing in the record. Sexual intercourse was not necessary to complete the offense. A marriage may be good if the parties never copulate. The crime of bigamy being complete, any sexual intercourse the appellant afterwards had with the woman constituted the crime of adultery, because the marriage was void, and they were to each other as if no marriage ceremony had been performed. This disposes of all the errors claimed in this case, and we see no error in the record. The judgment is therefore affirmed.

MINER, J., concurs.

(1 Colo. A. 28)

JONES v. JONES.

(Court of Appeals of Colorado. June 30, 1891.)

HUSBAND AND WIFE — SEPARATE MAINTENANCE—
CONTRACT.

1. A contract by which a husband agrees to pay his divorced wife \$45 a month for her support "for so long a time as she does not marry again" is not a restraint of marriage, nor in anywise against public policy.

2. It is a sufficient consideration for this agreement that the wife released the husband from all obligation under a prior contract for her separate maintenance, which was recognized as binding by the parties both before and after a decree of divorce.

Error to Arapahoe county court.

Cayless, Keeler & Sales, for plaintiff in error. *G. M. Allen*, for defendant in error.

RICHMOND, P. J. In this action plaintiff, Rebecca Jones, sought to recover of defendant, H. F. Jones, a certain sum of money claimed to be due under contract between them. Prior to the 29th of November, A. D. 1876, plaintiff and defendant were husband and wife, and on that day articles of separation were entered into, whereby H. F. Jones obligated himself to pay to Rebecca Jones certain sums of money for her support during the time they should remain separated. Previous to the 31st day of August, 1887, H. F. Jones procured a decree of divorce, and on that day entered into the contract sued on. The contract recites the existence of the previous "articles of separation," and the fact that they had been kept and maintained in force until that date. Further, that a certain change of circumstances had arisen, which rendered it desirable that there should be changes and modifications in the original articles; and in consideration of this fact and one dollar H. F. Jones contracted to pay to Rebecca Jones during the time she should remain single the sum of \$45 per month. Up to March 1, 1889, defendant fulfilled the contract. Thereafter he defaulted, and suit was brought to recover the amount due, \$405. To the complaint a demurrer was interposed and sustained, and leave was granted to amend the complaint. Demurrer was filed to the amended complaint, which was overruled, and subsequently default and final judgment entered against the defendant, he having failed to answer. To reverse this judgment this error is prosecuted.

The contention of plaintiff in error is: *First*, that the contract was void, it being in restraint of marriage, and therefore against public policy; *second*, that the contract was without consideration. Addressing ourselves to the first proposition, we must call attention to the language of the contract: "It is hereby mutually contracted and agreed that the party of the first part agrees to and with the party of the second part to pay to her for so long a time as she does not marry again the sum of \$45 per month for each and every month that the party of the second part shall remain single and unmarried up to the date of her death." This is not a contract in restraint of marriage. No obligation is imposed upon the woman not to marry. She is at liberty at any time to marry whom

and where she will. The condition is that he will pay the \$45 per month, presumably for her maintenance and support, so long as she may remain an unmarried woman; and this was her situation, as averred in the complaint, at the time of the institution of the suit. There is nothing in the agreement, so far as we can discover which in any way involves the question of morals or public policy. It is unnecessary for us to express any opinion relative to the contention of the plaintiff in error that a contract in restraint of marriage is void as against public policy, because it is evident from what we have already said that we do not consider the question involved in this case. Now, as to the second proposition,—that there was no consideration to support this agreement. We must differ also with counsel upon that proposition. Let us take into consideration the situation of the parties. Unable or unwilling to dwell together as man and wife, they entered into an agreement to separate and live apart, she sacrificing the comforts of home upon his promise to furnish her adequate means of support. Thereafter, and while this contract is in existence, the plaintiff in error procures a divorce,—upon what grounds the record is silent. But it is evident from the agreement entered into and sued upon that practically no defense was made, and no alimony sought on the part of the wife. After the divorce, and up to the date of this agreement, the former contract was recognized as binding, and acted upon by both parties, and in consideration of the agreement to pay her at the rate of \$45 per month she agreed to release him from his former contract. What the exact terms of the previous contract were we are not informed, except so far as it is set out in the agreement here. Its existence and legality is admitted, and by the terms of this contract the defendant is released from its performance, and the divorced wife surrenders what rights or interests she had thereunder, and accepts in lieu thereof this promise to pay. So far as is shown in this case, the original agreement did not provide for its rescission or termination upon a divorce being obtained. The promised support would be just as much needed after divorce as before. The record discloses that there was no agreement of parties for the divorce, nor was there any in the negotiations preceding the divorce that the contract should be annulled thereby. A decree of divorce of its own force does not have the effect of terminating the prior agreement for separate support. "Some contracts of separation might offend public policy and others not. Certainly there are cases where a wife would be justified in separating from her husband and asking support from him, notwithstanding the separation." *Carey v. Mackey*, 82 Me. 516, 20 Atl. Rep. 84. An agreement for support is not abrogated by a subsequent divorce of the parties, at least when no provision for alimony was made in the decree of divorce. *Clark v. Fosdick*, 118 N. Y. 7, 22 N. E. Rep. 1111; *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. Rep. 1114; *Pettit v. Pettit*, 107 N. Y. 677, 14 N. E. Rep. 500. The agreement conclusive

ly shows that the defendant did receive something for the promise made, to-wit, a release of his former agreement, which may or may not have been more burdensome in its requirements upon him than this one. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. Courts will not inquire into the adequacy of the consideration. It is enough that there is actually a consideration, that such consideration is legal, and that it has some value. We think the judgment of the court below should be affirmed.

(1 Colo. A. 16)

COOPER v. DE MAINVILLE et al.

(Court of Appeals of Colorado. June 28, 1891.)

ESTOPPEL IN PAID—APPEAL-BOND—SURETY—JUDGMENT.

1. Though a surety signs an appeal-bond on condition that it shall not be delivered until signed by another surety, where he delivers it to the principal, who files it in disregard of the condition, the instrument being regular on its face, and there being nothing to put either clerk or obligee on inquiry regarding it, such surety is estopped to say that the bond is not binding on him.

2. In an action on an appeal-bond, where it is found that the appellee has sustained damages to the amount of \$346, it is error to render judgment for \$600, the penalty of the bond.

Error to Lake county court.

J. E. Havens and Bennett & Bennett, for plaintiff in error. *N. Rollins*, for defendants in error.

RICHMOND, P. J. This was an action upon an appeal-bond. On the 21st of March, 1884, plaintiff in error obtained, before a justice of the peace for Lake county, a judgment against Sylvanus Ayres, Jr., for the sum of \$226, from which judgment Ayres appealed to the county court, filing an appeal-bond. Subsequently the county court directed appellant to file another and sufficient appeal-bond, which was done. Said appeal-bond, so filed, was signed by Isaac Cooper and William A. Ellis as sureties. The original cause was tried in the county court, resulting in a judgment for defendants in error. After this, suit was instituted upon the bond, and service of summons made upon Isaac Cooper. To the complaint Cooper answered, alleging that the bond was not his, because, at the time of the execution and delivery of it to the principal, (Ayres,) Ayres promised and agreed that he would not deliver the bond until the signature of another person had been procured. To this answer a demurrer was interposed and sustained. Thereafter Isaac Cooper died, and the plaintiff in error, Sarah F. Cooper, as administratrix of the estate, appeared to defend the action, and elected to stand by the answer. Two errors are assigned: *First*, the error of the court in sustaining the demurrer and entering judgment; *second*, to the form of the judgment. The first question for consideration is whether, when a surety who signs and seals a bond, and then delivers it to the principal obligor, upon the condition

that it shall not be delivered until it has been signed by another co-surety, and the principal delivers it in disregard of the condition, not making known the condition, there being no circumstances which should put the person receiving it on inquiry, does the instrument become operative as a legal deed. This question, we think must be answered in the affirmative. Conceding that every thing alleged in the answer is true,—that the understanding existed between Ayres and Cooper that another co-surety should be procured before the delivery of the bond, yet neither the obligee of the bond nor the clerk of the court to whom it was delivered had knowledge of such understanding or agreement. Besides, the bond was in all respects regularly executed, according to the prescribed form, and accepted by the officer whose duty it was to take it as a completed contract. There was nothing on the face of the paper, or in the instrument itself, to put the officer on inquiry, or to raise a suspicion in his mind that a condition was annexed to the delivery of the instrument. The transaction was one of ordinary occurrence in perfecting appeals from one court to another. No blank was left for the name of the additional co-surety, nor was the name embraced in the body of the bond; and, in addition to this, the record discloses the fact to be that the two sureties, Ellis and Cooper, appeared before the clerk of the court, and qualified as such sureties. At that time they knew the bond was in the hands of the clerk to be filed; they knew that the principal obligor, Ayres, had delivered it; and that upon their qualification it would be filed; and not until after the trial of the cause appealed from the justice's court, and the institution of suit on the bond does it appear that this agreement or understanding was made known. We admit that there is a conflict of authorities upon this proposition, yet, after a thorough review of those cited by the plaintiff in error, and such others as are referred to in the textbooks, we unhesitatingly declare that the better reasoning supports the position here taken. In *Dair v. U. S.*, 16 Wall. 1, Justice DAVIS, in commenting upon the identical proposition here under consideration, says: "It * * * is easy to see, if the obligors are at liberty, when litigation arises and loss is likely to fall upon them, to set up a condition unknown to the person whose duty it was to take the bond, and which is unjust in its result, that the difficulties of procuring satisfactory indemnity from those who are required by law to give it will be greatly increased." In *State v. Peck*, 53 Me. 284, BARROWS, J., has collected and distinguished the cases on this subject in a most satisfactory manner, and we might consistently rest our conclusion upon that case. In the conclusion of the opinion he says: "If there are cases that militate against the views here expressed, we are satisfied that they savor more of the growing looseness of commercial morality than of adherence to wholesome legal principles." If the doctrine of estoppel would not apply here, might not the in-

quiry well be asked, to what state of facts could it apply? Here the surety who defends this action had invested the principal with an apparent authority to deliver the bond, and there was nothing on the face of the bond, or in any of the attending circumstances, to apprise the official who accepted it that there was any secret agreement which should preclude the acceptance of the bond. This surety alone is certainly in fault, as but for this unwarranted trust in Ayres he would never have had it in his power to occasion the loss which the obligees of this bond must suffer if the defense made is successful. There is no reason why this opinion should be extended by further reviewing the authorities. The work has been done, and thoroughly done, in several well considered cases in Maine, Indiana, Kentucky, Missouri, Illinois, North Carolina, Virginia, Louisiana, and Michigan. *Hunt v. State*, 53 Ind. 321, *Millet v. Parker*, 2 Metc. (Ky.) 608; *Nash v. Fugate*, 24 Grat. 202; *State v. Potter*, 63 Mo. 212; *State v. Peck*, supra; *Chalarnon v. McFarlane*, 9 La. 227; *Smith v. Peoria Co.*, 59 Ill. 412. These authorities satisfy us that the conclusion of the court in sustaining the demurrer to the answer must be affirmed.

The next question for our consideration is as to the form of the judgment. The judgment rendered is against the estate of Isaac Cooper for the sum of \$600, the penalty of the bond. "The court finds that the estate of Isaac Cooper is indebted to the plaintiff in the sum of \$600, the penalty of the appeal-bond sued on herein, and that the damage sustained by the plaintiff herein amounts to the sum of \$346.78. It is therefore by the court ordered and adjudged that the plaintiffs, Frank De Muirville and W. H. Brisbane, do have and recover, of and from the said defendant, the estate of Isaac Cooper, deceased, the sum of \$600, the penalty of the bond aforesaid, together with their costs in this behalf expended, thereafter to be taxed, and that execution issue therefor." This was clearly error. The judgment should have been for the sum named as damages, payable out of the estate of the deceased in due course of administration. Gen. St., p. 1055, § 3618, provides that, "upon a recovery of judgment * * * against any executor or administrator, or a demand due from his testator or intestate, no execution shall be issued thereon, but the party recovering said judgment shall cause a transcript of the judgment entry to be filed in the county court, and the same shall be classed and paid as other demands are." This question is directly passed upon in *Mattison v. Childs*, 5 Colo. 78. For this error the judgment must be reversed, and the cause remanded, with instructions to enter judgment for amount of damage, in conformity with this opinion.

(1 Colo. A. 13)

CHAMBERLAIN v. AMTER.

(Court of Appeals of Colorado. June 23, 1891.)

VENDOR AND VENDEE—IRRIGATION—CONTRACT.

1. The owner of land contracted with an irrigation company to supply water for its cultivation upon deferred payments, and then sold and

conveyed the land, nothing being said of the water-right in the contract of sale. The only mention of it in the negotiations was a statement by the vendor's agent that the land had a certain water-right which was included in the purchase money. *Held*, that the vendee cannot recover of the vendor the deferred payments made by the former on the water-right.

2. Such right cannot be held appurtenant to the land, so that by the vendee's failing to get it a failure of title arises to that extent, where there was no conveyance of the right and no covenant.

3. In any event the vendee's agent in the purchase cannot maintain an action against the vendor in the premises without showing that he was compelled to pay out money to make good his principal's title.

Error to superior court of Denver.

A. L. Doud, for plaintiff in error. *Sullivan & May*, for defendant in error.

REED, J. This suit was instituted by the plaintiff in error on October 7, 1887. It appears by the allegations in the complaint that for some years prior to and on the 8th day of February, 1887, the defendant in error was the owner of 80 acres of land situated under the line of the Northern Colorado Irrigation Company's ditch, and that on the 23d day of June, 1884, the defendant in error entered into a contract with the corporation owning the ditch for water to irrigate the land. By the terms of the contract defendant in error was to pay to the corporation \$1,400 for a right to buy water for the land, and was to pay annually for the water supply for irrigating purposes an indefinite sum, to be fixed thereafter, varying from \$1.50 to \$4 an acre. The \$1,400 for the water-right was to be paid in different installments of interest and principal at various times from the date of the making of the contract to June, 1891. On the 8th day of February, 1887, partial payments had been made for the water-right, and it is alleged in order to perfect and secure the title to it, further payments to the amount of about \$1,100 were necessary; and on that day the plaintiff in error obtained an option on the property for a fixed time at the price of \$10,000, and to secure such option made a payment of \$500, and a memorandum or contract was entered into, as follows: "Denver, February 8, 1887. In consideration of one dollar (\$1.00) to me in hand paid by H. B. Chamberlain, the receipt whereof is hereby acknowledged, I hereby agree to sell to him or his assigns, at any time prior to March 8th, the following described property: The north half of south-west quarter section twenty, (20,) township four (4) south, range sixty-seven west, for the sum of ten thousand dollars (\$10,000.00), payable as follows: \$500.00 down, \$1,500.00 (\$2,500.00 in sixty days and \$2,000.00 in thirty days,) and the balance of five thousand dollars (\$5,000.00) in two years, at eight (8) per cent. per annum. MARK AMTER." On the 8th day of March following, plaintiff in error concluded the purchase of the land for one Charles B. Wood, who paid the whole consideration, and to whom a deed for the same was made. It is not shown by the testimony that at any time prior to the conveyance any contract was made between the parties whereby the contract

for water of the defendant in error with the ditch company was to be assigned, transferred, or sold to the plaintiff in error, or was to pass with the land under the option. It was shown by the testimony that the deed was accepted, and the trade consummated without any assertion of claim on the part of the plaintiff in error to have the water-right transferred. It will be observed that there is nothing in the written contract referring to the matter in controversy. The land was sold by one Millington as agent of the owner. The testimony in regard to the understanding of the parties with reference to the water-right is very meager and contradictory. Plaintiff in error testified that Millington, the agent, "stated that the land had been cultivated the year previous, and that it had the English ditch water-right, which was included in the purchase price." This appears to have been all that was said on the subject, and even this was not embraced in the writing. It is very indefinite. It does not show whether the contract, as it then stood, between defendant and the ditch company, was to be transferred, or whether it was to be secured, and final payments made by the buyer or seller. Where nothing is said with regard to it, under such circumstances, it is presumable that the future payments are to be made by the purchaser, else there would have been some contract or obligation on the part of the seller to pay in future; or, if the understanding had been that the seller should make the payments, it is to be presumed the buyer would have investigated the matter, and retained the amount from the purchase money. The strongest construction the language of the agent can really bear is that the land was susceptible of cultivation by the use of water from the company's ditch, and that the right to the water for the land was secured, and such right would go with the land. But this cannot be construed as a promise to pay the money to perfect the purchase of such right. The contention of counsel of plaintiff in error that the water was apportioned and went with the land, and, consequently, there being a failure of title as to part, the money could be recovered, cannot be sustained for two or three very good reasons: *First*, there was no conveyance of the right, and no covenant; *second*, if such had been the case, plaintiff in error could not recover the money, as neither land nor water was conveyed to him. It could, if recoverable at all, be recoverable only at the suit of the grantee. Wood having been the purchaser and grantee direct from the defendant in error, and the paper given the plaintiff in error having been but an option, he could acquire no right individually to the water, separated from the land, unless by showing that he had been damaged and had been compelled to pay the money to make good Wood's title, and therefore had a right to have it refunded. It is not pretended that such was the fact. In any view I can take of it, plaintiff failed to make a case which would warrant a recovery. It follows that the judgment of nonsuit was right, and should be affirmed.

(1 Colo. App. 5)

STANDARD ACCIDENT INS. CO. v. FRIEDENTHAL.

(Court of Appeals of Colorado. June 28, 1891.)
ACCIDENT INSURANCE—CONDITIONS—WAIVER—ACTIONS.

1. In an action on an accident policy the answer alleged that one acting for defendant's agent delivered the policy without authority, before the premium had been paid, and then, likewise without authority, received part of the premium after the assured had been injured. The reply alleged that the person delivering the policy was an agent himself; that he waived the condition requiring payment of the premiums in advance, agreeing that part should be paid in cash later, as was done, and part in services. *Held* that, in view of the new matter set up in the answer, the reply was not a departure, and a demurrer thereto was properly overruled.

2. The person who delivered the policy having all the apparent authority of a general agent, and therefore being such as to third persons, the insurer is bound by his waiver of the condition as to payment of premiums.

3. The reception of incompetent evidence is not ground for reversal where the trial was by the court, as it will be presumed, nothing appearing to the contrary, that the judge, being familiar with the rules of evidence, disregarded it.

Appeal from district court, Chaffee county.

It is alleged that on the 21st day of April, 1886, the appellant issued and delivered to Eugene H. Teats an accident insurance policy, to be effective for 12 months from its date, whereby Teats was to receive from the insurance company \$25 a week for loss of time in consequence of any bodily injury sustained by him during the existence of such policy, through external, violent, and accidental means, which should wholly disable him from transacting his business as a mining superintendent; that on the 26th day of April, 1886, Teats received a bodily injury that entitled him to such compensation by the terms of the policy of insurance, and that he was wholly disabled for the period of 13 weeks, and was entitled to receive the sum of \$325; that on the 7th day of August, 1886, Teats sold, transferred, and assigned his claim against the appellant to Friedenthal, the appellee. Friedenthal brought suit for the sum of \$325 and costs. The appellant answered, denying the material allegations in the complaint, and for further and special answer alleged that Teats did make application to one A. R. Hoyt, then acting for an agent of the appellant, as alleged in the complaint; and that by the terms of the application and the policy which was issued it was provided that Teats should pay as a premium to the appellant for the policy, and as a condition of obtaining it, \$37.50. That Teats did not pay the sum of \$37.50 nor any part of it, and that the policy of insurance was by Hoyt, without any right or authority, delivered to Teats without the payment of the premium as required; and that by reason of the failure of Teats to pay the premium, the appellant was not liable. That after the accident, and on the 26th day of April, Teats paid to A. R. Hoyt \$10, which Hoyt had no authority to receive, and that at the time of receiving the injury there was none of the premium paid; consequently, that the appellant was not liable upon the policy of

insurance. A replication was filed, in which it was denied that Hoyt, at the time of issuing the policy of insurance, was acting for an agent of the appellant, and alleging that Hoyt was the agent of appellant, and had full power and authority to make contracts for insurance and to issue and deliver policies of insurance; and that, by virtue of such agency, he made the contract of insurance and issued the policy, and signed and executed the same as the agent of the appellant, and delivered the policy to Teats. Admits that there was a condition in the policy and in the application to the effect that Teats should pay \$37.50 premium; and admits that the condition provides that the policy should be void unless the premium is paid before the injury was received, but alleges that the agent, Hoyt, waived the condition and delivered the policy, and expressly agreed with Teats that the premium should not be paid in cash, and was to be paid at some subsequent time. That Teats had under his control, as mining superintendent, a large number of men, whom Hoyt was desirous of insuring, and solicited Teats to use his influence with the men to induce them to insure with Hoyt, and that Teats was to pay \$10 in cash at some future time, and the balance was to be paid in services in soliciting the insurance of the men; and that he paid \$10 to Hoyt as alleged in the answer. A demurrer was filed to the replication. The demurrer was overruled. A trial to the court without a jury. Judgment for the appellant in the sum of \$310. From such judgment this appeal was taken. Testimony was very brief and uncontradicted. The deposition of Teats was read, in which he testified to the arrangement and agreement with Hoyt, by which the condition of the policy was waived, and the policy was delivered, to be effective and operative from its date. That he (Teats) was to pay \$10, and use his influence with the men to secure business and insurance for the company of appellant, and that the contract was that the premium should be \$25, instead of \$37.50; that he paid the \$10, but not until after the accident occurred, and that it was accepted by Hoyt. That within three days after the accident he furnished appellant proof of the injury as required by the policy. A copy of the insurance policy was also put in evidence, signed at the bottom: "A. R. HOYT, Agent at Leadville, Colorado. C. C. BOWEN, Secretary. D. M. FERRY, President. Countersigned this 21st day of April, 1886. A. R. HOYT, Agent." Indorsed upon such policy, among other conditions, was the following: "The policy shall not take effect unless the premium is paid prior to the happening of any accident under which claim is made." Also a copy of the application in which, among other statements, occurs the following, which is the only one necessary to be noticed in this connection: "(9) My premium for this period is \$37.50." Proper proof, as required by the company, appears to have been made of the injury and its nature, and the length of time that Teats was disabled by reason of such accident, accompanied by the cer-

tificate of the attending physician. In the deposition of Teats it is stated: "An officer of the company from Detroit, Michigan, also General State Agent Harrison of Denver, notified me that they would be in Buena Vista to adjust the claim. They came, and, in the presence of D. C. Sindlinger, asked me to discount the claim; but no special amount was offered." The appellant objected to the reading of this portion of the deposition. It was allowed to be read, and the court reserved the decision of its admissibility until the final decision of the case. The overruling of the demurrer to appellee's replication is assigned for error. Also the overruling of the objection made to the deposition of the witness Teats, and that the judgment in favor of appellee and against the appellant was erroneous.

Patterson & Thomas, for appellant.
George K. Hartenstein, for appellee.

REED, J., (after stating the facts as above.) There were no issues of fact to be determined in the case. The facts appear to have been conceded, at least there was no serious controversy. The first question arises upon the pleading. It is claimed that there was a departure, that the replication set up a new cause of action not embraced in the complaint, and that the court erred in overruling the demurrer. I cannot adopt this contention. The contract of insurance was one of indemnity,—to indemnify the insured to the extent of \$25 a week for all time he should, by accident, be disabled from performing the duties of a mining superintendent for the term of one year from date. The premium expressed in the policy was \$37.50. The language of the policy is "in consideration of the representations in the application for this policy and of thirty-seven dollars and fifty hundredths, does hereby insure," etc. The policy, though not containing a receipt for the \$37.50 in so many words, was signed by the agent, and delivered, and became the contract of appellant, and the language used, "in consideration * * * and of \$37.50 does hereby insure," etc., imports the payment prior to the delivery as the consideration for the delivery of the contract to the insured. When delivered, it became operative, and could only be impeached by showing that it had been obtained improperly or fraudulently by the insured in such manner as to negative the fact of the legal and voluntary delivery of the policy by the appellant. When delivered and operative, all that was necessary primarily was to allege the contract of insurance,—the happening of the contingency whereby the insurer became liable to pay by reason of the contract, and the amount of indemnity to which the insured was entitled. Anything impeaching the validity of the contract should have been alleged by way of defense. This was attempted, but the matters set up were not such as impeached the contract,—not acts of the insured by which the policy was defeated or improperly obtained, but the alleged improper acts of appellant's agent, which could not amount to a defense. Had appellee demurred to the special defenses

contained in the answer, the demurrer should have prevailed, but he replied instead. The reply was to matter contained in the special answer. There was no departure. Applying old common-law maxims of pleading, that are equally potent under the Code,—that a bad replication is good enough for a bad plea, and that the demurrer reaches back to the first faulty pleading,—I am compelled to hold that the judgment of the court upon the demurrer was correct. Nor can I adopt the contention that the court erred in its ruling upon that portion of the deposition of Teats in regard to an offer to compromise. It is true that no such evidence is competent, and, had the case been tried to a jury, appellant might have been prejudiced by a failure to suppress it; but, having been tried by a judge familiar with the rules of evidence, the presumption is that it was wholly disregarded, and the gist of the contention seems to be, not that the court acted upon the evidence to the prejudice of the appellant, but that he failed to state that he had disregarded it. It is alleged in the answer that Hoyt was not the agent of appellant, but that he was acting for an agent. No proof was offered upon the trial in support of the allegation. The agency seems to have been conceded. As far as the assured was concerned, there was no question of the agency. Whatever question there may have been between the agent and his principal, he was allowed to act as the general agent, not as a solicitor only of insurance. The policies of the company, executed by its proper officers, were in his possession to be filled and countersigned and delivered by him. He was invested by him principal with all the *indicia* of a general agent in that locality, and that was sufficient, as far as third parties were concerned. It was established by the evidence of Teats that a special contract was made with him, whereby the cost of the insurance to him was to be \$25, instead of \$37.50; \$10 of which was to be paid at an early day in money, and the balance was to be paid at some future date in assisting in securing insurance upon men in his employ. This contract was not contradicted by appellant, and is conceded. Had it not been, Hoyt could have readily denied it.

But one question remains, was appellant bound by the special contract of its agent, Hoyt? Or, in other words, could the agent by such a contract bind his principal, and waive the printed provisions and stipulations contained in and attached to the policy? "A person authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies, must be regarded as a general agent of the company pending negotiations; * * * and the possession of blank policies and renewal receipts, signed by the president and secretary, is evidence of such agency." May, Ins. § 126; Pitney v. Insurance Co., 65 N. Y. 6; Post v. Insurance Co., 43 Barb. 351; Carroll v. Insurance Co., 40 Barb. 292. It is

conceded that no part of the premium was paid until after the insured received the injury. Two days after the injury was received, \$10 was paid and accepted. It is contended that the clause, "this policy shall not take effect unless the premium is paid prior to the happening of any accident under which claim is made," is controlling, and, it being shown that it was not complied with, no action could be maintained. Having found by the authorities above cited that Hoyt was a general agent, and a contract was made by him to give time and accept payment in a certain manner, the contention cannot prevail. To give the provision the construction claimed in a case like the present, its illegality would be at once apparent. It is, in any view, of very doubtful validity, and can only be sustained in cases where there was no legal delivery of the policy with the intention of making it operative. In cases where the possession was obtained by fraud, or for the purpose of examination, it might be held to be valid. To apply it to cases where the transaction was consummated and the policy voluntarily delivered to the insured as evidence of the insurance, would at once render the illegality apparent. Take any case where the company insured for a year, for instance, and delivered its policy, and by a contract payment was not to be made until the expiration of the year, the insured would be held liable to pay for the entire time, whether disabled or not, and, the premium being unpaid, and so to remain until the expiration of the policy, there would be no insurance whatever in case of injury, and no consideration for the premium; consequently, no mutuality of contract. Contracts of insurance must be regarded and construed like all other contracts, so, if possible, as to make them mutual, and effectuate the intention of both parties. While the insurer should be guarded against fraud and misrepresentation, the insured should have indemnity, when guiltless of fraud, upon compliance with the contract as made by him, and no cunningly devised provision or exception in the policy should be so construed as to defeat it. I am clearly of the opinion that the provision requiring payment of the premium could be and was waived by the agent; also that the acceptance by the agent of the payment of \$10 after the injury was received was evidence that no default had been made, and was a recognition of the policy as still in force. That a general agent can waive any condition inserted in the provisions of the policy of insurance is established by numerous authorities. See Putnam v. Insurance Co., 4 Fed. Rep. 753; Ball, etc., Wagon Co. v. Aurora F. & M. Ins. Co., 20 Fed. Rep. 232; Joliffe v. Insurance Co., 39 Wis. 117; Insurance Co. v. Fennell, 49 Ill. 180; Washoe Tool Manuf'g Co. v. Hibernia F. Ins. Co., 66 N. Y. 613; Bochen v. Insurance Co., 35 N. Y. 131; Sheldon v. Insurance Co., 26 N. Y. 460; Elkins v. Insurance Co., 113 Pa. St. 386, 6 Atl. Rep. 224. The judgment of the district court should be affirmed.

(21 Or. 136)

KNAHTLA v. OREGON SHORT-LINE & U. N. RY. CO.¹

(Supreme Court of Oregon. June 24, 1891.)

INJURIES TO EMPLOYE—NEGLIGENCE—PLEADING—FELLOW-SERVANTS—SPECIAL FINDINGS—REMOVAL OF CAUSES.

1. Where, in an action for personal injury caused by a train falling through a bridge, the complaint merely alleges that defendant negligently suffered the bridge to become out of repairs, and to remain in an unsafe condition, there can be no recovery on the ground that the bridge was originally improperly constructed.

2. Where defendant claimed that the bridge was undermined by an extraordinary flood on the night before the accident, and it appeared that extraordinary storms had prevailed for several days, it was a question of fact for the jury whether or not, by care and prudence, the defendant might have discovered the defect; and it was proper to refuse to charge that, if the jury believe trains had safely passed over the bridge the day before, and on examination it was found safe for passage, and thereafter, during the night, an extraordinary freshet occurred, undermining the bridge, and that defendant could not, by the exercise of ordinary diligence, have anticipated the same, their verdict should be for defendant.

3. A section hand riding on a work train from one place of his work to another, under the charge of the road-master, is fellow-servant of the conductor and engineer of such train.

4. A state court does not lose jurisdiction of a cause by making an order transferring it to the circuit court of the United States, when the latter court refuses to entertain jurisdiction.

5. Under Hill's Code Or. § 240, which provides that "any party may, when the evidence is closed, submit, in distinct and concise propositions, the conclusions of fact which he claims to be established; * * * they may be written and handed to the court, or, at the option of the court, oral, and entered in the judge's minutes,"—it is discretionary with the trial court whether it will require the jury to make special findings, and such discretion is not reviewable.

Appeal from circuit court, Wasco county; R. P. BOISE, Judge.

This is an action to recover damages for injuries received by plaintiff in a wreck on defendant's road, caused by the giving way of a bridge near the Cascade Locks, and the falling through of a train on which plaintiff was being carried. After the service of process, and before the time for answering had expired, the defendant company filed a general demurrer, and at the same time filed a petition for removal of the cause to the circuit court of the United States, accompanied by the usual bond; whereupon the bond was approved, and an order made transferring the cause to the United States court. Afterwards that court made an order remanding the cause to the state court for want of jurisdiction, and, upon the filing of a properly certified copy of the order, the state court assumed jurisdiction, and proceeded with the trial of the cause. Plaintiff, who is a common laborer, was in the employ of the defendant as a section hand on a section of the road near The Dalles, some 40 or 50 miles from the place of the accident. On the day before the accident, the road having become obstructed by land-slides, the plaintiff was ordered by the road-master of defendant to leave his section, and go with the men, in charge of the road-master, on a delayed passenger train of the company, to assist in clearing the road

of slides between the Cascade Locks and Bonneville. The material allegations of the complaint, omitting formal allegations, are as follows: "That on or about the 2d day of February, 1890, and while the defendant was transporting the plaintiff upon its cars from the place where he had previously been employed to a place where further repairs had to be made, the defendant, negligently and carelessly, permitted its line of track, and the bridges thereon, to become and remain out of repair and unsafe, and negligently and carelessly failed to properly inspect said line of track and bridges, and to keep proper watch and oversight over the same, and to ascertain and report the condition thereof; and especially of a certain bridge on the line of said road situated between Cascade Locks and Lower Cascades, over and across which the plaintiff was required to go to get to the place where the defendant required his services as aforesaid, and which bridge the defendant negligently and carelessly permitted to become and remain out of repair, and in an unsafe condition, and negligently and carelessly failed to keep a proper watch and oversight over the same as aforesaid, and negligently and carelessly failed and omitted to ascertain the condition of the same, and to report it to the officers in charge of the train upon which the plaintiff was being carried as aforesaid. That while the plaintiff was being carried across the said bridge by the defendant, in its cars as aforesaid, by reason of the defective and unsafe condition of said bridge, and by reason of the failure of the defendant to keep a proper watch and oversight, and to ascertain and report the condition thereof to the officers in charge of said train upon which the plaintiff was riding, and by reason of the negligence and carelessness of the defendant's said officers in not keeping a proper lookout and in operating said train, the said bridge, and the railroad track upon the same, gave way, and the plaintiff was precipitated through the same, whereby he was greatly bruised," etc.; pleading permanent injury. The train upon which plaintiff was being carried left The Dalles in the forenoon of the day before the accident, and reached the Cascade Locks at 2:30 p. m. Communication was there had with the train dispatcher at The Dalles, who had charge of trains on that division of defendant's road, and the train was given "working orders" between the Locks and Bonneville, 4½ miles, which entitled it to run in either direction between these points, as against all other trains. The train then proceeded, west bound, passing over bridge No. 68, the giving way of which caused the accident, and found the slide about a half a mile west of this bridge. The workmen, some 20 or 30, under charge of the road-master, commenced to remove the slide, and continued to work until about dusk, when they walked back to the Cascade Locks for the night, the train having in the mean time returned to the Locks. The next morning more men were procured, who, with the engine and a caboose, the passengers and coaches having been left at the Locks, proceeded, west

¹ Rehearing denied.

bound, to the scene of the wreck the night before; and while passing over the bridge in question it gave way, letting the ca-boone and all the men into the bottom of the creek, killing several, and severely injuring others, plaintiff being one of the latter. The defendant by its answer denied the negligence charged or any negligence; pleaded the negligence of fellow-servants, and of the plaintiff, as causing and contributing to the injury; also that the alleged accident was caused by a freshet arising from natural causes, without the fault and knowledge of defendant, which had arisen during the night and morning preceeding the accident; and alleging that as at the time of the injury the plaintiff, with other workmen, was out upon the defendant's road engaged in repairing and keeping the same open from obstruction thereon arising without the fault of defendant, and arising from natural causes, the accident occurring and injury sustained thereby, if any, was a part of the risk of the employment of the plaintiff. The reply put in issue the affirmative matter pleaded. The trial resulted in a verdict and judgment in favor of plaintiff, from which this appeal is taken.

Zera Snow, for appellant. *A. S. Bennett*, for respondent.

BEAN, J., (after stating the facts as above.) The record contains numerous assignments of error, based upon exceptions duly taken to the ruling of the court, during the progress of the trial, on the admission of testimony, and its giving and refusing instructions to the jury. We shall proceed to examine such of these as we deem material.

1. It is contended by appellant that the court below lost jurisdiction of this cause by the petition of defendant for removal to the circuit court of the United States, and by the order approving its bond, and transferring its cause to that court. The circuit court of Wasco county had, under the constitution and laws of the United States and of this state, original jurisdiction of the subject-matter and of the parties in this case. That jurisdiction was formally invoked by the filing of a complaint and service of process on defendant, and the court was in the exercise of its unquestioned powers in the premises when the petition for removal was filed by defendant. Upon the filing of the petition and bond, the circuit court for Wasco county passed the order required by the statute of the United States governing the removal of causes from the state to the federal courts, but the federal court refused to entertain jurisdiction, and remanded the cause to the state court, and its decision on that question is final. In *re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. Rep. 141. It follows, therefore, that the cause never has in fact been removed to the circuit court of the United States. The removal is not complete until the United States court has taken jurisdiction, and this it has refused to do, so that the state court never lost its jurisdiction. When the circuit court of Wasco county granted the application for removal of the cause, it simply declined to proceed further

in the matter; but when it was ascertained that the order for removal was improper, and that the United States court did not have jurisdiction, the cause revived in the state court, and should have been proceeded with as though no order of removal had been made. *Thacher v. McWilliams*, 47 Ga. 306; *Ex parte State Ins. Co.*, 50 Ala. 464. In *Railroad Co. v. Koontz*, 104 U. S. 15, Mr. Chief Justice WARRE, in discussing the proceedings in the United States court on a motion to remand a cause removed from the state court, said: "When the suit is docketed in the circuit court, the adverse party may move to remand. If his motion is decided against him, he may save the point on the record, and after final judgment bring the case here for review, if the amount involved is sufficient for our jurisdiction. If, in such a case, we think his motion should have been granted, we reverse the judgment of the circuit court, and direct that the suit be sent back to the state court, to be proceeded with there as if no removal had been had." So in *Insurance Co. v. Francis*, 52 Miss. 466, Mr. Justice CAMPBELL says: "An order for removal in a case not embraced by act of congress is void, and has no effect in legal contemplation, and, although its practical effect may be an interruption improperly of the prosecution of the cause in the state court, the cause is to be considered as having been all the time pending in the state court, which delayed to see if the United States court would take jurisdiction, and, finding it would not, proceeds to try the case thus remitted to it as though no interruption had occurred."

2. The next contention of appellant is that evidence was received and a verdict permitted by instructions upon a ground of liability not pleaded. On the trial evidence was given and received, under defendant's objection, which it was claimed tended to show that the bridge which fell and caused plaintiff's injury was a defective structure, and originally improperly and negligently constructed. At the proper time the defendant requested the court to charge the jury that, in so far as this case is concerned, the bridge in question must be assumed to have been constructed in a proper manner. This the court refused to do, but, at the request of plaintiff, instructed the jury that, if it appeared from the evidence that the bridge had been improperly or negligently constructed, and by reason thereof the plaintiff was precipitated through the same and injured, while being carried by the defendant to the place where he was to be employed, he was entitled to recover. The point of the objection is that the complaint only charges negligence in keeping the bridge in repair, and in failing to keep a proper watch and oversight over it, in order to ascertain its condition. This brings us to the allegations of the complaint. The cause of action stated in the complaint is that "defendant negligently and carelessly permitted it [bridge] to become and remain out of repair, and in an unsafe condition, and negligently and carelessly failed to keep a proper watch and oversight over the same, and negligently and

carelessly omitted to ascertain the condition of the same, and to report it to the officers in charge of the train upon which plaintiff was being carried." These are the only acts of negligence charged in the complaint, so far as the bridge is concerned, and the only ones that defendant was called upon to defend against, and, as necessary consequences the evidence on the part of plaintiff must be directed to the proof of the negligent acts charged, and the instructions of the court must be confirmed to its allegations and proof. The plaintiff cannot aver negligence in one particular, and on its trial prove that defendant was negligent in another particular. The object of a complaint is to apprise the court and opposite party of the facts relied upon for a recovery so plainly that the defendant may be prepared to meet them. This object of a pleading would be entirely defeated if a plaintiff had a right to aver in his declaration one ground of action, and on the trial prove another and different one. As was said by EARL, J., in *Southwick v. Bank of Memphis*, 84 N. Y. 429: "Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action, and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary." There is no doubt that it is the duty of a railroad company to furnish for the use of its employes a reasonably safe track, which necessarily includes bridges, and to exercise reasonable care to keep and maintain the same in a good and safe condition, to secure as frequent and thorough inspection of its road-bed and track as under the circumstances may reasonably be necessary for the purpose of discovering any defects therein, to exercise care in the selection and retention of its servants, and to adopt such rules and regulations as may reasonably be necessary to guard against accident; and if the master fails to perform any of these duties, and a servant is injured, he is liable in an action for damages suffered by such servant, and any duty which the master is required to perform for the safety of his servant cannot be delegated to any servant of any grade, so as to exempt the master from liability for an injury resulting to a servant from its non-performance. *Anderson v. Bennett*, 16 Or. 527, 19 Pac. Rep. 765; *Hartvig v. Lumber Co.*, 19 Or. 522, 25 Pac. Rep. 358; *Miller v. Railroad Co.*, (Or.) 26 Pac. Rep. 70. The measure of the master's duty in these respects is to exercise due care, and *prima facie* he is presumed to have done so. Thus, when a railroad company builds its road, lays its rails, erects its bridges, and stocks it with machinery and cars, it is presumed to have done so with due care, and is not liable to a servant for any defect therein, unless negligence can in fact be shown in reference to the particular matter producing the injury. *Warner v. Railroad Co.*, 89 N. Y. 468; *Wood, Mast. & S.* § 346. Therefore, if a servant is injured by defect in the appliances or the instrumentalities

of its business, he must show some fault on the part of the master, as that he did not exercise due care in providing them originally, or that he did not exercise such care in keeping them in repairs, and a complaint, in an action for such injury, must allege the particular duty which the master failed to perform.

The duty of a master to exercise due care in providing proper and suitable instrumentalities and appliances is as separate and distinct from the duty to exercise such care to keep them in repairs after having so furnished as it is from its duty to exercise care in the employment and retention of servants. Under a complaint by an injured servant, charging the master neglected to exercise proper care to keep the appliances of its business in repair, it would not for a moment be claimed that a recovery could be had for the neglect of the master in not employing competent servants, or in promulgating suitable and proper rules for the government of its business, and with no more reason can it be argued that a recovery can be had for the neglect of the master in providing the appliances in the first place. It is the duty of the master to exercise reasonable care to provide safe and proper appliances for the use of a servant, and a continuing duty to exercise such care to keep such appliances in proper repair, and for a violation of either he is liable in damages to an injured servant; but the complaint must charge negligence in reference to the particular matter producing the injury, and the evidence and instructions of the court should be confined to issues made in the pleadings. In cases of this character the complaint should point out specifically the neglect complained of, and the trial should be had on the issue thus made. As was said by THAYER, J., in *Scott v. Navigation Co.*, 14 Or. 228:¹ "The law unfortunately can only lay down the general rules for the guidance of the two classes, (master and servant.) It can declare generally the obligations they are under, but its application can only be made to the facts and circumstances of the particular case, and it is often rendered more uncertain by failure on the part of the court administering it to require parties in the pleading to point out specifically the acts of negligence complained of, and to confine investigations strictly to such charges. As we have already said, the object of the pleading is to apprise the court and opposite party of pleader's claims. Certainly to a common intent it is all that is required, and this is attained in action for damages resulting from negligence, when the neglect of duty relied on and the resultant injury are described with substantial accuracy; but as the duty of a master to provide reasonably safe instrumentalities and appliances for the use of his servants, and the duty to exercise due care to keep them in repair after being so furnished, are separate and distinct duties, a charge of negligence in one will not be supported by proof of negligence in the other. Hence where the complaint in an

¹ 13 Pac. Rep. 98.

action against a railroad company for personal injuries alleged, as the grounds for plaintiff's claims, negligence on the part of the company in running its trains over a portion of its track which had been undermined and rendered dangerous by flood of waters, plaintiff is not entitled to recover for defects in the road-bed, or in the ties or material used on the road." *Ely v. Railroad Co.*, 77 Mo. 34. So where the complaint alleges that, by reason of defendant's negligence in having and using insufficient and defective machinery, and the proof is that the injury was caused by a broken frog, which caused plaintiff to fall, he cannot recover. *Waldhiser v. Railroad Co.*, 71 Mo. 514. So, when the complaint alleged that plaintiff's injury was occasioned by a deep hole between the rails, and the evidence was that it was between the rails of a side track, it was held that the complaint would naturally be construed to refer to the main track, and that the variance was material. *Batterson v. Railway Co.*, 49 Mich. 184, 13 N. W. Rep. 508. So when the injury is alleged to have been committed by the defendant carelessly running its train against a horse, it is not competent for the plaintiff to prove that the railroad track was not fenced, or that the cars were not provided with air-brakes, or any other negligence than that averred. *Railway Co. v. Foss*, 88 Ill. 551. In this case the complaint does not aver that the defendant did not exercise proper care in the original construction of the bridge in question, but permitted, presumably, a safe bridge to become out of repair. That was the only issue presented by the pleadings, and the only one that should have been tried.

It is clear, therefore, that although its construction, as an abstract proposition, may be unobjectionable, the vice of it lies in its inapplicability to the issues made by the pleadings. It authorized the jury to find a verdict upon a liability not pleaded, and we have repeatedly held it to be error for the court to give the jury instructions, however correct, as abstract propositions of law, if not within the issues. *Willis v. Navigation Co.*, 11 Or. 257, 4 Pac. Rep. 121; *Breon v. Henkle*, 14 Or. 494, 13 Pac. Rep. 289; *Roberts v. Parrish*, 17 Or. 583, 22 Pac. Rep. 136; *Woodward v. Navigation Co.*, 18 Or. 289, 22 Pac. Rep. 1076. The instructions could not do otherwise than mislead the jury upon a vital point in the case, and, although the court on its own motion may have stated the issues correctly to the jury, such fact would not cure the error, as it is impossible to tell which instructions the jury adopted to guide them in their deliberations, or upon which liability they based their verdict. The charge being that defendant negligently and carelessly suffered and permitted the bridge to become out of repair, and in an unsafe condition, it was incumbent on the plaintiff to prove that the bridge was in such condition, and that it resulted from defendant's negligence. It was, we think, competent for plaintiff to prove the manner in which the bridge was constructed, not as an inde-

pendent ground of liability, but for the purpose of showing the particular manner in which it was out of repair, and for that purpose the evidence offered and admitted may have been competent; but, as we have already said, the instruction was erroneous, because it authorized the jury to find a verdict on an issue not made by the pleadings. This is not a case like those cited by respondent's counsel, where the neglect of duty relied on, and the resultant injury, are described with substantial accuracy, but there is a variance which the courts held immaterial between the allegations and proof in some of the particular defects which caused the injury. This is a case where the plaintiff has stated in his complaint one cause of action, and been permitted to recover on a different one. He averred negligence of one kind, and, under the instructions of the court given at his request, the jury were authorized to find a verdict on proof of negligence of another kind, not referred to in the complaint, and in this there was error. *Carter v. Railway Co.*, 65 Iowa, 287, 21 N. W. Rep. 607; *Miller v. Railway Co.*, 66 Iowa, 364, 23 N. W. Rep. 756. We think, therefore, there was error in giving the instructions complained of.

3. Plaintiff alleges as one of the grounds of recovery that, "by reason of the negligence and the carelessness of the defendant officers in not keeping a proper lookout, and in operating the said train, [referring to the train upon which plaintiff was riding at the time of the accident,] the said bridge and the railroad track upon the same gave way," etc. As an answer to this cause of action, the defendant, among other things, relied, both in the pleading and proof, upon the proposition that the engineer and conductor on the train were, at the time of the accident, fellow-servants of the plaintiff, for the negligence of whom defendant was not liable. In the disposition of this question it must be kept in mind that the train had, on the day previous, ceased to be a passenger train, but had become a work train, and at the time of the accident was, with the workmen aboard, patrolling the road, under the direction of the road master, for the purpose of opening the same by removing any obstruction which may have accumulated thereon. When the train left the Cascade Locks on the morning of the accident, it was for the purpose of opening up the road, and the conductor and engineer were engaged in the same common employment with plaintiff. There was one general object to be attained. They were each engaged in furthering the same general object, and under the direction of the same road-master. They were as much at work while riding on the train as when actually engaged in removing obstructions, although at the time of the accident plaintiff had no active duty to perform. The fact that he had no active duty to perform while riding from one point of work to another did not make him any the less an employee during those times. He could not be an employee while at work at one place of obstruction, and while riding to the next become

a passenger, and at the next obstruction become an employe again. They worked as they went, wherever they found work to do, each doing his particular part.

That a master is not liable for an injury to his servant, caused by the negligence of a fellow-servant is elementary. The reason which is said to lie at the foundation of this rule is that, when a person engages in any employment, he voluntarily takes upon himself all the ordinary risks belonging to the particular service in which he is employed, among which is the negligence of fellow-servants. The want of proper care and attention on the part of the conductor and engineer of the train upon which plaintiff was riding at the time of the accident was one of the risks attending his employment. The particular labor in which he was engaged involved the use of the very cars and locomotive to which the accident which caused the injury occurred, and it seems to us, therefore, clear that, under the particular circumstances of this case, the conductor and engineer were fellow-servants with plaintiff. *Blake v. Railroad Co.*, 70 Me. 60; *Russell v. Railroad Co.*, 17 N. Y. 134; *Howland v. Railroad Co.*, 54 Wis. 226, 11 N. W. Rep. 529; *Dallas v. Railway Co.*, 61 Tex. 196; *Abend v. Railroad Co.*, 111 Ill. 202; *Prather v. Railroad Co.* (Ga.) 9 S. E. Rep. 530. There is a respectable line of authorities which, adopting the superior-servant criterion, hold that a conductor or engineer and employes, subject to their direction and control, are not fellow-servants, and such are the authorities cited by respondent's counsel, but they have no application to the facts in this case. The plaintiff here was in no way working under the direction and control of either the conductor or engineer. What has been said in reference to the conductor and engineer being fellow-servants of plaintiff, for whose negligence in the operation of the train defendant would not be liable, is only intended to apply to the charge of negligence in the operation of the trains, and not in any way to infringe upon the well-settled doctrine that the fact that the negligence of a co-servant caused the injury will not relieve the master from liability, if its own negligence contributed thereto, and if the negligence of its co-servant would not have caused the injury but for the concurrent negligence of the master. *McKinney*, Fel. Ser. § 16; *Railroad Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; *Rogers v. Leyden*, (Ind.) 26 N. E. Rep. 210; *Stringham v. Stewart*, 100 N. Y. 516, 3 N. E. Rep. 575; *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. Rep. 449; *Wood, Mast. & S.* § 405.

4. The defendant, by its answer and evidence, among other defenses claimed that the accident by which plaintiff was injured was occasioned by an unusual and extraordinary flood, which had arisen during the night and morning preceding the accident, and without any fault or negligence on its part the bridge was so undermined and weakened by the flood as to give way under the train on which plaintiff was riding, thereby causing the accident. Upon this theory of the case the

court was requested to instruct the jury as follows: "If the jury believes from the evidence that on the afternoon or evening of the day previous to the fall of the bridge in question the same was in safe condition for the passing of trains thereover; that trains had so passed thereover without any evidence or indication of weakness of the bridge; that the bridge had been examined on the day previous to the accident by the bridge foreman, Neff, and that the same was found to be, and was, in safe condition for the passing of trains, and trains had so passed thereover thereafter with safety; and that thereafter, and during the night, an unusual fall of water occurred, causing an extraordinary and unusual freshet, whereby during the night the bridge had become undermined; and that this freshet was of such a nature that it was unusual and extraordinary at the place, and of such a nature that the jury would say from the evidence that defendant could not, by the exercise of ordinary and reasonable diligence, have anticipated the same,—then your verdict should be for the defendant. By this request the court was asked to instruct the jury, in effect, that if, during the night preceding the accident, the bridge had become undermined by such an unusual and extraordinary flood as could not, by the exercise of ordinary care and reasonable diligence, have been anticipated by defendant, the plaintiff could not recover. The measure of the duty of a railroad company in constructing and keeping its ways, machinery, track, rolling stock, and plant free from dangerous defects is such care and diligence as a cautious and prudent man would exercise, under the same circumstances. In the location and erection of bridges and trestles, regard should be had to the size and character of the stream, the declivity and extent of the watershed, the nature of the surrounding country, and any other circumstances which would probably effect the flow of the water. They should be so constructed as not to be insufficient and insecure in cases of usual and ordinary floods incident to the particular section of the country. But they are not bound to provide against extraordinary and unprecedented floods, which could not reasonably have been foreseen or anticipated by competent and skillful persons. *Railway Co. v. Bridges*, 86 Ala. 448, 5 South. Rep. 864; *Gates v. Railway Co.*, 28 Minn. 110, 9 N. W. Rep. 579; *Railroad Co. v. Halloren*, 53 Tex. 46. But if the defective condition of the bridge in this case was caused by a sudden and unprecedented freshet, as defendant claims, such fact would not relieve the defendant from liability if it had time, in the exercise of reasonable care and attention, to discover the injury to the bridge before the accident, and whether it did or did not have such time was a question of fact for the jury, which this instruction would, if given, have taken from them. It was the duty of the defendant to make as frequent and careful inspection of its track as could be done consistently with the conduct of its business, and under circumstances of more

than ordinary peril, as, in the case of violent and unprecedented storms, it was its duty to inspect its line with more than ordinary promptness and thoroughness, and in particular to examine such portions of it as were particularly liable to injury by storms. *Banking Co. v. Kent*, (Ga.) 10 S. E. Rep. 965; *Patt. Ry. Acc. Law*, § 286. The fact that the defendant did not know of the defective condition of the bridge at the time of the accident does not necessarily exonerate it from liability, if, by the exercise of reasonable care and inspection, it could have discovered and remedied the defects, or avoided the danger incident therefrom. *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. Rep. 449. It was bound to know the condition of this bridge, so far as proper inspection would have enabled it to know. "It is enough to prove that the material was defective in such respect that, if proper inspection had been maintained, its defects would have probably been ascertained in time to have prevented the injury." *Shear. & R. Neg.* 223. In *Wood on Master & Servant*, § 346, it is said: "The fact that the defect might have been ascertained by proper examination and care on the master's part is sufficient evidence of negligence to charge him with liability." When this bridge became unsafe and insecure does not clearly appear from the evidence, but probably sometime during the night pending the accident, although the evidence of plaintiff tended to show that it was out of repair, and its foundation considerably undermined two or three days before. Certain it is, from the record before us, the court could say, as a matter of law, that the injury to the bridge was of so recent an occurrence, that the defendant, by the exercise of reasonable care and prudence, could not have discovered it, and averted the accident, or that the defendant exercised proper care and oversight over the road, under the circumstances. It had but one track-walker on this section of the road, whose duty it was to pass over the road during the night, and he had not been over this bridge for 48 hours before the accident, and we think it was a question for the jury to say whether, under these circumstances, with such extraordinary storms prevailing, it was negligence for the defendant to send out the train upon which plaintiff was being carried without making any investigation to ascertain the condition of the bridge over which it was to be carried.

5. The refusal of the court to permit defendant to submit to the jury propositions of fact embodied in a series of questions for answer by the jury is also assigned as error. By section 215, Hill's Code, it is provided that the court may, in all cases, instruct the jury, if they render a general verdict, to find upon particular questions of fact, to be stated in writing. Under this provision it was held in *Swift v. Mulkey*, 14 Or. 59, 12 Pac. Rep. 76, that it was discretionary with the trial court whether the jury shall be required to find on any particular question of fact in addition to the general verdict, and that this court will not undertake to review the

rulings of the trial court thereon. Counsel for defendant seeks to avoid the decision in the case above cited, by claiming that the propositions submitted in the case at bar comes within the terms of section 340, which provides that "any party may, when the evidence is closed, submit in distinct and concise propositions the conclusion of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both. They may be written and handed to the court, or, at the option of the court, oral, and entered in the judge's minutes;" and that under this section the right to submit such propositions is an absolute one, and not subject to the discretion of the trial court. The proper interpretation of the language of this section, when applied to jury trials, is difficult to determine. It requires that the conclusions of fact which a party claims to be established by the evidence shall be submitted in distinct and concise propositions. It does not seem to contemplate that the jury shall be required to determine whether such conclusions are correct or not. It is probably the intention of the section to permit any party, when the evidence is closed, to submit, in distinct and concise propositions, the conclusions of fact which he claims to be established, for the purpose of informing the jury of his claim, and aiding them in arriving at a general verdict. But, be this as it may, we do not think it was the intention of this section to give a party an absolute right to have the jury answer particular propositions of fact embodied in a series of questions. Such a construction would have the effect to deprive the court of the discretionary power given by section 215. The presiding judge, we think, has the right, in all cases, to determine whether the jury shall be required to make special findings, and a refusal, on his part, to submit particular questions for their answer cannot be assigned as error in this court. If the court was obliged to require the jury to render a special verdict, or make special findings, whenever demanded, no doubt the right would be abused, as the books show has been done in states where by statute the right is absolute, by demanding that the jury should answer an infinite series of questions, the object and tendency of which would be to confuse, embarrass, and confound the jury, instead of eliciting the facts upon which the rights of the parties depend. Nothing in the language of Mr. Justice THAYER in *Smith v. Shattuck*, 12 Or. 362, 7 Pac. Rep. 335, conflicts in any way with the conclusions we have reached. There are no doubt many cases in which a special verdict or special finding or particular question of fact would be a most valuable aid to a correct determination of the rights of the parties. By requiring the jury to pass separately and specifically upon each controverted question of fact material to the issue, in many important cases, a more careful and methodical consideration of the testimony by the jury may be secured, and the precise grounds upon which the gen-

eral verdict is based will be disclosed. But in what cases, and under what circumstances, such special verdict or findings shall be required, must rest in the sound discretion of the trial court.

6. There are many other assignments of error contained in the record, but the length this opinion has already necessarily attained forbids our examining them further. An exception was reserved to every instruction asked by defendant and refused, and to every instruction given by the court except those given on defendant's motion. The instructions and requests for instructions excepted to embrace 33 separate and distinct propositions of law, and cover 17 closely printed pages of counsel's brief, and are many of them, we think, inapplicable to the issue made by the pleadings. We have neither the time nor the inclination to enter upon a critical examination of the legal principles sought to be announced in every one of them. To do so would require us to write a treatise on almost every phase of the law governing the liability of a master for an injury to his servant. This task we must at this time decline to undertake. But in view of the record in this and other cases which have been before us, we cannot refrain from quoting with approval the language of Mr. Justice SCOTT in *Adams v. Smith*, 58 Ill. 418, who, in discussing the mischievous practice of requesting the court to give a multitude of instructions, says: "We do not understand why it is that counsel, where they have a good cause, will seek to incur it with such a multitude of instructions, the almost invariable effect of which is to introduce manifest error into the record. Such a practice does not enlighten the minds of a jury in the issues submitted to them, but rather tends to introduce confusion. Instructions should always be clear, accurate, and concise statements of the law as applicable to the facts of the case. It was never contemplated, under the provisions of the practice act, that the court should be required to give a vast number of instructions, amounting in the aggregate to a lengthy address. It is a mischievous practice, and ought to be discontinued. A few concise statements of the law, applicable to the facts, are all that can be required, and are all that can serve any practicable service in the elucidation of the case." In *State v. Mix*, 15 Mo. 109, an indictment for passing counterfeit bank-notes, where the trial court only gave six different instructions, the supreme court felt called upon to say: "A few plain propositions, embracing the law of the facts of the case, are greatly to be preferred in every case to a long string of instructions, running into each other, and involved in intricacies requiring as much elucidation as the facts of the case themselves." If counsel and the trial courts would confine the evidence to the issues made by the pleadings, and the instructions to a few clear, accurate, and concise statements of the law applicable to the facts, as understood by the court, this court would be relieved of much unnecessary labor, lengthy opinions would be

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avoided, and the necessity for reversals would exist in few cases. Judgment reversed, and new trial ordered.

RADEB v. McELVAIN.

(Supreme Court of Oregon. June 24, 1891.)

ACTION ON NOTE—PAYMENT—CONCLUSIVENESS OF RECEIPT—NONSUIT.

Where, in an action upon a note, defendant claims payment, and introduces a receipt given by plaintiff, it is error to exclude evidence explaining the receipt and grant a nonsuit, under Hill's Code Or. § 246, which provides that "a judgment of nonsuit may be given against the plaintiff on motion of defendant when on the trial the plaintiff fails to prove a sufficient cause to be submitted to the jury."

Appeal from circuit court, Sherman county; FRANK J. TAYLOR, Judge.

C. J. Bright, for appellant. *Huntington & Wilson*, for respondent.

BEAN, J. The answer admits the execution and delivery of the note, which is set out in the complaint, but avers payment thereof in full on January 22, 1889, which, being denied by the reply, made the only issue in the case. The note was identified, and admitted in evidence without objection. The defendant having offered in evidence a writing admitted to have been executed by plaintiff, and which on its face purported to be a receipt against a note of the same date and amount as the one described in the complaint, plaintiff offered to show that on or about February 2, 1888, the exact date not being known, he sold to defendant a horse for \$67.50; that defendant executed and delivered his note for the price of the horse, due in 20 months; that plaintiff lost the note, and, on informing defendant of that fact, it was agreed that a new note should be given, in terms as nearly as possible of the lost one, in lieu thereof, and that plaintiff should give a receipt against the lost note; that in pursuance of this agreement the note described in the complaint and the receipt offered in evidence by defendant were executed on January 22, 1889; and that neither the first nor second note had been paid. The court refused to admit this evidence, but allowed the motion of the defendant for a nonsuit. A judgment of nonsuit may be given against the plaintiff on motion of the defendant when the action is called for trial, and the plaintiff fails to appear; or, when the trial has begun, and before the final submission of the cause, the plaintiff abandons it; or when upon the trial the plaintiff fails to prove a cause sufficient to be submitted to the jury. Hill's Code, § 246. "A cause not sufficient to be submitted to the jury is one where it appears that, if the jury were to find a verdict for the plaintiff upon any or all of the issues to be tried, the court ought, if required, to set it aside for want of evidence to support it." Id. § 247.

In this case the cause of action alleged by plaintiff is admitted by defendant, so no proof was necessary on his part. The only issue was made by the allega-

tion of payment in defendant's answer, and the burden of proof was on him to sustain such issue. The plaintiff had not failed to prove a cause sufficient to be submitted to the jury, within the meaning of the section authorizing a judgment on nonsuit, for no proof of this cause of action was required, and, unless defendant proved the alleged payment to the satisfaction of the jury by a preponderance of the evidence, plaintiff was entitled to a verdict. It was therefore manifest error to grant the motion for a nonsuit. Nor could the court declare as a matter of law that the receipt offered in evidence was conclusive evidence of payment. It was but *prima facie* evidence, and subject to be contradicted or explained, and the evidence offered by plaintiff for that purpose should have been admitted. Without such explanation the jury could not have intelligently determined whether the note sued on had been paid or not. That was the only issue in the case, and the receipt was competent evidence as tending to prove it, but by no means conclusive. The plaintiff offered to show that it was not intended to be against this note, and he should have been permitted to do so. There was no variance, as claimed by respondent's counsel, between the note admitted in evidence and the allegation of the complaint. The copy of the note set out in the complaint and the note admitted were in words and figures exactly the same. The fact that the complaint alleges that the note was made and executed on the 2d day of February, 1888, when in fact it was executed in January, 1889, is immaterial under the admission in the answer. Judgment reversed and new trial ordered.

ATCHISON, T. & S. F. R. Co. v. TEMPLE.

(Supreme Court of Kansas. July 9, 1891.)

CARRIERS—INJURIES TO STOCK—NOTICE OF CLAIM.

A contract between a railroad company and a shipper of stock stipulated that as a condition precedent to his right to recover damages for any loss or injury to such stock he should give notice in writing to some officer of the railroad company or its nearest station agent before the removal of such stock from the place of delivery. In an action to recover damages for injuries to such stock while *en route*, where the condition of the stock was made known to the station agent of the railroad company at the place of destination, and such agent consented to the removal of the stock from the car, and had an opportunity to examine and inspect the animals after such removal, and before they had mingled with other stock, or been removed from the place of destination, and a written notice for damages was transmitted to the claim agent of the railroad company within four days after the removal of the stock from the car, and 10 days thereafter, upon the death of one of the animals, a subsequent notice for damages was given to the railroad company, *held*, that there had been a substantial compliance with the contract upon the part of the shipper.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Finney county; A. J. Abbott, Judge.

George R. Peck, A. A. Hurd, and J. G. Egan, for plaintiff in error. Brown, Blerer & Cotteral, for defendant in error.

GREEN, C. This was an action for damages, commenced in the district court of Finney county by Samuel A. Temple against the Atchison, Topeka & Santa Fe Railroad Company. The plaintiff alleged that on the 21st day of March, 1887, he shipped over the defendant's railroad, from Kansas City to Pierceville, Kan., a bay mare and three mules; that a written contract for the transportation of the stock was made, a copy of which was attached to his petition; that the railroad company broke the contract by negligently and violently striking the car in which the stock was being transported against another car, and thus throwing the animals together upon the floor of the car, and injuring them, resulting in the death of the mare and the crippling of the mules; that the condition of the stock was made known to the agent of the railroad company at Pierceville while they were in the car at the station; that the agent inspected the stock, and consented and requested that the mare and mules be removed from the car, and, after such removal, and before they had been intermingled with other stock, inspected the injured animals; that before bringing suit, and after the death of the mare, written notice was given to the defendant, through its agent, of the plaintiff's claim for damages. The contract of shipping contained the following condition: "And for the consideration before mentioned said party of the second part further agrees that as a condition precedent to his right to recover any damages for loss or injury to said stock he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before said stock is mingled with other stock." The defendant filed a general denial, and for a further defense allege that the plaintiff had not complied with the condition precedent in the contract for transportation requiring written notice of the claim for damages. The defendant filed a demurrer to the plaintiff's evidence, which was overruled. No evidence was introduced upon the part of the defendant. The jury returned a verdict for the plaintiff for the sum of \$345. A motion for a new trial was overruled, and judgment was rendered on the verdict. The plaintiff in error brings the record here for review, and the principal assignment of error is that there was not such a substantial compliance with the condition precedent, as to a written notice of a claim for damages, under the contract, as to entitle the plaintiff to recover. Complaint is made that the court refused certain instructions asked for by the defendant in error, to the effect that, if the plaintiff did not give a written notice of his claim for damages to some officer of the railroad company, or its nearest station agent, before the stock was removed from the place of destination or place of delivery, and before they were mingled with other stock, then their verdict should be for the defendant. Further,

that if they should find from the evidence that the plaintiff did not serve upon the defendant a written demand for damages for injury or loss of the mare in question until April 7, 1887, after the death of the mare, and her removal from the place of destination or delivery, or after the animals had mingled with other stock, then their verdict should be for the defendant. We think the instructions requested were properly refused. Upon this branch of the case the court instructed the jury as follows: "You are instructed that the railroad company has a right to limit their responsibilities to the owners in the carrying of stock or goods by a special contract, so long as the limitation does not affect their liability on account of negligence or misconduct. Plaintiff further alleges that the animals were removed from the car in which the injury was sustained by the advice and with the knowledge and the consent of the employees of the defendant prior to the time that written notice was given of any claim of damage because of said injuries. Should you find from the testimony that the animals were so removed, and that the mare died from the injuries so received, and that the mules were injured so as to be depreciated in value, and that the death of the mare and the injuries to the mules were caused by the carelessness and negligence of the agents and servants of the defendant company, and that the company had a good, fair, and reasonable opportunity to examine and inspect all of such stock, and to know of its condition after it was removed without unreasonable inconvenience, you will then find that the service of the notice of application for damages was made in due time, and that the company is not absolved from liability because of the fact that the written notice introduced in the testimony was not served upon the station agent or other employe of the company named in said contract prior to the removal of the stock from the car at the place of destination. The purpose of such notice is that the company may have a fair and reasonable opportunity of examination and inspection of the condition of the live-stock transported under its management before it shall be placed beyond its reach or beyond the possibility of certain identification." The court stated the law correctly. The plaintiff in error seems to rely upon the cases of *Goggin v. Railway Co.*, 12 Kan. 416, and *Sprague v. Railroad Co.*, 34 Kan. 352, 8 Pac. Rep. 465. In the former case no written notice was given for more than a year after the cattle were injured, and in the latter case no notice was given before suit was commenced. In the case before us written notice was given within a few days after the stock arrived at Pierceville, and before the mules were taken from the place of destination. While the carrier may stipulate by contract that notice of a claim for damages shall be given within a specified time in order to be valid, still the construction upon such stipulations must be reasonable, and adapted to the circumstances of each case. 3 Amer. & Eng. Enc. Law. 15. This court said, in the case of *Goggin v.*

Railway Co., supra: "Of course it is not understood that by the phrase 'before or at the time the stock is unloaded,' that it must be the identical moment, but so immediately that the object sought by the notice can be attained. Nor would such a notice be reasonable in the case of an ordinary shipper who did not accompany and superintend his stock, nor would it probably prevent a recovery for injuries sustained which could not readily be seen, and actually should not be discovered till the time for giving the notice had expired." *Rice v. Railway Co.*, 63 Mo. 314. *Oxley v. Railroad Co.*, 65 Mo. 629. It is claimed that the court erred in permitting a witness for the plaintiff to testify to a conversation had with some employe of the railroad company at Argentine, where it seems the stock was injured. In this conversation the employe told him how the accident had occurred; that there had been a jam, and the stock had been injured. The evidence may not have been competent, but we fail to see how the railroad company was prejudiced. It was established that the car and stock were in good condition at Kansas City. When next seen at Argentine the mare and mules were injured, and the car damaged. There was no controversy about there having been an accident, and the statement of the employe of the railroad company was immaterial error. We need not notice the other errors, as they are of the same nature. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 11)

ATCHISON, T. & S. F. R. CO. v. COLLINS.

(Supreme Court of Kansas. July 9, 1891.)

HARMLESS ERROR—CARRIERS—INJURY TO STOCK.

1. Where hearsay testimony is introduced in the trial of an action, but it appears that the adverse party's rights were not thereby prejudiced, *held*, that no material error was committed.

2. The case of *Railroad Co. v. Temple*, 46 Kan. —, 27 Pac. Rep. 98, followed.

3. The admission of incompetent evidence, which is not prejudicial, is not sufficient ground to set aside a judgment and grant a new trial.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Finney county; A. J. ABBOTT, Judge.

George R. Peck, A. A. Hurd, and J. G. Egan, for plaintiff in error. *Brown, Bierer & Cotteral*, for defendant in error.

GREEN, C. This was an action brought in the district court of Finney county by William F. Collins against the Atchison, Topeka & Santa Fe Railroad Company, to recover damages for the loss of a mare shipped from Winfield to Hartland over the railroad of the defendant below, under a written contract which provided: "And for the consideration before mentioned said party of the second part further agrees that as a condition precedent to his right to recover any damages for loss or injury to said stock he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest sta-

tion agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock." The defendant answered that no notice had been given by the plaintiff for damages, as required by the contract. The plaintiff, in reply, alleged that the mare had been removed from the car at Garden City, with the knowledge and request of the defendant's agents; that after the death of the mare the plaintiff notified the station agent in writing, at Garden City, of his claim for damages. The jury returned a verdict in favor of the plaintiff for the sum of \$175. A motion for a new trial was overruled, and judgment was rendered for the amount of the verdict.

1. The first assignment of error is in the admission of testimony claimed to be hearsay. The plaintiff stated that he had a conversation with one of the trainmen about 15 minutes after the jar which it is claimed caused the injury to the mare, in which the man apologized for being so rough with the train, saying he thought that there was a brakman on the bunch of cars which ran against the car of stock. The accident occurred at Valley Center. The car containing the plaintiff's stock was set out upon a siding, and in switching five or six cars were permitted to run down grade against the car occupied by the plaintiff. The plaintiff testified that the cars had no brakeman upon them. There was really no controversy about how the accident occurred. While the statement of the trainman was not a part of *res gestæ*, its admission was immaterial error. It is claimed that the plaintiff below was allowed to give evidence of another conversation said to have taken place with some employe of the railroad, in which the plaintiff told the employe that the mare was hurt, and the latter remarked that he had better take her off at Garden City; also that the plaintiff gave evidence, over the objection of the defendant, to the fact that some railroad man was present when the mare was unloaded at Garden City, and knew where the horses were taken. The evidence established the fact that the mare was unloaded at Garden City with the consent of the company, and we do not think there was any prejudicial error in this statement of the plaintiff. The company consented to the removal of the mare, and accepted the freight.

2. It is urged that the written claim for damages was not served until some time after the mare had arrived at Garden City, and had been unloaded and placed in a stable in which other animals were kept. This question was raised by several instructions which were requested and refused, to the effect that, if the plaintiff did not give a written notice of his claim for damages for the loss of the mare in question to the station agent at Garden City until after the mare had been removed from the place of delivery to the livery stable, or until after she had mingled with other stock, the jury should return a verdict for the defendant. This raises substantially the same question we have just

decided in the case of *Railroad Co. v. Temple*, 46 Kan. —, 27 Pac. Rep. 98, and upon the authority of that case we think the instructions were properly refused. The mare was unloaded on the 5th of March, and until she died was kept separate from other stock. The jury found that the written claim for damages was delivered by the plaintiff to the station agent of the railroad company at Garden City about the 10th or 12th of March, 1887. This, we think, was sufficient.

3. The last objection urged by the plaintiff in error is that the plaintiff below was permitted to give evidence, over the objection of the defendant, that the contract was signed after the stock had been loaded, and that he received no reduced rate. It is claimed that this evidence was foreign to the issue in the case. We do not know for what purpose this evidence was introduced. The defendant in error says there was no attack on the consideration and validity of the contract. The question was one of negligence, and the court instructed the jury that the action was upon a written contract, and that the railroad company had a right to limit its responsibility to the owner for the carrying of stock by special contract, so long as the limitation did not affect the liability on account of negligence or misconduct. The court instructed the jury as to the contract and the performance of the condition precedent, thus eliminating this testimony from the case, and we think there was no material error in its admission. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 1)

DWELLING-HOUSE INS. CO. v. JOHNSON *et al.*

(Supreme Court of Kansas. July 9, 1891.)

INSURANCE—ACTIONS ON POLICY—PLEADING AND PROOF.

1. In an action to recover on a policy of insurance the plaintiff alleged the contract of insurance, the loss by fire, and the refusal of payment. The insurance company answered that a material condition of the contract had been broken, and that the rights of the assured under the policy had been forfeited. The plaintiff replied by a general denial. On the trial proof was offered, over objection, tending to show that the company had waived the condition, and was estopped from taking advantage of the forfeiture, and also that since the loss a final compromise and settlement had been agreed upon between the assured and an agent of the company. *Held*, that this evidence and the instructions based thereon were not within the issues, and should have been excluded.

2. All acts, representations, and conduct relied on as an estoppel should be specially pleaded, before evidence to establish the same can be received.

(Syllabus by the Court.)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Rossington, Smith & Dallas and P. L. Soper, for plaintiff in error. *David Overmyer*, for defendant in error.

JOHNSTON, J. This was an action brought by Johnson & Williams upon a fire insurance policy issued by the Dwell-

mg-House Insurance Company. in their petition they set forth the contract of insurance, the payment of the premium, the destruction by fire of some of the property insured on December 26, 1886; that the loss sustained was \$1,600; and that the company had refused to pay the loss, although the plaintiffs had performed all the conditions of the policy incumbent upon them. The defendants answered, admitting the execution of the policy, but alleging a breach of the condition of the same in regard to incumbrances. The company averred that in the written application for insurance, upon the faith of which the policy was issued, Johnson & Williams represented and declared that they were the absolute owners of the property sought to be insured, and that their property was unincumbered, when in fact there was upon the property at the time of the execution of the policy a mortgage lien and incumbrance; and they allege that there was a provision of the policy to the effect that, if the interest of the insured in the property was at the time of the execution of the policy or should become any other or less than a perfect legal and equitable title, free from all liens whatever, except as stated in writing upon the policy, then the policy should be absolutely void. It was further alleged that the insured, without the knowledge or consent of the company, and in violation of the provisions of the policy, executed and delivered another mortgage upon the property after the execution of the policy and before the loss occurred. The reply of Johnson & Williams was a denial of the foregoing facts alleged in the answer. The trial resulted in a verdict and judgment against the company, and it complains of the ruling of the court in admitting testimony and in instructing the jury.

On the trial the plaintiffs below were permitted to offer proof tending to establish a waiver of the condition of the policy respecting incumbrances, and such as would estop the company from urging the forfeiture against a recovery on the policy. It is undisputed that at the time the contract of insurance was made there was a mortgage of \$3,500 upon the property insured, and it had not been discharged when the loss occurred. Testimony was given over objection that the agent wrote the answers in the application respecting incumbrances after it had been signed by the assured, and also tending to show that the agent knew of the existence of the mortgage when the contract of insurance was made. The court instructed the jury that, "as the local agent might by contract indorsed on the policy have waived the answer to the questions with respect to incumbrances, or might have waived the condition concerning the mortgage, so he may by acts and conduct of dealing with the assured do that which amounts to such waiver." Testimony was also introduced concerning a settlement made by one Peck, an adjuster of the company, shortly after the fire occurred, by which it was agreed between the insured and the adjuster that, if a reduction of \$112 was made from the amount

claimed, the loss would be paid at once. In respect to this defense the court charged the jury: "If you find from the evidence that after the loss by fire of the insured property on or about January 22, 1887, Peck, the adjuster of the company defendant, went on the plaintiffs' premises, and assisted the plaintiffs to make the proof of loss, and that said adjusting agent had full knowledge of the mortgage on the premises of the plaintiffs, if there was a mortgage, and that said adjusting agent of defendant, with full knowledge of all the facts, agreed with the plaintiffs, as a final settlement of the loss, to pay plaintiffs the sum of \$1,488 as such settlement, and that the plaintiffs agreed with the adjusting agent of defendant to accept \$1,488 in full satisfaction of the loss under this policy, then the parties should stand by this settlement, and your verdict should be for the plaintiffs for \$1,488, with interest at 7 per cent. from the time this sum was made payable by the agreement of the parties, if you find there was such agreement entered into." It is said that the amount named in the verdict of the jury corresponds with the amount mentioned by the court in its instruction. It is insisted that this evidence and these instructions are not within the issues, or warranted by the pleadings in the case, and we are forced to that conclusion. The conduct and acts of the agent and the adjuster relied on as a waiver form an important condition of the contract, and, to estop the company from claiming a forfeiture, should have been specially pleaded; and the same may be said respecting the compromise and settlement which has been referred to. This was new matter, which should have been set forth in the reply with frankness and certainty, so that the company could have been prepared to meet the issues with its proof. As the issues were framed the company had no notice that the assured would make any claim of waiver or estoppel. They set up in their petition the contract, the loss, and the refusal of payment. The company answered that certain conditions of the contract had been broken, and hence no recovery could be had. The assured replied by a mere denial, which was nothing more than to say that no breach had occurred. It gave no intimation that the assured admitted the existence of an incumbrance, but insisted that the company was estopped to take advantage of a forfeiture. The condition alleged to have been broken was an important one. In respect to it the court charged the jury that a breach of the same would render the policy void, and defeat a recovery unless the company was estopped by its own acts, or had waived the warranty given by the assured. If the acts of waiver and estoppel had been pleaded, there was sufficient testimony produced by plaintiffs below to warrant the instructions given by the court. Undoubtedly an agent clothed with the authority or apparent authority of the agent in this case may waive the conditions and stipulations in the policy, and might also by his knowledge and acts estop the company from availing itself of a breach of condition or a forfeiture in certain cases. The

evidence given to the jury on this subject, however, did not controvert the truth of the defense pleaded by the company, but practically admitted it, and then assigned reasons why the company should not be permitted to avail itself of such a defense. It is uniformly held that a waiver or estoppel must be specially pleaded before evidence to establish the same can be admitted. Under our Code the facts relied upon as a ground of action or defense must be clearly and concisely stated, and a definite issue presented, so that the opposite party may not be taken by surprise upon the trial, but may be fairly notified of what he is required to meet. The new matter introduced in this case was not put in issue by the pleadings, and the company may, as they allege, have been taken by surprise, and wholly unprepared with their proof to contest the new issue. Neither the evidence introduced nor the instructions based thereon are warranted under the pleadings as they exist, and before they can be properly received the reply must be amended. As tending to sustain this conclusion, we cite *Insurance Co. v. McLanathan*, 11 Kan. 533; *Railroad Co. v. Grove*, 39 Kan. 731, 18 Pac. Rep. 958; *Railroad Co. v. Irwin*, 35 Kan. 286, 10 Pac. Rep. 820; *Insurance Co. v. Hutchins*, 53 Tex. 61; *Hayes v. Association*, 76 Va. 225; *Lumbert v. Palmer*, 29 Iowa, 104; *Northrup v. Insurance Co.*, 47 Mo. 435; *Wardner v. Baldwin*, 51 Wis. 450, 8 N. W. Rep. 257; *City of Delphi v. Startzman*, 104 Ind. 343, 3 N. E. Rep. 937; *Phillips v. Van Schaick*, 37 Iowa, 229; *Dale v. Turner*, 34 Mich. 405; *Pom. Rem.* §§ 556, 590, 661. Error is assigned on the refusal of the court to permit an amendment of the answer just before entering upon the trial. The facts set forth in the proposed amendment constituted a defense, but the record fails to show any sufficient reason for the delay in presenting this defense; and, as the matter of amendment at that stage of the proceeding is largely within the discretion of the court, we cannot hold the ruling to be a reversible error. As there must be a new trial of the case, an opportunity will be given to both parties to amend their pleadings, and the objections suggested can thus be overcome. We find nothing more in the record that requires attention, but the errors mentioned compel a reversal of the judgment and the granting of a new trial. All the justices concurring.

(47 Kan. 51)

ACKER *et al.* v. WARDEN.

(Supreme Court of Kansas. July 9, 1891.)

NEGOTIABLE INSTRUMENTS — CONSIDERATION —
FRAUD.

Where a surety was induced to renew a note upon the representation of the payee that the consideration of the original note was for money paid to the principal maker over the counter of a bank by the payee, when in fact the consideration was for money paid by the payee for the benefit of the principal maker to another party for the purchase price of an interest in a patent-right, held, that no such fraud or deceit is shown to bar the recovery on the note by the payee against the surety.

(Syllabus by the Court.)

Error from district court, Marshall county; EDWARD HUTCHINSON, Judge.

On the 23d day of July, 1883, D. W. Acker and J. F. Watson brought their action against James S. Warden to recover as damages \$3,000. In their petition they alleged that one W. H. Gibbs was the owner of a patent right for the state of Kansas for an improvement in a dairy churn, originally issued to W. W. Sanborn, of Clinton county, Iowa; that Warden induced Frank W. Alvord, on September 21, 1880, to purchase the undivided one-half interest in the patent from W. H. Gibbs for the state of Kansas, excepting certain counties; that he induced Alvord to execute his promissory note therefor in the sum of \$500, and also induced the plaintiffs to sign the same as sureties; that Warden then and there promised he would buy the remaining undivided one-half interest in the patent-right for \$1,000, and would pay that sum for the same; that the representations of Warden about buying the undivided one-half interest for \$1,000 were wholly false, and known to him to be false; that W. H. Gibbs, without any consideration, on the 17th day of September, 1880, conveyed to Warden the undivided one-half interest in the patent-right, that the conveyance was made solely for the purpose of cheating and deceiving these plaintiffs as to the value of the patent-right and as to the amount that Warden was to pay therefor. They further alleged in their petition that on September 21, 1880, the date of the execution of the note of \$500 by Alvord and themselves, Warden represented to Alvord that the patent-right was a new, novel, and useful invention, and an improvement of great value; that large sums of money could be made from the sale thereof, but in fact, the patent-right was utterly worthless, and of no value whatever, and possessed neither novelty nor utility, and that Warden well knew this at the time he made all the foregoing representations, and so induced Alvord and these plaintiffs to sign and deliver the note of \$500 on September 21, 1880. The petition also alleged that on the 28th day of November, 1881, Warden induced the plaintiffs to execute a renewal of the note, upon the statement that Alvord had borrowed \$500, and that the first note had been executed for that amount of money, which he had paid to Alvord over the counter of his bank; that all of these representations were false, and known by Warden to be false at the time they were made; that Warden assigned and sold the note to the Exchange National Bank of Atchison, in this state; and that on the 18th of July, 1883, a judgment was rendered in favor of the bank and against them as principals on the note for the sum of \$532.50, which they will have to pay. The defendant, James S. Warden, in his answer denied generally the averments of the petition, and alleged that he did not assign or transfer the second note until after its maturity, and that in an action brought by the bank upon the note judgment was recovered against the plaintiffs upon personal service, and that therefore the plaintiffs have no cause of action whatever against him. The plaintiffs filed a reply, denying that the promissory note de-

scribed in their petition was assigned, transferred, or sold to the Exchange National Bank of Atchison before it became due. Trial had on the 2d day of September, 1885, before the court with a jury. After plaintiffs had introduced all of their evidence, the trial court sustained a demurrer filed thereto by the defendant, and rendered judgment for costs in favor of the defendant and against the plaintiffs. The plaintiffs excepted, and bring the case here. *W. A. Calderhead*, for plaintiff in error.

HORTON, C.J., (after stating the facts as above.) The material facts in this case are as follows: W. W. Sanborn, of Iowa, obtained on the 21st day of May, 1867, letters patent from the United States for certain improvements in dairy churns. Prior to 1880 the right to sell and use this patent in Kansas was purchased by W. H. Gibbs. In September, 1880, Alfred Hill and Frank W. Alvord purchased of Gibbs an undivided half of the patent-right for the state of Kansas, excepting a few counties, for \$1,000, and James S. Warden purchased the other undivided half for \$500. In paying for his undivided quarter Alvord executed his note of \$500, to James S. Warden, dated September 21, 1880, and due 120 days after date, bearing 12 per cent. interest after maturity. J. F. Watson and D. W. Acker signed this note as sureties for Alvord. When the note became due it was not paid, and on November 28, 1881, the note was renewed by Watson and Acker, payable eight months after date. George C. Brownell also signed this note. Subsequently, the note was sold and indorsed by James S. Warden to the Exchange National Bank of Atchison. On the 16th day of March, 1883, the Exchange Bank brought its action against Watson, Acker, Brownell, and Warden upon this note, and upon personal service obtained judgment against all the parties. On the 23d day of July, 1883, this action was commenced by Acker and Watson against Warden for damages, alleging fraud and deceit on the part of Warden in procuring both of these notes referred to. Upon the trial, after the plaintiffs had introduced all of their evidence, the defendant interposed a demurrer thereto, which was sustained by the court. The plaintiffs excepted, and bring the case here for review. It is claimed that Acker and Watson were induced to sign the note, of Alvord to Warden of \$500 on September 21, 1880, by the false representations of Warden. They claim that he promised to purchase and pay \$1,000 for an undivided half of the patent-right; second, that he represented that the sale of the patent right for two counties in Kansas had been made, which would nearly pay the note; and, third, that he stated the patent-right was valuable and useful, when it was worthless, and of no value whatever. It is also claimed that the evidence shows that Warden purchased the patent-right for Kansas on September 17, 1880, prior to the time that Alvord executed any note, or had purchased any part thereof. It appears from the evidence produced upon the trial that Warden never had any conversation with Acker and Watson prior to

their signing the note of September 21, 1880; therefore he did not personally by any representations or promises induce them to become the sureties of Alvord. Alvord made some such representations to Acker and Watson which he said Warden had made to him, and it appears that Warden did make some such statements to Alvord. It is clearly apparent, however, from Alvord's own statements, that the pretended sales of the patent-right, prior to his purchase, were not relied upon by Alvord, because he cannot remember the amount; and his other evidence shows that he was eager to make the purchase of a quarter interest in the patent-right, if he could raise the purchase price, or could give a good note therefor. It is evident that Alvord, after a short examination of the dairy churn in operation and his conversation with Warden, was induced to believe that the patent-right was a valuable one; and that, if properly operated, he could make money out of it. He also was induced to buy an interest in the patent-right because he thought that Warden was a first-class business man, and would not take an interest if the patent was not all right. The amount that Warden was to pay for an undivided half was not so important to Alvord, as the fact that Warden thought the patent-right of so much value as to become interested therein and the owner of an undivided half thereof.

Alvord testified, among other things, as follows: "Question. How long were you engaged in examining the patent churn? Answer. Why, not a great while. I think at the time I first saw it he was in the act of churning. Q. You thought it was a pretty good thing? A. Yes, sir. Q. And made up your mind, as I understand you to say, that you would take an interest in it, if you could put up your part of the money or the security? A. Yes, sir. Q. Did you have considerable talk with Mr. Gibbs about the operation of the churn? A. Not a great deal; no. I had a considerable talk with him as to dealing in patent-rights. Q. Did you see the churn operate yourself there at the fair-grounds? A. Yes, sir. Q. You say then that you believed it was capable of going? A. Yes, sir. Q. And you, in the exercise of your own good judgment, thought it was a pretty good thing at that time? A. Yes, sir. Q. And after that you had a talk with Warden, I understand you, and he told you to get security on this note for \$500, subsequent to that time? A. Yes, sir. Q. Now, at the time you spoke to Acker and Watson, had they any knowledge about your purchasing this patent-right, so far as you knew? A. Yes, I think they had. Q. Previous to that time? A. Yes, I think they did. Q. They knew what this note was for? A. Yes. Q. They knew that you had given this note for an interest in this patent-right? A. Yes, sir. Q. You explained to them fully what you wanted it for, and asked them to go your security? A. Yes, sir. Q. They had no interest in the patent-right themselves? A. No, sir. Q. They were simply accommodating you by indorsing your note? A. Yes, sir. Q. That

was the way you understood it? A. That was the understanding. Q. And I understand you to say that Mr. Warden was not present when they signed this note? A. No, sir; he was not. Q. They signed this note upon your request, and upon your solicitation alone? A. Yes, sir. Q. After these papers were fixed up you started out to sell these patent rights? A. Yes, sir. Q. You sold how many rights? A. I sold two. Q. What did you receive for them? A. I received \$160 for one right, and I traded the right of Clay county for a man's interest in a timber claim. Q. Did you afterwards sell the timber claim? A. No, sir; I traded him, besides a horse or pony that I had. Q. What was the timber claim worth? A. Well, I don't know. I couldn't have got anything for it I suppose. I tried to. Q. You abandoned it, did you? A. Yes, sir. Q. Did you make any other sales? A. No, sir. Q. Was that all the money you realized? A. That was all the money I realized. Q. And at Valley Falls, after you had attempted to manufacture this churn unsuccessfully, you threw up the business? A. Yes, sir. Q. Subsequent to that you and Acker and Watson were sued on the note, were you not, in this court? A. I believe we were."

The evidence of W. H. Gibbs shows that he sold the patent-right to Hill, Alvord, and Warden; that an undivided half was for Hill and Alvord and the other undivided half for Warden; that Warden advanced the money for the undivided half purchased by Hill and Alvord, less the discount; and that Warden paid the balance of the \$1,500 for which the whole patent-right was sold for Kansas, excepting a few counties. His evidence also shows that the patent-right purchased by Hill, Alvord, and Warden is a good and useful invention, and in skillful hands works well. All of the evidence tends to show that Warden believed the patent-right a valuable one, and also believed at the time he associated with him Hill and Acker in the purchase of it that money could be made in the sale of the patent-right in Kansas. There is no evidence showing or tending to show that Warden ever supposed or believed that the patent-right was worth less. It did not appear upon the trial that either Alvord or Watson were induced to sign the first note by the fraud or deceit of Warden. The renewal or second note, which was given to take up the first note, was executed long after all the foregoing facts were known to Alvord and Watson; and the only false statement which is alleged against Warden concerning the execution of the second note is the statement or representation that Alvord got \$500 from him at his bank on the first note. The evidence shows that the amount of this note, less discount, was turned over by Warden to Gibbs, and, although Alvord did not in person obtain \$500 at the counter of Warden's bank, yet the \$500, less discount, in money, was actually paid to Gibbs by Warden for the benefit of Alvord. Warden may have made some statements in the matter which were not wholly true, but it is not every false statement that is actionable. It is immaterial whether

Warden had paid to Alvord at his bank counter the \$500, or had paid it to Gibbs for Alvord. In re Cameron, 44 Kan. 64, 24 Pac. Rep. 90. As Gibbs sold the patent-right for \$1,500, it is possible that Alvord paid more than he ought to have paid for an undivided quarter, or that, on account of the payment of \$500, he is entitled to a larger share than an undivided quarter of the patent-right; but no such fraud or deceit is shown as to entitle the plaintiff to recover upon the testimony disclosed. The judgment of the district court will be affirmed. All the justices concurring.

(47 Kan. 83)

GAGNON v. BROWN *et al.*

(Supreme Court of Kansas. July 9, 1891.)

CHATTEL MORTGAGES—LIEN—PRIORITIES.

Where a mortgagee obtains possession of the mortgaged chattels before any lien or other right attaches his title under the mortgage is good against everybody if it was previously valid between the original parties to the mortgage. The purchaser of a note secured by a subsequent mortgage upon the same property taken by the mortgagee, with notice of the prior mortgage, is bound to take notice of the possession of the first mortgagee, acquired previous to such purchase.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Cloud county; EDWARD HUTCHINSON, Judge.

Laing & Wrong and *J. J. McFarlan*, for plaintiff in error. *Caldwell, Ellis & Cook*, for defendants in error.

GREEN, C. On the 30th day of November, 1885, August Berthlaume executed and delivered to Octave Gagnon a chattel mortgage on a bay mare named "Fan" and a bay horse called "Tom," to secure the payment of the sum of \$150 in one year from date. About the 9th day of November, 1886, Berthlaume executed and delivered to C. L'Ecuier another mortgage upon the same property, to secure the payment of a note for \$200, due on the 1st day of December, 1886. This mortgage was taken by Alcide L'Ecuier, as agent and attorney for the mortgagee; and it is claimed by the plaintiff in error that the former knew that Gagnon had a mortgage upon this property. This mortgage was filed in the office of the register of deeds of Cloud county on the 16th day of November, 1886. On the 29th day of November, 1886, the plaintiff in error took possession of both horses under the mortgage, and on the same day filed his mortgage for record in the same county. On the 1st day of December, 1886, N. B. Brown & Co. purchased the note and mortgage executed to L'Ecuier, and demanded possession of the horses of Gagnon, which was refused. This action was brought on the 11th day of December, 1886, in the district court of Cloud county, by the defendants in error, to recover the property described in the mortgage executed to L'Ecuier. The plaintiff in error offered to show that his mortgage was filed for record on the 29th day of November, 1886. The defendants in error objected, for the reason that the filing was of a date subsequent to the filing of the mortgage of the

defendants in error. This objection was sustained. The court instructed the jury to return a verdict for the plaintiffs below, and overruled the defendant's motion for a new trial. The plaintiff in error contends that L'Ecuyer had actual notice of the Gagnon mortgage, and took subject to it; that Brown & Co. got no better right by the assignment than they could have obtained had they taken a mortgage directly to themselves on the day the assignment was made to them; that on that day Gagnon had actual, open, and adverse possession of the property, under his mortgage, having taken it on the 29th day of November, 1886, and also had his mortgage on file at that date. The mortgagor, Berthlaume, left Cloud county about the 16th day of November, 1886. Prior to his departure he delivered the horses in question to Alcide L'Ecuyer, who was the agent of the mortgagee, C. L'Ecuyer, and it seems he delivered the property to Sifroy Berthlaume, who retained the horses until the 29th day of November, 1886, when they were taken from him, without his consent, by Gagnon. There seems to have been some question as to the open possession of the property by the latter until the suit was commenced. It is claimed that the horses were kept out of sight a portion of the time, and there is some evidence to support this claim. It is argued by the plaintiff in error that L'Ecuyer acquired no adverse interest in the mortgaged property, because of actual notice; that Brown & Co. had no specific interest in or lien upon the property prior to the time Gagnon filed his mortgage and took possession; therefore Brown & Co. acquired no superior equity through L'Ecuyer, because there was none to give. They had no such equity in their own right, because they bought with notice offered by adverse possession and prior record. It is conceded by counsel for defendants in error that if there had been no note connected with the mortgage, or if the note had been non-negotiable, the assignee would have had no better rights than the assignor; but it is urged that the general rule is that in all cases where a negotiable promissory note secured by a mortgage is indorsed before maturity to a *bona fide* purchaser for value the assignee takes the mortgage, as well as the note, free of all pre-existing equities. This rule may be correct, but the question is one of application. It is admitted by the defendants in error that Alcide L'Ecuyer, the agent of the mortgagee, under whom they claim, had sufficient notice of the existence of the mortgage of the plaintiff in error to put him on inquiry. It would not, therefore, be an open question between the original mortgagee and the plaintiff in error as to who would be entitled to the mortgaged property. Now, before the defendants in error acquired any right to the property mortgaged, the plaintiff in error took possession of the same. It is immaterial whether the mortgagee took possession *in invitum*, or the mortgagor voluntarily put him in possession, if the act be done in pursuance of a condition contained in the mortgage. Jones, Chat. Mortg. § 164a. The

evidence established the fact that this possession was acquired two days before the assignment of the note to the defendants in error. Was not such possession good against the defendants in error? The right of the defendants in error did not attach until after the plaintiff in error had acquired possession. If a mortgagee takes possession of the mortgaged property before any other right or lien attaches, his title under the mortgage is good against everybody if it was previously valid between the parties. Jones, Chat. Mortg. § 178; Dayton v. Bank, 23 Kan. 422; Cameron v. Marvin, 26 Kan. 612; Corbin v. Kincaid, 33 Kan. 649, 7 Pac. Rep. 145; Dolan v. Van Demark, 35 Kan. 304, 10 Pac. Rep. 848; Chipron v. Feikert, 68 Ill. 284. It was said by Chief Justice CAMPBELL, in the case of Parsell v. Thayer, 39 Mich. 467: "That an immediate and continuous change of possession into the hands of a mortgagee is the best possible notice of his rights against all others." Now, if it be conceded that the original mortgagee, under whom Brown & Co. claim, had notice of Gagnon's mortgage, the mortgagee could not have maintained *replevin* for the mortgaged property. It is true the mortgage was filed for record on the 16th day of November, 1886, but Brown & Co. acquired no rights to the property until the 1st day of December, 1886, when Gagnon was in possession of the property, so that the claim of Brown & Co. did not attach until the plaintiff in error had acquired possession under his mortgage; and we think, under the authorities cited, the defendants in error were bound to take notice of such possession. For the reasons given we think the district court erred in its charge to the jury. It is recommended that the judgment be reversed, and a new trial be granted.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 73)

DURHAM v. HADLEY.

(Supreme Court of Kansas. July 9, 1891.)

VENDOR AND VENDEE—WARRANTIES—FAILURE OF TITLE.

1. In every contract for the sale of land there is always an implied warranty by the vendor that he has good title, unless such warranty be expressly excluded by the terms of the contract. The implied warranty exists so long as the contract remains executory, *i. e.*, until the deed is given.

2. The case of O'Neill v. Douthitt, 40 Kan. 689, 20 Pac. Rep. 498, followed.

3. Where a purchaser enters into a written agreement with the alleged owner of certain land to purchase the same upon installments, and the purchaser afterwards discovers that the title is clouded upon the records by an apparent incumbrance in such a manner as to affect the value of the property, and to interfere with the sale of the land to a reasonable purchaser, such a purchaser is not compelled to complete the payments upon his contract, and trust to future litigation to clear or quiet the title.

(Syllabus by the Court.)

Error from district court, Johnson county; J. P. HINDMAN, Judge.

On the 14th day of February, 1888, T. J.

Hadley and C. M. McEntire brought their action against Thomas L. Hogue, S. R. Burch, and H. S. Miller to recover \$500 alleged to have been received by Hogue, Burch & Miller as the agents of Mrs. Bowen for certain real estate sold by them for her benefit. At the instance of Hogue, Burch & Miller, Thomas Durham was also made a defendant. With the consent of the court, he filed an answer, claiming the \$500. Trial before the court without a jury, and the court made and found the following special findings of fact: "(1) That on the 1st day of June, 1860, Charles H. Thompson received a patent from the United States for the S. E. $\frac{1}{4}$ of section 25, township 13, range 23, in the district of lands subject to sale at Leecompton, Kan., which patent was duly recorded in the office of register of deeds in Johnson county, Kan., April 12, 1873, and said Thompson became and was the absolute owner of said premises. (2) That the said Charles H. Thompson on the 3d day of March, 1859, duly conveyed said land by warranty deed to Simeon F. Hill. Said deed was duly recorded May 17th, 1859. (3) That said Simeon F. Hill and Mildred A. Hill, his wife, on the 1st day of May, 1860, executed a mortgage on said land to Wyllys King et al. to secure the \$1,143.30 due six months after date, which mortgage was duly recorded May 21, 1860, and has been duly released of record. (4) That on the 11th day of May, 1859, said Simeon F. Hill and wife, Mildred A. Hill, executed a mortgage on said land to said Charles H. Thompson to secure \$834, payable February 10, 1860, which was duly recorded in the office of the register of deeds of Johnson county, Kan., May 23, 1857. (5) That no assignment of said mortgage appears of record, and no release appears on the margin thereof, and that the only release of record of said mortgage executed by said Simeon F. Hill and wife to said Thompson in evidence or of record is the following instrument, recorded May 30, 1862, in the recorder's office of Johnson county, Kan.: 'Know all men by these presents that we, Benjamin M. Jewett and Matilda Jewett, his wife, for and in consideration of \$800 to them in hand paid by S. F. Hill, of Olathe, Kansas, have granted, bargained, sold, released, and forever quitclaimed unto the said S. F. Hill all the right, title, claim, and demand whatever which we have, or may have, acquired in and to a certain piece of land by reason of a certain mortgage executed by said Hill to Charles H. Thompson, which said land is described as follows, to-wit: South-east quarter, section twenty-five, (25,) in township thirteen, (13,) of range twenty-three, (23.) In witness whereof we have hereunto set our hands and seals this 28th day of May, 1862. [Signed] BENJAMIN M. JEWETT. MATILDA JEWETT. State of Missouri, county of Jackson—ss.: On this 28th day of May, 1862, before me, the undersigned clerk of the Kansas City court of common pleas, within said county and state, personally appeared Benjamin M. Jewett and Matilda Jewett, his wife, to me personally known to be the persons who executed the foregoing conveyance, and acknowledged that

they executed the same for the purposes therein mentioned, and the said Matilda Jewett being by me made acquainted with the contents of the foregoing, and, on examination separate and apart from her said husband, acknowledged that she executed the same, and relinquished her dower therein mentioned, freely and without compulsion or undue influence of her said husband. In witness whereof I here-to set my hand and affix the seal of said court at office in Kansas City, Mo., this 28th day of May, 1862. [Seal.] E. M. SLOAM, Clerk, by C. W. SLOAM, D. C.' (6) That said Simeon F. Hill died intestate in Johnson county, Kan., on the 9th day of January, 1863, leaving Mildred A. Bowen, his widow, and Lizzie Hill, aged 11 years, and Alice Hill, aged 8 years, his sole and only heirs. (7) That said Lizzie Hill afterwards intermarried with T. J. Hadley, one of the plaintiffs herein, in the year 1871, and the said Alice afterwards intermarried with John V. Haverty, in the year 1875, and that the said Mildred A. Hill, after the death of her husband, Simeon F. Hill, intermarried with one Addison Bowen in the year 1864. (8) That in the year 1867 M. A. Bowen commenced a civil action in the district court of Johnson county, Kan., against Lizzie Hill and Alice Hill to partition the land in said patent described, as well as other land of which Simeon F. Hill was owner at the time of his death, which proceedings in partition are in evidence herein, and that defendants Lizzie Hill and Alice Hill were duly represented in court by guardian *ad litem*, William Roy, Esq., appointed by the court, an attorney at law of this bar; that in said partition suit three commissioners were appointed by the court to make partition of said lands, and made their return, setting apart to M. A. Bowen the land in controversy, with other land, and which said report was submitted to said court, and spread upon the records thereof on the 26th day of October, 1867, the same being the 12th day of the October term of said court. An order was thereupon made by said court in the words and figures following: 'It is hereby considered and ordered by the court that the said proceedings and report be, and the same are hereby, approved and confirmed, and that said parties hold the parts and premises as set off and assigned to each, respectively.' That no other order for the partition of said lands, and no order of confirmation of said proceedings or judgment, or decree in partition was made in said cause, except as above set forth. (9) That the said M. A. Bowen had been in the actual, peaceable, adverse possession of the land in controversy for more than fifteen years before the sale thereof to Thomas Durham. (10) That on the 30th day of March, 1887, Hogue, Burch & Miller were the agents of M. A. Bowen to sell the land in controversy, and on that day they, as such agents, entered into the following written contract with said Thomas Durham: 'Articles of agreement made this 30th day of March, A. D. 1887, between Mrs. M. A. Bowen and Addison Bowen, her husband, parties of the first part, and Thomas Durham, party of the second part, witness-

eth: That the said party of the second part shall first make the payments and perform the covenants hereinafter mentioned in this instrument; the said party of the first part will convey and assure to the party of the second part, in fee-simple, clear of all incumbrances whatsoever, by a good and sufficient warranty deed, the following lot, piece, or parcel of ground, viz: Thirty-two (32) acres, more or less, in the south-east quarter of the south-east quarter, and a fraction in the south-west quarter of the south-east, all in section twenty-five, (25,) township thirteen, (13,) of range twenty-three, (23;) and the said party of the second part hereby covenants and agrees to pay to said party of the first part the sum of \$200 per acre, in the manner following: \$500 cash in hand paid, the receipt of which is hereby acknowledged, and the sum of one-half of the whole amount in twenty-nine days from the above date, and the balance in one year from date, at 8 per cent. interest per annum. The above land is sold subject to a lease made to M. T. Graham, which covers nine acres of grass land, with interest at 8 percent. per annum, payable annually on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments, or impositions that may be legally levied or assessed upon said land subsequent to the year 1886; and, in case of the failure of the said party of the second part to make either the payments or perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by said party of the first part in full satisfaction and in liquidation of all damages by her sustained, and she shall have the right to re-enter and take possession of the premises aforesaid. It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory for the heirs, executors, administrators, and assigns of the respective parties. In witness whereof the parties to these presents have herunto set their hands the day and year first above written. [Signed] Mrs. M. A. BOWEN. ADDISON BOWEN, per HOGUE, BURCH & Co., Agents. THOMAS DURHAM. (11) That said written contract was the only contract between said Thomas Durham and the said Bowens for the sale of said land. (12) That said Bowens executed a warranty deed to said land to said Thomas Durham, who was a non-resident of the state of Kansas, and that said deed was delivered to Hogue, Burch & Co. for said Durham; and said Hogue notified Thomas F. Durham, agent of Thomas Durham, of such tender and demanded the purchase money in accordance with the terms of the written contract; that said Durham objected to the title of said land, and refused to accept said deed, and make payment of said purchase money. (13) That in November, 1887, the said Thomas Durham, in Philadelphia, Pa., made to said Thomas F. Durham, in Kansas City, Mo., a quitclaim deed to said land in controversy.

(14) That the day before the commencement of this suit the said M. A. Bowen in writing assigned to her son-in-law, T. J. Hadley, and C. M. McEntire, plaintiffs herein, the sum of money so due to her from her agents, Hogue, Burch & Co., and that the consideration for such assignments was services rendered for her and work done. (15) That no deed was tendered to Thomas Durham or Thomas F. Durham, who lived in Missouri, but said Durhams were notified that said deed had been tendered to Hogue, Burch & Co. for him. (16) That an abstract was furnished to said Thomas Durham by T. J. Hadley; that by the terms of the contract Bowens were not bound to furnish such abstract. (17) That, at the date of the execution of said contract, the said Thomas Durham paid to Hogue, Burch & Co. \$400 cash, and gave to Hogue, Burch & Co. his due-bill for \$100, having only \$400 in his possession at the time, and that said Hogue, Burch & Co. never paid said Bowens said money, or any part thereof, but still retain the same. (18) That the said Bowens had complied with all the conditions on their part under said contract, and that a complete title to said land in controversy is vested in said M. A. Bowen, free and clear of incumbrances." And thereon, as a conclusion of law, the court found that T. J. Hadley and C. M. McEntire were entitled to recover from Hogue, Burch & Co. the \$400 in money, and the \$100 due-bill, as prayed for in their petition. Judgment was entered accordingly, and the costs were adjudged against Thomas Durham. He excepted, and brings the case here.

I. O. Pickering, for plaintiff in error.
John T. Little and J. P. Hudman, for defendant in error.

HORTON, C. J., (after stating the facts as above.) This action was brought by T. J. Hadley and C. M. McEntire, as assignees of Mrs. M. A. Bowen, to recover the sum of \$500 alleged to have been deposited with Hogue, Burch & Miller, real estate agents, by Thomas Durham, as part purchase money for certain real estate alleged to have been purchased by Durham from Mrs. M. A. Bowen, through Hogue, Burch & Miller, as her agents. Afterwards, by order of the court, Thomas Durham was made a party defendant, and filed his answer claiming the money. Hogue, Burch & Miller answered, admitting the payment of the money to them as agents of Mrs. Bowen, disclaiming all right thereto, and brought it into court to be paid to the party entitled thereto. Trial was had to the court without a jury, and, at the request of Durham, the court made special findings of facts and conclusions of law. Judgment was afterwards rendered in favor of Hadley and McEntire, and against Hogue, Burch & Miller, for the recovery of the money, and against Durham for the costs of suit. Durham excepted, and brings the case here.

It appears from the record that \$400 in cash and a note of \$100 were deposited on March 30, 1887, by Thomas Durham with Hogue, Burch & Miller, agents of Mrs. M. A. Bowen, on a contract for the sale of land, which contract was never consum-

mated. On February 13, 1888, the day before this action was brought, Mrs. M. A. Bowen assigned her claim to the \$500 in writing to Hadley and McEntire. After the written contract of the 30th of March, 1887, the evidence shows that Mrs. M. A. Bowen remained in possession of the land. After the contract was delivered, T. J. Hadley, the son-in-law of Mrs. M. A. Bowen, furnished an abstract of title of the land to Thomas F. Durham, the agent of Thomas Durham. As soon as the abstract was furnished and examined, Durham objected to the title, and paid nothing further upon the contract. Mrs. Bowen deposited a deed of the land with Hogue, Burch & Miller, and then demanded the money stipulated in the contract, and, when it was not paid over, she claimed the \$500 as a forfeit or penalty. In 1860, Charles H. Thompson was the owner of the land by a patent from the government. On the 3d of March, 1859, he conveyed the land by warranty deed to Simeon F. Hill. On the 11th day of May, 1859, Simeon F. Hill and wife executed a mortgage on the land to Charles H. Thompson to secure \$834, payable February 10, 1860. This mortgage was duly recorded in the office of the register of deeds of Johnson county on May 23, 1857. No assignment of the mortgage appears of record, and no release thereof appears on the margin of the record. On May 30, 1862, Benjamin M. Jewett and Matilda Jewett filed a release and quitclaim deed, reciting that Simeon F. Hill had paid to them the mortgage executed to Thompson. It was decided in *O'Neill v. Douthitt*, 40 Kan. 689, 20 Pac. Rep. 493, that "where an abstract of title shows that a mortgage on the land has been recorded, it is then necessary, in order that the abstract shall show a good and complete title, that it shall also show that the mortgage was not only released and discharged of record, but also that the person releasing or discharging the same had full and complete authority of record to do so."

There is nothing in the office of the register of deeds of Johnson county showing, or tending to show, that Benjamin F. Jewett and wife had any authority to release or discharge this mortgage. The title of the property described in the contract executed by Mrs. Bowen and Thomas Durham was clouded or affected by the real estate mortgage when the contract was executed, and the cloud had not been removed when Mrs. Bowen tendered her deed. It was said in *O'Neill v. Douthitt*, supra, that "the general policy of the law in this state is to require, as far as practicable, every interest in real estate, to be evidenced, not only by writing, but also by some public record of the county in which the real estate is situated. See 'Statutes of Frauds and Perjuries,' §§ 5 and 6; statutes relating to trusts and powers, § 1; registry laws; acts relating to conveyances, to mortgages, to the records of courts, to mechanics' liens, to other liens, and to taxes. Under our statutes, and in law, as contradistinguished from equity, everything affecting real estate must be in writing, (see statutes abovesaid,) and every instrument in writ-

ing affecting real estate may be recorded, (Conveyance Act, § 19,) and, to be considered as valid as against persons without actual notice it must be recorded. Id. § 21. Now, the release or discharge of a real-estate mortgage certainly affects real estate, or, to speak more accurately, it affects the title thereto or some interest therein. Hence a valid release of a real-estate mortgage should not only be shown by a valid writing, but it should also be shown by a valid record. Such has always been the view taken by this court. *Burhans v. Hutcheson*, 25 Kan. 625; *Lewis v. Kirk*, 28 Kan. 497; *Perkins v. Mattheson*, 40 Kan. 165, 19 Pac. Rep. 633." The question therefore arises whether, upon the conclusions of fact, Thomas Durham was compelled to perform his contract of the 30th of March, 1887, and, if he did not do so, whether the \$500 deposited by him can be treated as a forfeit or penalty. The trial court found that Mrs. Bowen had fully complied with all of the conditions of the contract upon her part, and that she was the owner of the land in controversy, free and clear of all incumbrances. But, notwithstanding this fact, it appears from the records that the title to the land is doubtful, or at least clouded on account of the non-release upon record of the mortgage of \$834, with interest. Mrs. Bowen agreed in her written contract that she would "convey and assure to Thomas Durham the 32 acres of land described therein in fee-simple, clear of all incumbrances whatsoever, by a good and sufficient warranty deed." Under the contract, Durham was entitled, as the purchaser of the land, not only to a good title, but to a marketable title. In every contract for the sale of land there is always an implied warranty by the vendor that he has good title, unless such warranty be expressly excluded by the terms of the contract. The implied warranty exists so long as the contract remains executory, i. e., until the deed is given; when the party must rely on the covenants in the deed, unless there have been fraud, in which case relief may be afforded in equity. It is undoubtedly true that, where an incumbrance is discovered upon land, the vendor must discharge it before he or she can compel the payment of the purchase money by the vendee, at law or equity. In this case it is claimed that no incumbrance existed, because the mortgage had been paid, but the records in the office of the register of deeds show no release and no payment to any party having authority to release or accept payment. If Mrs. Bowen had commenced an action for specific performance of the contract against Durham, she could not have succeeded, because it is the rule that, in actions by a vendor, the parties will not be forced to complete the contract, unless the title is free from any reasonable doubt. Again, a specific performance will never be decreed at the action of the vendor, whenever the doubt concerning his title is one which can only be settled by further litigation. A vendee "will not be compelled to buy a lawsuit." *Pom. Cont.* §§ 198-208.

In this case, under the decision of this court in *O'Neill v. Douthitt*, although

Mrs. Bowen may have had title to the land free from any incumbrance, neither the abstract of title, nor the county records, so showed; and as Durham not only wanted a good title, but a good marketable title, one which appeared from the records of the county to be good and free from all incumbrances, he could not be compelled to accept the deed of which he had notice, or be compelled to pay the money upon the contract, and then permit Mrs. Bowen to settle her title by litigation in the future, or be compelled to quiet his title by future litigation. Mrs. Bowen ought, before she made her contract, or offered her deed, or at least before this action was brought, had Charles H. Thompson release on the record the mortgage of \$834 and all interest, if it is paid, or she ought to have had the written assignment of the mortgage to Benjamin F. Jewett recorded, if Jewett was ever the legal owner thereof. She did none of these things, and none of these things have yet been done. The title is clouded with an apparent incumbrance, and the land, whether bought by Durham for speculation, or for other purposes, is in no condition to be sold, as the seeming incumbrance, not legally released, must affect the value thereof, and interfere with the sale of the land to a reasonable purchaser. It is said, however, that Mrs. Bowen never agreed to furnish any abstract, and therefore that this case differs from the O'Neill-Douthitt Case. It is immaterial whether there was any agreement to furnish an abstract or not. The cost of the abstract is not in controversy. The abstract was furnished, and whether Durham ascertained from the abstract, or from the records in the office of the register of deeds, that the title of the land was clouded by an apparent incumbrance is of no concern. The facts are that Durham could not and cannot obtain a good marketable title. He cannot be compelled to accept any other title. The quitclaim deed of Durham of the 15th of November, 1887, is of no importance. If he had no title or interest in the land, the quitclaim deed transferred nothing. Upon the facts we do not think that the money deposited with Hogue, Burch & Miller can be claimed as a forfeit or penalty, therefore the judgment must be reversed and cause remanded, with direction to the trial court to enter judgment upon the findings of fact in favor of Thomas Durham and against Hadley and McEntire, the plaintiffs below. All the justices concurring.

(47 Kan. 86)

CURTIS v. PAGGETT.

(Supreme Court of Kansas. July 9, 1891.)

TRESPASS ON LANDS—INJUNCTION.

When a petition states a cause of action in damages to real estate, and also asks for an injunction to restrain the defendant from trespassing thereon, and the jury find that the defendant had trespassed on plaintiff's land as alleged in the petition, but that he had abandoned his trespasses before suit was begun, and the court refuses to perpetuate the injunction, but renders judgment for the plaintiff for nominal damages and costs, *held*, not error.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Mitchell county; CLARK A. SMITH, Judge.

L. J. Crans, for plaintiff in error. A. H. Ellis and F. T. Burnham, for defendant in error.

STRANG, C. December 12, 1885, Alfred C. Paggett began a suit in the district court of Mitchell county, Kan., against Seymour F. Curtis. The petition stated a cause of action in damages for injury to real estate, and also asked for an injunction. The plaintiff alleged that he had a well of water upon his land in Mitchell county, Kan., and that the source whence the supply of water in said well came was also on his land, a short distance north and west of the well. The defendant owned a farm which cornered with the plaintiff's on the south-west, and it is alleged that the defendant sunk a well on his own land on the north-east corner thereof to the depth of 45 feet; that he then tunneled from the cavity of said well 18 feet in a north-westerly direction, and bored with a well augur in the same direction 54 feet; that the course of the channel made by such tunnelling and boring was in the direction of the plaintiff's land and of the source of the supply of water in the plaintiff's well; that said channel was made with the intention of tapping said supply of water on the plaintiff's land, and that it had crossed the line onto the land of the plaintiff a distance of 25 feet. The defendant answered, admitting that he owned the farm cornering with the plaintiff's as set out in the petition, and that he had sunk a well, tunneled and bored upon his said farm for the purpose of obtaining water thereon; but declared that the attempt to thus obtain water had proven a failure, and that he had wholly abandoned it, long before the commencement of the suit by the plaintiff. The case was tried by the court, which also submitted certain questions to a jury. The jury found, among other things, that the defendant in his attempt to secure water had carried his channel across the line onto the land of the plaintiff some 16 feet, and that in so doing he had intended to reach the water on the plaintiff's land which supplied the plaintiff's well, and divert the same from the plaintiff's land and well to his own; but the jury also found that the defendant had abandoned his attempt to thus secure water before suit was begun. The court entered judgment for the plaintiff for one cent damages and costs taxed at \$202.45. Motion for new trial was overruled, and the defendant below appeals to this court, and asks that the judgment below be reversed. He contends that the action was solely a proceeding for an injunction, and that, as the jury found the work on his well had been abandoned before the commencement of the action, the plaintiff was not entitled to an injunction, and, not being entitled to an injunction, he was not entitled to any judgment at all, and the defendant should have had judgment for costs. We do not think this view of the case is tenable. We think the judgment rendered by the court entirely proper under the circumstances of the case.

The petition states a cause of action for damages and also for an injunction. The injunction part of the case failed only because the defendant had abandoned his unlawful attempt to reach and divert the water from the plaintiff's well before the suit was begun. The jury having found that the defendant had abandoned his well and all effort on his part in the direction complained of before the plaintiff asked for an injunction, the court, for that reason, did not perpetuate it. But the injunction allowed was not all there was to the case. The plaintiff claimed that he was damaged in the sum of \$100, and alleged in his petition facts in support of his claim. The jury found that the defendant had bored his channel 16 feet into the land of the plaintiff. This was a trespass upon the plaintiff's land by the defendant, for which he was entitled to nominal damages at least; and that is exactly what the court below gave him. A judgment for nominal damages carries costs. The fact that an injunction was allowed at the commencement of the action added no more costs, practically, than would have accrued without such order. We find no error in the proceedings, and recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 758)

HOSKINSON *et al.* v. BAGBY.

(Supreme Court of Kansas. July 9, 1891.)

NEGOTIABLE INSTRUMENTS—ACTIONS—DEFENSES—SEPARATE TRIALS.

1. It is within the discretion of the trial court to allow separate trials to the several defendants in an action, or to refuse the same; and its ruling upon the subject will never be reversed unless it can be clearly seen that the trial court abused its discretion.

2. Where the defendants in an action upon a promissory note admit that they signed the note, and that the note after its maturity was assigned to the plaintiff in the action by the payee of the note, and the plaintiff has the possession of the note, *held*, that a *prima facie* case in favor of the plaintiff and against the defendants is established.

3. And where the defendants in such an action set up as a defense to the action that there was an agreement made at the time of signing the note that it should not have any force or effect unless another person besides the defendants should also sign the note, and such person never did sign the note, and such defense was verified by affidavit, and such defense was denied by the plaintiff, but the denial was not verified by affidavit, *held*, that the burden of proving such defense nevertheless rested upon the defendants.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. ABBOTT, Judge.

Milton Brown and Hopkins & Hoskinson, for plaintiffs in error. Morgan, Lowrance & Mason, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Finney county by E. A. Bagby against A. J. Hoskinson and 15 others on a promissory note, which, omitting signatures, reads as follows: "3,892.28. Garden City, Kas.,

Dec. 27th, 1886. For value received, six months after date we promise to pay to the order of the Bank of Western Kansas thirty-eight hundred ninety-two and 28-100 dollars, at its office in Garden City, Kansas, with interest at the rate of twelve per cent. per annum from maturity until paid; and we hereby waive all notice of protest, and agree to extensions of this note without notice." The note was signed by all the defendants. The plaintiff alleged in his petition that he was the owner of the note, and he attached a copy thereof, with all the indorsements thereon, to his petition, and made the same a part thereof. The indorsements read as follows: "Pay the within to E. A. Bagby, without recourse to the Bank of Western Kansas. 22nd July, 1887. F. M. Dickey, Cashier of Bank of Western Kansas." Each defendant answered separately, setting forth that he had signed the note, but that the note was intended to be given as a renewal, and in lieu of another note, signed by all the defendants and H. P. Myton, with the agreement that the note sued on should not have force or effect unless all the makers of the original notes should sign the new one, and that H. P. Myton did not sign the new one, and that the new note now in suit "was assigned to the plaintiff by the Bank of Western Kansas" after maturity, and with a full knowledge on his part of the above facts, and that the new note was given without consideration. The answer of each of the defendants was verified by affidavit, and the plaintiff replied to each answer by filing a general denial except as to matters admitted by the defendants, and the replies were not verified by affidavit. The case was tried before the court and a jury, and the jury found generally and specially in favor of the plaintiff and against the defendants, assessing the amount of the plaintiff's recovery at \$4,189.39; and upon the general verdict and special findings of the jury the court rendered judgment in favor of the plaintiff and against the defendants for the amount found due by the jury, and 12 of the defendants, as plaintiffs in error, have brought the case to this court, making the plaintiff below the defendant in error.

The first alleged error is as follows: "The court erred in refusing the defendants each a separate trial, and in overruling their applications for separate trials." Section 268 of the Civil Code provides as follows: "Sec. 268. A separate trial between the plaintiff and any or all of several defendants may be allowed by the court whenever justice will be thereby promoted." It is within the discretion of the trial court to allow separate trials to the several defendants in an action, or to refuse the same, and its ruling upon the subject will never be reversed unless it can be clearly seen that the trial court abused its discretion. *Rice v. Hodge*, 28 Kan. 164. The next alleged error is as follows: "The court erred in permitting the plaintiff to read the note sued on in evidence over the objections of the defendants." There was certainly no error in this, and for several reasons. It was admitted by the defendants that they signed the

note sued on, and that the same "was assigned to the plaintiff by the Bank of Western Kansas," the payee thereof; and the plaintiff, before reading the note in evidence, showed that he was in the possession of the same, and had been from some time prior to the commencement of this action. Indeed, sufficient was admitted by the defendants in their several answers to make out a *prima facie* case against them and in favor of the plaintiff. The following instruction given by the court to the jury states the law correctly, to-wit: "You are instructed that the possession of the note by the payee thereof is *prima facie* evidence of its delivery, which must be overcome by evidence of the defendants; otherwise it must be regarded as sufficiently proved." As the plaintiff by the pleadings and also by the evidence made out a *prima facie* case concerning the execution of the note and its delivery, as well as everything else necessary to entitle him to recover, it then devolved upon the defendants to prove their affirmative defenses that there was a parol agreement and other facts on account of which the note was not regularly executed or delivered, and that it was without consideration. There can really be no pretense that the note was without consideration, and as to whether it was properly executed and delivered or not the jury found against the defendants and in favor of the plaintiff, both generally and specially, and upon sufficient evidence. From the evidence in the case it would seem that the note from its inception up to the time when it was transferred to the plaintiff was in the possession of the Bank of Western Kansas by one or more of its agents, and since it has been in the possession of the plaintiff. It was an agent of the bank that procured the signatures of the defendants to the note. There are some other questions presented and claims of error made, but we do not think that any of the questions are of a substantial character, or that any of the claims of error are tenable. Upon the entire record in the case we think the judgment of the court below is correct, and it will be affirmed. All the justices concurring.

(46 Kan. 762)

FORD v. GLADFELTER.

(Supreme Court of Kansas. July 9, 1891.)

JUSTICE OF THE PEACE—CHANGE OF VENUE—COSTS.

An action of replevin was brought before D., a justice of the peace, and on the application of the defendant a change of venue was granted transferring the case to P., another justice of the peace, and P. dismissed the plaintiff's action at the plaintiff's costs, taxing some of the costs accruing in Justice D.'s court to the plaintiff. The plaintiff then took the case to the district court on petition in error, where the judgment of the justice of the peace was affirmed, and he then brought the case to the supreme court on petition in error; but the record brought to the supreme court does not contain, and apparently the transcript taken from the justice's court to the district court did not contain, copies of any of the papers in the case, and such record and transcript do not show what costs which accrued in Justice D.'s court were taxed to the plaintiff by Justice P. Held, that the supreme court can-

not say that the district court erred in affirming the judgment of the justice of the peace.

(Syllabus by the Court.)

Error from district court, Montgomery county; GEORGE CHANDLER, Judge.

Clark & Clark, for plaintiff in error. Joseph Chandler and S. M. Porter, for defendant in error.

VALENTINE, J. As near as we can ascertain from the record brought to this court we think the facts of this case are substantially as follows: The action was one of replevin, brought originally by O. S. Ford against Levi Gladfelter, before R. W. DUNLAP, a justice of the peace of Montgomery county. Afterwards, on motion of the defendant for a change of venue, the case was transferred to T. R. PITMAN, a justice of the peace of the same township. Afterwards, on motion of the defendant, Justice PITMAN dismissed the plaintiff's action, and rendered a judgment for costs made before both justices in favor of the defendant and against the plaintiff. Afterwards the plaintiff took the case to the district court on petition in error, where the judgment of Justice PITMAN was wholly affirmed. Afterwards the plaintiff brought the case to this court for review on petition in error. The case is brought to this court by a "case made," and this "case made" does not contain and apparently the transcript of the proceedings taken from Justice PITMAN's court to the district court did not contain, any copy of the plaintiff's bill of particulars, or his affidavit for replevin, or his replevin bond, or the summons or writ of replevin, or the application for a change of venue, or the order granting the change of venue, or anything showing that any of the costs accruing in Justice DUNLAP's court had been paid, or that a judgment for the same had been confessed before the change of venue was granted, or anything showing whether the costs accruing in Justice DUNLAP's court and taxed to the plaintiff by Justice PITMAN were costs made by the plaintiff or made by the defendant or by both, or whether they were for witness' fees, or for issuing or serving subpoenas, or were costs in transferring the case from Justice DUNLAP to Justice PITMAN, (Justices' Code, §§ 78, 79,) or were costs for something else, as for Justice DUNLAP's other fees in issuing the summons and writ of replevin, making docket entries, filing papers, approving bonds, administering oaths, etc., and the constable's other fees, in serving the summons and writ of replevin, keeping the property taken on the writ of replevin, and possibly many other things. The burden of showing all these things, both to the district court and to this court, devolved, and now devolves, upon the plaintiff, who was the plaintiff in error in the district court, and is the plaintiff in error in this court. How could the district court say, or how can this court say, that Justice PITMAN erred in dismissing the plaintiff's action, and in taxing some of the costs against him, without any of these things being shown? It is not clearly shown why the justice

of the peace dismissed the action and rendered judgment for costs as he did, and we shall not speculate concerning his reasons; but, if the ruling of the justice was right, we could not reverse the same, even if we should think that he gave a wrong reason therefor. As to dismissing actions for want of jurisdiction and taxing all the costs to the defeated party, see *Kent v. Commissioners*, 42 Kan. 534, 22 Pac. Rep. 610. Taking the showing that was made by the plaintiff in error to the district court, we cannot say that that court erred in affirming the judgment of the justice of the peace, and therefore the judgment of the district court will be affirmed. All the justices concurring.

(47 Kan. 66)

RIGGS V. ANDERSON.

(Supreme Court of Kansas. July 9, 1891.)

TOWN-SITE CERTIFICATES—TAX-DEEDS.

In an action for the recovery of real estate, where the plaintiff claimed title under a certificate issued by a town-site company, duly assigned, showing that that holder was entitled to a good and sufficient warranty deed as soon as such company should receive the title to the town-site and such town-site company obtained the title through the probate judge, but never made a deed to the assignee of such certificate, and the corporation expired by limitation, and the defendant claimed under tax-deeds which were void, and the fact that he had been in possession of the premises and made lasting and valuable improvements thereon more than one year before suit was brought, *held*, that the plaintiff's title was paramount to that of the defendant, and that he was entitled to recover as the equitable owner of such real estate.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Butler county; C. A. LELAND, Judge.

J. Jay Buck, for plaintiff in error. *Eaton, Pollock & Love*, for defendant in error.

GREEN, C. This was an action for the recovery of lot 4 in block 77 in Arkansas City, commenced in the district court of Cowley county, but tried on a change of venue in Butler county. The plaintiff below claimed title under the following state of facts: The lot in question was a part of the town-site of Arkansas City, which was entered by the probate judge of Cowley county on the 15th day of July, 1871, and deeded by him to the Arkansas City Town Company on the 2d day of October, 1871. A patent was issued May 1, 1873. The Arkansas City Town Company was chartered July 13, 1871, and the term of existence was fixed at the period of 10 years. Jacob Stotler was a member of the town company and a stockholder. As such stockholder he received two certificates from the town company, which were the same, except as to the number, one of which reads as follows: "No. 270. Arkansas City Town Company. This certificate of stock entitles the holder, Jacob Stotler, to one share of seven lots in Arkansas City, Cowley county, Kansas, and to receive a good and sufficient warranty deed for the several lots as soon as the company shall receive title to the town-site,

and shares shall be drawn. N. B. NORTON, President. W. M. SLEETH, Sec'y. Arkansas City, Sept. 6th, 1871." Previous to the drawing, Jacob Stotler sold and assigned his interest in the certificate to Solomon H. Dodge, and made the following indorsement thereon: "For value received, I hereby transfer and assign the within certificate to Solomon H. Dodge. [Signed] JACOB STOTLER." This assignment was recognized by the town company, and on the 28th day of October, 1871, Dodge was notified by its secretary of the drawing, and that certificate numbered 270 had drawn lot 4 in block 77, with others. Some time in the year 1883 Dodge delivered his certificates to the plaintiff in this action, with a request to procure a deed for the lots drawn; and in February, 1883, the plaintiff applied to the secretary of the town company for such deed, but failed to obtain it, for the reason that the secretary regarded the corporation as extinct by the limitation in its charter. Solomon H. Dodge died on the 23d day of May, 1886, leaving two heirs, who conveyed by quitclaim deed to the plaintiff all their interest in the lots drawn by both certificates. A complete record was made of the drawing, but opposite the lots drawn by the certificates issued originally to Stotler and assigned to Dodge no name was written to indicate the person entitled to the deed for such lot. H. B. Norton was the only president of the Arkansas City Town Company, and he removed to California in 1874 or 1875, and died there in 1884. The defendant below claimed title by possession acquired on the 10th day of March, 1885.—*First*, under a tax-deed, dated May 15, 1876, to F. Gallotti; *second*, by a sheriff's deed dated June 3, 1879, based upon the foreclosure proceedings of a mortgage given by Gallotti to F. J. Chapel; *third*, by virtue of a tax-deed executed to C. M. Scott, September 14, 1883, and recorded September 22d, following, holding title by intermediate conveyance from the grantees. The defendant, with those under whom he claims, paid all of the taxes upon the lot in controversy, except the taxes embraced in the two deeds. The defendant entered into possession of the lot on the 10th day of March, 1885, and has ever since been in the actual and exclusive possession, and has made lasting and valuable improvements upon the same, which were completed more than one year before this action was brought. Previous to March 10, 1885, the lot in question was vacant and unoccupied, and never was in the possession of Stotler or Dodge. The first tax-deed under which the defendant below claimed was void on its face, and it was established that the second tax-deed was made by the county clerk in express violation of the order of the board of county commissioners. The taxes had been previously paid, and the board had declared the sale invalid, and ordered the clerk not to convey the same; and the county treasurer was authorized to refund the taxes and penalties paid. The court below found for the defendant, and quieted the title in him. The plaintiff in error claims that under the facts as found by the district court he had a perfect equal

table title to the lot in question, and brings the case here upon the findings of the court, and asks a reversal of the judgment. The tax-deeds under which the defendant claimed title were void. The first deed, because the lots included therein were not contiguous or adjacent, and were all sold and deeded together. The second deed was void for two reasons: *First*, the taxes for which the lot had been sold had been paid; *second*, the clerk had been ordered not to make a deed on account of the erroneous sale and was voidable, because the final notice was defective; hence the defendant was an occupant under two void tax-deeds.

Do the findings of the court establish such an equitable title in the plaintiff in error as authorized a recovery of the lot in question? The legal title to the lot was in the Arkansas City Town Company. It had issued certificates which had been duly assigned by the holder to Dodge, and by Dodge's heirs the interest in such certificates had been quitclaimed to the plaintiff in error. The only thing lacking was a conveyance from the town company to the plaintiff in error to make his title complete. Before he procured a deed the corporation had expired. The certificate recited that the original holder was entitled to a sufficient warranty deed for the several lots as soon as the company received a title to the town-site and the shares should be drawn. From the findings it appears that the town company obtained the title and that fact established the right of the holder of the certificate to a deed. The assignment of the certificate to Dodge, and the quitclaim deed of his interest by his heirs, made the plaintiff in error the equitable owner of the lot. While it is true and a well-settled legal proposition that a plaintiff in an action in ejectment must recover upon the strength of his own title, yet in this state, under section 595 of the Code of Civil Procedure, the plaintiff is not required to hold the legal title, or a title paramount to the title of all others, to enable him to recover. All that is necessary to entitle him to recover is that he shall have some kind of an estate in the property in controversy, legal or equitable, and that his title to the property shall be paramount to that of the defendant. *Hollenback v. Ess*, 31 Kan. 87, 1 Pac. Rep. 275; *Railroad Co. v. Pracht*, 30 Kan. 71, 1 Pac. Rep. 319; *Railroad Co. v. Rockwood*, 25 Kan. 302; *Simpson v. Boring*, 16 Kan. 248, and cases there cited. We think the title of the plaintiff, as found by the trial court, was superior to that of the defendant. The court found that the first tax-deed was void on its face, but as to the second, while good on its face, as a matter of fact the taxes had been paid prior to the sale. This rendered the second deed void. Where the owner of land or his agent redeemed the same from a tax-sale before the execution of the tax-deed, in accordance with the provisions of the statute, a tax-deed issued after the land is so redeemed is null and void. Section 140, Tax Laws, paragraph 6994, Gen. St. 1889; *Leitzbach v. Jackman*, 28 Kan. 524. As we view the case, the defendant only had a possessory title.

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While possession, with claim of ownership, is evidence of title, it is, of itself, an inferior title. The legal title to the town-site passed from the government to the probate judge, and from him to the town company; and the latter had issued a certificate by which it parted with all its interest in the lot in question, except conveying the legal title, which it held for the benefit of the certificate holder, his heirs or assigns. It will be presumed that the probate judge deeded the land to the proper party. *Sherry v. Sampson*, 11 Kan. 612. The defendant can be amply protected for the improvements he has made upon the premises and the taxes he has paid, Section 142, Tax Laws, (paragraph 6996, Gen. St. 1889, and sections 601 and 602, Code Civil Proc.) We recommend a reversal of the judgment of the district court, and that a new trial be granted.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 70)

COOK et al. v. LARSON.

(*Supreme Court of Kansas. July 9, 1891.*)

JUSTICES OF THE PEACE—CONTINUANCE—REVIEW.

1. Paragraph 4981 of the General Statutes of 1889 secures to either party to a cause the right to a continuance for any number of days, not exceeding 15, upon the filing with the justice the affidavit required thereby.

2. Where, in a justice's court, an application for a continuance has been made and refused by the court, the alleged error growing out of such refusal may be reviewed in this court, without any motion for a new trial.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Wilson county; L. STILLWELL, Judge.

Hudson & Reed, for plaintiff in error. *George P. Uhl*, for defendant in error.

STRANG, C. This action was begun before a justice of the peace by James Larson against Hiram Cook, R. S. White, J. C. Vassar, and C. G. Glenn. Service was never had on Vassar. On the return-day of the summons the other defendants appeared and made a motion for a continuance, which was supported by an affidavit alleging that they could not safely proceed to trial at that time for want of material testimony which they had been unable to procure. They asked for a continuance for 15 days. The court refused to grant them a continuance for 15 days, and set the cause for trial in 10 days, over the objection and exception of the defendants. On the day to which the case had been continued the defendants did not appear, and the court rendered judgment against them for the amount of the plaintiff's claim. Within 10 days thereafter the defendants prepared and the court allowed and signed a bill of exceptions, and the case was taken to the district court on a petition in error, in which it was alleged that the court had committed error in refusing the defendants a continuance for 15 days. The district court held that the justice had committed no error, and remanded the case to his court for execution of the judgment. The plaintiffs in er-

ror were not satisfied with the judgment of the district court, and bring the case here, still insisting that they were entitled to a continuance for 15 days on their application in the justice's court, and that it was error for that court to refuse them such continuance; and also that the district court erred in refusing to reverse the justice for such error; and this is the only assignment of error in this court. The defendant in error raises some preliminary questions, to which our attention is directed in his brief. It is admitted that there was no motion for a new trial in the justice's court, and it is asserted that, because there was not, no review of the error assigned can be had in this court. The error complained of did not arise on the trial of the cause. It occurred 10 days before the trial of the case was begun, and was not, therefore, error of law occurring on the trial of the cause. The decisions of this court which hold that rulings of the lower court, made in the course of a trial, are not available as grounds of error in this court, unless the lower court has had an opportunity to re-examine and correct them upon a motion for a new trial, are not, therefore, applicable to this case. The application for the continuance, and the affidavit in support thereof, became a part of the record in the justice's court; and when brought up to the district court, and to this court, by the bill of exceptions, the alleged error complained of is apparent upon the record, and needs no motion for new trial to bring it to the attention of the court. Among other things, paragraph 4641, Gen. St. 1889, says: "The supreme court may reverse, vacate, or modify a judgment of the district court for errors appearing on the record." In this case the alleged error appears on the record, and the above is sufficient authority for reviewing and correcting it here. See, also, the case of *Earlywine v. Railroad Co.*, 43 Kan. 746, 23 Pac. Rep. 940. The defendant contends that the refusal to grant a continuance cannot be reviewed here, because the bill of exceptions allowed and signed by the justice was not allowed and signed in time; that the ruling of the court refusing the continuance complained of was on the tenth day of the month, and the bill of exceptions was not signed until the 29th. The defendant seems to think the bill must be allowed and signed within 10 days from the date of the ruling complained of. But the statute says: "The bill of exceptions may be signed and sealed at any time within ten days from the day on which judgment is given in the action." The judgment was rendered on the 20th day of the month, and the bill was allowed and signed on the 29th, and was therefore within time. Were the defendants in the justice's court entitled to a continuance on the application made there as a matter of right? We think they were. Paragraph 4931, Gen. St. 1889, reads as follows: "Either party may have the trial adjourned without the consent of the other, for a period not exceeding fifteen days, by filing an affidavit of himself, his agent or attorney, that he cannot, for want of material testimony which he has been unable to pro-

duce, safely proceed to trial." The defendants filed the affidavit provided for by the above section, and demanded a continuance for 15 days. We think the statute gives either party filing the affidavit the absolute right to a continuance for any number of days, not exceeding 15. It vests no discretion in the court. It is mandatory. *West v. Rice*, 4 Kan. 563. If the defendants were entitled to a continuance for 15 days, then the refusal of the court to allow it was error; and, if such refusal was error on the part of the justice's court, then, when the matter was taken to the district court by petition in error, it was error for said court to overrule the petition in error. It is therefore recommended that the judgment of the district court be reversed, and the case sent back for new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 29)

LEAVENWORTH COAL CO. v. BARBER *et al.*

(Supreme Court of Kansas. July 9, 1891.)

STATUTES—TIME OF TAKING EFFECT—APPEAL—VESTED RIGHTS.

1. Where it is necessary to justice, and it can be done, the courts may take notice of the fractions of a day; and the precise time when an act is done may be shown.

2. Where a statute provides that it shall take effect "from and after its publication," in computing the time when it takes effect the day of its publication is to be included; but the precise time of its publication or taking effect may be shown, where an act is done on the same day of its publication, if the hour of publication affects such act in any way.

3. No appeal or proceeding in error can be had or taken from and after the publication of chapter 245, Sess. Laws 1889, made on the 20th of March, 1889, to the supreme court in any civil action, unless the amount or value in controversy, exclusive of costs, exceeds \$100, except in cases involving the tax or revenue laws, or the title to real estate, or damages for slander, libel, malicious prosecution, or false imprisonment, or the constitution of this state, or the constitution, laws, or treaties of the United States, and when in such a case the judge of the district or superior court trying the case involving less than \$100 shall certify to the supreme court that the case is one belonging to the excepted classes. Civil Code, § 542a, par. 4642, Gen. St. 1889.

4. A party who has been defeated in a civil action in the district court has no vested right to an appeal or to the prosecution of proceedings in error in the supreme court to review the rulings or judgment of the district court before he has filed his appeal or proceedings in the supreme court, and an act of the legislature taking away the privilege of appeal or the permission to prosecute proceedings in error before the appeal or petition in error is filed is valid and constitutional.

(Syllabus by the Court.)

Error from district court, Leavenworth county; ROBERT CROZIER, Judge.

T. A. Hurd, for plaintiff in error. W. W. Black, for defendants in error.

HORTON, C. J. On the 2d day of February, 1889, Allen Barber and Frank Seichpine recovered a judgment against the Leavenworth Coal Company for \$65 and costs taxed at \$72.20. The coal company excepted to the judgment, and on Febru-

ary 20, 1889, the case made was duly settled and signed by Hon. ROBERT CROZIER, judge of the district court of Leavenworth county. On the 20th of March, 1889, the coal company filed a petition in error in this court, and also a *præcipe* directing the issuance of a summons thereon. A motion has been submitted by the plaintiffs below to dismiss the proceedings in error under the provisions of chapter 245, Sess. Laws, 1889, § 542a of the Civil Code, par. 4642, Gen. St. 1889. Chapter 245 was approved on March 2, 1889. Section 2 provides that "this act shall take effect and be in force from and after its publication in the official state paper." The act was published in the official state paper on the 20th of March, 1889, the same day as that upon which the petition in error and *præcipe* were filed in this court. The question therefore arises whether the day of the publication is included or excluded, as the act provides that it shall take effect "from and after its publication." And also the further question arises, if the day of publication is to be included, not excluded, at what precise time on the 20th of March, 1889, did chapter 245 go into force? Undoubtedly the great weight of authority is to the effect that a statute which is to take effect "from and after its passage" takes effect upon the day of its passage. *Arnold v. U. S.*, 9 Cranch. 104; *Matthews v. Zane*, 7 Wheat. 164, 211; *Mallory v. Hiles*, 4 Metc. (Ky.) 53; *People v. Clark*, 1 Cal. 406. The reason usually assigned for this is that it is in accordance with the general rule that when a computation of time is to be made from an act done, the day on which the act is done is to be included. *Arnold v. U. S.*, *supra*; *Mallory v. Hiles*, *supra*. In *Dougherty v. Porter*, 18 Kan. 206, Mr. Justice BREWER approvingly cited *Soldiers' Voting Bill*, 45 N. H. 613, where it is held "that in the computation of time from a date, or from the day of a date, the day of the date is to be excluded; but that, where a computation is to be made from an act done, or from the time of an act, the day in which the act is done is to be included." To like effect are the cases of *Jacobs v. Graham*, 1 Blackf. 391, and *Chiles v. Smith's Heirs*, 13 B. Mon. 461. In the latter case the court says: "It was decided by this court in the case of *Woods v. Patrick*, Hardin, 465, that in calculating the thirty days which were required by the statute to intervene between the lodging of the order and the commencement of the next term to entitle the party to a change of venue the day of depositing the order should be included. So, where process is required to be served a certain number of days before the term, the day on which the process was executed is reckoned as one of the days in the computation of the time." Applying this rule, and the day of filing the reply and joining the issue, the day of an act done, will be included. The authorities which rule that, where a statute provides it shall take effect "from and after its passage," or "from and after its publication," the date of its passage or publication is to be excluded, assent to the doctrine that a day is to be deemed an indivisible point of time, and therefore that the fractions

of a day must be disregarded. Under these authorities, the words, "from and after its passage" or "from and after its publication," are words of exclusion, and this construction is largely given to the word "from" so as to avoid the old harsh rule that a statute taking effect on the day of its passage or publication is to be deemed in force from the earliest moment of that day. These authorities also hold that there is usually no satisfactory means of ascertaining the exact hour of the passage or publication of the statute; hence, that it is public policy to hold that a statute shall not go into operation until the day after its passage or publication. *Parkinson v. Brandenburg*, 35 Minn. 294, 28 N. W. Rep. 919. We are not in sympathy with the decisions ruling that courts of justice must not take cognizance of the fractions of a day. Lord MANSFIELD said: "But though the law does not, in general, allow of the fractions of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour of the day may not be so, too, when it is necessary, and can be done; for it is not like a mathematical point which cannot be divided." In *Louisville v. Bank*, 104 U. S. 469, Mr. Justice HARLAN, speaking for the court, uses the following language: "In view of the authorities, it cannot be doubted that the courts may, when substantial justice requires it, ascertain the precise hour when a statute took effect by the approval of the executive. In determining when a statute took effect no account is taken of the time it received the sanction of the two branches of the legislative department, which sanction is as essential to the validity of the statute as the approval of the executive. We look to the final act of approval by the executive to find when the statute took effect, and, when necessary, inquire as to the hour of the day when that approval was in fact given." Sutherland on Statutory Construction says: "The law takes notice of fractions of a day when necessary. The general principle declared by Lord MANSFIELD is believed to be sound, and established by the weight of authority, that, where it is necessary to justice, and it can be done, the law takes notice of the parts of a day, then the precise time when an act is done may be shown. This necessity exists when an act is done on the same day that a legislative act is passed, if that statute, being passed afterwards, should not affect such act, or, being passed before, should do so." Section 110, p. 133. In this case the evidence clearly shows that said chapter 245 was published at 6 o'clock A. M. on the 20th of March, 1889. Therefore, following the great weight of authority and the better reason, and taking notice of the fractions of a day, said chapter 245 went into operation "from its publication;" that is, from and after 6 o'clock A. M. of the 20th of March, 1889. The petition in error and *præcipe* were not filed until a much later hour during that day. They were not in fact filed until several hours after the publication of said chapter 245. That statute, therefore, was in full force at the time of the commencement of the proceed-

ings in this court. As the amount in value in controversy in this action, exclusive of costs, is \$65 only, the proceedings in error cannot be retained in this court. Defendant below had no vested right for an appeal or proceeding in error prior to the commencement thereof in this court. The appeal or proceeding in error was not had or taken until after chapter 245, Sess. Laws 1889, was in force. Therefore the proceeding in error in this case was filed too late to give this court any jurisdiction under the provisions of said section 542a, Sess. Laws, 1889, c. 245 of the Civil Code. This proceeding does not come within any of the excepted cases of said chapter 245. The proceedings must be dismissed, at the cost of the plaintiff in error. All the justices concurring.

(47 Kan. 58)

HOWBERT *et al.* v. HEYLE.

(Supreme Court of Kansas. July 9, 1891.)

GUARDIAN AND WARD—SALE OF LAND—LIMITATIONS.

1. Where a person has been in the actual and exclusive possession of real estate, claiming to be the owner thereof under a guardian's sale and deed, for more than 15 years, and the minor whose land was sold and conveyed, and who is a female, attained her majority in the meantime by arriving at the age of 18 years, and also in the meantime permitted more than 2 years after attaining her majority to elapse before she commenced any action to disturb the possession of the person holding under the guardian's sale and deed, or to question his ownership with regard to the land, *held*, that any cause of action which she might have had because of such adverse possession and claim of ownership is barred by the 15-years statute of limitations. Civil Code, § 16, subd. 4.

2. Where letters of guardianship are issued and recorded in the probate judge's office, and the guardian gives bond, and duly qualifies and enters upon the discharge of his duties as guardian, with the approval of the probate judge, and all this is of record, the guardian's acts will be held valid when attacked collaterally, although there may not be any further record in the probate judge's office of his appointment.

3. Where a petition by a guardian to sell certain land belonging to his ward states, among other things, that the ward had no money nor personal property, and that it was to his interest, and necessary for his support and education, that the land should be sold, and describes the land as being an undivided one-twelfth interest "in the following-described real estate, to-wit, the south-east quarter of section 32, range 17, township 12," without stating specifically in what county or state the land was situated, or whether in range east or west, or township north or south, but land answering to the aforesaid description was in fact situated in Shawnee county, where all the parties interested resided, and where all the proceedings were had, *held*, that the petition must be held to be sufficient when the sale under it is many years afterwards attacked collaterally.

4. Where the petition and notice for the sale by a guardian of his ward's real estate are each signed by the guardian and served upon the minor by an individual who is not an officer, and the proof of the service is shown by the affidavit of the person who served the same, and all were filed in the probate judge's office, and the probate judge, as well as the district court, found that the service was sufficient, *held*, that the supreme court must also consider it sufficient, and especially so where the service is attacked only in a collateral proceeding.

5. Where the aforesaid petition and notice was served on April 18th, and the hearing was

to be had and was had on April 28th, *held*, that the service was at least 10 days prior to the time fixed for the hearing within the meaning of the statute.

6. The failure of a guardian to give security as required by section 15 of the act relating to guardians and wards will not render void a sale regularly made and approved. Following *Watts v. Cook*, 24 Kan. 378.

7. Other irregularities mentioned, and *held* not to invalidate the guardian's sale and deed when the same are attacked in a collateral proceeding.

(Syllabus by the Court.)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Wheat, Chesney & Curtis and *Hollister & Hollister*, for plaintiffs in error. *J. J. Hitt*, for defendant in error.

VALENTINE, J. This was an action in the nature of ejectment brought in the district court of Shawnee county by Lulu M. Howbert and George Howbert against Valentine Heyle, to recover the undivided two-twelfths of a certain quarter section of land hereafter described. A trial was had before the court without a jury, and the court made certain findings of fact and conclusions of law, and upon such findings and conclusions rendered judgment in favor of the defendant and against the plaintiffs; and the plaintiffs, as plaintiffs in error, bring the case to this court for review. It appears that in 1869 George W. Howbert owned the undivided two-thirds of the aforesaid quarter section of land, to-wit, the south-east quarter of section 32, township 12, range 17, in Shawnee county; and that, while owning the same, and in 1869, he died intestate, leaving as his heirs his wife, Martha, and four children,—Dora, Augusta, Lulu M., and George. After his death, and on November 6, 1869, Joseph A. Deltrich was appointed, and he gave bond and duly qualified as the guardian of Dora, Lulu M., and George; they at the time being minors. Afterwards, and on June 6, 1870, the guardian sold the interest of the aforesaid minors in the aforesaid quarter section of land to Valentine Heyle for the sum of \$357, which sale was immediately confirmed, and a guardian's deed executed and recorded, and Heyle took the immediate possession of the land, all on June 6, 1870, and he has been in the actual and continuous possession of the land ever since, claiming exclusive ownership therein, adverse to the plaintiffs and to all others. This action was commenced on October 16, 1886. The defendant, in his answer, denied generally all the allegations of the plaintiffs' petition except as to his, the defendant's, possession; and also pleaded the 15-years statute of limitations. Civil Code, § 16, subd. 4.

The first question arising in the case upon the pleadings and the evidence is whether or not the plaintiffs' action is not barred by the aforesaid 15-years statute of limitations. One of the plaintiffs, Lulu M. Howbert, was born on June 16, 1866; hence she arrived at 18 years of age and attained her majority on June 16, 1884, (act relating to minors, § 1;) and the two years given her by section 17 of the Civil Code after her disability of minority was

removed within which to commence her action expired on June 16, 1886, just four months prior to the commencement of this action; hence her present action is barred by the aforesaid 15-years statute of limitations. Lulu's action would also be barred by the five-years statute of limitations, relating to real property claimed under a guardian's sale and deed, (Civil Code, § 16, subd. 2.) if such sale and deed were only voidable, and not absolutely void, for she had more than five years after her supposed cause of action accrued, and more than two years in addition thereto after she attained her majority, before she commenced this action. This five-years statute of limitations, however, was not pleaded, but, as this is an action in the nature of ejectment, it may be considered in determining the rights of the parties under the general pleadings without any special plea of the statute if the sale and deed were only voidable, and not utterly void. The aforesaid statutes of limitations, however, do not apply to the other plaintiff, George Howbert, for he did not attain his majority until within less than one year before the commencement of this action, and he then attained the same by a proceeding in the district court. Nor can either of the plaintiffs recover in this action if the aforesaid sale and deed were only voidable, and not void; for this is purely a collateral attack upon them, and not a direct attack. As to Lulu Howbert, the judgment of the court below must, of course, be affirmed, for the reason that her cause of action was barred under the 15-years statute of limitations before this action was commenced. As to George Howbert, however, it will be necessary to consider the case further in order to ascertain whether the guardian's sale and deed were and are utterly null and void or not. If they are only voidable, they cannot be attacked in this proceeding, for the reason that such attack is only collateral, and is not direct. Counsel for the plaintiffs claim that such sale and deed are utterly null and void. Indeed, they claim that all the proceedings in the probate court with reference to the guardianship, and everything done under the guardianship, are utterly null and void. Going into particulars, it is claimed that there is no record in the probate court showing the appointment of the guardian. The court, below, however, found as a fact that the guardian was duly appointed on November 6, 1869, and that he gave bond and duly qualified. This was the bond required by section 8 of the act relating to guardians and wards. It is also shown by the evidence and found by the trial court that letters of guardianship were duly issued by the probate judge to the guardian, Joseph A. Deltrich, and that such letters were duly recorded by the probate judge in the records of his office, and Deltrich afterwards, with the approval of the probate judge acted as such guardian. This is certainly sufficient. The case of Higginbotham v. Thomas, 9 Kan. 328, has but little, if any, application to this case, and is not controlling.

It is further claimed by the plaintiff in

error that the petition of the guardian to sell the land of the plaintiffs is insufficient: *First*, because it does not state facts, but only conclusions and inferences; and, *second*, because it does not give a sufficient description of the land to be sold. We think the petition is amply sufficient, when attacked collaterally, as it is now attacked. It stated that the minors had no money or personal property, and that it was to their interest, and necessary for their support and education, that the land should be sold; and it described the land as the one-twelfth interest of each of the minors "in the following described real estate, to-wit, the south-east quarter of section 32, range 17, township 12." The objection to this description is that it does not state in what county or state the land is situated, nor whether in range east or west, or township north or south. The land, however, is situated in Shawnee county, and the aforesaid description of it is perfect, except as to the omissions complained of. All the parties interested in the land resided in that county. All the proceedings were had in that county, and in all the other proceedings the description of the land was complete, and no person could have been misled as to where the land was situated. We think the description was and is sufficient, when attacked collaterally, as in this case. The case of Cohen v. Trowbridge, 6 Kan. 385, has but little, if any, application to this case, and is not controlling. It is also claimed that no sufficient service of the petition to sell the land and the notice of the hearing thereof was ever made upon the minors: *First*, because no notice at all was ever served upon them; *second*, because the petition accompanying the notice was not sufficient as above stated; *third*, because the petition and notice were not served upon the minors by a proper person; and, *fourth*, because the service was not made a sufficient length of time prior to the hearing of the application to sell the land. Section 12 of the act relating to guardians and wards reads as follows: "Sec. 12. The petition for that purpose must state the grounds of the application, must be verified by oath, and a copy thereof, with a notice of the time at which such application will be made to the court, must be served personally upon the minor, if a resident of this state, at least ten days prior to the time fixed for such application." It will be noticed that the statute provides for serving a copy of the petition "with a notice of the time at which the application will be made," and does not provide for the service of a summons or a writ or an order or any kind of process issued by a court or coming within the meaning of section 1, c. 38, Laws 1869. Gen. St. 1889, par. 2120. The notice and the petition were each signed by Joseph A. Deltrich, the guardian, and both were actually served upon the minors by Elias B. Williams, and the notice and petition and the affidavit of service by Elias B. Williams were filed in the probate judge's office, and are among the files of the probate court; and this, we think, is sufficient. Both the probate court and the district court have expressly found that

the service was made, and that it was sufficient, and we think the findings were made upon sufficient evidence. The petition and notice were served on April 18, 1870, and the hearing was to be had and was had on April 28, 1870. We think the notice was served "at least ten days prior to the time fixed for such application," within the meaning of the statute, and in accordance with all the decisions of this court upon similar questions. *Schultz v. Clock Co.*, 39 Kan. 334, 18 Pac. Rep. 221; *Northrop v. Cooper*, 23 Kan. 432; *State v. Eggleston*, 34 Kan. 719, 10 Pac. Rep. 3; *Dougherty v. Porter*, 18 Kan. 206; *Neitzel v. Hunter*, 19 Kan. 221; *Warner v. Bucher*, 24 Kan. 478. The case of *Garvin v. Jenner-son*, 20 Kan. 371, has no application to this question, for the reason that the statute there commented on required that the act to be done should be done "at least one day before the day of the trial," and not at least one day before the trial. One clear day, besides the fractions of the first and the last days, was there intended. If the statute in the present case had required the service to be made at least 10 days prior to the day on which the hearing should be had, instead of providing as it does, it would have presented a very different question. The decision which we now make with respect to the petition and notice does not contravene anything decided in the case of *Mickel v. Hicks*, 19 Kan. 578.

It is further claimed by the plaintiffs in error that it was also found by the trial court that the guardian never gave the bond required by section 15 of the act relating to guardians and wards; and it is therefore claimed, for that reason especially, that all of the proceedings with respect to the sale and conveyance of the plaintiffs' land were and are void. This court, however, in the case of *Watts v. Cook*, 24 Kan. 278, has decided otherwise. In that case this court decided that "the failure of a guardian to give security, as required by section 15, c. 46, (Comp. Laws 1879,) upon obtaining an order for the sale of real estate, will not render void a sale regularly made and approved." It is now the opinion of the writer of this opinion that that case was decided wrongly and against the great weight of authority, but it was decided nearly 11 years ago, and has possibly to some extent become a rule of property, and it is not against all authority nor all reason, but there are cases in Ohio, Pennsylvania, and Iowa which seemingly sustain it. *Mauarr v. Parrish*, 26 Ohio St. 636; *Arrowsmith v. Harmoning*, 42 Ohio St. 254; *Lockhart v. John*, 7 Pa. St. 137; *Merklein v. Trapnell*, 34 Pa. St. 42; *Thorn's Appeal*, 35 Pa. St. 47; *Dixey's Ex'r's v. Laning*, 49 Pa. St. 143; *Bunce v. Bunce*, 59 Iowa, 533, 13 N. W. Rep. 705. It is therefore now believed by this court, or at least by a majority of its members, that we should follow our former decision upon this subject, and we shall do so; and therefore the point made by the plaintiffs in error with reference to this subject will be overruled.

Other irregularities are mentioned by the plaintiffs in error, but we hardly think that they require any comment. They

claim that the minors did not receive any of the money paid by Heyle for the land. That, however, was not his fault. He paid it to the guardian, and the guardian loaned all but \$100 thereof to the minors' step-father, with whom they resided; and he has never returned it to the guardian, or accounted for it. In all probability, however, their board, clothing, and education cost more than all the money of theirs which their step-father received. But this is immaterial. It is also claimed that the sale of their property was procured through fraud, but there is but little, if anything, to sustain this claim, and the court below must have found against them. Certainly there is nothing that shows that Heyle defrauded the plaintiffs or desired to do so; and the entire proceedings, from the beginning up to the time when the guardian's deed was executed to Heyle, were approved by the plaintiffs' mother, their step-father, their guardian, and the probate judge, and there is nothing really to show that any of these persons during any part of that time intended or desired to defraud the plaintiffs. It is also claimed that there are some discrepancies as to dates. We have examined this, and it is unfortunate that they occur, but there is enough in the record to indicate in every instance what was the true date, and hence they cannot render the proceedings void. It must also be remembered that the probate court in this state is a court of record (Const. art. 3, § 8; Act Relating to Probate Courts, § 1;) and, while it has jurisdiction only of particular classes of things, such as the care of the estates of deceased persons, minors, and persons of unsound mind, yet it has general jurisdiction of these things. See constitution and statute above cited, and also acts relating to executors and administrators, guardians and wards, and lunatics, and habitual drunkards. Hence all presumptions should be in favor of the regularity of all the proceedings of probate courts within its jurisdiction of the aforesaid particular classes of things, and such proceedings should seldom be held to be void when attacked collaterally, as in this case; never, indeed, except where it is shown affirmatively that the court had no jurisdiction. The judgment of the court below will be affirmed. All the justices concurring.

(46 Kan. 773)

ST. LOUIS WIRE-MILL CO. v. CONSOLIDATED BARB-WIRE CO.

(*Supreme Court of Kansas. July 9, 1891.*)

SALE—CONTRACT—PRINCIPAL AND AGENT.

1. Where a parol contract for the purchase of goods is made between the parties, but at the same time an instrument in writing purporting to be the contract, but which, as to prices, was never intended by the parties to be the contract, is signed by the purchaser, and such writing is made to differ, as to prices, from the real contract, because of an illegal and existing combination previously entered into on the part of the seller with other dealers in the same kind of goods to enhance the prices of that kind of goods in the market above their real value, held, that the writing cannot be enforced as to the prices therein mentioned, by the seller, against the other party, and as against the real contract of

the parties, although such real contract exists only in parol.

2. Where an agent makes a contract for his principal, and afterwards, in an attempted settlement between the parties, makes statements with reference to the terms of the contract, *held*, that such statements may be shown in evidence by the adverse party, where parol evidence would be competent.

(*Syllabus by the Court.*)

Commissioners' decision. Error from district court, Douglas county; A. W. BENSON, Judge.

D. S. Alford, for plaintiff in error. S. O. Thacher, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Douglas county by the St. Louis Wire-Mill Company of St. Louis, Mo., against the Consolidated Barb-Wire Company of Lawrence, Kan., to recover the sum of \$809.05 upon an account. The defendant answered, admitting substantially the correctness of the account, except that it claimed that the whole amount due the plaintiff had been paid in the manner which we shall hereafter state. A trial was had before the court and a jury, and the verdict and judgment were in favor of the defendant, and against the plaintiff; and the plaintiff, as plaintiff in error, brings the case to this court for review. Only two questions are presented in this court by the plaintiff in error, and they both have reference to the admission of evidence on the trial in the court below. In order to obtain a correct understanding of these questions, it is necessary to obtain a correct understanding of the pleadings in the case, and the issues presented by them. The plaintiff in its petition sets forth a claim for wire furnished by the plaintiff to the defendant, amounting in value to \$6,425.63, with credits to the amount of \$5,616, leaving a balance alleged to be due to the plaintiff to the amount of \$809.05. Among the credits given is one designated as a "rebate" on 500 tons of wire, at 10 cents for each 100 pounds, amounting to \$1,000; and another credit is a "rebate" on 77½ tons of wire, at 15 cents per 100 pounds, amounting to \$232.50; total rebates allowed, \$1,232.50. There is nothing in the petition showing that the wire, or anything else, was furnished upon any written contract, or upon any writing. The defendant answered, stating that the rebate upon the whole of the wire furnished by the plaintiff should have been at the rate of 15 cents for each 100 pounds, and therefore that it was entitled to a further rebate on this account of \$500 more. The defendant also alleged that there was an overcharge of \$12.59 in the account; and also that the Kansas City Barb-Wire Company of Kansas City, Mo., was entitled to a similar rebate of 15 cents for each 100 pounds on 300 tons of wire purchased at the same time by that company of the plaintiff, amounting to the sum of \$900, of which amount the sum of \$600 had been paid, leaving a balance of \$300 due and unpaid, except another credit of \$3.54; and that the remainder of the claim, to-wit, \$296.46, was still due and unpaid; and that it had been assigned to

the defendant by the Kansas City Barb-Wire Company, and that the defendant then owned the same, and was entitled to recover the amount thereof. It will be seen that the whole of the defendant's claim amounts to \$809.05, just the amount of the plaintiff's claim. There was nothing stated in the defendant's answer showing that the contract between the plaintiff and the defendant, or between the plaintiff and the Kansas City Barb-Wire Company, was in writing. The plaintiff in reply to this answer filed a general denial. Upon the trial the defendant assumed the burden of proof, and introduced its evidence first. It introduced Albert Henley as a witness, and it was shown by his testimony that he was the secretary, treasurer, and general manager of the defendant, and that he was also the president and agent of the Kansas City Barb-Wire Company, and that he acted for both; and that he made the contracts upon which all the wire was furnished by the plaintiff to both the Lawrence Company and the Kansas City Company. It was disclosed by his testimony, however, that the contracts were in writing, and they read as follows.

"St. Louis, Dec. 12th, 1885.

"St. Louis Wire-Mill Co., St. Louis, Mo.: Please enter our order for 500 tons of wire, as follows:

320 tons	No. 12 annealed.....	2 90
80 "	" 13½ barbing.....	3 15
40 "	" 12 galv.....	3 65
10 "	" 13½ galv.....	3 90
32 "	" 9 annealed.....	2 70
8 "	" 13 barbing.....	3 15
8 "	" 9 galvanized.....	3 45
2 "	" 13 galvanized barbing.....	3 90

"Deliveries to be made during February, March; and April, 1886, in about equal amounts in each month; terms, cash. D't with bill lading, less 2 per cent.

"CONSOLIDATED BARB-WIRE CO.

"By A. HENLEY, Sec'y."

"St. Louis, Dec. 12th, 1885.

"St. Louis Wire-Mill Co., St. Louis, Mo. —Gentlemen: Please enter our order for 300 tons wire, as follows:

160 tons	No. 12 annealed.....	2 90
40 "	" 13 barbing.....	3 15
32 "	" 9 annealed.....	2 70
8 "	" 13 barbing.....	3 15
8 "	" 9 galv.....	3 45
2 "	" 13 " barbing.....	3 90
40 "	" 12 galv.....	3 65
10 "	" 13 " barbing.....	3 90

"Delivery to be made during Dec., 1885, and Jan., Feb., March, and April, 1886. Terms, cash, with bill lading, less 2 per cent. KANSAS CITY BARB-WIRE CO.

"E. L. BRUCE, Manager."

It is also shown by the testimony of this witness, Mr. Henley, that he procured E. L. Bruce to sign the Kansas City Company's contract; and it was then shown by his testimony, over the objections and exceptions of the defendant, that at the time when these contracts were made it was agreed between the parties in parol that there should be a rebate from the prices mentioned in the contracts of 15 cents on each 100 pounds of all the wire furnished by the plaintiff to both the Lawrence and the Kansas City Companies; and wheth-

er this evidence is competent or not is the first and principal question presented to this court. As before stated, the plaintiff allowed a rebate of 15 cents on each 100 pounds on a portion of the wire furnished to the Lawrence Company, and allowed a rebate of 10 cents on each 100 pounds on all the remainder of the wire furnished to the Lawrence and the Kansas City Companies, and the dispute now is whether there should be a further rebate of five cents on each 100 pounds of the wire furnished to the two companies upon which a rebate of only 10 cents had previously been allowed, so as to make the entire rebate at the rate of 15 cents on each 100 pounds of all the wire furnished. The whole amount of the rebate allowed was as follows: To the Lawrence Company on 500 tons of wire, at 10 cents, \$1,000; on 77½ tons, at 15 cents, \$232.50; and to the Kansas City Company on 300 tons of wire, at 10 cents, \$600; total rebate allowed, \$1,832.50. And the defendant claims that a further rebate should be allowed as follows: To the Lawrence Company on 500 tons of wire, 5 cents more on each 100 pounds, \$500; to the Kansas City Company on 300 tons, 5 cents more on each 100 pounds, \$300; total additional rebate claimed by the defendant, \$800. The legal question, however, presented by the plaintiff's objection to the foregoing evidence is not whether the defendant should be allowed a rebate of 5 cents more on each 100 pounds, but it is whether the defendant could introduce any evidence showing that any parol contract was made authorizing or requiring any rebate in any amount to be allowed or paid. The plaintiff claims that as the contracts between the parties appear to be in writing, and are signed by the parties to be charged, no parol evidence could be introduced that would contradict or vary the terms of the written contracts in the slightest particular; and it further claims that to show that any rebate in any amount was to be allowed would contradict and vary the terms of the written contracts.

Under the evidence introduced in the case, and the findings of the jury and the decision of the trial court, it must now be held that the Lawrence and the Kansas City Companies did in fact sign and execute the above writings, which are called contracts, and also that they, together with the plaintiff, did in fact at the same time enter into a parol contract that a rebate of 15 cents on each 100 pounds of the wire, to be subsequently furnished by the plaintiff to the Lawrence and Kansas City Companies, should be allowed. But the question then arises, why was not the entire contract or the real contract between the parties put in writing? Why did not the writings mention the rebate or fix the prices of the wire at just what they would have been after deducting the rebate, to-wit, a rebate of \$3 on each ton of wire? The reason for this, as shown by the evidence, is that the plaintiff had entered into a combination with other manufacturers of wire, under heavy penalties, not to sell wire for rates less than those mentioned in the foregoing writings. Henley represented and acted for the Law-

rence and Kansas City Companies at the time when the contracts were made and the above writings were signed, and the plaintiff was represented by William Edenborn, its president and agent, and C. F. Heintz, its vice-president, secretary, and agent; and Henley testified on the trial, among other things, as follows: "15 cents per hundred pounds. They asked us not to put it in writing, and they wouldn't put it in writing; and they asked us not to say anything about it, not even to have any correspondence about it, * * * because they were under a penalty. They had to pay a certain amount as a fine if it was shown that they had made a rebate below the full pool price. * * * Mr. Edenborn stated that, by reason of certain arrangements they had entered into with other manufacturers of wire, they couldn't put on their books only a certain price, and they wouldn't enter into any contract, but they would give us fifteen cents rebate, as we were getting before; he didn't see why we shouldn't have it the same as before." Mr. Henley also testified that the combination or pool prices were those mentioned in the foregoing writings, and were \$3 per ton, or 15 cents per hundred pounds more than his companies were to pay. We shall decide this case upon the theory that the foregoing writings were not the real contracts between the parties, but that the parol contracts entered into between the parties through their agents, Henley and Bruce on the one side, and Edenborn and Heintz on the other side, were their real contracts; and that none of the parties expected or intended to be governed by the writings as to prices, but all expected and intended to be governed by the parol contracts; that the prices fixed in the writings were intended to be used principally, if not entirely, for the purpose of deceiving the other members of the combination of wire manufacturers, of which combination the plaintiff was also a member. We shall also decide this case upon the theory that it is always admissible to prove an independent parol agreement made contemporaneously with a written contract. *Babcock v. Deford*, 14 Kan. 408; *Weeks v. Medler*, 20 Kan. 57; *McNamara v. Culver*, 22 Kan. 661, 670, and cases there cited; *Dodge v. Oatis*, 27 Kan. 762. But that "proof of a contemporaneous parol agreement is inadmissible to alter or contradict a contract in writing." *Hopkins v. Railway Co.*, 29 Kan. 544; *Cornell v. Railway Co.*, 25 Kan. 613; *Miller v. Edgerton*, 38 Kan. 36, 15 Pac. Rep. 894; *Windmill Co. v. Piercy*, 41 Kan. 763, 21 Pac. Rep. 793. We shall also decide this case upon the theory that combinations of the kind, entered into between the wire manufacturers in this case, to fix the prices of wire above the real value thereof, are against public policy, illegal, and not enforceable in courts of justice. *Greenh. Pub. Pol.* 642-645, and cases there cited; *Railroad Co. v. Closser*, (Ind.) 26 N. E. Rep. 159.

There is no pretense in the present case that the wire was worth the combination prices, or that it was worth more than the prices fixed by the parol contracts. We think the real question in the present case

is as follows: Where a parol contract for the purchase of goods is made between the parties, but at the same time an instrument in writing purporting to be the contract, but which as to prices was never intended by the parties to be the contract, is signed by the purchaser, and such writing is made to differ as to prices from the real contract because of an illegal and existing combination previously entered into on the part of the seller with other dealers in the same kind of goods to enhance the prices of that kind of goods in the market above their real value, can the writing be enforced as to the prices therein mentioned by the seller against the other party, and as against the real contract of the parties, although such real contract exists only in parol? This question must be answered in the negative. To answer otherwise would be to hold that the plaintiff might recover an amount of money vastly in excess of the real value of the property it sold, in violation of a lawful parol contract, and in furtherance of an unlawful combination between itself and others to inflate the prices of such property vastly beyond its true value.

The next question is whether the court erred or not in admitting proof on the part of the defendant of the declarations and statements of Edenborn after the aforesaid contracts were completed, as to what their terms were. There can certainly be no error in this. Edenborn was the president and agent of the plaintiff. He was its principal agent in making the contracts, and these statements were made pending an attempted settlement between the parties with reference thereto. *Water-Power Co. v. Brown*, 28 Kan. 677, 692; *Railroad Co. v. Closser*, supra. Of course, Edenborn's statements would be competent only where parol evidence would be competent. The judgment of the court below will be affirmed. All the justices concurring.

(46 Kan. 764)

MUSGROVE v. HODGES et al.

(Supreme Court of Kansas. July 9, 1891.)

SPECIFIC PERFORMANCE—CONSENT OF THIRD PERSON.

1. Where the performance of a contract depends upon the consent of a third person, and that consent is withheld, specific performance becomes an impossibility, and that remedy is not available.

2. A contract was made between M. and H. to exchange farms. M. agreed to convey his tract to H., in consideration of which H. agreed to convey his tract to the wife of M., and she was to assume the payment of a lien which existed against the land of H. The wife was not a party to the contract, and did not consent to accept the conveyance or assume the payment of the debt. She refused to consent or to complete the contract, and an action for specific performance was brought by H. Held, that the action will not lie.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. TROUP, Judge.

S. D. Pryor, for plaintiff in error. Eaton, Pollock & Love, for defendant in error.

JOHNSTON, J. This was an action for the specific performance of a contract for the exchange of certain lands. W. J.

Hodges, who brought the action against J. R. Musgrove and Isabelle Musgrove, alleged, in substance, that he owned an 80-acre tract of land in Cowley county, upon which was a mortgage of \$750; that J. R. Musgrove was the owner of 160 acres of land situated in Sumner county, against which there was a mortgage of \$2,000; and that on or about the 23d day of August, 1888, an agreement was entered into between J. R. Musgrove and himself for an exchange of lands,—that is, he was to convey his 80-acre tract, by a good and sufficient deed of warranty, to Isabelle Musgrove, the wife of J. R. Musgrove, subject, however, to the mortgage of \$750, which was to be assumed by her; in consideration of which J. R. Musgrove was to convey to Hodges, by a good and sufficient deed of warranty, his 160-acre tract, subject to the \$2,000 mortgage, which Hodges was to assume and pay. It was alleged that Hodges had complied with all the conditions of the agreement upon his part, but that Musgrove had failed upon demand to execute a conveyance or to comply with the agreement which he had made. A trial was had, and the court made a general finding in favor of Hodges, decreeing that the plaintiff below should deposit with the clerk of the court an abstract of title and warranty deed for the 80-acre tract, conveying the same to Isabelle Musgrove, free and clear of all incumbrances except the mortgage of \$750, which mortgage it was decreed that Isabelle Musgrove should assume and pay. It was adjudged and decreed that J. R. Musgrove and Isabelle Musgrove should execute and deliver to Hodges a warranty deed conveying the 160-acre tract, free and clear of all incumbrances, except the mortgage thereon for the sum of \$2,000, which it was decreed Hodges should assume and pay. Isabelle Musgrove alone complains of the judgment of the court, and the principal ground of complaint is that she was compelled to accept a conveyance of land, and assume an obligation, without an agreement or any consent given by her. She has reason to complain. The contract between Hodges and J. R. Musgrove for an exchange of farms was not signed by or for her. By the terms of that contract the Hodges land was to be conveyed to her, and she was to assume the payment of the \$750 mortgage which existed against the land. She had not consented to accept the conveyance of the land, or undertake the payment of the lien which existed against it; and the court is powerless to make a contract for her, or to compel her to carry out the one which was made by J. R. Musgrove. It is said that the title to the land in Sumner county was in J. R. Musgrove, and that, if the conveyance of the Hodges land was made to her, she would only hold the title in trust for J. R. Musgrove, and it would have the same effect as if the conveyance had been made directly to him. Granting this claim, why should she be compelled to undertake the trust against her objection, and especially where there is coupled with it the personal assumption of a large indebtedness? No such burden can be imposed upon her unless she consents to as-

sume it. When the contract was made, Hodges knew that the consent of the plaintiff in error was essential, and he took the chances that she would refuse to assume the burden and execute the conveyance in accordance with her husband's agreement. Having declined the performance of the contract that was made, even J. R. Musgrove was incapable of executing the same without her consent, and hence the remedy of specific performance is not available. Where performance of a contract depends upon the consent of a third person, and that consent is withheld, the performance becomes an impossibility, and will not be decreed. Pom. Spec. Perf. Cont. § 295. Defendant in error contends that the question of forcing a conveyance upon Isabelle Musgrove, and compelling her to assume the payment of the mortgage, was not presented or determined in the district court, but the record brought here shows that the question was raised by objections made by plaintiff in error to the testimony, and by a demurrer interposed by her to the evidence offered in behalf of Hodges; and hence the question cannot be overlooked here. The judgment of the district court will be reversed. All the justices concurring.

(47 Kan. 36)

*MASTIN et al. v. LEVAGOOD.*¹

(Supreme Court of Kansas. July 9, 1891.)

MASTER AND SERVANT—DANGEROUS MACHINERY.

1. When the owners of a horse-power threshing-machine are guilty of gross negligence by leaving the bevel-wheel and cogs uncovered, knowing them to be imminently dangerous to human life and limb in this uncovered condition, and a workman, engaged in threshing with the machine in this condition, attempts to oil the cylinder without the knowledge of the uncovered condition of the bevel-wheel and cogs, and in this attempt loses his hand, the owners of the machine are liable for damages occasioned by such injury.

2. In any voluntary act which may naturally result in the injury of another, the actor must see to it, at his peril, that injury does not follow, or he must respond in damages therefor.

3. When danger is foreseen and pointed out to the owners of a threshing-machine by the uncovered condition of the bevel-wheel and cogs, a duty is imposed upon them to use every possible precaution to avoid injury to those engaged in operating the machine or working about it.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Marion county; FRANK DOSTER, Judge.

Keller & Dean, for plaintiffs in error. *Grattan & Grattan*, for defendant in error.

SIMPSON, C. The plaintiffs in error were the two-thirds owners of a horse-power threshing-machine, the other third being owned by the father of one of them. When they went to a farmer's for the purpose of threshing his wheat with their machine, they furnished two feeders,—one man to drive the horse-power, and one man to measure the grain,—it being the duty of the farmer for whom they were threshing to furnish pitchers and the other necessary help. On the 16th day of September, 1886, the plaintiffs in error were engaged in threshing grain for one Pam-

pella, with a Nichols & Shepherd horse-power machine. E. E. Mastin was driving, and Jack Mastin was feeding. Galbreth, whom the Mastins brought to the Pampella farm to feed, had traded work with one Rankin, who was in the employment of Pampella, and Rankin was feeding. Galbreth was hauling grain away from the machine. York, an employe of the Mastins, was measuring the grain. This defendant in error was pitching from the stack, and was an employe of Pampella. During the work, and at about 4 o'clock p. m. of the 16th of September, 1886, Jack Mastin was feeding, and was taken sick, and called to Rankin to take his place. Rankin did so, and recollecting that he had not recently oiled the cylinder, and knowing that Jack Mastin was sick, called to the defendant in error, who was pitching grain from the stack to the feeder, to oil the cylinder. The machine in use was a vibrator, of the Nichols & Shepherd pattern. The large iron wheel revolves rapidly, and when so revolving the exposed bevel-wheel and cogs are imminently dangerous to human life and limb. The manufacturers of the machine make a strong iron shield to be placed over the wheel and cogs to render it safe to oil the cylinder or to do other work about it. In operation the straw naturally lodges on, over, and about the wheel and cogs, and conceals them, and makes it necessary, when any one is about to oil the cylinder, to remove the straw, and this is generally done with the hand. The shield had become so impaired that it was impossible to fasten it, or it would require great extra work to do so. It seems to be admitted that when the shield was not on, the wheel and cogs were imminently dangerous, and there is no question but that during the two days threshing at Pampella's, and at the time the defendant in error lost his hand, the shield was not on, and the wheel and cogs were uncovered, except as hidden by the straw. To oil the cylinder, one has to reach up and over the shield to get the oil cup, and when the shield is on it can be oiled without danger. When the shield is off, and one knows it, to avoid imminent peril, the oil can is reached in an opposite direction from that used when the shield is on. The defendant in error, having inquired, was told where the oil can was, and went to the side on which the large iron bevel-wheel is situate, at a point where the tumbling rods connect with the horse-power, and the wheel revolves rapidly in cogs on the end of the cylinder, attempted to brush away the straw covering up the wheel, when his hand was caught in the cogs of the bevel-wheel, and was mashed. He brought this suit to recover damages for the loss of his hand, and was awarded \$1,331. The jury returned answers to special interrogatories as follows: "First. Did not the plaintiff know, at and before the time he attempted to oil the cylinder, that the shield was off the bevel pinion? No. Second. Did not the plaintiff know that it was dangerous, if it was dangerous, to attempt to oil the cylinder when the shield was off? No. Third. Could not the plaintiff, in the exercise of ordinary prudence and

¹ Rehearing pending.

care, have known that the shield was off? No. *Fourth.* Would not the plaintiff have known that the shield was off if he had been ordinarily attentive to what he saw about the machine, and what he heard said by the defendants or others? Plaintiff did not know it was off. *Fifth.* How much damage, if any, do you allow on account of the physical and mental suffering of the plaintiff? \$100. *Sixth.* How much damage, if any, do you allow on account of the loss of plaintiff's hand? \$997. *Seventh.* How much damage, if any, do you allow on account of plaintiff's expenditures for medicine and surgical services? \$130. *Eighth.* What sum of money, if any, do you allow as exemplary damages? None."

1. The admitted fact is that the uncovered bevel-wheel was very dangerous. It is established by the evidence, and there is no controversy as to the fact that the owners of the machine knew that it was uncovered, and that they had been warned of the dangerous consequences, and that they were guilty of gross negligence for using it in that condition. It is equally clear from the evidence, and the jury so find, that the defendant in error did not know that the bevel-wheel was uncovered, and that the shield was not on. Now, on this state of facts, separate and apart from any contractual relations, or any question as to the attitude of these parties as master and servant, the operation of this machine in its dangerous condition imposed a duty on the owners and operators thereof towards all who were engaged in the work, or who by any possibility, in the discharge of duty, or in the performance of labor, might be brought in contact with it, that was certainly disregarded. For it may be stated as a general rule that as to any voluntary act which may naturally result in the injury of another the actor must see to it, at his peril, that injury does not follow, or he must respond in damages therefor, and this is true regardless of the motive or the degree of care with which the act is performed. *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, Id. 163; *Cahill v. Eastman*, 18 Minn. 324, (Gil. 292;) *Phinizy v. Augusta*, 47 Ga. 260; *St. Peter v. Denison*, 58 N. Y. 416; *Wilson v. New Bedford*, 108 Mass. 261; *Scott v. Bay*, 8 Md. 431; *Cooper v. Randall*, 53 Ill. 24; *Railway Co. v. Eagles*, 9 Colo. 544, 13 Pac. Rep. 696. This rule applies to these plaintiffs in error in all its vigor. They operated the machine with the knowledge that the uncovered wheel was imminently dangerous to those working around it. They did this, too, after warnings that injurious consequences were liable to follow such use. The injuries resulting to the defendant in error were the natural and probable result of the use of this machine with the cogs and wheel in this uncovered condition. Its danger was foreseen and pointed out to the owners, and the duty was imposed upon them to adopt every possible precaution to avoid such a consequence. It seems clear to us, under the uncontradicted evidence respecting the danger of operating the machine in such manner, and of the knowledge of the Mas-

tins of the danger, and of the want of knowledge on the part of the defendant in error that the wheel was uncovered, that the right of recovery is clear and undoubted. It was an act of practical necessity that the machine should be oiled, as the business, both of the Mastins and Pampella, was to be expedited by it. The feeder, whose business or duty it was to oil when the other feeder was actively engaged at the mouth of the machine, was prostrate on the ground, sick and disabled. Any one working about the machine, either for the Mastins or for Pampella, or for both, could be called upon to do this special work, but when called upon was entitled to have all the necessary protection to save him harmless while performing the special labor. We do not understand that there is any cast-iron rule that forbids a man who is engaged in pitching from the stack from attempting to oil the machine at the request of any one whose duty it is to see that the machine is in proper working condition. The evidence in this particular case shows clearly that, if the shield had been on and the wheel covered, any person could have oiled the machine without any danger to life or limb; hence the immediate, adequate, and efficient cause of the injury is found in the fact that the wheel was negligently and knowingly left uncovered by these plaintiffs in error. Whatever intermediate acts may have been committed by Rankin or by other employees, the injury must rest for an efficient cause on this act of negligence of the plaintiffs in error. On general considerations growing out of the contract and the nature of the employment of the defendant in error, he was bound to do and perform, within reasonable limits, any ordinary act, expediting the business in which all parties there present were engaged, that might be requested or demanded of him. He was designated by some one in authority to pitch from the stack, and he was directed by one who had authority to feed the machine and to see that it was running properly, and to oil the machine. Both of these acts, and his faithful performance of them, were necessary ones, and expedited the business of both the Mastins and Pampella, and resulted to their benefit. We do not understand that the defendant in error was either a volunteer or an intermeddler, in the common acceptation of the term. He was there as an employee of Pampella, to perform the labor assigned him, subject to the orders and directions of those who had charge of the various branches of the work. Pampella and the Mastins were associated together for a common purpose, and to do a particular part of the work. In the absence of some special controlling direction, the duty of the defendant in error was to do and perform all acts requested of him that were reasonable and he was capable of doing, to expedite the associated effort. If the shield had covered the wheel, it would have been a very ordinary act to have oiled the machine, when directed to do so by the person that all agree was charged with the duty of seeing that it was properly oiled; hence we regard all this conten-

tion about the defendant in error being a volunteer or intermeddler as having no force or bearing. He was rightfully there. It as a part of his duty, under his contract of employment, to do and perform all ordinary acts of which he was capable, and which he was directed to do by those having charge of the work, that was necessarily included in its practical operation. Hence it seems that there is a direct responsibility to him by reason of his rightful presence there, and his lawful participation in the work on the part of the Mastins, independent of the inquiry as to whether he was an employe of the farmer or the owners of the machine.

It seems to be an established fact in this case that the operation of the machine with the uncovered wheel was imminently dangerous, and this is equivalent to saying that the owners of the machine were guilty of gross negligence in its operation. The great bodily harm of some one working about the machine, without the knowledge that the wheel was uncovered, was the natural and almost inevitable consequence of such gross negligence. The uncovered condition of the wheel imposed upon its owners the exercise of the highest degree of caution. This increase of duty arose out of the nature of the business, and the danger to others incident to the operation of the machine. The duty of exercising great caution by the owners of the machine did not arise out of the contract with Pampella to do his threshing, but grew out of the wrong being done by the use of an uncovered wheel known by them to be imminently dangerous. The owner of a horse and cart, who leaves them unattended in the street, is liable for any damage which may result from his negligence. *Lynch v. Nurdin*, 1 Adol. & E. (N. S.) 29; *Ullidge v. Goodwin*, 5 Car. & P. 190. The owner of a loaded gun, who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for damages occasioned by the discharge. *Dixon v. Bell*, 5 Maule & S. 198. The general rule is that damages for which a party is liable are those, and those only, which are the natural and necessary consequences of his acts. *Kellogg v. Railroad Co.*, 26 Wis. 267; *Ryan v. Railroad Co.*, 35 N. Y. 211. There is this marked distinction between an act of negligence imminently dangerous and one that is not so, the guilty party being liable in the former case to the party injured, whether there was any relation of contract between them or not, but not so in the latter case. *Colegrove v. Railroad Co.*, 6 Duer, 410; *Burke v. De Castro*, 11 Hun, 357. Where contractors entered into a contract to put a cornice on a mill, the mill-owners to furnish the necessary scaffolding, and the scaffolding furnished, being defective, fell and killed an employe of the contractors, the mill-owners were held liable because the injury was the natural consequence of their negligence in constructing the scaffolds. *Coughtry v. Woolen Co.*, 56 N. Y. 128; *Cook v. Dock Co.*, 1 Hilt. 437; *Smith v. Railroad Co.*, 19 N. Y. 130. So, in this case, the injury to the defendant in error was

the natural consequence of the gross negligence of the owners of the threshing-machine in leaving the wheel, with its imminently dangerous cogs, uncovered. That it was dangerous to human life and limb is unquestioned. That the Mastins knew it was, is conclusively established. Despite the warnings of friends and neighbors, they persisted in its use in this dangerous condition. The natural result of this gross negligence was the serious injury of the defendant in error. Their answer to his demand for damages is that he was not their servant. This answer, addressed to a man who was there in the regular course of employment, to aid the accomplishment of the very work for which the owners of the machine had brought it to the farm of Pampella, is not a sufficient one. His duty was to do and perform such acts as assisted in the accomplishment of the common design. He did not direct the work, or had no right to, or was not appointed or selected for that purpose. His duties were assigned by those who had the controlling authority, or by those who seemed from the ordinary course of affairs to be in authority. His duty was obedience to the directions of those in authority. In obedience to a direction, a request, or a command by one who was in actual control of the machinery, he attempted to oil the cylinder. The act attempted appears to have been one of absolute necessity, requiring immediate attention. It was an ordinary act, unattended with danger, that any reasonably prudent man could perform without injury, if it had not been for the gross negligence of the Mastins. Rankin, who made the request or gave the direction, was in sole charge of that part of the machinery about which the request was made and the direction given. He had been in charge for two days, with the knowledge, consent, and approval of the owners of the machine. The writer of this opinion is clear in his conviction that, under these circumstances, Rankin was, for all legal purposes, the employe of the Mastins, in charge of this branch of the machinery, responsible for its successful operation, and fully authorized and empowered to do, or cause to be done, any act that was necessary for the accomplishment of that part of the work. That the defendant in error, by reason of his employment there, was subject to all reasonable orders and directions necessary to the safe conduct of the business by those in authority, and that as a matter of law he was an employe of the Mastins to the same extent, and to the same degree, as if he had been directly employed by them. That the relation of master and servant was established between them by reason of his employment by Pampella to engage in the associated work of the Mastins and Pampella, and that the Mastins are liable to him for injuries caused by their gross negligence because of said employment. And that they are liable both because they used this dangerous machinery with the knowledge of its danger, and because they failed to exercise reasonable care to protect an employe. The instructions of the court complained of, being in sub-

stantial conformity to these views, are not erroneous. We recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 23)

HEIZER *v.* PAWSEY.

(Supreme Court of Kansas. July 9, 1891.)

ARREST—ACTION ON BOND—APPEAL—SUPERSEDEAS.

The institution of proceedings in error in the supreme court, and the giving of a *supersedeas* bond, under sections 551, 552, of the Civil Code, will not prevent the plaintiff below from maintaining an action upon a bond given to secure the discharge of the defendant from arrest in the original case. A *supersedeas* bond only stays the execution of a judgment or final order sought to be reversed. *Railroad Co. v. Andrews*, 34 Kan. 563, 9 Pac. Rep. 213, followed.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Barton county; ANSEL R. CLARK, Judge.

Cole Bros., for plaintiff in error. *J. W. Clark*, for defendant in error.

GREEN, C. This was an action upon a bond executed by the plaintiff in error in an action commenced by the defendant in error against H. M. Fordham, in which an order of arrest had been procured. The bond sued on had been given in the district court of Barton county, to obtain the discharge of Fordham from arrest. The original suit of Elizabeth Pawsey against H. M. Fordham was prosecuted to judgment October 15, 1886, and the order of arrest was sustained by the district court. On the 24th day of January, 1887, H. M. Fordham filed in this court a petition in error and case made, with a bond for costs, wherein he sought to have reviewed certain alleged errors in the case of Elizabeth Pawsey against H. M. Fordham, and filed a *supersedeas* bond on the 7th of March following in the office of the clerk of the district court, to stay the issuance of an execution on the judgment rendered until that case could be determined in this court. This action was commenced after the filing and approval of the *supersedeas* bond, and was therefore pending in the district court of Barton county at the same time the original case was for hearing in this court. It is contended by the plaintiff in error that the approval of the undertaking, under sections 551 and 552 of the Civil Code, stayed all proceedings until the causes should be finally determined in this court. The condition of the bond sued on was that "the said H. M. Fordham should in his own proper person appear, if judgment should be rendered against him, and render himself amenable to the process of the court thereon." It was established that an execution was issued upon the judgment against the body of Fordham, and placed in the hands of the sheriff, who returned the same on the 5th day of March, 1887, indorsed, "Not found." This was done before the approval of the *supersedeas* bond. This action was commenced on the 7th day of May, 1887, but was not tried in the dis-

trict court until the judgment in the original case of Pawsey against Fordham had been affirmed by this court. It is insisted by the defendant in error that the pendency of the original suit in this court, without any stay-bond having been filed until after the return of the execution, did not preclude the commencement of this action; that the return of the execution, as made by the sheriff, fixed the liability of the plaintiff in error, under sections 165 and 167 of the Civil Code; and that an action might be brought at any time after the liability had been fixed. This court has decided that the institution of a proceeding in error in the supreme court does not, of itself, operate to suspend further proceedings in the case in the court below; nor will the giving of the undertaking provided for in sections 551 and 552 of the Civil Code suspend proceedings in the district court further than to stay execution of the judgment or final order sought to be reviewed. *Railroad Co. v. Andrews*, 34 Kan. 563, 9 Pac. Rep. 213. In the opinion the law is stated: "In none of the provisions of the Code, however, is the undertaking made to stay any of the proceedings beyond the issuance of an execution to enforce the judgment or final order of the court below." That case settles the only question involved in this case in favor of the defendant in error. Proceedings against the bail could have been stayed, under section 172 of the Civil Code, or paragraph 1930 of the General Statutes of 1889, upon proper application to this court. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 26)

WOODMAN *et al.* *v.* INNES *et al.*

(Supreme Court of Kansas. July 9, 1891.)

CONTRACTS—PUBLIC POLICY—LOCATION OF POST-OFFICE.

Where the general public has an interest in the location of a public office, like that of a post-office in a city, a contract to induce the retention of the post-office at a given point, thereby restricting its location in the city to one place only for individual benefit or personal gain, is against public policy, and not enforceable.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. REED, Judge.

Harris & Vermillion, for plaintiffs in error. *Dale & Wall*, for defendants in error.

HORTON, C. J. The material facts of this case are as follows: The firms of Innes & Ross and Aldrich & Brown, in 1882, owned property and were engaged in business on Main street, in the city of Wichita, in this state, near the building where the post-office in Wichita was kept. They were desirous of having the post-office remain in the building near their place of business, and, as an inducement to have the post-office remain in the building, on the 1st of October, 1882, they executed and delivered to W. C. Woodman their written contract, whereby they agreed to pay him, as part of the rent for

the post-office building, the sum of \$75 every three months. The post-office was continually kept in the building on Main street up to the 1st of October, 1886, and the firms of Innes & Ross and Aldrich & Brown paid the rent up to the 1st day of October, 1886, but refused thereafter to pay any further rent. On the 24th of December, 1886, W. C. Woodman commenced his action to recover \$303.96 for the balance of the rent which he claimed to be due upon the written contract. While the action was pending in the court below, W. C. Woodman died, and his executors were substituted by the order of the court as plaintiffs. Upon the trial, the defendant objected to the introduction of any evidence. The court sustained the objection, holding that the contract was against public policy, and therefore void. We approve of the ruling of the trial court. It was decided in *Railroad Co. v. Ryan*, 11 Kan. 602, that a contract not to have or use a depot within three miles of a given point was against public policy, and void. It was said in that case, among other things, that "railroad corporations are, as we have seen, public agencies, and perform a public duty. They are agencies created by the public, with certain privileges, and subject to certain obligations. A contract that they will not discharge, or by which they cannot discharge those obligations, is a breach of that public duty, and cannot be enforced. They are under obligations to use the utmost human sagacity and foresight in the construction of their roads to prevent accidents to passengers. A contract that they will not use such sagacity and foresight certainly cannot be upheld. They are under obligations to employ skillful and competent engineers to manage their engines, and other competent employees to superintend and take care of the running of their trains. A contract that they will not employ such agents and servants is certainly void. They are bound to furnish reasonable facilities for the transportation of freight and passengers, both as to the quality and quantity of cars and coaches, and the number of trains, and a contract not to furnish such facilities will not be tolerated. So, though one train a day, with one freight-car and one passenger coach, might be at present amply sufficient to do all the business between two given places, yet a contract never to run but the one train a day, with the one car and coach, could not be upheld, for the necessities of trade and travel are varying, and it is the duty of the company to adjust its capacities and facilities for business to these varying necessities. Upon the same principle, it is the duty of a railroad company to furnish reasonable depot facilities. The number and location of the depots, so as to constitute reasonable depot facilities, vary with the changes and amount of population and business. A contract to leave a certain distance along the line of the road destitute of depots is in contravention of this duty." Under the allegations of the petition, the location of the post-office in this case was to be restricted to one place. The government locates only one post-office in a city,

and such office is a public one, and the general public has an interest in the location of the office. Any contract which is made for the purpose of securing the location of such an office, or which prevents, or tends to prevent, the change or removal of such an office, when the necessities of business or the interest of the public demand a change or removal, tends to the injury of the public service, and therefore is against public policy. Such contracts as referred to in the petition tend to improperly influence those engaged in the public service, and also tend to subordinate the public welfare to individual convenience or gain. Parties should not be permitted to make contracts which induce personal or private interest to overbear public duty or public welfare. *County Lodge v. Crary*, 98 Ind. 238. Counsel for plaintiffs say that the written contract of the parties is enforceable, because it is not shown that it is unfair, or that any undue influence was to be used to retain the post-office on Main street. Such contracts lead to secret, improper, and corrupt influence, to the injury of the public. In this view, we cannot think it good policy for the courts to enforce such contracts. "All agreements for pecuniary considerations, to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void, as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country." *Tool Co. v. Norris*, 2 Wall. 45. If W. C. Woodman had no control over the location of the post-office, or if he could not, by his influence, representations, or otherwise, induce the United States post-office department to permit him to retain the post-office upon Main street, then the contract sued upon was wholly without consideration, and for that reason ought not to be enforced. The case of *Beal v. Polhemus*, 67 Mich. 130, 34 N. W. Rep. 532, which is referred to as fully sustaining the petition, is somewhat different in its facts, but all said therein is not satisfactory to us. The judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 769)

MISSOURI PAC. R. CO. v. SHUMAKER.¹

(Supreme Court of Kansas. July 9, 1891.)

ANIMALS AT LARGE—INJURIES ON RAILROAD—EVIDENCE.

1. When the owner of a farm, by an arrangement with the occupant of an adjoining farm, allows his stock, with which is a bull more than a year old, to run across the line on the latter farm to graze, and both farms are otherwise inclosed, such bull is not running at large, within the meaning of paragraph 6725, Gen. St. 1889.

2. Where the answer of a witness is not responsive to the question put to him, an objection to the question is not available on error. There must be a motion to strike out the answer.

3. Record examined, and held, that the wit-

¹ Rehearing pending.

ness Magruder had shown himself qualified to testify to the value of the bull in suit as an expert.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Miami county; J. P. HINDMAN, Judge.

W. A. Johnson, for plaintiff in error.
John C. Sheridan, for defendant in error.

STRANG, C. Action for damages under the stock law of 1874. December 14, 1887, Lavina Shumaker was the owner of a farm, upon which she resided, in Miami county, Kan. At that time the Missouri Pacific Railroad Company operated a line of railroad through said county, and through and across the said farm of Lavina Shumaker. She alleges that the right of way of said railroad through her farm was not sufficiently fenced; and that, in the operation of its train of cars upon said railway across her farm, the defendant below, on said 14th day of December, 1887, killed two cows and injured a bull, the property of her, the said Lavina Shumaker, whereby she suffered loss and was damaged in the sum of \$155. Demand was made upon the company for the amount of damages so sustained, which was refused, and suit therefor was commenced July 5, 1888, before a justice, who rendered judgment for the plaintiff. Defendant appealed, and the case was tried in the district court of Miami county, before the court and a jury, resulting in a verdict for the plaintiff below in the sum of \$120 as damages, and \$35 as a reasonable attorney's fee. Motion for new trial was overruled, and the company brings the case up for review. The first contention of the counsel for the plaintiff in error is that the court erred in permitting the witness W. W. Magruder to give his opinion of the value of the bull alleged to have been injured. It is insisted that the witness had not shown himself competent to answer the question put to him. The question was as follows: "You may state what the value of a Hereford bull three years and a half old, of average size, was in the community in which she lived last December. Answer. I should think that bull ought to have brought \$60 for breeding purposes, for which I bought him, and for which I sold him." Perhaps a sufficient answer to the objection interposed to this evidence is that no motion was made to strike out the answer to the question objected to. It will readily be seen that the answer is not responsive to the question, and hence, though the question may be objectionable, it requires a motion to strike out to get rid of the answer, and a refusal by the court on which to base an objection. The question was general and hypothetical, while the answer relates specifically to the bull in suit, and puts a value on him for a particular purpose or use not mentioned in the question. But a review of the examination of the witness Magruder, we think, shows him qualified to testify as an expert on the question of the value of the bull in suit. He testified he was a farmer, had been engaged in raising, buying, and selling

cattle since 1848, during which time he had handled blooded and other stock; that he lived but 15 or 16 miles from Mrs. Shumaker; that he knew what price cattle were selling for from time to time in Miami county; that he thought he knew the price of cattle in the neighborhood of Mrs. Shumaker at the time her cattle were injured, and that he judged from the price he and others around him were selling cattle for at the time; that he had bought the bull in question, and sold him to Mrs. Shumaker. We think this evidence discloses such an acquaintance on the part of Magruder with the cattle business in Miami county, and in the general neighborhood of the locality where the injury occurred, as to qualify him to testify as an expert upon the question of the value of cattle there at that time, and, if so, then neither the question objected to, nor the answer thereto, was objectionable, for any reason given. The answer, then, was objectionable only because it was not responsive to the question, and, as there was no motion to strike it out, the plaintiff in error cannot be heard to complain on that account. In the second assignment it is contended that the cattle of Mrs. Shumaker were running at large when injured, and that, therefore, no recovery can be had, so far as any injury to the bull is concerned, because it was permitted to be and run at large in violation of the statutory law of the state; that by permitting her bull to run at large Mrs. Shumaker was guilty of such negligence as defeats any right of recovery on her part, so far as any injury to the bull is concerned. The question, under this assignment of error, then, is, was the bull running at large, within the meaning of our statute, at the time of his injury by the company's train? Paragraph 6725 of the General Statutes of 1889, so far as it relates to this question, reads as follows: "If any bull over one year old * * * be permitted to run at large, the owner of the same shall be guilty of a misdemeanor, and on conviction thereof shall be fined for the first offense five dollars, and for every subsequent offense shall be fined ten dollars." If the bull was running on the inclosed premises of Mrs. Shumaker, he would not be running at large, within the meaning of the above paragraph, though the right of way of the railway company through her farm was not fenced. *Gooding v. Railroad Co.*, 32 Kan. 150, 4 Pac. Rep. 136. Within the meaning of the above case, we assume that the bull would not be running at large, under paragraph 6725 above quoted, though, by an arrangement between Mrs. Shumaker and the occupant of the Stevens farm, he was permitted to pass from her farm upon the Stevens farm for grazing purposes, provided the latter was inclosed. The evidence shows that these farms lie adjacent to each other, and each farm was inclosed with a sufficient fence on all sides, except on the south side; that the Shumaker farm is fenced part of the way on the south side, and the stream known as "Wea Creek" incloses this farm the balance of the way on that side; and this stream also abuts the whole south side of the Stevens farm, thus completing the inclos-

ure of that farm. The evidence, in this connection, shows that the stream itself, being wide and deep, and its banks high and abrupt, is of such a character that the cattle do not cross it, except occasionally, when the stream, and the ground constituting the approaches thereto, where the banks are not too high and abrupt to admit of passage, are frozen solid enough to bear their weight; that they cannot cross at all when not frozen over, without swimming, the banks where low being miry and difficult of passage. From a summary of the evidence on this question, we think it may be said that, with the fences and Wea creek surrounding the Shumaker and Stevens farms, they were "inclosures," within the meaning of *Gooding v. Railroad Co.*, above cited. There is nothing in the statute that requires a bull over one year of age to be confined, nor is there anything prescribing the character of restraint to be thrown around such an animal. The statute simply prescribes that such an animal shall not be permitted to run at large. Any fence, barrier, or obstruction surrounding a field or tract of land in which such animal is permitted to run, that is sufficient to restrain him, we think is sufficient to constitute the field an inclosure. For instance, if a ditch should surround a field on all sides sufficient to restrain stock, we would think the field an inclosure, and that an animal therein would not be at large under the statute. The evidence in this case shows that the stream on the south side of the Stevens farm, and partly on the south side of the Shumaker farm, was sufficient to restrain stock, and that such farms were therefore inclosures, and the bull in suit was not running at large when injured. See, also, paragraph 3063, Gen. St. 1889. This conclusion disposes of the question relating to instructions; and, as there is no question but that the evidence supports the verdict and judgment upon the general features of the case, it is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 22)

COFFEY V. CARTER *et al.*

(Supreme Court of Kansas. July 9, 1891.)

VACATING JUDGMENT.

A defendant in an action to foreclose liens of material-men and mechanics, who is personally served with summons, and allows judgments to go against him by default, is not entitled nearly six months thereafter, and at a subsequent term of the court, and after the property has been sold at sheriff's sale, to have the judgments vacated, on motion or petition, without showing that he has a defense to the whole or a part of the action in which the judgments are rendered.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Marion county; FRANK DOSTER, Judge.

Winslow, McDuffie & Curtis, for plaintiff in error. Keller & Dean and C. E. Malcom, for defendant in error.

STRANG, C. John F. Carter, one of the defendants in error, begun this action in

the court below, April 12, 1888, to recover a judgment against F. M. Coffey for lumber and building material amounting to \$457, sold by the former to the latter, for the erection of a dwelling upon lots 33, 34, 35, and 36, block 21, Santa Fe addition to the city of Florence, Marion county, Kan., and to foreclose a lien for material thereon. The other defendants in error were made defendants in the court below because of some interest claimed by them in the premises, and each of said defendants filed cross-petitions asking for affirmative relief in the form of judgments and foreclosures of liens. F. M. Coffey, defendant below, made default, and the court, when the case came up for hearing, entered judgment for Carter on his petition, and foreclosed his lien on the lots described. The other defendants were given judgments on their cross-petitions, and each had his lien for material or labor foreclosed. All these judgments were entered May 28, 1888. November 19, 1888, the plaintiff in error went into the district court, and filed a motion to vacate all the judgments in the case, which motion was sustained as to the judgment of the Badger Lumber Company for \$54.19, and overruled as to the other judgments. Coffey brings the case here, alleging that the other judgments should have been vacated, and points out several reasons why the ruling of the district court on the motion to vacate should be reversed. Without examining the alleged errors pointed out by the plaintiff in error, we think there are several reasons why he cannot insist upon a reversal of this case: First, before the suit was begun in the court below, Coffey, the defendant therein, and plaintiff in error, had sold and conveyed by a quitclaim deed all his interest in the premises described in the petition to one Richard Wilson, who had assumed the payment of the liens thereon. It follows, then, that when his motion was filed Mr. Coffey had no interest in the controversy, and therefore no standing in court, and could not be heard to complain about a matter in which he had no interest. Besides, he had allowed judgment to go against him by default, after personal service, and had waited nearly six months, and until the property had been sold by the sheriff on an order of sale growing out of the judgment and foreclosure of the liens thereon, before he went into court to attack the proceedings by his motion to vacate. This was inexcusable delay in asserting his rights, if he had any, in the premises. He should have defended against the judgments of foreclosure, if he had any defense, or moved their vacation soon after their rendition, and not have waited until after a sale of the premises had been had thereon. Suppose the proceedings upon which the judgments were had were irregular, it would avail nothing to set them aside, after the premises had been sold at sheriff's sale. Again, the plaintiff in error made no showing of any defense to the actions on which the judgments were rendered, in connection with his motion to vacate said judgments. A mere allegation in the affidavit, in support of his motion, that he had a defense,

is not sufficient. The facts constituting the defense must be stated so that the court may adjudge whether or not a defense exists. Having made no showing of any defense to the action in which the judgments were rendered, the plaintiff in error failed to put himself in a position to entitle him to a vacation of the judgments, even if subject to such a motion as made by him, and hence it was not error for the trial court to overrule such motion. Paragraph 4673, Gen. St. 1889. "A judgment shall not be vacated on motion or petition until it is adjudged that there is a defense to the action on which the judgment is rendered." *Anderson v. Beebe*, 22 Kan. 768. For the reasons given above, and without examining further the errors complained of, it is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 767)

MCCREA v. CITY OF LEAVENWORTH.

(*Supreme Court of Kansas. July 9, 1891.*)

PUBLIC IMPROVEMENTS—SPECIAL TAX—IN-JUNCTION.

A plaintiff who seeks to restrain a city of the first class from collecting a special tax on his property on account of the cost of the improvement of a street upon which his property is situate is not entitled to a judgment on the pleadings, when an answer by said city is on file, verified by the city attorney, that is in effect a general denial.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Leavenworth county; ROBERT CROZIER, Judge.

Cole McCrea and *F. G. Hentig*, for plaintiff in error. *C. F. W. Dassler*, for defendant in error.

SIMPSON, C. The plaintiff in error, with many others who are not here complaining, commenced an action in the district court of Leavenworth county on the 9th day of August, 1887, to restrain the collection of an assessment upon their lots for paving with cedar blocks the street upon which the lots fronted. A special ordinance was passed by the city on the 23d day of July, 1887, determining the specific amount of special tax levied upon each lot or half lot in each block fronting on said street. The district court of Leavenworth refused to restrain the collection of the special tax, and the case is here for review. At the conclusion of the trial in the district court time was given for the plaintiff in error to make a case for this court, but this was not done, and the order allowing it was subsequently vacated at the request of the plaintiff in error. He brings here a certified copy of his petition, with exhibits, the answer of the defendant city, a motion for judgment on the pleadings and the order overruling it, with some other matters, and a copy of the final judgment; and these are certified to by the clerk as being true copies of the originals on file in his office. There is nothing then before this court but a certified copy of the pleadings and judgment.

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There is no case made, no bill of exceptions, no evidence. There is a motion for a judgment for the plaintiff in error on the pleadings, and an adverse ruling thereon, and there are a number of propositions that by inference were propounded to the trial court for answer, but, as the evidence is not here, we do not know whether any or all of them would be material as special findings of fact or conclusions of law. The motion for judgment on the pleadings was properly overruled because there was a verified answer on file at the time the motion was made. There is one question that might arise on the pleadings and judgment; that is, are the allegations of the petition sufficient to sustain the judgment? But as the judgment in this case was against the plaintiff below and the plaintiff in error here that question is not presented. In a word, this record is in such condition that we have no power to determine the very many questions suggested by the briefs of counsel, whose friendly efforts ought to have been aided by a more complete transcript of the proceedings had in the trial court. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 24)

O'BRYAN et al. v. STANDIFORD et al.

(*Supreme Court of Kansas. July 9, 1891.*)

ACTION ON NOTE—UNVERIFIED ANSWER—PLEADING PAYMENT.

In an action on a note and mortgage, where the petition is sworn to, an unverified answer, alleging payment and satisfaction of the debt, will put in issue the question of payment, and it is error for the trial court to render judgment on the pleadings in favor of the plaintiffs.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Barber county; C. W. ELLIS, Judge.

W. S. Denton and *S. J. Jones*, for plaintiffs in error. *E. C. Sample* and *C. I. Loug*, for defendants in error.

GREEN, C. This was an action on a note and mortgage, commenced in the district court of Barber county. The plaintiffs filed an ordinary petition in a foreclosure suit, which was duly verified by one of their attorneys. The defendants answered—*First*, by denying all of the allegations of the petition, except the execution of the note and mortgage described in the petition; and, for a *second* defense, alleged that the debt sued upon had been wholly paid and satisfied in full. The answer was not sworn to. The plaintiffs filed a motion for judgment on the pleadings which was sustained by the court, and judgment was accordingly rendered in favor of the plaintiffs for the amount prayed for in their petition, and a decree was entered for the foreclosure and sale of the mortgaged premises. The plaintiffs in error bring the record here for review. The court below seems to have held that, because the petition was sworn to, and the answer was unverified, the latter did not raise an issue, and therefore rendered

judgment in accordance with the prayer of the petition. This was error. The defendants below, in their answer, alleged payment and satisfaction of the debt, which, if true, was a complete defense to the action. There was no necessity for a verification of the answer, under section 108 of the Civil Code. That section provides that in all actions allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of an appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney. This does not include the defense of payment. It is claimed by the defendants in error that the answer was rightfully disregarded, because the summons was returnable on the 21st day of April, 1888, and therefore the answer should have been filed on or before the 11th day of May following. But opposed to this position is the fact that the summons designated when the defendants should answer, and the further fact that they did file their answer on the very day named in the summons. The motion for judgment on the pleadings should have been overruled. It is recommended that the judgment of the district court be reversed, and a new trial be granted.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 15)

F. HAMMAR PAINT CO. v. GLOVER.

(Supreme Court of Kansas. July 9, 1891.)

BREACH OF WARRANTY—DAMAGES.

1. In an action for damages for a breach of warranty concerning the quality of certain paint, probable or future damages, which are not certain, fixed, or liquidated, cannot be allowed.

2. If there is a breach of warranty in the sale of personal property on the part of the seller, the right to nominal damages exists at once in favor of the purchaser.

3. If a breach of warranty on the part of the seller in the sale of paint, or any similar article for use, has involved the purchaser in a legal liability to pay money or to incur expense to other parties for whom he did work with the paint or other article to relieve himself against the effects of the bad quality of the paint or other articles, such liability or expense, if certain, fixed, or liquidated, whether paid or not, constitute elements of damages for which the defendant is entitled to recover.

(Syllabus by the Court.)

Error from district court, Lyon county; CHARLES B. GRAVES, Judge.

J. G. Hutchison, for plaintiff in error. Lambert & Dickson, for defendant in error.

HORTON, C. J. Several preliminary questions are presented in this case, but we need to refer to one only. It is urged that the case made does not in terms purport to contain all of the evidence. We have carefully examined the alleged omissions from the record, and are of the opinion that it does not properly show that all the evidence is preserved. *Ryan v. Madden*, 45 Kan. —, 26 Pac. Rep. 679. There

is no statement at the end of the testimony showing the case contains all that was offered. The stenographer certifies that the record contains a true and correct copy of her short-hand notes of the evidence, excepting the matter set forth on page 21½ of the record. A statement is also included in the certificate of the judge, who settled the case, to the effect that it embraces the evidence introduced on the trial, but the certificate and the statement of the district judge is ineffectual to accomplish the purpose intended. *Railroad Co. v. Grimes*, 38 Kan. 241, 16 Pac. Rep. 472; *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. Rep. 492. We have decided time and again that "in order to have the question whether the evidence supports the findings and judgment examined, the case made should show that it contains all the evidence. A statement to that effect in the certificate of the district judge settling the case, or in the notice served with the case upon the opposing party, when such notice is not a part of the case made, is insufficient." *Newby v. Myers*, 44 Kan. 477, 24 Pac. Rep. 971. It is urged that the case contains the evidence within the rule laid down in *Dewey v. Linscott*, 20 Kan. 686, and *Lewis v. Linscott*, 37 Kan. 386, 15 Pac. Rep. 158. We find, however, that this is not true. There are palpable omissions from the record, notably Exhibit A, referred to in the testimony of plaintiff. There are also other exhibits marked "A, A," and "B," which ought to have been attached to the depositions read upon the trial, but these are not included with the depositions, and are placed after the judgment. It is difficult, without having been present at the trial, to ascertain to which depositions the several exhibits at the end of the case belong. As far as we can understand the case from the partial record presented, the material facts are as follows: In 1886 George C. Glover was a painter, residing and carrying on his business in Emporia, in this state. In January, 1886, he purchased of the F. Hammar Paint Company 51 gallons of paint. On the 6th of September, 1886, he purchased 30 gallons; on the 7th of March, 1887, he purchased 51 gallons; and on the 18th of May, 1887, he also purchased 51 gallons. The paint cost him \$1 a gallon. He paid for the paint purchased in January and September, 1886, but refused to pay for the paint purchased in March and May, 1887, amounting to \$102, because he alleged it was worthless. This case was tried before the court with a jury. The jury returned a verdict in favor of the defendant for \$300 as his damages, and the trial court compelled the defendant to remit \$52 of the verdict, and judgment was rendered for \$248 in favor of the defendant and against the plaintiff. The defendant testified upon the trial, among other things, that he purchased the paint upon the following warranty: "Any building, when painted with prepared paints, according to directions, and applied properly, we will guaranty to give satisfaction, or repaint free of charge to the owner." That he used the paint upon two houses belonging to Mr. Hughes, upon Mr. Bundrems' house, Mr. Balweg's house, Mr. Ford's

house, Mr. McCoy's fence, and his own house. That this work was worth \$300. That it would cost \$140 to put the work in proper condition to be repainted. That the paint purchased, with the exception of the first lot, was unsatisfactory. That the paint commenced to crack and peel off in three to six months. That he told the plaintiff the work done with its paint was peeling off, and requested the company to repaint the same; and that this has not been done.

There were no exceptions taken to the instructions given, and the only instruction prayed for which was refused is as follows: "If the jury believe from the evidence that the defendant, Glover, has been paid in full for all the painting he has done with the paint bought of these plaintiffs, and that he has not had to refund any of the money or repaint any of the houses, then defendant has not sustained any damage, and the jury must find for the plaintiffs in the full amount of their claim, as stated in their bill of particulars, and interest thereon." This instruction does not correctly declare the law, and was therefore properly refused. If there was a breach of the warranty on the part of the plaintiff, the right to nominal damages existed at once in favor of the defendant to vindicate the right. If the consequences of the act for which the law renders the party in default responsible have developed themselves so as to create absolute injury before the verdict, the jury are bound to give compensation for such injury; but if at the time of trial the loss is still only probable, the verdict should be but nominal damages. 1 Sedg. v. Dam. (7th Ed.) p. 200. In all cases where the defendant personally agreed to repaint, upon request so to do, an actual liability against him exists, which can be enforced in the way of damages, if he refuses to perform. If the plaintiff's breach of the warranty has involved the defendant in a legal liability to pay money or to incur expense to the parties for whom he did work, to relieve himself against the effects of the bad paint, such liability or expense, whether paid or not, constitute elements of damages which the defendant was entitled to recover. It is probable that, if all the evidence introduced upon the trial had been properly preserved in the record, and sufficient exceptions had been taken to the instructions of the trial court, the large judgment rendered for damages against the plaintiff would not be allowed to stand; but upon the record as presented, and the exceptions therein appearing, we cannot interfere. The judgment of the district court must be affirmed. All the justices concurring.

(46 Kan. 724)

LEACH v. LEACH.

(Supreme Court of Kansas. July 9, 1891.)

Grounds for Divorce—Depositions—Alimony—Custody of Children.

1. Where a wife has refused for more than five years to cohabit with her husband as a wife, and has neglected and refused for the same period of time to perform many of her household duties, *held*, that such conduct is sufficient to authorize the granting of a divorce to the husband upon the ground of "gross neglect of duty,"

within the meaning of the statutes. Civil Code, § 639.

2. Where a notice to take depositions was that they would be taken at Detroit, Mich., on February 21, 1890, and from day to day, until the taking of the same should be completed, and two were taken on that day, and one remained to be taken, and the officer before whom the depositions were being taken adjourned the taking of the same to Monday, February 24th, for the reason that the next day, Saturday, was Washington's Birthday, and a legal holiday in Michigan, and that the next day thereafter was Sunday, and on account of the illness of the witness whose deposition was to be taken; and where a motion was afterwards made in the court to suppress these depositions because of such adjournment, and the court overruled the motion,—*held* not error.

3. Certain evidence commented on, and *held*, that no material error was committed in admitting it.

4. The marriage took place on March 14, 1872. The husband at the time had money and property worth about \$15,000. The wife had nothing. On March 22, 1890, a divorce was granted to the husband for the fault of the wife, and at that time the husband's property was worth from \$10,000 to \$14,000. He was owing debts to the amount of \$500 or more; was made liable for and required to pay the whole amount of all the costs of the divorce action, which amount was very large, and was required to support all the children, five in number, and all minors, and required to pay his wife as alimony the sum of \$2,500, and to surrender to her a large number of articles of personal property, the value of which is not shown. *Held*, under all the circumstances of the case, that the supreme court cannot say that the trial court erred in not granting a larger amount of alimony.

5. In a case of divorce, where the trial court finds upon sufficient evidence "that the defendant is not a proper person to be intrusted with the custody and management of the said minor children, [and] the court further finds that the plaintiff is a proper person to be intrusted with the custody, management, and maintenance of said children," *held*, that the supreme court cannot say that the trial court erred in awarding the custody, management, and maintenance of such children to the plaintiff.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. REED, Judge.

Sunkey, Campbell & Amidon, for plaintiff in error. *Sluss & Stanley*, for defendant in error.

VALENTINE, J. This was an action for divorce, and for the custody of the children, five in number, and all minors, brought in the district court of Sedgwick county on September 5, 1889, by Robert T. Leach against his wife, Susan T. Leach, charging her with gross neglect of duty in refusing to cohabit with him as his wife, and in refusing to perform the household duties of a wife, for more than five years. The defendant filed an answer and cross-petition, charging the plaintiff with gross neglect of duty and cruelty, and asking for a divorce and the custody of the children, and for alimony. The case was tried from March 1 to 22, 1890, before the court without a jury, and the court found generally in favor of the plaintiff, and against the defendant, and also found specially as follows: "The court further finds that the defendant has been guilty of gross neglect of duty, as charged in the petition. The court further finds that the defendant is not a proper person to be intrusted with the custody and management of the

said minor children. The court further finds that the plaintiff is a proper person to be intrusted with the custody, management, and maintenance of the said children. The court further finds that the defendant is entitled to alimony in the sum of two thousand five hundred dollars." Upon these findings, general and special, the court granted the plaintiff the divorce prayed for in his petition and the custody of the children, and granted to the defendant, as alimony, the sum of \$2,500, and awarded to her a large number of articles of personal property, and adjudged that the plaintiff should pay all the costs of the suit; and the defendant, as plaintiff in error, brings the case to this court, making the plaintiff below the defendant in error. There was ample evidence to support the findings and judgment of the court below. According to the plaintiff's evidence, the defendant had refused to cohabit with him as his wife for more than five years before the commencement of this action, and she admitted that she had so refused for a year and a half or more; and the plaintiff's evidence also showed that she had neglected and refused to perform various other duties as a wife for an equally great period of time. Such conduct we think is sufficient to authorize the granting of a divorce to the aggrieved party upon the ground of "gross neglect of duty," within the meaning of the statutes. Civil Code, § 639. Indeed, we think the refusal of the defendant to cohabit with the plaintiff as his wife for more than five years, as he alleged in his petition, and as was shown on the trial, was sufficient. Probably a much shorter period of time would be sufficient, but whether it would or not it is not necessary now to express any opinion.

Errors, however, are alleged as occurring during the trial, as follows: It is claimed that the court below erred in overruling the defendant's motion to suppress depositions. It is claimed that the notice to take the depositions specified that the depositions would be taken at Detroit, Mich., on Friday, February 21, 1890, and from day to day until the taking of the same should be completed, but that the depositions were not so taken; that one of the depositions was taken on an adjournment from February 21 to 24, 1890. It appears that two of the depositions were taken on February 21, 1890, and that an adjournment was then had to February 24, 1890, when the remaining deposition, that of Mrs. Mary Elizabeth Joslin, was taken. The defendant did not make any appearance at any time, and there is no pretense that the adjournment caused her any inconvenience. With regard to the adjournment the officer before whom the depositions were taken certifies as follows: "Thereupon I adjourned the taking of said depositions to Monday, February 24, A. D. 1890, between the hours of eight o'clock A. M. to six o'clock P. M.; Saturday, February 22, 1890, being a legal holiday, (Washington's Birthday,) and February 23d, 1890, being Sunday. Said adjournment was taken on account of the illness of Mary Elizabeth Joslin, a witness produced by said plaintiff. Thereupon,

on Monday, February 24, A. D. 1890, the said plaintiff produced said witness Mary Elizabeth Joslin, who testified as follows, to-wit." Now, Washington's Birthday is everywhere in the United States considered in the nature of a holiday, and it is in fact, under the statutes of Michigan, a legal holiday. How. Ann. St. Mich. 1882, § 1591. And Sunday is certainly not a day for the taking of depositions. And the witness Mrs. Joslin was ill. We think the court below did not err in refusing to suppress the depositions. Besides, the deposition taken on February 24, 1890, had but little materiality, and could not have materially affected any of the substantial rights of the defendant.

The plaintiff further complains that the court below erred in admitting "the testimony of the witnesses Mrs. York, Mrs. Buck, and Mrs. Wheaton, as to the declarations and conduct of Mrs. Leach from seven to twelve years prior to this action, about raising children," etc. The object of this testimony was to show the hatred and ill feelings entertained by Mrs. Leach towards her husband, the plaintiff, and as tending to corroborate his testimony that she had refused to cohabit with him as his wife for a very long period of time. We think the evidence was competent. The plaintiff alleged in his petition that the defendant's gross neglect of duty commenced more than five years before he commenced his action, and she, in her answer and cross-petition in denial and asking for affirmative relief, alleged "that, ever since her marriage with the plaintiff, [which was on March 14, 1872,] she has conducted herself in all respects as an obedient, dutiful, and affectionate wife, and conscientiously fulfilled all her marital duties."

The plaintiff in error also complains "of error in the admission of the evidence of Mrs. Reeves as to Mrs. Leach's desire to leave Kansas, etc.; also the evidence relating to her conduct shortly after the birth of her last child." Her last child was born on January 8, 1882. The first of the above complaints has no importance one way or the other; and the second shows that a few months after the birth of the defendant's last child she had a dance at her house, and danced herself. This was for the purpose of showing that her health was good. It was also shown that she danced on many other occasions. As before stated, the defendant's last child was born on January 8, 1882, and prior to that time, and in the early part of 1881, when she first discovered that she was pregnant with that child, was the time when the principal troubles between the parties commenced, and from that time on they have had but very little, if any, sexual intercourse with each other.

We shall now consider the question of alimony, and probably the plaintiff in error, defendant below, considers this the most important question in the case. Both the parties asked for a divorce in their pleadings, and probably both desire that it should be granted, but each wants the bulk of the property. It appears that the plaintiff below, while still a single man, and in 1871, removed from Michigan

to Kansas, and purchased a quarter section of land in Sedgwick county. Afterwards he returned to Michigan, and there, on March 14, 1872, married the defendant, and immediately brought her to Kansas, and they arrived at his farm about April 2, 1872. At the time of his marriage he owned a quarter section of land in Sedgwick county; had \$1,400 in money; and had debts coming to him secured by mortgage, from which he realized about \$12,500. She had nothing. At the time of the divorce he owned two quarter sections of land in Sedgwick county; had some personal property worth perhaps \$1,500; had no money of any consequence; was owing debts to the amount of \$500 or more; was made liable for and required to pay all the costs in this present action, which will be a very large amount; and is required to support all his children, five in number, and required to pay to the defendant the sum of \$2,500 as alimony, and to surrender to her a large number of articles of personal property, the value of which is not shown. At the time of the plaintiff's marriage he was probably worth about \$15,000. At the time of the divorce he was not worth that amount. The counsel for the plaintiff in error, defendant below, state the amount to be \$14,000, but probably it was not more than ten to twelve thousand dollars, and even that amount is made up largely from the increased value of his real estate caused by the settlement and the growth in population and in wealth of the country. The defendant's case is not like the case of that class of wives who bring something to their husbands, or who after marriage assist their husbands in accumulating wealth or property; for she brought nothing to her husband, and afterwards largely retarded and hindered him from accumulating wealth and property, and was largely the cause of reducing his wealth. Ordinarily, \$2,500 or \$3,000 alimony out of an estate worth from \$10,000 to \$14,000 would be too small, yet in this case it is probably right. At most, we cannot say that the court below erred in not granting a larger amount of alimony.

As to the custody of the children, the district court had better means of knowing what was right than we have, and we cannot say that the court erred in awarding the custody of all of them to the plaintiff. The youngest child is a boy, and, as before stated, was born on January 8, 1882. Whether, however, the plaintiff shall continue to have the custody of the children, or whether the defendant may at some future time have their custody, or the custody of some of them, is a question that will remain open, and may at any time be further considered and adjudicated by the courts. Circumstances may change, and it may at some time be for the best interests of the children, or of some of them, that the defendant shall have their custody, and the court may then award them to her. But at the present all that this court can do will be to affirm the ruling of the district court upon this subject. It can make no difference that one of the quarter sections of land

was the homestead of the parties. It was decided some years ago in the case of *Brandon v. Brandon*, 14 Kan. 342, 346, that the homestead of the husband and wife "is the homestead of each, and upon a divorce the court has power to assign it to either." We cannot say that any substantial error has been committed in this case, and therefore the judgment of the court below will be affirmed. All the justices concurring.

(46 Kan. 679)

STATE v. MORRISON *et al.*

(*Supreme Court of Kansas. July 9, 1891.*)

OBSTRUCTING OFFICER—INFORMATION—EVIDENCE.

1. An information in a criminal prosecution which charges the defendant substantially in the language of the statute and in detail with knowingly and willfully obstructing, resisting, and opposing the sheriff in selling certain personal property on execution in a civil action, is sufficient although it may state other matters not necessary to be stated.

2. The evidence examined, and held to be sufficient to sustain the verdict of the jury and the judgment of the court.

3. The instructions of the court to the jury examined, and held that, although some portions of them may not be technically correct, yet, taking them all together, they could not have misled the jury in any material matter, and will not require a reversal of the judgment.

4. Where a sheriff is about to sell personal property on execution in a civil action, and the tendency of the conduct of the owner and his friends at the time is to provoke a quarrel with the sheriff, and to bring about a breach of the peace, and to prevent the sale, and such conduct does in fact prevent the sale, such owner and his friends who are guilty of such conduct must be held to be responsible therefor, and for all that necessarily and reasonably follows from it, and for preventing the sale, whether they intended to prevent the sale or not.

(*Syllabus by the Court.*)

Appeal from district court, Jackson county; ROBERT CROZIER, Judge.

Thomas H. Bain and *A. H. Vance*, for appellants. *J. N. Ives*, Atty. Gen., and *R. G. Robinson*, for the State.

VALENTINE, J. The defendants, Con Morrison, (whose full name is Cornelius Morrison,) and Thomas Cooney, were convicted in the district court of Jackson county of the offense of having knowingly and willfully obstructed, resisted, and opposed the sheriff of said county in the service of an execution and an order to sell personal property in a civil action. The defendant Morrison was sentenced to pay a fine of \$200, and the defendant Cooney was sentenced to pay a fine of \$150, and they were adjudged to pay the costs jointly, and each was to stand committed to the county jail until their respective fines and the costs should be paid; and both appeal to this court.

The first claim of error is that the court below erred in overruling the defendants' motion to quash the information. The statute under which this information was drawn reads as follows: "Sec. 165. If any person or persons shall knowingly and willfully obstruct resist, or oppose any sheriff, or any other ministerial officer, in the service or execution, or in the attempt to serve or execute any writ, warrant, or

process, or in the discharge of any other duty, in any case, civil or criminal, other than felony, or in the service or attempt to serve any order or rule of court in any case, every person so offending shall, on conviction, be adjudged guilty of a misdemeanor, and punished by imprisonment in the county jail for a term not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment." Section 165 of the act relating to crimes and punishments. The information under which the defendants were prosecuted, after averring all the necessary preliminary matters, and that the defendants, with others, on September 1, 1890, unlawfully assembled together with the intent to disturb and to forcibly resist, oppose, and prevent the sheriff from executing the aforesaid writs of execution and order of sale then in his hands, and copies of which are given in the information, and from proceeding with the sale, then charges as follows: "And the said Con Morrison, Thomas Cooney, * * * then and there being, did then and there unlawfully, knowingly, and willfully obstruct, resist, and oppose the said R. B. Francis, sheriff, as aforesaid, in executing the said order of sale and writ of execution, and in his attempt to proceed with said sale of said personal property thereunder as aforesaid, by then and there knowingly and willfully using loud, profane, vulgar, and threatening language towards him, the said sheriff, and language calculated to provoke an affray, and by conducting themselves in a threatening and bolsterous manner, and by intimidating and assaulting said R. B. Francis, sheriff, as aforesaid, in his attempt to perform his official duty as aforesaid, and by then and there disturbing the peace and quiet of said R. B. Francis, and preventing him from proceeding with said official sale by reason of theirs, the said defendants', said unlawful acts and conduct, against the will of said R. B. Francis, and against the peace and dignity of the state of Kansas." Section 108 of the Criminal Code, with reference to indictments and informations, reads as follows: "Sec. 108. Words used in the statutes to define a public offense need not be strictly pursued, but other words conveying the same meaning may be used." In the case of *State v. McGaffin*, 36 Kan. 315, 13 Pac. Rep. 560, it is decided as follows: "As a general rule it is sufficient if an indictment or information charges an offense in the language of the statute; and even the statutory words need not be strictly pursued, but others conveying the same meaning may be used." See, also, the case of *State v. White*, 14 Kan. 538. In the case last cited it is decided as follows: "The common-law rules of construing criminal pleadings have been set aside by our Code of Criminal Procedure, and to that Code must we look for the rules to determine the sufficiency of an information or indictment. It is not necessary in an information to use the exact words of the statute in charging an offense. It is sufficient if words are used conveying the same meaning." See, also, the following cases: *State v. Craddock*, 44 Kan. 489, 24 Pac.

Rep. 949; *State v. Foster*, 30 Kan. 365, 2 Pac. Rep. 628; *State v. Hart*, 33 Kan. 218, 6 Pac. Rep. 238; *Madden v. State*, 1 Kan. 340, 348, 349; *State v. Barnett*, 3 Kan. 250. In the case of *State v. Schweiter*, 27 Kan. 499, 506, it was decided as follows: "Where the statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately, and as distinct crimes, when each shall have been committed by different persons and at different times, they may, when committed by the same person and at the same time, be coupled in one count, as constituting all together one offense only. In such cases the offender may be informed against as for one combined act in violation of the statute, and proof of either of the acts mentioned in the statute and set forth in the information will sustain a conviction." Section 110 of the Criminal Code reads as follows: "Sec. 110. No indictment or information may be quashed or set aside for any of the following defects: *First*, for a mistake in the name of the court or county in the title thereof; *second*, for the want of an allegation of the time or place of any material fact, when the venue and time have once been stated in the indictment or information; *third*, that dates and numbers are represented by figures; *fourth*, for an omission of any of the following allegations, viz., 'with force and arms,' 'contrary to the form of the statute,' or, 'against the peace and dignity of the state of Kansas'; *fifth*, for an omission to allege that the grand jurors were impaneled, sworn, or charged; *sixth*, for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged; nor, *seventh*, for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." In the case of *Madden v. State*, 1 Kan. 340, 348 et seq., the following language is used in the opinion of the court: "The legislature evidently designed by the Code of Criminal Procedure to simplify pleadings so that the technicalities which had become so interwoven with the old system should no longer be used to defeat the ends of justice. * * * The legislature has attempted to close these avenues of escape by the provisions of the Code, whether wisely or not it is not for us to consider. It is for courts only to give effect to its provisions according to the rules prescribed by it. * * * The Code has specified, in sections eighty-nine and ninety, the requisites of an indictment, but has provided in section ninety-six a large class of defects, for the existence of which the indictment may not be quashed or set aside. Now, it must be obvious to any one reading the indictment in this case that it does not state the facts constituting the offense in plain and concise language, without repetition, as directed in the second clause of section eighty-nine. But the sixth subdivision of section ninety-six declares that for any surplusage or repugnant allegation, where there is sufficient matter alleged to indicate the crime and person charged, the in-

dictment shall not be quashed or set aside. The eighty-ninth and ninetyeth sections are the guides for the pleader, from which he ought never to depart. The ninety-sixth section limits the court in the application of the requirements of those sections, and furnishes a different rule for its judgment than it had given the pleader for his guidance in sections eighty-nine and ninety. By the sixth subdivision of the ninety-sixth section, if sufficient matter is alleged to indicate the crime and person charged, the indictment may not be quashed, although it may contain surplusage and repugnant allegations. Now, surplusage and repugnant allegations cannot be that 'plain and concise language, without repetition,' directed to be used in section eighty-nine. Yet the court must disregard such surplusage, when called upon to pass upon the indictment, applying the criterion provided in sections eighty-nine, ninety, and ninety-five, as explained and limited by section ninety-six; and we think it will be found that the indictment, though inartificially and clumsily drawn, must be sustained." Sections 89, 90, 95, and 96, above mentioned, correspond respectively to sections 103, 104, 109, and 110 of our present Criminal Code. See, also, *State v. Furney*, 41 Kan. 115, 116, 21 Pac. Rep. 213. Following the statutes and the cases above cited it necessarily follows that the court below did not err in overruling the defendants' motion to quash the information. No indictment or information shall be quashed—"Sixth, for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged; nor, seventh, for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Crim. Code, § 110.

The next alleged errors have reference to instructions given by the court to the jury; but before proceeding to the consideration of these instructions it will be proper to state some of the evidence in the case. Evidence was introduced tending to show, among others, the following facts: In 1890 Reuben B. Francis was the sheriff of Jackson county. On August 18th of that year he held in his hands an execution and an order of sale against personal property of the defendant Con Morrison, and about that time he levied upon such property and advertised the same to be sold on September 1, 1890, at 2 o'clock in the afternoon. On Tuesday, August 26, 1890, he was at Morrison's house, but Morrison was not at home. Mrs. Morrison and some of the children were there. The sheriff believed that some of the oats that he had previously levied on had been removed, and that Morrison was responsible for their removal. He told Mrs. Morrison that he knew where the oats had gone, and that, if Morrison did not give him the money for them, he would have him arrested, and put in jail. The above is according to the sheriff's testimony. James Morrison, a son of the defendant, testified that this was on Thursday, August 28, 1890, and that the sheriff, among other things, told his mother, using some

profane language, that he would have a warrant for his father, and put him in the penitentiary. This the sheriff denies. Mrs. Morrison at the time was in an advanced stage of pregnancy, and on the Sunday following gave birth to a child. On Monday morning Judge McAloon, the principal adviser of Morrison, and Morrison and others, procured a warrant from a justice of the peace for the arrest of the sheriff upon grounds in some manner connected with the aforesaid conversation had between the sheriff and Mrs. Morrison, and placed the warrant in the hands of a constable named Frank Jackson to serve. On that day, and before the time for the sale to occur, a large number of persons gathered at Morrison's house. Jackson, the constable, testified that McAloon said to him, "Don't serve the warrant unless he [the sheriff] commences to sell." This was said in the presence of Morrison; and McAloon, as a witness, admitted on his cross-examination that he had heard Morrison tell the constable "not to arrest him [the sheriff] unless he commenced the sale." Jackson arrested the sheriff before the time for the sale to commence. But it would seem that the arrest did not interfere materially with the sheriff's liberty, or his freedom to proceed with the sale. The sheriff testified on the trial that the following then occurred: "McAloon came to me, and in the presence of all these defendants he said I could not go on with the sale for the reason that I was under arrest. * * * Mr. Cooney was standing behind me, and he says: 'To come down to a man's place, and do as you have done here, damn you, you will get a rope around your neck before you get away from here.' * * * 'You need not laugh, God damn you, I mean it.' * * * Mr. Morrison about that time says, 'I would like to see any son of a bitch move a hoof of this stuff away,' or something of that nature. At that time McAloon took me off over towards the stable, and Morrison followed; came over there and cursed me; called me sons of bitches and all kinds of names. He came right up in front of me, and said: 'God damn you, I would like to wipe the ground with you.' He wanted to whip me whether or no. * * * He [Morrison] drove Mr. Fellows away from there. * * * He told him, God damn him, he had no use for him there, and to get out from there. * * * He went, and went quick. * * * I seen a revolver in Mr. Morrison's pants, right in there, [pointing to his own pants;] think it was on that side. It was what I took to be a revolver. Could see the handle sticking a little above top of his pants. * * * The tone of voice was pretty wicked. Think they meant what they said." On cross-examination the sheriff, Francis, testified: "He [Morrison] said he would like to see a son of a bitch move any of that stuff from there. * * * About that time there was one Mr. Cooney began to talk about hanging me, and I got my mind off the other business." McAloon, who resides at St. Mary's, brought a law book with him. The sheriff also testified that Morrison shook his fists at him while he was talking to him; and also

testified that he announced that he postponed the sale for one week, and he did this because he thought there would be trouble, and somebody would get hurt, if he went on with the sale. The sale did not take place on that day, nor for about two weeks afterwards. The constable, Jackson, testified, among other things, that Morrison "became enraged, and said: 'Mr. Francis, I want you to understand one thing right here. You won't sell a damn thing that is on this place.'"

* * * "No God damn son of a bitch could come from Holton and take anything off that place." * * * Mr. Morrison says [to Fellows:] "What are you doing here? I did not tell you to come here, damn you. Get out of here." And he got. * * * "I heard him [Morrison] say that the sheriff could not sell anything,—could not sell anything that was on that place." Mr. Swetlick testified that "Morrison says: 'You don't come and sell this property. You or no damn son of a bitch from Holton should sell it.'"

* * * They were shaking their fists right at the sheriff." Mr. Faulk testified that after the time at which the sale was to take place Morrison "said that the sheriff came down there to sell some property that belonged to him, and that he stopped the sale, and would not let him sell it." Mr. Fellows testified that on the day that the sale was to take place he went there to bid on some of the things to be offered, and "there was something that I took for a revolver in the pocket of Morrison. I did not care about opposing that thing." He also testified to Morrison's threatening demonstrations. Fellows left the place. He testified, "I thought there would be trouble if I stayed." Mr. Franze testified that Morrison said that "no Holton son of a bitch or sons of bitches,—don't know whether he used the singular or plural number,—could take any property from there." He also testified that both Morrison and Cooney "seemed excited and violent," and that Morrison seemed "very much enraged." Indeed, all the witnesses testified that Morrison and Cooney were both angry, and seemed to mean what they said. Judge McAloon, Morrison's principal adviser, testified that he "thought that it would not be safe to proceed with the sale." And he also testified that "Mr. Cooney came up to the sheriff in an angry and violent and threatening manner, shook his fists at him, and told him that no son of a bitch from Holton could take away any property off that farm." Mr. Cleveland testified that before the day on which the property was to be sold Morrison said that "it would not be sold. No one would take anything off the place. He would not permit it." There was much other testimony of the same character as the above. On the side of the defendants the witnesses testified that all the trouble that occurred on the day on which the sale was to take place occurred because of what was said by the sheriff to Mrs. Morrison on the Tuesday or Thursday prior to the day on which the sale was to take place, and that nothing was said or done for the purpose of preventing

the sale, or hindering the sheriff from making it. The evidence on many points was very conflicting, but the jury and the court evidently did not fully believe the testimony of the defendants' witnesses, and did believe the testimony of the witnesses for the state. It is probably true that what was said by the sheriff to Mrs. Morrison prior to the day on which the sale was to take place partially furnished the excuse for some of the threatening demonstrations that were made by the defendants and their friends; but evidently, from the evidence, the principal object on the part of the defendants and their friends was to prevent the sale, and they accomplished their object so far as that day was concerned.

The court below instructed the jury, among other things, that they could not find the defendants guilty unless they found beyond a reasonable doubt that the defendants did, as charged in the information, knowingly and willfully obstruct, resist, and oppose the sheriff with respect to his intended sale; and also instructed the jury as follows: "You are the exclusive judges of the testimony and of the credibility of the witnesses. If any one or more of them has willfully testified falsely to any material fact in the case, you are at liberty, but not bound, to disregard the whole of the testimony of that witness. If in considering the testimony you are unable to reconcile it, which would be your first duty, then it is for you to determine which side, when it is directly in conflict, you will believe. You are not at liberty to arbitrarily disregard the testimony of any witness. You should consider it, and give it the weight it is entitled to, considering all the surrounding circumstances that throw any light upon it; and it is your duty to consider the interest of the person testifying, if any is shown on the stand; his intelligence, his means of knowledge, his bias in any direction, from friendship or otherwise,—in determining the weight of testimony of any witness on any side; and from all such considerations and any other that in your judgment would throw any light on the value of the testimony of the witness, and from it all, determine its weight. I need not call your attention to the fact that there is conflicting testimony with regard to material matters in the case. If you are convinced that any one of them testified falsely, as some of them must have done, if their testimony conflicts, it is for you to determine which you will believe, and give it the weight it is entitled to." The last sentence of the above instruction is objected to, but, considering it in the light of the testimony and of the other instructions, it cannot be considered as erroneous or materially erroneous. The defendants also objected to other instructions. The court instructed the jury that the question for them to determine was "whether or not the defendants or any of them willfully and knowingly obstructed, resisted, or opposed the sheriff in the execution of a lawful duty," and then defined these various words. In defining the word "willfully," the court used the following, among other, language: "Willfully," in

this connection, means that, if they knew the effect of what they were about to do would be to obstruct the officer in the performance of his duty, or such effect might be reasonably apprehended from their acts, then they may be found to have willfully so acted." The judge also, in this connection, instructed the jury as follows: "And so I say to you that it is not absolutely necessary to a conviction under this section of the statute that they should, in what they did, have actually intended that no sale should take place. If what they did do, would, reasonably considered, prevent a sale. In reference to the claim on the part of the defense that whatever was done there was in regard to some grievance Mr. Morrison had against the sheriff for misconduct towards his wife at the time when he was not present, I say, if the purpose of these people—Mr. Morrison or his friends, these defendants—was to get up an altercation there with the sheriff, the reasonable consequences of which would be, not that they intended to do so, but the reasonable consequence of which would be that the sale could not take place, then they would be within the statute, although they did not intend—actually intend—to disturb the sale at all. The statute says, 'if they shall obstruct an officer in the execution of his duty,' that would mean if they put impediments in his way,—as getting the property away so that he could not get it for sale,—would be obstructing an officer in the execution of his duty. Opposing; that might be done in various ways,—by ordering away bidders, giving notice to the bidders that the title was not good, that the sheriff had no right to sell,—and various things of that sort would be, within the meaning of this clause, opposing the sale, or resisting an officer in the execution of a writ. In this case, if the sheriff was there to sell the property, and they had prevented him by force from collecting the property together at a place where it could be sold, that would be resisting the execution of this process." Some portions of these instructions may not be technically correct, and yet, taking the whole of the instructions together, we do not think that they were misleading or erroneous as to anything material in the case, and certainly not so misleading or erroneous as to require a reversal of the judgment. If, for instance, some person had been at the place of the intended sale, who in good faith believed that he owned the property, and not Morrison, and that the sheriff for that reason had no right to sell it, he would have had a right to give notice of his claims to the sheriff, and to the bidders, and to all other persons, and to have warned all persons not to bid on the property, for the reason that he claimed to own the same. But there is nothing of that kind in this case, so far as the present defendants are concerned. They knew what they were doing, and certainly must have known that the tendency of their acts would be to prevent the sale. In this connection it is necessary to make some further comment upon the instructions. While the defendants must have known that the tendency of their acts

and conduct would be to prevent the sale, and while in all probability they actually intended that such acts and conduct should bring about such result, yet the court below instructed the jury that it was not absolutely necessary to a conviction that the defendants should have actually intended that no sale should take place, provided, if what they did would, when reasonably considered, prevent the sale. We are inclined to think that the instruction, under the circumstances of this case, was right. The tendency of the acts and conduct of the defendants was to provoke a quarrel with the sheriff, and to bring about a breach of the peace. Their conduct was wrong, and they should be held to be responsible for all that would necessarily and reasonably follow from it, and which did in fact follow from it. The sale was prevented because of the defendants' conduct, and they evidently had reason to believe, and did believe, that such would be the result. We cannot say that material error was committed by the court below, and therefore its judgment will be affirmed. All the justices concurring.

(46 Kan. 730)

BUFFINGTON v. GROSVENOR.

SAME v. SEARS.

(*Supreme Court of Kansas.* July 9, 1891.)

CONSTITUTIONAL LAW—CITIZENS—ALIENS—RIGHT TO DOWER.

1. The word "citizens," as used in section 17 of the bill of rights prior to the amendment of 1888, meant citizens of Kansas; and the word "aliens," as there used, meant persons born out of the United States, and not naturalized.

2. The statute which provides that the widow shall not be entitled to an interest in lands conveyed by the husband when the wife, at the time of the conveyance, was a non resident of the state, is not repugnant to section 2 of article 4, or the fourteenth amendment to the constitution of the United States.

(*Syllabus by the Court.*)

Error from district court, Kingman county; S. W. LESLIE, Judge.

Hallowell, Hume & Gordon, for plaintiff in error. *John E. Lydecker and Dohitt, Jones & Mason*, for defendant in error.

JOHNSTON, J. Martha A. Buffington brought two actions in the district court of Kingman county, one against William S. Grosvenor and the other against John G. Sears, to recover from each one-half of certain real property situate in Kingman county. She was unsuccessful in each case, and is here complaining of the judgments that were given. The material facts of the cases are alike, and, as they present but one question, they may be disposed of in a single opinion. Martha A. Buffington became the wife of Pierce Buffington in 1865, and continued in that relation until the time of his death, in 1884. He removed to Kansas five or six years before his death, and shortly after coming here he acquired the absolute legal title to the property in controversy. Afterwards he conveyed the property by warranty deeds to certain grantees, and the defendants, by subsequent conveyances, have acquired all the title obtained by

such grantees. Martha A. Buffington did not join her husband in conveying the property, and has never executed a conveyance of the same to any one, but she was never a resident or citizen of Kansas, and was never in the state prior to the death of her husband. She now claims to be entitled to one-half interest in the real estate of her husband, of which she had made no conveyance; but the trial court held, under the proviso of section 8 of the act concerning descents and distributions, that, as she had not been a resident of Kansas, she never had any interest in the land conveyed, and her signature or conveyance was unnecessary to a complete transfer of the land by her husband. The section referred to reads as follows: "One-half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property, in fee-simple, upon the death of the husband, if she survives him: provided, that the wife shall not be entitled to any interest, under the provisions of this section, in any land to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not or never has been a resident of this state. Continuous cohabitation as husband and wife is presumptive evidence of marriage, for the purpose of giving the right aforesaid." Gen. St. 1889, par. 2599. The plaintiff's contention is that the proviso of the section violates both the state and federal constitutions, in that it discriminates against the citizens of other states, and aliens. It is first contended that the proviso falls within the inhibition of section 17 of the bill of rights, which at the date of the conveyance of the land in controversy by Pierce Buffington read as follows: "No distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment, or descent of property." Does the proviso mentioned make "a distinction between citizens and aliens in reference to the purchase, enjoyment, or descent of property?" We are inclined to think that it is a regulation of the manner of transferring property within the state, instead of a restriction upon its descent. However, that question is immaterial in this case, so far as section 17 of the bill of rights is concerned. In no event can it be said that there is a distinction between citizens and aliens in the present case, for it does not appear that the plaintiff is an alien within the proper meaning of that term. It is alleged by plaintiff, and conceded on the other side, that she is a citizen of the United States. The wife of a citizen of Kansas, who resides in another state, cannot be regarded as an "alien." Webster defines the word as "one born out of the jurisdiction of the United States, and not naturalized," and Bouvier gives a like definition. Anderson's Dictionary of Law defines an "alien" to be "one born in a strange country, under obedience to a strange prince, or out of the allegiance of

the king." The amendment to this constitutional provision, which was adopted in 1888, shows that that is the sense in which it is used in our constitution. Section 17 of the bill of rights, as amended, reads as follows: "No distinction shall ever be made between citizens of the state of Kansas, and the citizens of other states and territories of the United States, in reference to the purchase, enjoyment, or descent of property. The rights of aliens in reference to the purchase, enjoyment, or descent of property may be regulated by law." Before this amendment was adopted, citizens and aliens stood upon an equality with reference to the purchase, enjoyment, and descent of real property, but by the amendment the people ordained that the restriction upon the legislature should be removed, and authorized such discriminating regulations against aliens in this respect as might be deemed wise. The use of the term "alien" in the amendment leaves no doubt of the sense in which the word is used, and furnishes an argument that it was used in the same sense in the original provision. We agree with counsel for plaintiff that the term "citizen," as used in the original provision, refers to citizens of the state of Kansas. Counsel, who filed a brief by the permission of the court as *amicus curiæ*, contend that the term includes all citizens of the United States, but we are not inclined to agree with that view. We conclude, then, that section 17 of the bill of rights had no application to this case.

It is next contended that the proviso is repugnant to that provision of the federal constitution which ordains that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and also violative of a like limitation in the fourteenth amendment. We think the proviso is not in conflict with either of these provisions. It makes no discrimination against the citizens of other states in respect to any of the privileges or immunities of general citizenship. The proviso, in connection with other statutes, furnishes a rule regulating the manner of the transfer and transmission of real property. Where a person owns the absolute title to land in Kansas, and his wife is a resident of the state, she must join in the conveyance; but when she is not a resident of Kansas, and therefore not subject to its laws, her signature and conveyance are unnecessary, and the husband alone may convey a good title. It is competent for the legislature of each state to declare the mode and manner by which real property situate within the state may be transferred by the husband, or by the husband and wife, or by a judgment and process of court, so as to divest the husband, or husband and wife, of all estate or interest therein, and also to provide for the distribution of and the right of succession to the estates of deceased persons. "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle

ple of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." U. S. v. Fox, 94 U. S. 315.

It is urged by the plaintiff that the wife is an heir, and as such is entitled to inherit one-half of her deceased husband's property, but that the proviso discriminates against widows who reside outside of the state, and deprives them of the right which is accorded to a resident widow. The wife, strictly speaking, is not an heir of the husband, although she is generally spoken of as such; but still, if she is regarded as an heir, the non-resident widow is not deprived of any "privilege or immunity." Under our statute, the property of the husband belongs exclusively to him, as the wife's property is exclusively her own. Neither has any vested interest or control over the property of the other by virtue of the marriage relation. The wife has no estate in the land of the husband. It is a mere possibility, depending upon the death of the husband, or whether he has divested himself of the title prior to his death. If he survives her, no interest is taken by nor transmitted to her heirs. If she survives him, but before his death he conveys the land, or it has been sold on execution or other judicial sale, nothing remains for her to take, and she has been deprived of no right. If there was an attempt to convey by the husband alone when his wife was a resident, the title would remain in her, because the manner of conveying land prescribed by statute had not been pursued; and if there was no judicial sale of the land, and it was not necessary for the payment of debts, a one-half interest would descend to her. In such a case, if she was a non-resident of the state, the conveyance by the husband alone would, under the rules prescribed for conveying, be sufficient to divest the title, and hence there would be nothing for her to inherit. It therefore appears that, if the conveyance is made in the manner prescribed by statute, there is nothing for either the resident or non-resident widow to inherit. There is really no discrimination between the resident and the non-resident widow, for each takes one-half of all the real property which her husband owned at the time of his death. When the husband's land has been conveyed in accordance with law during his life, there is no descent to either, for there is nothing to descend. For reasons that were deemed sufficient, the legislature made the signature and conveyance of the non-resident wife unnecessary. The fact that the wife did not accompany her husband to Kansas, or had abandoned him and gone to another state, and may or may not have obtained a divorce elsewhere, thus leaving the *status* of the parties in doubt, and making it difficult to obtain a perfect transfer of land in many cases, may have been deemed sufficient reason for prescribing this rule of conveyance. The statute was enacted shortly after the admission of the state, and when it was rapidly in-

creasing in population, through immigration from many of the eastern states, and also foreign countries, many coming without their wives and families; and possibly the rule was adopted to avoid inconvenience and deception in the transfer of real property. The "immunities" and "privileges" referred to in the federal constitution would not, in any event, include the claim made by the plaintiff. Those terms "mean that all citizens of the United States shall have the right to acquire property and hold it, and this property shall be protected and secured by the laws of the state in the same manner as the property of the citizens of the state is protected; that this property shall not be subject to any burdens or taxes not imposed on the property of citizens of the state." 3 Amer. & Eng. Enc. Law, 253. See, also, the cases there cited, and *Cordfield v. Coryell*, 4 Wash. C. C. 380; *McCready v. Virginia*, 94 U. S. 391. According to these authorities, many rights and privileges may be granted by a state, depending to some extent upon the residence of those to whom they are granted, without infringing upon this provision of the constitution. The privilege of voting, of holding office, or of acting as an administrator of estates, may be withheld until after persons have resided within the state a reasonable period of time, without violating the constitution; and it is not violated by allowing an attachment against the property of a non-resident debtor without an undertaking, although such process cannot be obtained against a resident without an undertaking. *Head v. Daniels*, 38 Kan. 1, 15 Pac. Rep. 911; *Cooley, Const. Lim.* (6th Ed.) 490. These and many other distinctions do not fall within the privileges and immunities of general citizenship. In treating upon this question, Judge Cooley says: "Although the precise meaning of 'privileges' and 'immunities' is not very clearly settled as yet, it appears to be conceded that the constitution secures in each state, to the citizens of all the other states, the right to remove to and carry on business therein; the right, by the usual modes, to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts, and the enforcement of other personal rights; and the right to be exempt in property and person from taxes or burdens which the property or persons of citizens of the same state are not subject to. To this extent, at least, discriminations could not be made by state laws against them. But it is unquestionable that many other rights and privileges may be made, as they usually are, to depend upon actual residence, such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the state, and the like." *Cooley, Const. Lim.* (6th Ed.) 490; also note on page 25. There are several adjudicated cases in other states sustaining a provision of statute substantially similar to the proviso in question. In *Pratt v. Tefft*, 14 Mich. 191, it was decided that a woman residing out of the state at the time of her husband's death was not entitled to lands lying within the state,

owned by him, but which had been conveyed without her joining in the deed. Although the estate of dower has been abolished in Kansas, the contingent interest of the wife in the real property of the husband is similar to dower in its inchoate stage; at least, it is substantially similar, so far as the validity of such a provision as we are considering is concerned. In *Ligare v. Semple*, 32 Mich. 438, it was again decided that "a wife who is a non-resident of the state, at the time the husband makes an absolute conveyance of lands divesting himself entirely of his seisin and estate, has no right of dower, under the statutes of this state, in lands so conveyed." The supreme court of Nebraska held that, "where a husband conveys lands in this state while his wife is a non-resident thereof, she has no dower interest in the land thus conveyed." *Atkins v. Atkins*, 18 Neb. 474, 25 N. W. Rep. 724. In *Bennett v. Harms*, 51 Wis. 251, 8 N. W. Rep. 222, a like provision of the statute was under consideration, and the point was directly made that it conflicted with the constitution of the United States by discriminating against non-resident citizens, but the validity of the statute is sustained in an elaborate opinion. A like question has been decided by the supreme court of the United States under a law of Louisiana which discriminated in favor of women who contracted marriage within the state, or who contracted marriage out of the state, and afterwards went there to live; and it was claimed to be in conflict with the provision of the federal constitution that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states;" but it was ruled, Judge CURTIS delivering the opinion, that such discrimination had no connection with that clause of the constitution. *Conner v. Elliott*, 18 How. 591. Following these decisions, we conclude that the statute is not repugnant to the federal constitution; and, if we are in error in this regard, the parties are entitled to have the decision reviewed in the supreme court of the United States. We find no error in the record, and therefore the judgment of the district court will be affirmed. All the justices concurring.

(46 Kan. 750)

STATE V. CURRENS.

(Supreme Court of Kansas. July 9, 1891.)

NEW TRIAL—NEGLECT OF ATTORNEY—NEWLY-DISCOVERED EVIDENCE.

1. Record examined, and *held*, that it does not disclose any such neglect on the part of the attorneys for the appellant in the preparation or trial of the case in the court below as entitles him to a new trial on that account.

2. Record examined, and *held*, that it does not disclose any newly-discovered evidence upon which to base an application for a new trial, and therefore it was not error for the trial court to refuse the appellant's application therefor.

(Syllabus by *Strang, C.*)

Commissioners' decision. Appeal from district court, Wyandotte county; O. L. MILLER, Judge.

E. S. Earhart, and W. F. Guthrie, for ap-

pellant. J. N. Ives, Atty. Gen., and Henry McGrew, for the State.

STRANG, C. This is an appeal from a judgment of the district court of Wyandotte county, refusing a new trial. March 10, 1890, the defendant was tried and convicted of the larceny of a horse, and sentenced to the penitentiary for the period of seven years. September 29th of the same year the defendant filed his petition for a new trial, which was heard and overruled. The defendant alleges that he was entitled to a new trial, first, because of the negligence of his counsel in the preparation and conduct of his defense. We have examined the record, and, outside of the allegation of the defendant in his petition for a new trial, we discover no indication of negligence in the conduct of the trial on the part of the attorneys for the defendant. He complains that no motion for a new trial was filed. It is true no motion for a new trial was filed by the attorneys for the defendant. But, so far as we know, they had nothing upon which to base a motion for a new trial, and, if they had not, the filing of a motion for a new trial would have been a mere idle ceremony. We are also bound to believe that the defendant did not at the conclusion of his trial, and before sentence, know of anything upon which to base a motion for a new trial, since he alleges in his petition that it was since the trial and verdict that he discovered the evidence upon which he bases his right to a new trial. Besides, if he had known of the newly-discovered evidence at the time of the trial, it would not have constituted any cause for a new trial, though not used on the trial. Again, the defendant testified in his affidavit for a continuance that it was not until the 4th of March that he came into possession of money to employ counsel to defend him. On the same day they prepared and filed an application for a continuance, which was heard by the court the next day, the 5th, and the case continued thereon until the 10th of the month. This evidence shows that the counsel for the appellant were not employed until the day before the application for a continuance was heard. The application for continuance also shows that counsel and the appellant got their information in regard to what witnesses therein named would swear to from one Riley Miller, a friend of the appellant, from Leavenworth. The appellant alleges negligence in the preparation of the affidavit for the continuance, in this: that it did not correctly state what the witnesses therein named would swear to. It is pretty certain that the application for continuance, so far as it purported to give facts that could be proved upon the trial of the case, if a continuance was had, was a fraud; but it is equally certain that it was no fault of the counsel for the appellant that it was so, for they got their information from the friend of the appellant; and, having just been employed, they had no time in which to verify the information thus obtained. Appellant alleges in his petition for a new trial that he did not know about the

alleged evidence contained in the affidavit for continuance, except as he got it from his counsel. This is very unlikely, since he states in the affidavit for a continuance that he was entirely without money or means to employ counsel to advise him or prepare for his defense in said action, or to hunt up the whereabouts of his witnesses, until the 4th day of March, 1890, when his friend Riley Miller arrived from Leavenworth, and informed him of the whereabouts of witnesses material to his defense. It is unreasonable to suppose that this man, the appellant's friend, as he swears in his affidavit, came from Leavenworth to inform him of the whereabouts of material witnesses for his defense, and did not tell him what the witnesses would testify to; or that he gave appellant one version of what they would swear to, and his counsel another and a different one; or that his counsel did not correctly embody in said affidavit the information thus obtained. A perusal of this affidavit for continuance satisfies us that appellant's complaint of negligence on part of his counsel is without foundation. He knew whether Miller was a friend of his or not when he made the affidavit, and whether he was from Leavenworth, and, much better than counsel, must have known whether Miller's story of the evidence witnesses named in the affidavit would give was true or false. It is alleged in the brief of the appellant that his counsel in the court below did not except to rulings of the court below, nor to the instructions. But appellant makes no complaint in his petition for new trial of any errors in the rulings of the court, or in the instructions, and therefore he cannot complain of them.

The second contention of the appellant is that he should have a new trial on account of newly-discovered evidence, which is shown by the affidavits of the witnesses through whom it is alleged it can be secured. Mary Allen is the first witness by whom it is said new evidence can be made. In the first place the matter set up in her affidavit is but hearsay, and is not evidence, and then any fact contained in her affidavit was fully within the knowledge of the appellant before he was tried, and therefore, if evidence at all, was not newly-discovered evidence. Nor is there any newly-discovered evidence disclosed in the affidavits of Givens and Mrs. Givens. If the appellant purchased the horse he was charged with having stolen at the house of Mr. and Mrs. Givens, January 30, 1890, in the presence of the Givens, he knew that fact as well as they did, and he knew it at and before his trial. It was his duty to have had Mr. and Mrs. Givens subpoenaed to attend his trial. They lived, as their affidavits show, in Kansas City, Kan., at the time of the alleged purchase of the horse in their presence. If they had removed in the mean time to Leavenworth,—and we do not know that they had, though the affidavits they make are sworn to at Leavenworth, September 24, 1890,—yet if it were true that he purchased the horse he was charged with having stolen at the house of the Givens, in their presence, at the

time they say he did, he knew as well before his trial that he could prove that fact by them as he did six months afterwards. But no intimation of their knowledge finds its way into the case until September 24, 1890, six months after the trial. We do not think there is anything in the affidavits of Mary Allen and the Givens entitling the appellant to a new trial, or to justify the granting of a new trial. The verdict in the case was amply supported by the evidence. There is very little or no room for doubt of the defendant's guilt. The appellant was seen near the barn whence the horse was taken, the evening that he was stolen. It is admitted that he had the horse, and traded him off very soon after he was stolen; and, when *en route* from Leavenworth to jail, he inquired of the officer having him in charge if he knew the prosecutor, and if he was a hard man to deal with, and said he would give him \$100 to drop the case against him. Afterwards, while in jail awaiting trial, he offered the prosecutor \$100 to abandon the case against him. That was not the conduct of an innocent man who had purchased the horse, and who knew he could prove that fact by two witnesses who were present when he purchased him. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 44)

STATE *ex rel.* SEARS, Co. Atty., v. BURTON,
County Clerk, *et al.*

(Supreme Court of Kansas. July 9, 1891.)

RES ADJUDICATA — EFFECT OF JUDGMENT ON
STATE—COUNTY SEAT ELECTION—CONSTITUTIONAL LAW.

1. The rule stated in *State v. Stock*, 38 Kan. 154, 16 Pac. Rep. 106, as to private judgments having no binding force, where the state is attempting to enforce its laws, followed.

2. The plea of a subsequent county-seat election held bad, upon the same authority.

3. The act entitled "An act to legalize a certain election in Cheyenne county, and to declare the town of St. Francis the permanent county-seat of said county," approved February 5, 1891, is constitutional and valid.

(Syllabus by Green, C.)

Commissioners' decision. Original proceeding in *mandamus*.

C. N. Sears, S. W. McElroy, and Edwin A. Austin, for plaintiff. Webb & Lindsay, for defendants.

GREEN, C. This is an original proceeding in *mandamus*, brought by the county attorney to compel the county officers named, of Cheyenne county, to remove their respective offices from St. Francis to Bird City, and to compel them to hold their offices at Bird City as the permanent county-seat of Cheyenne county. The alternative writ was allowed on the 2d day of February, 1891, and served on the defendants on the 7th. The cause was submitted upon the facts stated in the alternative writ and answer. The facts material to the issue, as claimed by the plaintiff, are substantially as follows:

Cheyenne county was organized April 1, 1886, and Bird City was designated as the temporary county-seat. An election was held on the 15th day of May, 1886, and Bird City received a majority of the votes cast for the permanent county-seat. The county officers held their respective offices at Bird City until about the 1st day of March, 1889, when they removed their offices to St. Francis. The answer of the respondents was a justification of such removal, and continuance of the county-seat at St. Francis, upon three grounds: *First*, that the election on the 15th day of May, 1886, had been adjudged to be null and void; *second*, that there had been a subsequent election held in the county on the 26th day of February, 1889, at which St. Francis received a majority of all the votes cast for the permanent county-seat; and, *third*, that by an act of the legislature approved February 5, 1891, St. Francis was declared to be the permanent county-seat.

1. The plea of *res adjudicata* is stated in the answer to alternative writ, as follows: "That the election in Cheyenne county, on the 15th day of May, 1886, so far as the location of the county-seat was and is concerned, was duly and finally determined and adjudged against the relator, the state of Kansas, and all persons whomsoever, by the consideration and decree of the district court of Cheyenne county, in a certain proceeding duly commenced, pending, and had in said court, wherein the state of Kansas, on the relation of Thomas J. McCarty and R. M. Jacques, citizens, electors, and tax-payers of the town of Wano, were plaintiffs, and Edwin M. Phillips, clerk of the district court of Cheyenne county, was defendant, in the nature of *mandamus* to compel said Edwin M. Phillips, as such clerk, to remove his office from the town of Bird City, where he was unlawfully keeping his office, and to keep the same at the town of Wano, now St. Francis, which said last-named place the relators alleged to be the county-seat of said county, and in which the said relators sought to and did contest the pretended election held May 15, 1886, and the result thereof, as declared by the board of county commissioners of said county, upon which election and result relator herein relies in this action and proceeding. It was duly and finally adjudged by said court that said pretended election was null and void, and that no town was and had been chosen as permanent county-seat of said county at said election." The plea cannot be sustained in this case, which is brought upon the relation of the county attorney. The state is not bound by a suit prosecuted by a private party, in an action of this kind. *State v. Stock*, 38 Kan. 154, 16 Pac. Rep. 106.

2. The second plea of justification may be briefly stated: "That afterwards, on January 19, 1889, upon a petition of a sufficient number of the electors of said county, whose names appeared on the last assessment rolls of the township assessor of the county, filed with the county clerk of said county, the board of county commissioners, acting on said petition, called

an election to be held February 26, 1889, for the purpose of permanently locating the county seat of said county; that notice of said election was duly published by the county clerk on January 24, 1889, and weekly thereafter, in a newspaper published and of general circulation in said county; that notice of said election was also duly published by the sheriff of said county on January 31st, and weekly thereafter, until said election, in a newspaper published and of general circulation in the county; that afterwards, on January 28, 1889, the board of county commissioners duly appointed certain persons to fill vacancies existing in the board of registrars for the several voting precincts in said county; that registration of the voters in the manner provided by law, by the persons authorized by law to act as judges of election in the several election precincts in said county, was had, and in pursuance of said proceedings of said board of county commissioners, and said notice of said election, an election was held in said Cheyenne county on February 26, 1889, for the purpose of permanently locating the county-seat of said county, and at said election, and by the result thereof as canvassed, the city of St. Francis received a majority of all the legal votes cast at said election, as was duly declared by the board of county commissioners sitting as a board of canvassers of the election returns of said election in said county." We think this plea is bad. Taken in connection with the first, it appears that the state was not bound by the judgment of the court, which declared the first election void; hence it is not clear that there was any authority for calling the second election. The judgment and decree of the district court of Cheyenne county, upon the relation of two citizens against the clerk of the district court, was not sufficient ground for ordering another election. The first election must be set aside by some competent authority by which the state is bound before another election could be ordered; and the subsequent election, having been held within five years, was unauthorized. "No election for the relocation of such county-seat shall be ordered or had within five years from the time of the holding of the last preceding election, touching the location or relocation of such county-seat." Paragraph 1897, Gen. St. 1889.

3. The following act of the legislature is set up as the third plea of justification: "An act to legalize a certain election in Cheyenne county, and to declare the town of St. Francis the permanent county-seat of said county. Whereas, on the 26th of February, 1889, there was held in the county of Cheyenne an election for permanently locating the county-seat of said county, at which election the town of St. Francis received a majority of two hundred and ninety-two votes; and whereas, the county of Cheyenne now owns in said town of St. Francis a block of land of the value of four thousand dollars, and county buildings thereon of the value of three thousand dollars; and whereas, it is claimed by rival town-site companies that said election was illegal, and there is likely to arise

in said county a contest over the permanent county-seat thereof, to the great detriment of the people and tax-payers of said county: Now, therefore, be it enacted by the legislature of the state of Kansas: Section 1. That the said election for the purpose of permanently locating the county-seat of Cheyenne county, held February 26, 1889, be, and the same is hereby, legalized, and the town of St. Francis is hereby declared to be the permanent county-seat of said county. Sec. 2. This act shall take effect and be in force from and after its publication in the official state paper. Approved February 5, 1891. Published in official state paper, February 6, 1891."

It is contended by the relator that this act is void and unconstitutional, because it is in contravention of section 1 of article 9 of the constitution, which says: "But no county-seat shall be changed without the consent of a majority of the electors of the county." It is argued with a great deal of force that the consent required by the constitution must be affirmatively given; that the election held on the 26th day of February, 1889, was a nullity; and therefore the legislature had no power to legalize such a nullity. Let us examine this proposition. The constitutional restriction placed upon the legislature is that it cannot change the location of a county-seat without the consent of a majority of the electors of the county. It is true the legislature has said that, when a county-seat has been located, no other election shall be had within five years of the time of the holding of the last election. Yet it could dispense with this rule, and provide for the holding of an election at any time. It is a matter peculiarly within the power of the legislature to say when and how county-seat elections shall be held. If it be within the power of the legislature to prescribe the rule for such elections, can it not by subsequent legislation legalize an election which was lacking in one of the requisites which it might have dispensed with by a previous act? The law has been stated by Judge Cooley: "If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Cooley, Const. Lim. (6th Ed.) 457. This court has said that where an irregularity rendering an act of a city or subordinate agency illegal or void is simply a failure to comply with some provision of the statute which the legislature might in advance have dispensed with, the legislature can, by a general curative statute, subsequently passed, dispense with such compliance, and thereby render the act of the city or subordinate agency legal and valid. *Mason v. Spencer*, 35 Kan. 512, 11 Pac. Rep. 402. Again, this court has said, in speaking of

county-seat elections, that a vote of a majority is not necessary, nor even the formality of an election. The consent of a majority of the electors, in whatever form expressed, whether in election or by petition or otherwise, is sufficient. In re County-Seat of Linn Co., 15 Kan. 500. Now, the fact exists that an election was held in Cheyenne county on the 26th day of February, 1889. It may not have been authorized, but it is admitted, by the pleadings, that an expression was given upon the question of the location of the county-seat in that county. Was not this sufficient for the legislature to consider as a consent, within the spirit of section 1 of article 9 of the constitution? We need not call it an election, for that is not necessary. The consent may be expressed by petition or in any other form. We do not know what was before the legislature, and can only resort to the preamble and the act itself to determine the object of the legislature. With this existing fact before us, of an expression having been given by the people of Cheyenne county upon the question of the location of the county-seat, we cannot say that the legislature acted upon an absolute nullity. There was something expressed which it regarded as a consent, and upon that consent based its action, by passing the law in question. The proposition may be summarized: An election was held on the 15th day of May, 1886, locating the county-seat at Bird City. The people of the county subsequently expressed themselves in favor of St. Francis as the county-seat, but in a manner not authorized by law at the time; but the defect in such expression was a matter which the legislature might have dispensed with in the first instance. The defect, therefore, was such a one as the legislature could and did cure by a subsequent enactment, which we are constrained to uphold. We therefore recommend that the peremptory writ of *mandamus* be denied.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 738)

HURLA *et al.* v. CITY OF KANSAS CITY *et al.*
(*Supreme Court of Kansas. July 9, 1891.*)

CITIES—EXTENSION OF BOUNDARIES—TAXATION.

1. A city of the first class has power to extend and enlarge its boundaries so as to include within it a continuous body of land lying contiguous to the prior limits of said city, when the ordinance providing for such extension is approved by the district court of the county within which said city is situate.

2. A city of the first class has the power to enlarge or extend its limits so as to include several tracts of land, some of which adjoin the city, and others adjoining those that do adjoin the city, so as to form one contiguous body, but the annexation ordinance must be approved by the district court of the county in the manner and under the conditions and requirements of the statute.

3. A tract of land wholly within the limits of a city of the first class, although never divided into blocks, lots, streets, and alleys, and used for agricultural and horticultural purposes, is subject to be taxed for ordinary city revenues. The case of *Mendenhall v. Burton*, 42 Kan. 570, 22 Pac. Rep. 553, cited and followed.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

Dall, Bird & Marsh, for plaintiffs in error. *Winfield Freeman, A. H. Cobb, and L. C. True*, for defendants in error.

SIMPSON, C. The plaintiffs in error commenced an action in the district court of Wyandotte county to set aside certain proceedings theretofore had, by which it was attempted to make their land, consisting of 30 acres devoted to agriculture and horticulture, a part of the city of Kansas City, by an extension of the limits of said city; and also commenced an action against the county treasurer of said county to enjoin the levy and collection of the taxes of 1890 on said land. The petitions specifically alleged that on the 30th day of December, 1887, the city of Kansas City attempted, by ordinance duly published, to extend its boundaries so that the same should include the territory of the original cities of Kansas City, Armourdale, and Wyandotte, together with all the additions thereto, and all of the territory embraced in the original consolidated city of Kansas City, Kan., and all the territory within certain boundary lines fully described in said ordinance; that said ordinance was attempted to be passed on the 30th day of December, 1887; was approved on the 4th day of January, 1888, and was duly published in the *Kansas Pioneer*, the official paper of said city, and designated in said ordinance, within 20 days after its passage; that after the publication of said ordinance the mayor of said city, at the first regular term of the district court of Wyandotte county, Kan., commenced after said 20 days, presented to the court a copy of said ordinance, together with the affidavit showing the proper publication thereof, which were filed with the clerk of said court, and thereupon said court did determine that said publication had been made as by law required, and by its judgment approved, but modified, said ordinance,—first, hearing all objections, if any, and proofs, if any, offered by the city or persons affected by said ordinance, and the limits or area of the said city were attempted to be enlarged or extended as designated in said ordinance, and modified by court, as of the date of the approval or modification, to-wit, on the — day of —, 1888; and the limits of said city were attempted to be extended as in said judgment specified, which limits, as so modified, embraced the said land of plaintiffs; and that the said district court made a record of its finding and determination in the premises; and plaintiffs further alleged that at the time of the passage of the said pretended ordinance, and at the time of the said proceedings in said district court, the said property of plaintiffs was bounded and completely surrounded by unplatted territory, and by territory which did not at said time adjoin to the city limits of said defendant city; and that it was not subdivided into lots, blocks, streets, and alleys; and that the land at said time was used

exclusively for horticultural and agricultural purposes, and was surrounded completely and entirely by land of similar kind, and used in the same manner for horticultural and agricultural purposes; that no street of said defendant city was opened to it or touched it anywhere, nor was any street of said city open to or touching upon the land surrounding said property of plaintiffs; and that the plaintiffs' land was not accessible by any street leading to the business part of said city, nor was the land surrounding the land of said plaintiffs as aforesaid, accessible by any street leading to the business part of said city; that, by reason of the premises, the said defendant city had no power or authority to pass any ordinance including the land of plaintiffs within the corporate limits of said city, nor did said district court have any power or authority, in passing upon said ordinance, to include the land of plaintiffs within the corporate limits of said city, and said ordinance, and the said judgment of said district court thereon, were and are each thereof absolutely null and void, and of no effect whatever; that neither of the plaintiffs had ever done or suffered to be done on their behalf anything by which they had ratified or confirmed, in law or equity, the said void proceedings of said city and of said district court. Said plaintiffs further alleged that their said land was attempted to be assessed by the authorities of said defendant city at the sum of \$13,700, and taxes were levied thereon for the year 1890 in the sum of \$730, which taxes were duly extended upon the tax-rolls, and that the said defendant county treasurer threatens to sell the property of plaintiffs therefor; that the assessed valuation of said property before said attempted proceedings were had by which it was pretended to be incorporated into said defendant city was the sum of \$2,500, and the taxes thereon amounted to \$125; that their land is of no greater value at this time than it was at said time, and that the said sum of \$125 would be a just amount of taxes upon the said land of plaintiffs for the year 1890; and that the plaintiffs tendered said sum of \$125 to the county treasurer, which was refused, and they tendered said sum in court. To these petitions the defendants city filed demurrers, and upon the hearing of these demurrers it was agreed that the petitions should be amended by incorporating a statement therein as follows: "All land brought into said city under said proceedings—taken in its entirety—composed a continuous body of land lying contiguous to the prior limits of said city, but, considering the portions or tracts owned by different parties as separate tracts, they did not all adjoin the city, and the land of the plaintiffs, so considered separately, did not so adjoin the city." These demurrers were sustained by the district court, and the plaintiffs in error bring the case here for review. They claim that the statute did not authorize land situated as theirs is to be brought within the city limits; that the statute is unconstitutional and void, as an attempted delegation of legislative power; that,

if their land is properly within the city limits, it must be taxed as agricultural land, and not as city property.

The act of the legislature first authorizes "territory adjoining the city limits, that has been subdivided into lots, blocks, streets, and alleys, to be added to the city, with the approval of the city council and mayor." It then provides "that no unplatted territory of over five acres shall be taken into said city against the protest of the owner thereof, unless the same is circumscribed by platted territory that is taken into the city." It is then provided that "any city of the first class may enlarge or extend its limits or area by an ordinance specifying with accuracy the new line or lines to which it is proposed to enlarge or extend such limits or area. Within twenty days after the passage of such ordinance the same shall be published in the city official paper, published in said city, to be designated in said ordinance. When said publication shall have been made, the mayor of said city, at the first regular term of the district court of the county in which said city is situated, commencing after said twenty days, shall present to said court a copy of said ordinance, duly certified by the clerk of said city under its seal, and also therewith an affidavit or affidavits showing the publication of said ordinance as hereinbefore provided, which said certified copy of said ordinance and said affidavits shall be filed with the clerk of said court. Thereupon said court shall determine whether said publication has been made as herein required, and shall then consider said ordinance, and by its judgment either approve, disapprove, or modify the same, first hearing all objections, if any, and proofs, if any, offered by said city or persons affected by said ordinance. Should said ordinance be approved or modified by said court, then the limits or area of said city shall be enlarged or extended as therein designated, from the date of such approval or modification; but should it be approved entirely, or modified and approved, the judgment of said court shall stand, and the limits of such city shall be extended as is in said judgment specified, and the determination of the matter thus submitted to said court shall be final, and all courts of the state shall take judicial notice of the limits or area of such city, as thus enlarged or extended, and of all the steps in the proceedings leading thereto. The district court shall make a record of its finding and determination in the premises, which shall be conclusive evidence of the facts so found and determined; and, after the disapproval or modification of one ordinance, another or others may be passed and acted on." First Class City Act. § 8. The land in question is about 30 acres, used for horticultural and agricultural purposes, and is entirely surrounded by lands of like character. It does not adjoin the city. It is not subdivided into lots, blocks, streets, and alleys, nor is it surrounded or circumscribed by platted lands; but it is one of several tracts that, taken in their entirety, compose a continuous body of land lying contiguous to the prior limits of the city, some of which

tracts do adjoin the city, and this tract does adjoin some that adjoins the city limits.

The controlling question in this case, therefore, is, can the city limits be extended under the section of the law of 1887, above quoted, so as to include a tract of land that is part and parcel of a large compact and contiguous body that does adjoin the prior city limits, although this particular piece does not so adjoin the city limits? This question we answer in the affirmative, because of these words contained in the section: "Any city of the first class may enlarge or extend its limits or area by an ordinance specifying with accuracy the new line or lines to which it is proposed to enlarge or extend such limits or area." We think this expressly authorizes the city council to take into the limits of the city such land as adjoins the city, and such other land as adjoins land that adjoins the city, so as to make a continuous and compact body, as may be approved of by the district court, as provided in the other provisions of the section. In other words, we think the proper construction to be given to the act of 1887 is this: *First.* The mayor and council has power to embrace within the limits of the city all land that has been subdivided into lots, blocks, streets, and alleys, without reference to the extent of the land so divided, if such platted land adjoins the city; this part of the section being framed on the theory that, by so platting the land, the proprietor himself establishes its character as city property, and assents to its absorption by the city. *Second.* The mayor and council has power to extend the limits of the city so as to embrace tracts of unplatted land not exceeding five acres, and exceeding five acres when the owner does not protest against such absorption. When the unplatted land is circumscribed by platted land that is taken into the city, the unplatted land can be taken in without regard to its extent. *Third.* Any city of the first class can enlarge or extend its limits or area so as to embrace a contiguous body of land lying contiguous to the prior limits of the city, composed of different tracts, but this extension must be approved by the judgment of the district court, had in the manner prescribed by the law of 1887. If the land sought to be incorporated into the city was detached, so as not only not to join the city, or not to join land adjoining the city, we would have grave doubts about the power to extend the city limits so as to embrace a detached tract. That is, we doubt, under the power delegated in this section, if the city council are authorized to leave out or disregard small tracts adjoining the city limits and pass them over, and attempt to take within the city a detached tract not adjoining the city, and entirely surrounded by tracts that do or do not adjoin the city limits; but, as we understand the amendment to these petitions, descriptive of the location and surroundings of the land of the plaintiffs in error, we think it could, by proper proceedings in conformity to the provisions of the act of 1887, be brought within the city limits. This being so, the district

court acquired jurisdiction, and had the power to hear and determine the questions presented by the ordinance, and, having jurisdiction, the plaintiffs in error are bound by the result. As we understand the contention of the counsel for plaintiffs in error, they do not attack the regularity of the proceedings either before the council or the district court. All they claim in this respect is that, as the statute does not authorize the city to take the land of the plaintiffs in error into the city by an extension of its limits, the council of the city had no power to pass the ordinance, and the district court had no power to approve it, but as we hold that they have the power, and the district court having jurisdiction, the ordinance is valid for this reason.

Their next contention is that the part of the act of 1887 that confers upon the district court of the proper county the power to approve, disapprove, or modify such an ordinance is unconstitutional, for the reason that it is a delegation of a purely legislative power. We had occasion to consider, discuss, and determine practically the same question in the case of *Callen v. City of Junction City*, 43 Kan. 629, 23 Pac. Rep. 652. That case involved the constitutionality of section 1 of chapter 69 of the Laws of 1886. A comparison of the act of 1886 with that of 1887 will demonstrate that there is no substantial difference between them so far as the delegation of power is concerned. In one, it is to the district judge; in the other, it is to the district court. In the one case, the action of the district judge precedes that of the council; in the other, the action of the district court reviews that of the council; but in both there must be concurrent action to legalize the ordinance. It must be evident that, if the delegation of power to the district judge under the act of 1886 can stand, that to the district court, under the act of 1887, must be sustained. So that the conclusion is that the act of 1887 is constitutional and valid, against the objection now urged to it.

3. This leaves the question of the legality of the taxes to be passed upon. This question was considered by this court in the case of *Mendenhall v. Burton*, 42 Kan. 570, 22 Pac. Rep. 558, and the cases now cited by council for plaintiffs in error were then commented upon. In addition to what was said in that case it appears to us that, when it is determined that the land of the plaintiffs in error is a part of the city of Kansas City, there must exist some extraordinary condition to exempt it from the payment of the ordinary city taxation. If the assessment was too high, resort could have been had to the board of equalization, and possibly other remedies might have been used to have equalized its assessment. The rule is that all property situate within the city must bear its proper proportion of taxes, and must be assessed as city property. We regard the judicial determination of the district court of Wyandotte county making this land a part of the city of Kansas City as permanently fixing it as city property, and as such it must be assessed and taxed. It would breed unwarranted con-

fusion with our assessments, and produce endless strife in our taxation, to permit any body of land that has been declared a part of an incorporated city to be taxed as farming land, the same as if it was not embraced within the city limits. Under our system of the extension of the limits of a city of the first class, all questions of this character are considered and passed upon by the district court when it approves an annexation ordinance. The character of the land is fixed as city property, and its assessment and taxation as such arbitrarily follows. We think it was properly assessed and taxed as city property. These conclusions compel us to recommend that the judgment of the district court of Wyandotte county sustaining demurrers to the petitions be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 754)

STATE V. JARRETT.

(*Supreme Court of Kansas. July 9, 1891.*)

CRIMINAL LAW—COMPLAINT—NEW OFFENSE IN INDICTMENT.

Where the complaint and warrant charge a defendant with the larceny of United States currency and United States coins, and the defendant, upon arrest, waives a preliminary examination thereon before the examining magistrate, the county attorney, in filing the information against the defendant, cannot add a new offense; that is, he cannot charge the defendant with the larceny of a pocket-book or a promissory note, neither of which are mentioned, referred to, or by any implication whatever charged, in the original complaint or warrant, when the preliminary examination was waived.

(*Syllabus by the Court.*)

Appeal from district court, Barber county; G. W. McKAY, Judge.

R. A. Cameron, for appellant. J. N. Ives, Atty. Gen., and Lyman W. De Geer, for the State.

HORTON, C. J. Starling Jarrett was arrested upon the complaint of Dawson Brown, charging him with stealing, taking, and carrying away from the house of W. M. Brown \$36 in United States currency and coin. The warrant followed the complaint, and alleged that Jarrett did, on the 20th of December, 1890, in Barber county, Kan., unlawfully, feloniously, and at the house of W. M. Brown, steal, take, and carry away one \$20 United States currency bill, current as money, of the value of \$20; one \$10 United States currency bill, current as money, of the value of \$10; one \$5 United States currency bill, current as money, of the value of \$5; and one \$1 gold piece, of the denomination of \$1, current as money, of the value of \$1,—all of the aggregate value of \$36, and the property of Dawson Brown, of which property a more particular description is unknown. Jarrett waived a preliminary examination, and was held to answer at the next term of the district court, and in default of bond was committed to jail. The county attorney in due time filed his information against him charging "that one Starling Jarrett whose true name is to me unknown, did

then and there unlawfully and feloniously steal, take, and carry away one \$20 paper currency bill, current as money of the United States, of the value of \$20; one \$10 paper currency bill, current as money of the United States, of the value of \$10; one \$5 paper currency bill, current as money of the United States, of the value of \$5; one \$1 gold coin currency piece, current as money of the United States, of the value of \$1; one leather pocket book, of the value of 50 cents; one promissory note, dated — day of —, A. D. 1890, made payable to Dawson or bearer, for \$25, and signed by — Rodgers, of the value of \$25,—a more minute or particular description of said personal property cannot be given for want of knowledge of such minute or particular description,—all of the aggregate value of \$62.50, and the property of Dawson Brown." Jarrett filed a plea in abatement, upon the ground, among others, that he had never had or waived a preliminary examination for the crime of stealing, taking, and carrying away the pocket-book and note mentioned in the information. The district court overruled the plea in abatement, although it found the allegations therein were true. After the jury had taken the case and retired to consider their verdict, they sent a request to the district judge to be allowed to take the note mentioned in the information and the plea in abatement to their room, which request the judge granted, over the objection of the defendant's counsel, the defendant at this time being absent from the court-room in the county jail. The note was accordingly taken into the jury-room, and remained there during all their deliberations in the case. Verdict of guilty and sentence to one year in the penitentiary.

Section 69 of the Criminal Code provides that no information shall be filed against any person for any felony until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination. Fugitives from justice and persons charged with misdemeanors, not cognizable before a justice of the peace, are exempted from the provisions of this section. A preliminary examination is required for the purpose of giving to the defendant a reasonable notice of the nature and charge of the offense charged against him. *State v. Bailey*, 32 Kan. 83, 3 Pac. Rep. 769. "All that is necessary is that the defendant should be given a fair opportunity to know, by a proffered preliminary examination, the general character and outlines of the offense against him; and it is not necessary that all the details and technical averments required in an information should be set forth in the papers used on the preliminary examination." *Redmond v. State*, 12 Kan. 172; *Jennings v. State*, 13 Kan. 90; *State v. Smith*, Id. 274; *State v. Spaulding*, 24 Kan. 4; *State v. Tension*, 39 Kan. 726, 18 Pac. Rep. 948. If it shall appear from the preliminary examination that the defendant is guilty of the offense charged in the warrant of arrest, then he is committed to jail, or required to enter

into a recognizance, etc. Sections 53, 54. But, "if upon the trial [preliminary examination] it shall appear that the defendant is guilty of a public offense, other than that charged in the warrant, he shall be held in custody of the officer, and tried for such offense, a reasonable opportunity having been given him to obtain his witnesses and prepare his defense." Section 55. It will therefore be seen that the original complaint and the warrant of arrest may charge one offense, and the defendant may be bound over for another. In such a case, in justice to the defendant, a new complaint ought to be filed, but the statute does not in terms require it." *Redmond v. State*, supra. In *State v. Spaulding*, supra, Mr. Justice BREWER, speaking for the court, said: "It will be remembered that these preliminary proceedings are generally had before justices of the peace, officers not learned in the law, and if the same fullness and precision, the same precautions against all the contingencies of the testimony, were required there as in the information or indictment, justice would be often delayed and defeated. All that can be required is that there shall be a single statement, containing the substantial facts of the offense charged, and then the prosecutor, in preparing the information, may use many counts varying in them the formal and non-essential matters of the crime. He may not add a new offense. To larceny he may not add robbery, nor to murder, arson. Neither may he add to the larceny of one piece of property the larceny of another. He may not substitute one offense for another; but he may, by several counts, guard against the contingencies of the testimony." *State v. Smith*, supra. In this case the information added the larceny of a pocket-book and a promissory note. Such articles were not mentioned, referred to, or by implication contained, either in the complaint, or warrant, when the defendant waived a preliminary examination. The allegations of the plea in abatement were true, and the plea should have been sustained, not overruled. This ruling need not release or discharge the defendant from the larceny of the pocket-book or promissory note. A new complaint may be filed before any justice of the peace of Barber county for the larceny of these articles, and proper proceedings had thereon, as required by the statute. It is urged, however, against the plea in abatement, that a full transcript of the case has not been filed, and therefore that the plea in abatement is not properly before this court for consideration. The certificate of the clerk to the transcript is too prolix. He ought to have certified merely "that the above and foregoing was a full and complete transcript of the proceedings in the above-entitled cause." The clerk recites, however, in the certificate, that the transcript contains copies of certain papers, and "that the same constitute a full and complete transcript of the proceedings of the district court in the above-entitled cause." An examination of the transcript shows that on the 11th day of February, 1891, "the defendant filed his plea in abatement to the action of the plaintiff against

him, in words and figures following." Here the plea is given, but, instead of the affidavit thereto being set forth in full, the bill of exceptions recites that the plea in abatement "was properly verified by the defendant." The bill of exceptions also states that the trial court "found that the allegations and averments contained in the plea in abatement were true." Taking the record and certificate, we think that a full and complete transcript of the case has been filed, and that the case is properly here for review. Further, it appears from the record that the defendant was absent and confined in the county jail when the court, at the instance of the jury and against the objections of his counsel, sent a portion of the written testimony in the case to the jury-room. It is doubtful whether this is correct practice, under section 207 of the Criminal Code. That section prohibits the trial of any person accused of felony unless he is personally present throughout the trial, and it is doubtful if any written testimony should be sent to the jury against the consent of his counsel, while the defendant is absent from the court-room and confined in the county jail. *State v. Myrick*, 38 Kan. 233, 16 Pac. Rep. 330; *State v. Moran*, 45 Kan. —, 26 Pac. Rep. 754. The judgment of the district court will be reversed, and cause remanded for a new trial. All the justices concurring.

(46 Kan. 695)

STATE *ex rel.* CURTIS, County Attorney, v. DUREIN *et al.*

(Supreme Court of Kansas. July 9, 1891.)

CONTEMPT—JURY TRIAL—PUNISHMENT—EXCEPTIONS TO EVIDENCE—COSTS—ATTORNEYS' FEES—VIOLATION OF INJUNCTION.

1. A party charged with contempt for the violation of an injunction is not of right entitled to a jury trial.

2. Where the plaintiff in error fails to specifically point out the evidence alleged to have been erroneously admitted, as the rules of the court require, the assignment of error will not be considered.

3. In 1886, and under the act of 1885, the state obtained a judgment against the appellant, perpetually enjoining him from maintaining a common nuisance in violation of the prohibitory liquor law; and in 1887 the act was amended so that the penalty for the violation of such injunction was fine and imprisonment, instead of fine or imprisonment, in the discretion of the court. In 1891 the appellant was adjudged guilty of violating the injunction, and the penalty authorized by the act of 1887 was inflicted. *Held*, that the act of 1887 furnishes the measure of punishment for a contempt of that character, and that it applies to judgments rendered before the amended act was passed.

4. Upon the rendition of a judgment in such contempt proceeding the court rendering the same may allow a reasonable attorney's fee in favor of the plaintiff and against the defendant therein, to be taxed and collected with other costs in the case; but no such allowance can be made in the absence of any proof as to what constitutes a reasonable fee.

5. A decree of injunction like that involved in the present case does not become dormant by the mere lapse of time, and the fact that more than five years have expired since the rendition of such judgment is no reason why a person who violates the same will not be subject to punishment for contempt.

(Syllabus by the Court.)

Appeal from district court, Shawnee county; JOHN GUTHRIE, Judge.

Martin & Keeler and *Hazen & Isenhardt*, for appellant. *J. N. Ives*, Atty. Gen., and *R. B. Welch*, for the State.

JOHNSTON, J. Frank Durein asks thereversal of an order and judgment made in an injunction proceeding. On March 19, 1886, the state of Kansas obtained a final judgment of perpetual injunction against Frank Durein and Conrad Kreipe, forever enjoining them, and each of them, from using or permitting to be used a certain building in the city of Topeka as a place where intoxicating liquors are sold, bartered, or given away, or kept for sale, barter, or gift, otherwise than by authority of law. On April 1, 1891, the county attorney of Shawnee county filed an affidavit with the clerk of the district court, charging that Durein & Kreipe had violated the perpetual injunction which has been mentioned, and thereupon the court issued an attachment to bring them before the court, and requiring them to show cause why they should not be punished for the alleged contempt. On April 13, 1891, Durein appeared, and a hearing was had upon the charge of contempt, when it was found that Durein had willfully and knowingly used and permitted others to use his premises as a place where intoxicating liquors were sold and given away without authority of law, in violation of the decree and judgment of the district court, and he was adjudged to be guilty of contempt. The penalty imposed was that he should be confined in the county jail for 40 days, pay a fine of \$500, and that a fee of \$100 be taxed for the county attorney as a party of the costs in the case; and, further, that Durein should stand committed to the jail of the county until the fine and costs were paid. A reading of the testimony leaves no doubt that Durein was engaged in the unlawful sale of intoxicating liquors on his premises, contrary to the decree of injunction; but nevertheless he insists that the proceedings in contempt were erroneous, and the judgment unauthorized.

The first error assigned by Durein is that his demand for a jury trial was wrongfully refused. While the proceeding was of a criminal nature, it was really incidental to and one of the final steps in the civil action of injunction. He was not entitled to a jury trial in the original proceeding, and neither could he demand a jury as a matter of right to try the charge that he had violated the injunction previously granted. The constitutional provision that "the right of trial by jury shall be inviolate," has no application in a summary proceeding of this character. This guaranty does not extend beyond the cases where such right existed at common law; and the right to punish for contempt without the intervention of a jury was a well-established rule of the common law. *Kimball v. Connor*, 3 Kan. 414; *State v. Cutler*, 13 Kan. 131; *In re Burrows*, 33 Kan. 675, 7 Pac. Rep. 148; *McDonnell v. Henderson*, 74 Iowa, 619, 38 N. W. Rep. 512; *State v. Becht*, 23 Minn. 411; *State v. Doty*, 32 N. J. Law, 403; *State v.*

Matthews, 37 N. H. 451; Gandy v. State, 13 Neb. 445, 14 N. W. Rep. 143; Arnold v. Com., 80 Ky. 300; King v. Railway Co., 7 Biss. 529; Neel v. State, 9 Ark. 259; Crow v. State, 24 Tex. 12; Hart v. Robnett, 5 Mo. 11; Elkenbury v. Edwards, (Iowa,) 25 N. W. Rep. 832; Rap. Contempt, § 112; 3 Amer. & Eng. Enc. Law, 719.

The next error alleged is that declarations made by Conrad Kreipe, not in the presence of Durein, were received in evidence over his objection; but counsel fail to point out where in the voluminous record brought up such testimony may be found. The pressure of business in this court is such that we cannot stop to search through a large record for alleged errors that are not specifically pointed out, as the rules of the court require. Besides, the concessions that have been made in this case would in any event render the objection immaterial.

The further objection is made that Durein was sworn as a witness at the instance of the state. The record discloses that the court sustained an objection, and did not require him to testify; and hence there is nothing substantial in the objection.

It is next contended that the court had no authority to allow the county attorney a fee of \$100 to be taxed as costs against the defendant. It is claimed that the authority for taxing a fee for the county attorney in such a case may be found in section 4, c. 165, of the Laws of 1887. It is there declared that all places where intoxicating liquors are manufactured, sold, or given away in violation of law are common nuisances, and provision is made for abating and enjoining the maintenance of such nuisances. To accomplish this object provision is made in the same section for maintaining three proceedings or actions: *First*, a criminal action for prosecuting and punishing those who maintain a common nuisance; *second*, a civil action to abate and perpetually enjoin the maintenance of a nuisance; and, *third*, the prosecution and punishment of those who, in violation of an injunction, proceed to keep and maintain a common nuisance. It is then provided that, "in case judgment is rendered in favor of the plaintiff in any action brought under the provisions of this section, the court rendering the same shall also render judgment for a reasonable attorney's fee in such action in favor of the plaintiff and against the defendant therein, which attorney's fee shall be taxed and collected as other costs therein, and, when collected, paid to the attorney or attorneys, of the plaintiff therein." In the contempt proceeding a trial is had, and there is also a formal judgment rendered, as well as in the other proceedings provided or in that section. There is an equal necessity for the services of the attorney general or county attorney in that proceeding as in the others. Although summary is its character, and the trial is had without a jury, an information or complaint must be filed, and proper preliminary steps taken to bring the party before the court for trial. Evidence is then produced, and, if the defendant is convicted,

the court imposes a fine of not less than \$100 nor more than \$500, and imprisonment in the county jail of not less than 30 days nor more than 6 months. As the state obtains a judgment in such a proceeding, it would seem, under the provisions of the statute, that an attorney's fee might be awarded in that case, the same as in the other. In the present case, however, an insuperable objection exists against the allowance of such a fee and the taxing of the same as costs against the defendant. No proof was offered before the court with reference to what constituted a reasonable attorney's fee in the case, and hence the allowance of the same was unauthorized.

It is further contended that there was no authority to impose the penalty adjudged by the court against Durein. The ground of this claim is that the judgment of injunction was given in 1886, under the authority of section 13, c. 149, of the Laws of 1885, but that the violation of the injunction was in 1891, after that section had been amended and repealed. The section was amended by section 4, c. 165, of the Laws of 1887, but the only change made was in the penalty provided for the violation of injunctions granted under that law. Under the law of 1885 the court might impose a fine or imprisonment, or both, in its discretion; whereas, under the law of 1887, the punishment is required to be both fine and imprisonment. But the amount of the fine and the duration of the imprisonment was not changed. In fact, the provisions of the two sections are identical, except that in the latter it is made fine *and* imprisonment, instead of fine *or* imprisonment, in the discretion of the court. It is clear that the provisions of the law of 1887 were applicable to the case, and that the defendant was subject to the penalty mentioned in section 4 of chapter 165 of that act. Nothing in that act indicates a purpose on the part of the legislature to abrogate or annul any decrees of injunction which have been already granted. Every provision with reference to instituting an action of injunction and obtaining a judgment perpetually enjoining the maintenance of a common nuisance is the same in every particular as the law of 1885. So far as the provisions with reference to what constitutes a nuisance, and how the same may be abated and perpetually enjoined, are concerned, the law of 1887 was a re-enactment of that of 1885, and they have continued uninterruptedly in force. "The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment." Gen. St. 1889, par. 6687. The amended law simply provides a different penalty for the violation of such injunctions, without regard to whether they were granted before or after the amendment was made. It is beyond question that it is competent for the legislature to change the penalty for the violation of existing injunction at any time; and, where the penalty is increased or reduced without any express purpose of excluding existing injunctions from the new rule, it will apply to them as well as

to judgments thereafter rendered. Even if the law of 1885 were in force, the penalty adjudged by the court was no greater than might have been inflicted under that act. By its terms the punishment for contempt might be both fine and imprisonment, in the discretion of the court; and the penalty adjudged did not extend beyond that. The act of 1887, however, furnishes the measure of punishment for a contempt of that character, and it authorized the judgment that was rendered.

Finally, it is suggested, rather than argued, that the decree of injunction is dormant, and insufficient as a basis for a contempt proceeding, for the reason that more than five years have elapsed since its rendition. The provision of the Code that a judgment shall become dormant and cease to operate as a lien upon the estate of the debtor when execution has not been taken out for a period of five years has no application to a judgment of this character. It was final and perpetual, and no execution was necessary to continue it in force. It perpetually enjoined the defendants from the commission of an offense, and created no lien on their estates, and did not come within either the letter or spirit of the statutory provision with reference to dormant judgments. The judgment of the district court will be affirmed, except as to the allowance of \$100 as attorney's fee which has been taxed as costs in the case. This item should be stricken out. The cause will be remanded to the district court for this modification, and, when so modified, the judgment will stand affirmed. All the justices concurring.

(46 Kan. 707, 718)

FIRST NAT. BANK OF EMPORIA V. RIDENOUR et al.

(Supreme Court of Kansas. March 7, 1891.)

CHATTEL MORTGAGES—FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE.

1. A chattel mortgage by a firm to one of the members thereof, as nominal mortgagee, to secure a note executed by the members of the firm to a bank, representing a *bona fide* indebtedness, in which the note is copied, and it is expressly stated therein that the mortgage is given to secure the payment of said note to said bank, *held*, that the security is given by the firm to the bank.

2. Where the court, in a foreclosure proceeding on said mortgage, finds that the mortgage was executed by the mortgagors to hinder and delay their creditors, but the bank did not know of or participate in the fraudulent intent of the mortgagors, such mortgage would not be void in the hands of the bank in favor of subsequent attaching creditors, though the nominal mortgagee knew of and participated in the fraudulent intent of the mortgagors.

3. The assent of a creditor to a chattel mortgage executed in good faith, of which he is the beneficiary, will be presumed, although it was executed and filed without notice to him and without knowledge, and such acceptance will relate back to the day of filing.

4. If a chattel mortgage is given by an insolvent debtor to a creditor in good faith to pay a *bona fide* debt, although the giving of such a mortgage will have the effect to hinder and delay the other creditors in the collection of their claims, and may, by the exhaustion of all the property of the debtor to pay the honest debt of the preferred creditor, absolutely prevent the other creditors from collecting any part of their claims, such mortgage is not fraudulent or void

merely because of such unfortunate results to the creditor not preferred.

(Syllabus by the Court.)

Commissioners' decision. Error from district court, Barber county; C. W. Ellis, Judge.

Sluss & Stanley, for plaintiff in error. *Smyth & Brooks* and *Kellogg & Sedgwick*, for defendants in error.

STRANG, C. Action by the plaintiff to foreclose a chattel mortgage, begun in the district court of Barber county, Kan., October 2, 1886. August 30, 1886, the firm of Lovejoy & Glasscock, being indebted to the plaintiff in the sum of \$10,000 and accrued interest, executed a chattel mortgage to C. J. Lovejoy to secure said indebtedness, which mortgage was filed in the office of the register of deeds of Barber county September 1, 1886, at half past 7 o'clock A. M. On the same day Lovejoy & Glasscock executed a chattel mortgage to C. J. Lovejoy to secure an alleged indebtedness of said firm to him, the said C. J. Lovejoy, in the sum of \$4,500, which mortgage was filed with the register of deeds of said county at the same time with the first above mentioned mortgage. No claim is made by C. J. Lovejoy under this latter mortgage, so far as this case is concerned. Several days after the filing of said mortgage with the register of deeds, attachments were levied upon the goods therein described, in suits against Lovejoy & Glasscock in favor of Ridenour, Baker & Co., the National Bank of the State of Illinois, and Kub, Nathan & Fisher, in each of which cases judgment was obtained against Lovejoy and Glasscock. Each of said attaching creditors was made defendants in this case. October 15, 1887, the case was tried by the court without a jury, the court making the following findings of fact and conclusions of law, and rendering a personal judgment in favor of the plaintiff upon its note against C. J. Lovejoy, H. C. Lovejoy, and A. C. Glasscock, but holding the mortgage of the plaintiff void as against Ridenour, Baker & Co., the National Bank of the State of Illinois, and the other attaching creditors of the defendants Lovejoy & Glasscock represented in the case.

Findings of fact: "(1) The firm of Lovejoy & Glasscock executed the mortgage described in the plaintiff's petition, and delivered the same to C. J. Lovejoy. (2) That at the time of the execution of said mortgage the firm of Lovejoy & Glasscock was justly indebted to plaintiff to the amount of the note described in the petition, which is the indebtedness to the First National Bank of Emporia, in said mortgage described, and was also justly indebted to the National Bank of the State of Illinois, which is also described in said mortgage, neither of which debts have been paid. (3) That at the time of the execution of said mortgage the said C. J. Lovejoy was a member of the firm of Lovejoy & Glasscock, and liable for all the debts of said firm. That at and prior to the time of the levy of the several attachments mentioned in this case the said C. J. Lovejoy was in the actual and exclusive possession of the property involved in this

action, claiming the same undersaid mortgage. (4) That the said mortgage was given to hinder, delay, and defraud the creditors of the firm of Lovejoy & Glasscock, which said intent was known to and participated in by the defendants, C. J. Lovejoy, H. C. Lovejoy, and A. C. Glasscock. (5) That the plaintiff had no knowledge or notice of such intent, and did not participate therein. (6) That the value of the mortgaged property was not in excess of the debts described in said mortgage. (7) That at the time of the execution of the notes to the first National Bank of Emporia, and the National Bank of the State of Illinois, mentioned in the chattel mortgage set out in the petition, the defendant C. J. Lovejoy was a member of the firm of Lovejoy and Glasscock, and he was one of the principals of said notes, and not simply a surety therein. (8) That at the time of the commencement of the action the defendants Ridenour, Baker & Co., the National Bank of the State of Illinois, Kuh, Nathan & Fisher, the Alcott Packing Co., the Gauss-Shelton Hat Co., and Charles Nelson, each had a valid attachment lien upon the property, or some portion of it, which was included in the chattel mortgage set out in the plaintiff's petition, and which was taken possession of by the receiver herein."

Conclusions of law: "As conclusions of law, based upon the foregoing findings of fact, the court finds that the chattel mortgage set out in plaintiff's petition is void, and that plaintiff has no right to or lien upon any of the funds in the hands of the receiver herein, and that the defendants, Ridenour, Baker & Co., the National Bank of the State of Illinois, Kuh, Nathan & Fisher, the Alcott Packing Co., the Gauss-Shelton Hat Co., and Charles Nelson, are entitled to said funds in the hands of the receiver in accordance with their several attachments."

It is asserted that all the evidence that was received and considered on the trial of the cause in the court below is not returned in the record to this court and an examination of the record seems to sustain the claim. But as, from our view of the case, the findings of fact made by the court below are not to be disturbed, we have not examined the record to see whether sufficient evidence is returned to sustain such findings.

The next contention of the defendants is that there is such a want of parties in the case as presented to this court that the case here must necessarily be dismissed. Defendants claim that the Alcott Packing Company, the Gauss-Shelton Hat Company, and Charles Nelson were parties defendant in the case below, and are therefore necessary parties to the case in this court, and, not having been made parties herein, this case must be dismissed. It is true that the parties mentioned were included in the petition of the plaintiff filed in the district court, but there is no evidence in the record that they were ever served with process. So far as appears from the record, none of them filed any pleadings in the case, or in any other way appeared on the trial thereof. We find in

the record the following stipulation: "It is admitted by the plaintiffs that the goods in controversy were attached in the case of Ridenour, Baker & Co., and the case of the National Bank of the State of Illinois against the Lovejoy-Glasscock Trading Co., otherwise, Lovejoy and Glasscock, H. C. Lovejoy, and A. C. Glasscock, also Kuh, Nathan & Fisher against the same parties, in actions pending in the district court in Comanche county, Kan. That the levying of the attachments and all proceedings in said cause were regular. That judgments have been procured in said causes against all the defendants in the following sums: In favor of the National Bank of the State of Illinois for the sum of \$21,500; in the case of Kuh, Nathan & Fisher, \$2,100; and in case of Ridenour, Baker & Co., for \$1,907.45; and that said judgments have not been paid." There is no evidence in this record of the pendency of any suit on the part of the Alcott Packing Company, the Gauss-Shelton Hat Company, or Charles Nelson, or any other party against Lovejoy & Glasscock, not included as defendant here. There is no judgment in favor of any other parties against Lovejoy & Glasscock, affecting the goods in controversy, so far as we can learn from the record. It is true that the court in its eighth finding says that, in addition to the parties to this record, the Alcott Packing Company, the Gauss-Shelton Hat Company, and Charles D. Nelson each had a valid attachment lien upon the property, or some portion of it, which was included in the chattel mortgage set out in plaintiff's petition. But, as there was no pleading or other appearance by such parties on the trial of the case in the court below, and no stipulation in respect to them, and there being a stipulation in respect to the cases of the parties made defendants in this court, we do not think it sufficiently appears that these alleged omitted parties were parties to the trial of this cause in the court below in such a way as to make them necessary parties here. They obtained no judgments in the court below. The journal entry showing the judgment of the court below contains the following significant words. After reciting the National Bank of the State of Illinois and Ridenour, Baker & Co. as parties to the judgment, the court adds: "And the other attaching creditors of the defendants Lovejoy and Glasscock, represented herein." The words "represented herein" show that there were attaching creditors of Lovejoy & Glasscock, not represented in this cause in the court below.

The real question upon the merits of the case arises out of the character to be given the mortgage sought to be foreclosed by the plaintiff. The mortgage was either given by the firm of Lovejoy & Glasscock, whoever that might include, to indemnify C. J. Lovejoy for some liability or assumed liability of his for the debt of the firm, or it was given and intended as security for the plaintiff, the First National Bank of Emporia. It was not given to C. J. Lovejoy to secure any principal debt from the firm to him, in which a third party or stranger to the instrument could only

take under it by assignment, for there was no pretense that there was any principal debt owing by the firm to C. J. Lovejoy, except the debt of \$4,500, secured by the other mortgage, and no pretense that the debt named in the mortgage of plaintiff was due from the firm to C. J. Lovejoy in any way, except as by their contention he was a surety on their note to the plaintiff. Was the mortgage in controversy given to indemnify C. J. Lovejoy as surety on their debt to the bank? This question must be answered in the light of the findings of fact made by the court below, as well as the other matters in the record bearing upon the question. The note representing the indebtedness secured by the mortgage was signed by C. J. Lovejoy, H. C. Lovejoy, and A. C. Glascock, each an apparent principal on the note. If he had not been a partner in the firm, he might have signed as an apparent principal, and still have been as between himself and the other makers of the note, a surety. But the finding of the court makes him a partner with C. H. Lovejoy and A. C. Glascock, in the firm of Lovejoy & Glascock; and it is difficult to see how, if he was primarily liable as a partner for the debt of the firm to the plaintiff, and signed the note as an apparent principal, he was anything but a principal debtor on the note. If he was principal on the note as between himself and his co-makers, he could not be a surety thereon, and the mortgage could not have been made to him to indemnify himself. The court also finds that he was a principal, and not a surety on said note. The security tendered in a mortgage like the one in controversy is not to him who may be nominated therein as a party of the second part, but to the owner and holder of the debt therein identified as the debt to secure which the mortgage is given. While C. J. Lovejoy is nominated as party of the second part in this mortgage, the mortgage upon its face declares it is given to secure the debt due the Emporia National Bank, the plaintiff in this case, and, so far as this case is concerned, for no other purpose, because it provides that upon the payment of the debt of the plaintiff such mortgage shall be null and void. It is apparent that C. J. Lovejoy is a mere nominal party to said mortgage, and that all the rights accruing thereunder inure directly to the beneficiary therein named, the Emporia National Bank, and that Lovejoy took nothing thereunder. By the execution and delivery of said mortgage the mortgagors undertook to and did set apart property for a specific purpose, to secure the payment of a specified debt, and thereby conferred upon the owner and holder of the debt named an equitable lien that could not be discharged or otherwise interfered with by the nominal mortgagee. Such lien having attached, it remains good against all persons except purchasers without notice. In this case there were no such purchasers, and the attachments were levied several days after the mortgage was filed with the register of deeds.

In the case of *Eastman v. Foster*, 8 Metc. (Mass.) 19, it is said: "The court

are of the opinion that the mortgage made by Cushmans, the principal debtors, to Eastman, the surety, conditioned to pay the notes and indemnify him, did create a trust, and an equitable lien for the holders of the several notes; that the mortgagee held the property subject to such trust; and that it created an equitable lien thereon for the security and payment of the specified debts." In *Bank v. Lee*, 11 Conn. 112, it is held: "Property mortgaged to a surety to secure him for indorsing the mortgagor's note, whether such property be real or personal, may be subjected to the payment of such note by a bill filed by the creditor, where the debtor is insolvent. In such case the creditor need not levy execution so as to obtain a lien upon property mortgaged to a surety for the same debt for his indemnity, as he has an equitable lien upon the property so mortgaged. The security or fund is created for the payment of the debt, and is a trustee existing for that specific purpose, and whether the creditor or the surety be trustee is very immaterial. The trust is created ultimately for the benefit of the creditor." In *Russell v. Clark*, 7 Cranch, 69, the court declare "that the person for whose benefit a trust is created, who is ultimately to recover the money, may sustain a suit in equity to have it paid directly to himself." "In some states a distinction seems to be drawn between cases where security is given for indemnity only and where it is given both for indemnity to the surety and to secure the debt. Where it is given to secure the debt as well as indemnity, there would seem to be little doubt that the creditor, whether cognizant of the assignment and its purpose or not at the time of the assignment, could, when it came to his knowledge, avail himself of it as effectually, on maturity of his debt, as he could had it been assigned to him directly. But when the assignment is for indemnity only some courts have held that the surety's right to apply the security as he pleased is inconsistent with the idea of a trust in favor of the creditor, and that the creditor can only reach the security by way of subrogation after the surety has been damaged, actually or constructively. The great weight of authority, however, is against the proposition that the creditor's right is rooted in the doctrine of subrogation. The assignment of security by the principal to his surety is an appropriation of funds for the ultimate discharge of the debt for which he is holden. The surety has the right to apply the security directly to the payment of the debt. If the surety pays with his own funds, he keeps his principal's debt on foot against him, and then applies the security to its payment. Thus, in any event, the funds of the principal are made to satisfy the principal's debt, and this accords with the purpose of the principal when he gave the security. If the surety, after assignment of the security, becomes insolvent, or by any act of the creditor is discharged from liability, he holds the security in trust for the creditor." *Cullum v. Bank*, 23 Ala. 797; *Clark v. Ely*, 2 Sandf. Ch. 166. "The clear deduction from the cases is that an

assignment of securities by the principal to his surety for indemnity merely raises an implied trust in favor of the creditor, which, on maturity of his debt, he may enforce, whether the surety has been damaged or not, and irrespective of the question whether the surety or principal, either or both, are solvent." *New Bedford Institution for Savings v. Fairhaven Bank*, 9 Allen, 175; *Kramer's Appeal*, 37 Pa. St. 71; *Rice's Appeal*, 79 Pa. St. 168; *Insurance Co. v. Ledyard*, 8 Ala. 866; *Moore v. Moberly*, 7 B. Mon. 299; *Curtis v. Tyler*, 9 Paige, 432; *Ten Eyck v. Holmes*, 3 Sandl. Ch. 428; *Paris v. Hullett*, 26 Vt. 308; 1 Story, Eq. Jur. (Redf. Ed.) § 499; *Brandt, Sur.* § 293. "A mortgage deed, given by the principal maker of a promissory note, conditioned that the principal will pay the note and save the surety harmless, creates a trust and an equitable lien for the holder of the note, and the surety holds the mortgaged property subject to such trust and lien, even after the holder's claim on him to pay the note, is barred by the statute of limitations, and though the property as between the mortgagor and mortgagee, may have become absolute by foreclosure. The trust created by such mortgage is not secret; and when the mortgage is recorded, it gives constructive notice of the trust to all creditors and purchasers so that they cannot, by attachment or grant take it discharged of the trust." 8 Metc. (Mass.) 19. It will be seen from the authorities cited that, even where the security is given to indemnify the surety solely, an equitable lien attaches to the securities in favor of the principal debtor, which he may enforce by direct proceeding. His right does not depend on the law of subrogation. This right becomes stronger when the securities are delivered not only to indemnify the surety, but to secure the principal debt; and where, as in this case, from the terms of the mortgage and the finding of the court, the nominal mortgagee is not a surety, and the security by its terms is delivered for the sole purpose of securing the principal debt, which it clearly identifies, it seems there can be little doubt about the right of the principal debtor to enforce, in a direct proceeding, the payment of his debt out of the security given. The execution and delivery of the mortgage sued on was the setting apart of the property to pay the debt therein named and identified; and the principal debtor at once obtained an equitable lien thereon, which, when the mortgage security was recorded, was good against any act of the mortgagor or nominal mortgagee, or any lien of creditors of the mortgagor obtained subsequent thereto, and that, too, though the principal debtor did not at the time know of the execution and delivery of the security, provided he afterwards accept the security tendered. This right of the owner and holder of such security may be enforced in the name of such owner, without any regard to the nominal mortgagee. "The beneficiary will be presumed to have accepted the fund deposited or raised for the ultimate satisfaction of his demand. It is the trust fund, and not the trustee

as an individual, that gives a court of equity jurisdiction; and having the fund under its control, the court will decree in favor of the parties entitled." *Breedlove v. Stump*, 3 Yerg. 257. The assent of the person selected as trustee is not necessary to the validity of the deed. If he refuse to execute it, a court of chancery will execute it. The assent of the beneficiary in the deed may be given any time after the deed is executed, and in the absence of proof to the contrary, will always be presumed. *Field v. Arrowsmith*, 3 Humph. 442. "It will be presumed on the part of the beneficiaries under a deed of trust, in the absence of proof to the contrary, that each accepts the provisions made for his benefit, and such acceptance may be given at any time after the conveyance is made, unless renounced or waived; and such acceptance, in fact, will relate back to the day of registration." *Furman v. Fisher*, 4 Cold 626.

Finally, it is contended that because C. J. Lovejoy was made the nominal mortgagee in the security claimed by the plaintiff, and the trial court found that the mortgage was made by the mortgagors to hinder and delay their creditors, and that C. J. Lovejoy participated in the fraudulent intent of the mortgagors, that the mortgage is necessarily void as a security in favor of the plaintiff, though the court also found that the plaintiff knew nothing of such fraudulent intent of the mortgagors. It is said that C. J. Lovejoy took nothing under the mortgage, because of the fraudulent intent, in which he participated, and that the plaintiff could get no more rights under the mortgage than C. J. Lovejoy got; that whatever rights the plaintiff got under the mortgage came to it from C. J. Lovejoy. If the plaintiff got no more rights under the mortgage than C. J. Lovejoy got, then, indeed, they might as well go out of court, for C. J. Lovejoy got no rights at all under the mortgage except that of mere nominal mortgagee, or the right of a mere naked trustee. He got no right to any of the security for any purpose. If he had refused to act as trustee of the trust, the plaintiff's rights would not thereby have been affected. Their lien upon the security would have remained the same, and they could have enforced it without his aid. He had no power to affect their rights. He could not have discharged their lien, nor could he have satisfied the mortgage. The plaintiff took nothing by, through, or under him, but had and has its lien upon the security without regard to him, by the direct act of the mortgagors in setting aside property to secure and pay its debt, and when once the assignment of the security was made, in spite of him or any act of his. He did not in any way represent the plaintiff by any act, request, or authority from it. Nor does the plaintiff take from him by assignment or any other act of his, nor by being in law subrogated to any rights of his. The firm of Lovejoy & Glasscock owed the plaintiff a *bona fide* debt of \$10,000. They had the right to secure such debt by making the mortgage, and the fact that they used C. J. Lovejoy as a nominal mortgagee in the

security they were assigning to the plaintiff could not invalidate the security in the hands of the plaintiff, no matter what their intent was in making the mortgage, nor how much he whom they chose to act as nominal mortgagee knew of their intent. The plaintiff knew nothing of any wrongful intent; and it is probably true, under the authorities, that any amount of knowledge of the intent of the mortgagors on the part of the plaintiff would not render the mortgage void in their hands in favor of liens created after the recording of the mortgage, so long as the debt to secure which it was given was *bona fide*, and they got by their security no more than the fair value in property of the debt secured. *Worland v. Kimberlin*, 6 B. Mon. 608, and cases there cited; *Covanhoven v. Hart*, 21 Pa. St. 495; *Cooper v. Bank*, 40 Kan. 5, 18 Pac. Rep. 937. We are of the opinion that the court below was mistaken in its conclusion of law upon the facts as found. The judgment of the court below is therefore reversed, and the cause remanded, with instructions for the court below to enter a decree in favor of the plaintiff for the foreclosure of its mortgage and the application of the proceeds thereof to the payment of its debt.

PER CURIAM. It is so ordered; all the justices concurring.

ON REHEARING.

(July 9, 1891.)

HORTON, C. J. It was declared in the former opinion handed down, among other things, that "the assent of the beneficiary in the deed may be given any time after the deed is executed, and, in the absence of proof to the contrary, will always be presumed. It will be presumed on the part of the beneficiaries under a deed of trust, in the absence of proof to the contrary, that each accepts the provisions made for his benefit, and such acceptance may be given at any time after the conveyance is made, unless renounced or waived, and such acceptance in fact will relate back to the day of registration." Upon this declaration of law we held that the chattel mortgage of \$10,000 executed by Messrs. Lovejoy & Glasscock on the 30th of August, 1886, to secure the indebtedness due the First National Bank of Emporia, was a prior lien to the attachments on the goods of the firm made by their creditors several days after the filing of the mortgage, and upon such conclusion we reversed the judgment of the trial court, and directed judgment accordingly. This declaration of law and the reversal of the judgment of the trial court were vigorously assailed at the rehearing upon the ground that the chattel mortgage was executed by the firm of Lovejoy & Glasscock with the intent to hinder, delay, and defraud their creditors, and, therefore, that it had no force or effect in favor of the bank until the bank actually assented to or accepted the mortgage; and upon this it is maintained, even if the chattel mortgage was valid between the parties, that it had no validity or force as to the attaching creditors until

after the assent or acceptance of the bank, which it is alleged was subsequent to the levy of the attachments. Therefore it is urged that in any event the attachment liens were prior to the chattel mortgage. We concede, as stated by Burrill on Assignments, that the assent of a creditor to a void or fraudulent assignment or chattel mortgage must be actually given, and will not be presumed. Burrill, Assignm. (5th Ed.) § 295, p. 444. In *Benning v. Nelson*, 23 Ala. 801, it is said by PHELAN, J., that, "if a jury should find the fact to be that a deed was made by the grantor with intent 'to hinder, delay, and defraud creditors,' the law will not presume the assent of a beneficiary to such a deed, however much it might really be for his benefit, because this would be to put it in the power of the grantor, by the aid of a legal presumption, to make valid his own fraudulent deed. Such a deed can only become valid by the actual assent of the beneficiary in some form. Until such actual assent, any creditor may levy or attach, and hold in defiance of the deed." See, also, *Townsend v. Harwell*, 18 Ala. 301; *Stewart v. Spenser*, 1 Curt. 157; *Ashley v. Roblison*, 29 Ala. 112; *Baldwin v. Peet*, 22 Tex. 708. We do not construe the findings of the trial court, however, when considered together, as showing that the chattel mortgage to the First National Bank was given to hinder, delay, and defraud the creditors of the firm of Lovejoy & Glasscock. It is true that the trial court made such a finding, or rather made such a general conclusion of law; but this general statement or conclusion is greatly modified by the further findings of the trial court, that stated that the First National Bank had no knowledge or notice of any intent upon the part of the firm of Lovejoy & Glasscock to hinder, delay, and defraud their creditors, and did not participate in any such fraud or intent, and that the value of the property embraced in the chattel mortgage was not in excess of the debts due to the First National Bank from the firm of Lovejoy & Glasscock, as described in the mortgage. From all the findings of fact we must construe that the finding or conclusion of the trial court that the chattel mortgage "was given to hinder, delay, and defraud the creditors of the firm of Lovejoy & Glasscock" meant that, as the effect of the mortgage was to hinder and delay all the other creditors of the firm excepting the First National Bank of Emporia, such chattel mortgage was given to defraud. Every preference by an insolvent debtor to one creditor over another tends to hinder and delay the creditor not secured or paid, but we have decided time and again that "a debtor, even in failing circumstances, may prefer creditors, if the same is done in good faith; and this, not only in the form of actual payment of money to the particular creditors preferred, but also in the form of the sale or appropriation of the property or the giving of chattel mortgages to such creditors." *Tootle v. Coldwell*, 30 Kan. 125, 1 Pac. Rep. 329; *Bailey v. Manufacturing Co.*, 32 Kan. 73, 3 Pac. Rep. 756. It is well settled that an insolvent, as long as he retains a *jus dis-*

ponendi of his property, may appropriate it to the payment of his debts, and may prefer creditors. He may use all his property this way, or he may so use a part, and make a general assignment of the remainder. *Lampson v. Arnold*, 19 Iowa, 479; *Dodd v. Hills*, 21 Kan. 707; *Randall v. Shaw*, 28 Kan. 419. See, also, *Bank v. Croco*, 45 Kan. —, 26 Pac. Rep. 942, and the cases there cited. It is true that the chattel mortgage was made to the national bank while the firm of Lovejoy & Glasscock was insolvent, and that such preference or chattel mortgage operated to hinder and delay the other creditors in the collection of their claims; and we may further say from the findings that it was the intention of the firm of Lovejoy & Glasscock to prefer and pay the claim of the First National Bank in preference to the claims of the other creditors, even if such payment exhausted all of their property; but all of these things, under the frequent prior decisions of this court, do not affect the validity of the chattel mortgage, as it was executed in good faith to pay a *bona fide* debt, and the value of the property mortgaged was not in excess of the debt described therein and actually due from the firm of Lovejoy & Glasscock to the bank. Under these circumstances, as there was no fraud in fact within the prior rulings of this court, we repeat what we said before, that the assent of the First National Bank of Emporia to the chattel mortgage, although given after it was executed, and even after the levy of the attachments, must be presumed and such assent or acceptance in fact will relate back to the day of the filing of the mortgage. This is the law where the chattel mortgage is not fraudulent or void. But opposing counsel say that any deed, any chattel mortgage, or any assignment may be fraudulent, although made in consideration of an honest debt; and a large number of authorities are cited supporting this view. We concur in what is said in the authorities upon this matter, but hold that the findings of fact do not show that the chattel mortgage or transfer is fraudulent. In the cases where the transfers were fraudulent, but the considerations on honest debts, it appeared that the deeds or conveyances were made for the ease and favor of the debtor, or for some other purpose to aid and assist the debtor, rather than to protect and prefer the honest creditor.

Thus it is said in *Devries v. Phillips*, 63 N. C. 53: "It is well settled that a conveyance to secure a *bona fide* debt, or for a valuable consideration, will be fraudulent if made for the ease and favor of the debtor." In *Shelley v. Boothe*, 73 Mo. 74, it was ruled "that, if it appeared from the circumstances attending the transaction that the preferred creditor was not acting from an honest purpose to secure the payment of his own debt, but from a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret interest therein, or in locking it up for the debtor's own use

and benefit, he will not be protected, and the sale would be fraudulent as to other creditors, because in such cases the fraud of the debtor becomes the fraud of the preferred creditor, because of his participancy therein." In *Smith v. Schwed*, 9 Fed. Rep. 483, it was decided "that if the purpose of the preferred creditor is not to secure his debt, but to help the debtor cover up his property, he cannot shield himself by showing that his debt was *bona fide*." In *Drury v. Cross*, 7 Wall. 299, the preferred creditors unlawfully combined together to raise the decree to an extent which prevented all fair competition at the sale of the property, and therefore in that case they were not protected. *James v. Railroad Co.*, 6 Wall. 752, was a similar case of actual fraud by certain parties to prevent fair competition at a sale. In the case of *Cox v. Miller*, 54 Tex. 16, there is a discussion of whether the facts in that case show that the mortgage was given to secure a *bona fide* debt, or whether it was simply a colorable pretense resorted to for the purpose of covering up the property. The facts were set forth, among which were that the property conveyed was greatly in excess of the pretended debt, and that the security was only a part consideration for the conveyance, and that the motive of the conveyance was to transfer to the grantee a large amount of property under the false claim that it really belonged to her, and for the purpose of putting it beyond the reach of creditors. In *Thompson v. Furr*, 57 Miss. 478, it appeared that there was a secret agreement between the debtor and creditor secured by a mortgage, that a one-half interest in the property conveyed was to be held by a secret trust for the benefit of the debtor, and was not to apply to the payment of the debt; and the consideration of the conveyance was falsely set at about double the actual debt for the purpose of misleading the creditors, which of course would be a fraud upon the creditors in fact; and wherever there is a fraud in fact, notwithstanding a *bona fide* debt may be incidentally secured, it vitiates the transaction. These and many other cases which are cited show that where the conveyance to a creditor having a *bona fide* claim is in excess of the actual debt, or is given to favor the debtor, or to merely cover up the property from other creditors, or to prevent a fair sale of the property, then the transaction, sale, or conveyance, so fraudulently made to the creditor having the honest debt is void, at least as to the creditors not preferred. See *Wallach v. Wylie*, 28 Kan. 138; *Winstead v. Hulme*, 32 Kan. 568, 4 Pac. Rep. 994. But in this case the findings, taken as whole, bear no such interpretation. The chattel mortgage, according to the findings, was not given to favor the insolvent firm, but to protect honest debts due the bank. The mortgage was not in excess of the debts secured, or given to cover up property, or to prevent a fair sale thereof. The rehearing will be denied. All the justices concurring.

(40 Kan. 704)

CRAWFORD V. SHAFT.

(Supreme Court of Kansas. June 6, 1891.)

REVIEW ON APPEAL—ERROR APPARENT OF RECORD—JUDGMENT IN EJECTMENT.

1. An error, apparent of record, in a final judgment in the district court may be reviewed in the supreme court without a motion for a new trial.

2. Where, in an action of ejectment, judgment is rendered in favor of the plaintiff, and proceedings are had under the occupying claimants' act, and the sheriff's jury return an assessment and valuation of the land and improvements, as well as the rents and waste accrued since the commencement of the action, and the net annual value of the rents and the waste exceed the value of the improvements, it is the duty of the court, under section 607 of the Code of Civil Procedure, to render a judgment for the difference in favor of the plaintiff.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Chase county; FRANK DOSTER, Judge.

Madden Bros. and Gillette & Sudler, for plaintiff in error. C. N. Sterry, for defendant in error.

GREEN, C. On the 1st day of April, 1884, D. P. Shaft took possession of the W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, of section 14, township 20, range 8, in Chase county, claiming the same under a tax-deed. On the 5th day of April following, J. L. Crawford brought suit in ejectment, in the district court of Chase county, for the land, claiming title under a patent. The case was tried, and resulted in a judgment in favor of Shaft, which judgment was reversed by this court, (Crawford v. Shaft, 35 Kan. 478, 11 Pac. Rep. 334;) and when again tried judgment was entered in favor of Crawford for the possession of the premises, and, upon the suggestion and application of Shaft, the court determined the tax-lien, and caused a journal entry to be made that the defendant was entitled to the benefit of the occupying claimants' act. The defendant having neglected to call for a jury, on the 20th day of January, 1888, the plaintiff filed his application therefor, and an appraisal was made, which was, upon motion of the defendant, set aside, upon the ground that proper notice had not been given him of the meeting of the jury, and leave was given to either party to require a new jury to be drawn. On May 9, 1888, the plaintiff again filed his application for a jury, which made the following return: "Value of land, July 11, 1887, \$1,050.00; rent of land April 7, 1884, to July 11, 1887, \$201.30; waste land, April 7, 1884, to July 11, 1887, \$49.00; improvements, July 11, 1884, \$13.30." On December 11, 1888, the plaintiff filed his motion for judgment for the amount of rent and waste, after deducting the value of the improvements, according to the assessment of the sheriff's jury. Upon the oral request of the defendant, the court gave him an affirmative judgment against the land for the value of the improvements, and gave the plaintiff judgment for the costs, under the occupying claimants' proceedings, but overruled the plaintiff's motion, and refused to give him judgment against the defendant for the rents and waste, or to allow

him to set off the same against the improvements. This ruling of the court we are asked to review.

1. It is first insisted by the defendant in error that a motion for a new trial was necessary to have the assigned errors considered by this court. It has been determined otherwise. The proceedings under the occupying claimants' act were all after the rendition of the judgment in the original case, and the matter complained of is apparent of record. An error in the final judgment of the district court may be reviewed, although no motion has been made to correct the error in the trial court. Coburn v. Weed, 12 Kan. 183; Earlywine v. Railroad Co., 43 Kan. 746, 23 Pac. Rep. 940.

2. We think the court erred in its ruling. The defendant asked and obtained a judgment for the improvements that he had placed upon the land when occupying the same under his tax-deed. He was not in a situation to question the regularity of the assessment and return of the jury. He was ready to accept the benefits of a verdict, so far as it related to him. Sec. 607 of the Code of Civil Procedure reads: "If the jurors shall report a sum in favor of the plaintiff or plaintiffs in said action, for the recovery of real property on the assessment and valuation of the valuable and lasting improvements, and the assessment of damages for waste, and the net annual value of the rents and profits, the court shall render a judgment therefor without pleadings, and issue execution thereon as in other cases; or, if no excess be reported in favor of said plaintiff or plaintiffs, then and in either case the said plaintiff or plaintiffs shall be thereby barred from having or maintaining any action for mesne profits." The object of this section of the occupying claimants' act was to provide a simple method by which the occupant and the owner might have settled and determined, without pleadings, the amount due, upon the one hand, to the occupant for his improvements, and, upon the other, the sum due the owner of the land for rents and waste during the period that the other was in the wrongful possession of the premises. The rule is an equitable one which makes it the duty of the party in possession, who claims pay for the improvements he has placed upon the land, to respond to the owner for its net rental value during the period that he has unlawfully held possession of the property. The rent and waste, as returned by the sheriff's jury, having accrued to the plaintiff since the commencement of the original suit, it was within the power of the court, under section 607 of the Code, to render judgment in favor of the plaintiff for the amount of such rent and waste, less the improvements, and that amount should have been awarded him without pleadings. It is recommended that the judgment of the court, under the occupying claimants' proceedings, be reversed, and that the district court proceed in accordance with the views herein expressed.

PER CURIAM. It is so ordered; all the justices concurring.

90 Cal. 173

NOTMAN v. GREEN. (No. 14,164.)

(Supreme Court of California. July 5, 1891.)

ACTION ON NOTE—PLEADING.

In an action on a note, a complaint which says nothing on the subject of failure to pay, except that "no part of the principal sum mentioned in said note still remains due and unpaid," is insufficient to sustain a judgment.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

A. B. Hotchkiss, for appellant. E. E. Powers, (Max Lowenthal, of counsel,) for respondent.

GAROUTTE, J. This is an action upon a promissory note, and to foreclose a mortgage upon real estate given to secure the same. Defendant filed a general demurrer, which was overruled, whereupon he failed to answer, and judgment was finally rendered against him, and the realty sold under execution. He appeals from the judgment, and insists that the complaint is fatally defective, in this: that there is no allegation of non-payment of the note. The only allegation in the complaint referring to this matter is as follows: "That all the interest on the said principal sum mentioned in said promissory note, and in the said mortgage, has been paid up to February 26, 1888, and no part of the principal sum mentioned in said promissory note and mortgage, together with the interest thereon at the rate of ten per cent. per annum from the 28th day of February, 1888, compounded quarterly, still remains due and unpaid from said defendant to said plaintiff." We may safely assume that this allegation of the pleader does not express his intention and desires at the time. He insists that the defect of the allegation consists in a clerical error in the accidental insertion of the words "no part of." It is not our province to speculate how the allegation happened to be framed as it is. It is sufficient to say it is not an allegation of non-payment of the note, and therefore the complaint is fatally defective. *Scroufe v. Clay*, 71 Cal. 123, 11 Pac. Rep. 882; *Richards v. Insurance Co.*, 80 Cal. 506, 22 Pac. Rep. 939. Appellant sits quietly by; allows his demurrer to be overruled for lack of presentation of the defects of the complaint to the court; permits the court to hear evidence and enter its judgment; allows respondent to sell the premises, which are inadequate to pay the judgment, at his own cost and expense; and then appeals from a judgment based upon a complaint clearly insufficient, and which would have been ordered amended by the court upon the slightest notice of the defects. It would afford us pleasure if we were acquainted with some principle of law that would justify us in affirming this judgment, but we know of none. Let the judgment be reversed, and the cause remanded.

We concur: HARRISON, J.; PATERSON, J.
80 Cal. 606

MOWRY v. RAABE et al. (No. 13,097.)

(Supreme Court of California. June 26, 1891.)

LIBEL—EVIDENCE—DAMAGES—NEW TRIAL.

1. In an action for libel the evidence showed that plaintiff was a butcher; that defendants,

who constituted the "Butchers' Protective Union," printed and circulated dodgers which read: "Don't sow the seeds of disease, and spread pestilence and death, by buying Chinese pork and lard; [plaintiff] sells Chinese pork and lard." There was also evidence that plaintiff had bought some pork from the Chinese, and that the Chinese often sold diseased pork, but the defendants' own witness testified that the pork sold by plaintiff was wholesome. *Held*, that plaintiff was entitled to judgment, since, in order to justify, the defendants must prove that the Chinese pork sold by plaintiff was unsound.

2. In such action, a verdict for \$300 damages is not excessive.

3. It was claimed by the defendants that one object of the "Butchers' Protective Union" was to prevent the sale of unsound pork by Chinese. *Held*, that plaintiff might show why he refused to join the union.

4. It is proper to refuse to allow one of the defendants to testify that he had no malice against plaintiff when he published the libel, since the publication of matter false and libelous is, as matter of law, malicious.

5. To grant a new trial on account of newly-discovered evidence, where no diligence is shown, and the alleged new evidence is merely cumulative, and the fact of its being newly-discovered is denied, is an abuse of judicial discretion.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

J. H. Miller, for appellant. Lloyd & Wood and J. D. Sullivan, for respondents.

TEMPLE, C. This appeal is from an order granting defendants a new trial. Plaintiff was a retail butcher, doing business at the corner of Grove and Laguna streets, San Francisco. The defendants constitute the "Butchers' Protective Union." In July, 1886, they printed and circulated a great number of circulars or dodgers, which read as follows: "Protect yourself and family. Don't sow the seeds of disease, and spread pestilence and death, by buying Chinese pork and lard. Geo. B. Mowry, of the new Hayes Valley Market, corner Grove and Laguna streets, sells Chinese pork and lard. This is a fact, and can be vouched for by the committee of the Butchers' Protective Union. Buy your meats only where you see the union sign." It was alleged in the complaint that by this circular defendants intended to and did charge that plaintiff was engaged in selling his customers Chinese pork and lard, which contained the seeds of disease, and spread pestilence and death. The defendants admitted the publication, but denied that it was malicious, and averred that it was true. On the trial they offered evidence tending to prove that plaintiff purchased some pork from Chinese, which he sold to his customers, and also that the Chinese often sold diseased pork; but none which proved, or tended to prove, that the pork plaintiff sold was diseased, or would spread the seeds of disease and death. On the contrary, defendants' own witness testified that the particular pork sold by the plaintiff was sound, wholesome food. The learned judge held, and we think correctly, that the justification required defendants to prove not only that the pork sold by plaintiff was obtained from the Chinese, and was therefore what was

known as "Chinese pork," but also that it was unsound. They offered no evidence which tended to establish that fact. The publication was therefore false and malicious. From the nature of the charge, it was calculated to injure the plaintiff. The grounds upon which the new trial was granted do not appear. We have therefore carefully reviewed the grounds upon which the motion was based, as shown in the statement, and have come to the conclusion that there is nothing in any of them which would justify the order for a new trial.

The verdict was for \$300. There is clearly nothing in the amount of this verdict which can shock the moral sense of any one on the ground that it is excessive.

Nor was there anything improper in allowing plaintiff to explain why he refused to join the Butchers' Protective Union, even admitting that it was immaterial to the issue. It was claimed that one object of the union was to prevent the sale of unsound pork by Chinese, and a prejudice would probably have existed against plaintiff at the start, unless he could explain that he had other reasons than a desire to deal in such commodities. The defendants could not have been injured by it. Nor do we think there was error in refusing to allow Raabe, one of the defendants, when testifying in his own behalf, to answer the question: "Did you have any malice against the plaintiff at the time of the publication of the alleged libel?" The publication of matter false and libelous is, as matter of law, malicious. If the publication be admitted, as in this case, there is no way to rebut the implication of malice, except by proof of the truth of the charge. The defendant may, however, show, if he can, in mitigation, that he was not actuated by ill-will or a feeling of personal spite, and his own testimony directly to the point is competent evidence, tending to establish that fact. But no amount of testimony of this character can disprove that malice which constitutes a necessary ingredient of the cause of action. It is true the question is capable of being understood as referring only to ill will, which is sometimes called actual malice; but on its face it was an attempt to disprove malice, and thereby show that plaintiff had no cause of action, and had it been allowed defendants would perhaps have claimed, in submitting the case to the jury, that this necessary ingredient of plaintiff's cause of action did not exist. It was not an abuse of discretion on the part of the trial court to sustain the objection to the question in this form, thereby compelling defendants, if they desired to pursue the matter further, to propound such questions as could not have been misunderstood.

The affidavits which, it is claimed, show newly-discovered evidence, do not justify the order granting a new trial. (1) No diligence is shown. It is true this is a matter specially within the discretion of the trial court, but not to the extent of requiring no showing as to diligence, and here there was practically none. (2) The counter-affidavit discloses facts which show conclusively that defendants were

fully aware of the facts of the newly-discovered evidence long before the trial; their own affidavits do not negative this. (3) The newly-discovered evidence is entirely cumulative. In fact the gist of it all was admitted by plaintiff in his own testimony. It only goes further in showing in detail disgusting practices of the Chinese, calculated simply to intensify class prejudices already existing, and to extend the odium to plaintiff. (4) The proposed new evidence does not meet the exigencies of the case. In fact, unless it goes further, and shows that the Chinese sold no sound pork, it would be irrelevant and immaterial. The other alleged errors there is plainly nothing in, and there was no conflict of evidence upon any material point. We think the order granting a new trial an abuse of discretion, and advise its reversal.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order granting a new trial is reversed.

90 Cal. 77

In re GET YOUNG. (No. 13,301.)

(Supreme Court of California. June 30, 1891.)

APPEAL—WHEN LIES—ORDER.

No appeal lies from an order refusing to revoke a former order, which was itself appealable.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Lyman I. Mowry, (A. C. Niles, of counsel,) for appellants. A. Ruef, for respondent.

FOOTE, C. This is an appeal from an order refusing to revoke an order granting letters of guardianship of a minor. The order made by the probate court appointing the guardian, was one which it was within the jurisdiction of that tribunal to make, and it was itself appealable. Section 963, Code Civil Proc., subd. 3. Hence the appellate court will not entertain jurisdiction of the appeal now here. *Goyhinech v. Goyhinech*, 80 Cal. 409, 22 Pac. Rep. 175; *Larkin v. Larkin*, 76 Cal. 323, 18 Pac. Rep. 396; *Railroad Co. v. McGrath*, 74 Cal. 49, 15 Pac. Rep. 360; *Tripp v. Railroad Co.*, 69 Cal. 631, 11 Pac. Rep. 219. The matter does not come within the rule as to void judgments, laid down in *People v. Greene*, 74 Cal. 400, 16 Pac. Rep. 197. We therefore advise that the appeal be dismissed.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal is dismissed.

89 Cal. 599

DEARDORFF V. GUARANTY MUT. ACC. ASS'N. (No. 13,122.)

(Supreme Court of California. June 26, 1891.)

MUTUAL BENEFIT INSURANCE.

In an action on a mutual benefit certificate by which the society agrees that in case of the

member's death it will pay his wife "the amount realized from one assessment upon all the members, not exceeding the sum of \$5,000," the plaintiff cannot recover where there is no proof that any assessment was made or demanded, or what was the number of members, or what one assessment would realize.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

I. B. L. Brandt, for appellant. *Whittemore & Sears*, for respondent.

TEMPLE, C. Appeal from judgment and order denying defendant a new trial. This action is upon a life insurance policy issued by the defendant, which is a mutual insurance society upon the assessment plan. In this case the policy or certificate declares that the society accepts J. R. Deardorff "as a full-rate member of said association, subject to all the requirements and entitled to all the benefits, thereof. The principal sum, not exceeding five thousand dollars, realized upon an assessment in accordance with the by-laws, to be paid Mary E. Deardorff, (wife,) if surviving, * * * within sixty days after satisfactory proof that said member at any time," etc., "said association shall, upon the surrender of this certificate, pay the amount realized from one said assessment upon all the members, at the time of the accident, of said association, to the member above named, not, however, exceeding the sum of five thousand dollars," etc. The complaint contains no allegation of an assessment, or of a demand that an assessment be made, and a refusal by the corporation, nor any averment as to the number of members, or what an assessment would amount to under the by-laws referred to, nor are there any data given in any form by which the court can arrive at such conclusion, nor does it appear that an assessment has been collected, or that the corporation has any money. There is, in fact, a total omission of any allegation upon the subject. The complaint is not, however, defective in this respect, for it avers an absolute insurance in the sum of \$5,000. The true nature of the policy is set up in the answer, in which the certificate or policy of insurance is set out at large; and its genuineness is admitted. Nor was there any attempt at the trial to prove an assessment or a demand that one be made, or a refusal, or the number of members, or to what one assessment would amount. It is manifest that the judgment for the plaintiff must be reversed. The general rules of pleading apply to cases of this character; and the plaintiff, as in other cases, must show by proper averment his true cause of action, and the relief to which he is entitled. Many other points are raised by the appellant, but there is no appearance here on the part of respondent, and the questions may not arise upon another trial. We advise that the judgment and order be reversed, with leave to plaintiff to amend her complaint, if she shall be so advised.

We concur: FITZGERALD, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, with leave to plaintiff to amend her complaint, if she shall be so advised.

(90 Cal. 10)

NILES v. EDWARDS. (No. 18,050.)¹

(Supreme Court of California. June 29, 1891.)

CONVERSION BY PLEDGER—STOCK.

Plaintiff, being the owner of a stock certificate indorsed in blank, lent it to A. for the purpose of being pledged as security for the purchase of other stock. A. pledged it for that purpose with defendant, to whom he was already indebted; and defendant, after buying the other stock for A., and selling it again at a profit, sold plaintiff's stock to satisfy A.'s previous debt, after being notified that plaintiff owned the stock. Held, that defendant was guilty of converting the stock.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

O'Brien, Morrison & Daingerfield, for appellant. *Hall & Rodgers*, for respondent.

TEMPLE, C. Appeal from the judgment on the judgment roll. Judgment, on the findings, was for defendant. The plaintiff, who takes this appeal, claims that the findings do not support the judgment, but, on the contrary, show that plaintiff was entitled to recover. It appears from them that defendant was a stockbroker and a member of the stock and exchange board. Plaintiff was the owner of 100 shares of stock in the Ophir Mining Company. This certificate, like many others, as the practice was, had been issued to a trustee, who had indorsed it in blank, in which form it passed from hand to hand without further assignment. Plaintiff delivered this certificate to one Armstrong, to enable him to pledge it as security for the purchase of 50 shares of stock in the Gould & Curry Mining Company. For that purpose Armstrong deposited the certificate with defendant, who accordingly purchased the Gould & Curry stock, and afterwards sold it on Armstrong's account at a profit. Armstrong was indebted to defendant at the time this stock was deposited with him, on a previous account. Defendant had no notice at that time of plaintiff's ownership, but was notified of such fact about two months afterwards. It is not specifically found that the stock was pledged for the pre-existing debt, but only that Armstrong was indebted to defendant, and deposited the certificate, and thereupon he purchased the Gould & Curry stock. The Gould & Curry stock was sold March 1, 1886, and November 17, 1886, plaintiff demanded from defendant the stock, and offered to pay any proper charges against it, which demand defendant refused to comply with, and also notified plaintiff that a tender was unnecessary, as he would not deliver the stock. The findings are somewhat defective here, but we take it for granted that, in offering to pay all proper charges, plaintiff did not propose to pay the indebtedness of Armstrong, but simply assessments and outlays made by defend-

¹New trial ordered on rehearing, 37 Pac. Rep. 296.

ant upon the stock. The sale of the Gould & Curry stock more than repaid the new loan. Defendant held the stock until July, 1887, when he sold it, applying the proceeds to the indebtedness of Armstrong to himself. The findings show the market value of the stock and the amount of damages to which plaintiff is entitled, if it be held that there was a conversion by the defendant; and upon that subject we entertain no doubt. The plaintiff is clearly entitled to judgment. The apparent ownership of Armstrong is not shown to have resulted in injury to the defendant. On the contrary, he is better off by the transaction than he would have been by the amount of the profit realized on the Gould & Curry stock. There is no claim that he was induced to forego any remedy he may have had against Armstrong by reason of the pledge, or that he was any worse off in any way with reference to such indebtedness. After the moneys were repaid which were advanced on the stock, we think defendant did not hold the pledge in good faith and for value, in the sense of section 2991, Civil Code. There is a finding that defendant did not at any time convert the stock. This is evidently a conclusion of the court from the special facts found. If there had been no other finding, this would probably be regarded as the ultimate fact, but in the connection in which it is here found it is simply a conclusion of law, and must be so held. We think the judgment should be reversed, and the court below directed to enter judgment for plaintiff on the findings.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to enter judgment for the plaintiff on the findings.

(95 Cal. 160)

TYLER V. MAYRE *et al.* (No. 13,043.)¹
(Supreme Court of California. June 30, 1891.)

TRUST—ATTORNEYS—LIMITATIONS—WITNESSES.

1. The owner of a note, who had brought suit on it against the maker, assigned the note, together with all the avails of the suit, to a trustee for the purpose of securing certain persons who had become sureties for him upon a bond, "first deducting and paying out of any money that may be realized all charges for costs and attorney's fees." *Held*, that such assignment created a trust in favor of the assignor's attorney for his fees and disbursements for costs in the suit on the note.

2. Upon the death of such trustee the trust devolves upon his administrator, whose liability to the attorney may be enforced by suit.

3. The attorney's right of action to enforce such trust is not within the purview of Code Civil Proc. Cal. § 1493, which limits the time for presenting against the estates of decedents claims arising upon contract.

4. In an action against the administrator of a trustee and the administrator of the trustor to enforce the execution of the trust by the former, Code Civil Proc. Cal. § 1880, which makes parties in actions upon claims against decedents incompetent as witnesses as against the representatives of the decedent, does not render the plaintiff an incompetent witness to prove the contract between himself and the trustor, by virtue of which he became the *cestui que trust*.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; NOBLE HAMILTON, Judge.

Whittemore & Sears, for appellant. *W. H. H. Hart, Aylett R. Cotton, J. B. Reinstele*, and *A. J. Le Breton*, for respondents.

VANCLIEF, C. On November 24, 1873, one Jane E. Chase, being the owner and holder of a promissory note made by Briggs, Evoy, and Cobb, employed plaintiff, as her attorney at law, to bring suit on said note, which he did, and on the 3d of December, 1873, recovered final judgment thereon against the estate of Evoy (then deceased) for \$6,175. On May 21, 1878, Jane E. Chase executed to the defendant William Irvine the following instrument: "Know all men by these presents, that Jane E. Chase, of Martinez, Contra Costa county, California, party of the first part, for the consideration and purpose herein-after set forth, hath sold, assigned, transferred, and set over, and doth hereby sell, assign, transfer, and set over, unto William Irvine, of the city and county of San Francisco and state aforesaid, party of the second part, all and singular the following claims, indebtedness, and obligations, to-wit: The certain promissory note, in writing, made and executed to me by M. G. Cobbs, G. G. Briggs, and John Evoy, for the principal sum of twenty-five hundred dollars, gold coin, with interest at the rate of one and one-half per cent. per month, payable in thirty days from the date thereof, and dated August 21, 1871, now in suit in the third district court in and for the county of Alameda, wherein the said party of the first part is plaintiff, and Mary J. Evoy, administratrix of the estate of John Evoy, deceased, and others are defendants, together with all the avails of said action that may be paid, collected, or realized on or on account of the said note, and in the said action, and also the following insurance claim of the party of the first part, viz: Claim against the Hartford Fire Insurance Co. for twenty-five hundred dollars, claim against the Lamar Insurance Co. for nineteen hundred and fifty dollars, and claim against the Rhode Island Association of nineteen hundred and fifty dollars, all which insurance claims are now in suit in the district court of the 10th judicial district in and for the city and county of San Francisco; together with all and singular the avails and moneys that may be paid, collected, recovered, or received for or on account of said several claims: provided, always, that this assignment, sale, and transfer of said several claims and demands is made by said party of the first part to said party of the second part in trust, and to and for the following uses, intents, and purposes, to-wit: To secure Geo. W. Tyler and H. K. W. Clark, their, and each of their, heirs, executors, and administrators for their respective obligations and liabilities incurred by them, and either of them, as the bondsmen of the party of the first part as administratrix of the estate of M. S. Chase, deceased, made and delivered on her appointment as such administratrix, and also to secure any other substitutes of said bondsmen, or either of

¹ Rehearing granted.

them, to be hereinafter substituted as her bondsmen in the matter of her administration of said estate, first deducting and paying out of any moneys that may be realized out of said claims all charges for costs and attorney's fees and charges, to provide for the payment of which this assignment and transfer is also made; hereby constituting and appointing the said party of the second part my true and lawful attorney, in my place and stead, to demand, collect, receive, and recover the said several demands, indebtedness, and claims, with full power and authority to compound for and settle and give acquittances for the same, as fully, in all respects, as I could do in my own proper person, but for this assignment and power." On August 28, 1881, Jane E. Chase died, and in July, 1882, defendant Clara J. Slater was appointed administratrix of her estate; the said Clara and the defendant Rhodes being her only heirs at law. On November 12, 1882, William Irvine died, and on December 4, 1882, the defendant Mayre was appointed administrator of his estate.

The purpose of this action is to recover from the estate of Irvine, through the administrator thereof, a portion of the money realized, or to be realized, from the judgment against Evoy, sufficient to pay plaintiff's fee (alleged to be \$1,500) as attorney for Chase in the action in which that judgment was recovered; and also \$70, alleged to have been expended by plaintiff as costs in the prosecution of that action; the plaintiff contending that the assignment of the note by Chase to Irvine was in trust to pay from the money realized from the note, among other things, first, the attorney's fees and charges due plaintiff for his services in said action on the note, which action was still pending (on appeal) at the time of the assignment of the note. Before the commencement of this action, by agreement of the parties interested, \$1,000 of the money realized from the judgment on the note were deposited in the Bank of Martinez (the corporation defendant) to abide the judgment in this action. The prayer of the complaint is (1) that the court appoint some competent person to carry out said trust; (2) that it be adjudged "that there is due plaintiff from * * * the estate of Jane E. Chase, deceased, the sum of \$1,570, payable out of the amount due on said judgment; (3) that the Bank of Martinez pay to said trustee the said sum of \$1,000; and (4) that said trustee proceed to collect from the administratrix of John Evoy the amount due on said judgment, and pay the plaintiff out of the moneys so collected the sum of \$1,570;" and for such other relief, etc. The separate answer of Mayre, administrator of Irvine, admits all the allegations of the complaint, and alleges that he has no interest in the subject-matter of this suit, because, he says, the estate of Evoy, with the consent of the administratrix of the estate of Chase, has paid to the estate of Irvine, "all the money due to said Irvine's estate," and therefore he "consents to any judgment herein that to the court may seem meet. The same is not to be taken against

the said Mayre for any relief of costs." The separate answer of Shaw, administrator of the estate of Evoy, denies all the allegations of the complaint, and avers that, in obedience to an order of court made in the matter of the estate of Evoy, he paid upon the claim of the estate of Jane E. Chase the sum of \$8,765. The joint answer of Slater, administratrix of Chase, and the Bank of Martinez denies that the assignment of Chase to Irvine was made in trust to secure payment of plaintiff's fees as attorney for Chase or for plaintiff's benefit, except as indemnity to him for having become a surety on the bond of Chase as administratrix of the estate of M. S. Chase, deceased; denies that the services of plaintiff were reasonably worth \$1,500, or any sum whatever; denies the necessity for the appointment of any trustee to succeed Irvine; avers, in proper form, that the claim of plaintiff set up in his complaint, and upon which the action is based, is barred by section 1493 of the Code of Civil Procedure, and also by section 1500 of the same Code. The court found that the plaintiff performed the services charged for in his complaint under a special agreement with Jane E. Chase to the effect that she was to pay him therefor only \$300, which was to be paid only "out of any moneys that might be collected upon final judgment recovered by plaintiff in that suit," viz., the suit in which the services were rendered; but also found that plaintiff's causes of action against the estate of Jane E. Chase were barred by section 1493 of the Code of Civil Procedure. As matter of law, the court construed the written assignment of the note by Chase to Irvine as not being in trust for plaintiff's benefit, and as not giving him any lien upon or interest in that note or the money to be collected in the suit thereon, as security for his fees or expenditures in the prosecution of such suit, or otherwise. As a necessary result of these findings, the court gave judgment for the defendants; from which, and an order denying his motion for a new trial, the plaintiff appeals.

1. As contended by appellant, I think the court misconstrued the assignment from Chase to Irvine. That the assignment was in trust for certain purposes, and accepted as such by Irvine, there should be no doubt, (Civil Code, §§ 2221 and 2222,) though Irvine, the trustee, was also one of the beneficiaries, (Perry, Trusts, §§ 59, 297.) That one of the purposes of the trust was to pay the plaintiff and other attorneys of Chase their proper fees and charges for services and expenditures in the actions in which they were employed is expressed with sufficient certainty in the instrument itself. Before applying the money to be realized from the note and other claims assigned to any other purpose of the trust, the trustee is directed to deduct and pay "out of any moneys that may be realized out of said claims all charges for costs and attorney's fees and charges, to provide for the payment of which this assignment and transfer is also made." It appears that suits upon all the demands assigned were pending at the time of the assignment, and

that plaintiff was the attorney for the assignor in the suit upon the note of Evoy, and rendered the services alleged by him, and was entitled to proper fees therefor, though it is found that a special agreement between him and Chase limited his fees to \$300, to be paid only from the money recovered on the note.

2. The trust in this case devolved upon the administrator of Irvine, (Perry, Trusts, §§ 143, 144,) and the facts stated in the complaint constitute an equitable cause of action directly against Irvine's administrator. "The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission." Civil Code, § 2251; *Bettis v. Townsend*, 61 Cal. 333. And, even though the relation between Chase and Irvine should be held not to be that of trustor and trustee, the agreement between Chase and Irvine, upon a sufficient executed consideration, that the latter should pay plaintiff for his services to Chase, may be enforced by plaintiff directly against Irvine in an action at law. Civil Code, § 1559; *McLaren v. Hutchinson*, 22 Cal. 188; *Pom. Rem.* § 139; *Whart. Cont.* § 785 et seq., and notes. To plaintiff's alleged cause of action against Irvine's administrator, section 1493¹ of the Code of Civil Procedure has no proper application; nor was it or any other statute of limitation pleaded by the administrator of Irvine, whose answer admits all the allegations of the complaint, and consents to any judgment deemed proper by the court, except a judgment against him for costs; and therefore plaintiff's cause of action against the administrator of Irvine is not affected by the finding that his cause of action against the administratrix of Chase was barred by section 1493 of the Code of Civil Procedure. No question is raised as to the propriety of having joined the administratrix of Chase as a party defendant. Perhaps she was properly joined for the reason that she may be entitled to a resulting interest in the trust fund after all the purposes of the trust shall be satisfied; and, in view of one branch of the prayer of the complaint, it may have been prudent and proper for her to plead section 1493 of the Code of Civil Procedure as a bar to any relief sought against the estate of Chase. But the relief to which plaintiff is entitled against any one of the defendants is not limited by his prayer for relief against other defendants. He is entitled to any relief justified by the facts alleged in his complaint, if such facts are proved or admitted.

3. J. B. Reinstein was called as a witness by the defendants to prove the contents of a lost paper writing relating to the compensation plaintiff was to receive for his services in the case of *Chase v. Evoy* and others, and testified as follows: "That paper I saw was an agreement between Jane E. Chase and Geo. W. Tyler, signed by both, in which the sum of \$250 or \$300 was mentioned, to be paid to Ty-

ler out of the proceeds of any judgment he might secure in that case for his services in that suit, and in connection with the promissory note on which that suit was founded. I cannot remember the whole or exact contents of the paper, but that much I do remember." "The plaintiff, in rebuttal, offered to prove, by his own oath, that the paper spoken of by witness Reinstein was an agreement between him and Jane E. Chase, providing for the payment for his services in preparing and presenting the claim against the estate of John Evoy, and in bringing said suit, and in procuring a judgment in the district court; and, when the note and suit was assigned by Jane E. Chase to Wm. Irvine in trust, plaintiff went to Jane E. Chase's room, at her request, and there met Mr. Wm. Irvine, and the whole matter was talked over between the three; that plaintiff was told of the assignment to Irvine in trust, and that he was to look to him thereafter for his pay for his services and expenses in said suit, which he agreed to do; that the first contract was talked about, and it was conceded by J. E. Chase, William Irvine, and himself that the agreement provided only for the preparation and presentation of the claim against the estate of John Evoy, deceased, and the bringing of suit and the trial of the case in the district court; that it was then and there agreed between plaintiff, Jane E. Chase, and William Irvine that plaintiff should continue to prosecute the case as attorney for plaintiff, and, if he finally succeeded in getting a judgment, he should be paid out of the proceeds of said judgment, when collected, a reasonable fee." This proffered testimony was objected to "as incompetent, under section 1880, Code Civil Proc.,² because it is not competent for plaintiff to testify, as against the administratrix, to any matters of fact occurring before the death of Jane E. Chase." The court sustained the objection, and excluded the testimony. Conceding that this testimony would have been incompetent to prove a cause of action against the administratrix of Chase, I think it was admissible in this action to establish and enforce a trust against the administrator of Irvine, even though it incidentally involved proof of a contract between plaintiff and Chase, made during the life of the latter. *Myers v. Reinstein*, 67 Cal. 89, 7 Pac. Rep. 192; *Knight v. Russ*, 77 Cal. 410, 19 Pac. Rep. 698; *Perry, Trusts*, § 86.

4. As already remarked, the trust devolved upon the administrator of Irvine; but, even if the trusteeship had been vacant, there would have been no necessity for the appointment of a successor to Irvine, as it appears that all parties controlling and interested in the trust fund are before the court. *Perry, Trusts*, § 873. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FITZGERALD, C.

¹ Code Civil Proc. Cal. § 1493, limits the time for presenting claims against estates where such claims arise upon contract.

² Code Civil Proc. Cal. § 1880, declares that parties are incompetent as witnesses, as against an executor or administrator, in an action upon a claim against the decedent.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

CRAFT v. DALLES CITY.

(*Supreme Court of Oregon. June 24, 1891.*)

BILL OF EXCEPTIONS—CONTENTS—OBJECTIONS TO EVIDENCE.

1. When a party excepts to the decision of a court excluding a written document, in order to avail himself of his exception, he ought to set out a copy of the instrument in the bill of exceptions, and unless he do so, when the same is essential to a proper understanding of the question involved, he can take nothing by his exception assigned as error.

2. When a question is asked which is objected to, and the objection is sustained, and an exception is taken, in order to get error in the record which will be available in this court, it should be made to appear in the bill of exceptions what it was proposed to prove by the answer to the question.

(*Syllabus by the Court.*)

Appeal from circuit court, Wasco county; JAMES A. FEE, Judge.

J. L. Story, for appellant. Mays, Huntington & Wilson, for respondent.

LORD, J. This was an action to recover money claimed to be due on an alleged written contract to survey and establish a base of grades and map of the city, for which the defendant was to pay the plaintiff at the rate of \$45 per mile for such survey, and \$5 apiece for each monument stone established, etc. The complaint alleges that the plaintiff fully performed the work and completed it at the time specified according to the terms of such contract, and the particular sum it amounted to and the amount paid upon it, and the amount due thereon, etc. The defendant denied each of the material allegations, including the making of said contract, and set up separate defenses, which it is not necessary to state or consider upon this record. A motion for nonsuit was granted, and from the judgment rendered therein this appeal is brought. The first objection made by the plaintiff is to the ruling of the court in not admitting as evidence a certain written instrument, which was claimed to be the contract between the plaintiff and defendant, under which the work was performed, and for which the present action was brought. The bill of exception discloses that the plaintiff, as a witness, testified that he was a surveyor and civil engineer; that he had a contract with the defendant, and that it was in writing; and, at the request of his counsel, produced a written instrument, which he said had his own signature and that of the mayor attached. This paper was then offered in evidence, when the defendant's counsel objected to its introduction for the several reasons (1) that it does not appear to be an original writing, and does not purport to be executed in duplicate; (2) that the city council of Dalles City has no power to authorize any work of the kind referred to therein, or to make a writing of that kind; and (3) that such writing could, in no event, become competent evidence, unless plaintiff should also

offer proof that it was authorized by ordinance, and by order of the council signed by the mayor. Plaintiff's counsel then stated that he would not be able to offer as evidence any ordinance authorizing, or in any way directing, the execution of the writing offered; and thereupon counsel for the defendant renewed his objections, when counsel for the plaintiff stated that he would follow the proposed proof, if admitted, by introducing a resolution of the council of Dalles City, passed some time after the date of the instrument, and approved by the same, but that this was after the alleged work was done. The defendant then renewed each of its objections to the admission of the instrument, and the court sustained the objections, which was excepted to by the plaintiff. It will be observed by this statement of the record that the bill of exceptions in no wise discloses what this instrument was, or purported to be, as to its provisions, so that the court is able to say there was error in the refusal of its admission. It is not possible for us to understand the point wherein it is supposed to have erred without the document, or written contract, to which the exceptions were reserved, is set forth in the bill of exceptions, or sufficiently so to enable the court to understand the matter on which the decision to be reviewed is founded. When a party excepts to the decision of a court in excluding a written document, in order to avail himself of his exception, he ought to set out a copy of the instrument in the bill of exceptions; and unless he do so, when the same is essential to a proper understanding of the question involved, he can take nothing by his exception assigned as error. The rule laid down is that documents or other writings, an understanding of which is essential to the appellate court in coming to a decision on the errors excepted to, should be annexed to the bill of exceptions, or incorporated in the body of it, or else so particularly described as to render their identity conclusive. See 2 Amer. & Eng. Enc. Law, p. 220, tit. "Bill of Exceptions," where the authorities to this point, and further as to what a bill of exceptions should contain, are fully collected and stated. Unless, therefore, such writings, or other matter, are put into the bill of exceptions, and authenticated as required by law, they cannot be reviewed by the appellate court. It results that the first assignment of error is not well taken.

The next exception taken is to the refusal of the court to allow the plaintiff to answer the question asked him. When a question is asked which is objected to, and the objection is sustained, and an exception is reserved, in order to get error in the record which will be available in this court, it should be made to appear in the bill of exceptions what it was proposed to prove by the answer to this question, which must appear to be something material, and the rejection of which as evidence would be prejudicial to the party excepting. This has been expressly ruled by this court. In *Kelley v. Highfield*, 15 Or. 277, 14 Pac. Rep. 744, it was held that a question to a witness, and the ruling of the court refusing

to allow it to be answered, and the exception, present no question for review; the bill of exceptions must disclose the particular facts sought to be elicited. It was further suggested by way of argument that, even if the exception were available, there would be no error, as the plaintiff cannot recover upon a *quantum meruit* when he declares upon a written contract. It is not quite apparent, nor is it necessary for us to decide upon the merits of that phase of the question, except to suggest, as the case may be begun anew, that, as we glean the case from the record, there has been alleged an express contract in writing as to both the nature of the services and the price to be paid for them; and it would seem to result necessarily that the plaintiff cannot recover as upon a *quantum meruit*, but that in such case the action must be on the express contract. In *Marsh v. Holbrook*, 8 Abb. Dec. 176, it was held that when an action was on the express contract the plaintiff is not entitled to prove that the value of the services was less, although the complaint contain allegations appropriate to an action on a *quantum meruit*. But for the reasons already suggested the judgment for nonsuit must be affirmed.

MARX V. BLOCH *et al.*

(*Supreme Court of Oregon. June 24, 1891.*)

SALE OF DECEDENT'S LAND—MORTGAGE BY HEIR—RIGHTS OF MORTGAGEE.

Where J. W. D., who was the administrator of A. D., deceased, and also an heir at law of said A. D., procured the entire interest of the other heirs at law of said A. D. to be vested in himself, and then mortgaged the land to secure the payment of his own debt, with covenants of general warranty, and subsequently, as such administrator, takes such proceedings in the county court as result in a sale of all of said real property to pay the debts of A. D., deceased, held that, as against J. W. D., the surplus arising from the sale of said premises so mortgaged, after paying the debts of A. D., deceased, was subject to the lien created by the mortgage. Held, further, that J. W. D., by the covenants in his mortgage deed, had estopped himself from claiming either the land or its proceeds, as against the plaintiff, as long as said mortgage remained unsatisfied.

(*Syllabus by the Court.*)

Appeal from circuit court, Union county; MORTON D. CLIFFORD, Judge.

The object of this suit is the foreclosure of a lien alleged to exist upon a certain fund now in the hands of the defendant M. S. Bloch as administrator of the estate of A. Dray, deceased. The facts upon which plaintiff claims said lien are about as follows: That about the 19th day of May, 1887, one A. Dray, now deceased, owned all the real property described in the complaint. That upon his demise the defendant J. W. Dray was duly appointed his administrator. That thereafter said J. W. Dray secured deeds to himself for said real property from all the heirs at law of A. Dray, deceased. That thereafter, while said administration was pending and unsettled, and on the 15th day of June, 1888, the plaintiff loaned said J. W. Dray the sum of \$1,500, and agreed to pay interest thereon at the rate of 10 per cent. per annum. That afterwards, on said

day, said J. W. Dray executed to the plaintiff a mortgage on all of said property to secure said sum of money, and any advances which plaintiff might thereafter make to said J. W. Dray. That said mortgage was in the form of an absolute deed, with general covenants of warranty. That afterwards, about April 27, 1889, plaintiff made a further advance to said J. W. Dray on said security of \$125; all of which sums of money were due and payable on demand. That thereafter such proceedings were duly had in the county court of Union county, Or., on the petition of J. W. Dray, as administrator of A. Dray, deceased, that an order was duly made for the sale of all of said real property for the payment of the debts of A. Dray, deceased, and that upon such sale the sum of \$6,000 was realized. That afterwards said J. W. Dray was duly removed from said trust for cause, and the defendant M. S. Bloch was appointed administrator *de bonis non* of said A. Dray, deceased, and that said \$6,000 came into the hands of said M. S. Bloch as such administrator. It is also alleged that the indebtedness of A. Dray, deceased, was \$1,200, which has been paid from the proceeds of such sale, and that the expense of closing and settling up said estate will not exceed \$400, and that the balance of said fund remains in the hands of said administrator, except about \$400 which he paid to said J. W. Dray as heir at law of A. Dray, deceased, and as owner of said real estate, and said administrator threatens to pay all of the proceeds of said sale over to said J. W. Dray. The defendants demurred to the complaint, which was sustained, and the suit dismissed, from which decree this appeal is taken.

C. H. Finn and John R. Crites, for appellant. T. H. Crawford, for respondents.

STRAHAN, C. J., (after stating the facts as above.) When the defendant J. W. Dray mortgaged the real property described in the complaint to the plaintiff to secure the payment of money, as against himself and all persons claiming under him by title subsequent, he set apart and appropriated his entire interest in said property to the payment of said debt. It is true that said property stood charged with a paramount claim, namely, the debts of A. Dray, deceased; but, as soon as they are paid, the rights created by the mortgage take precedence over the right of J. W. Dray, either as heir or purchaser of the interests of his brothers. And inasmuch as the fund in court was realized from the sale of the mortgaged premises, as against J. W. Dray, the mortgagor, the same is subject to the lien created by such mortgage. In other words, as against the mortgagor, this fund is treated in equity as realty. The principle that we think applicable to these facts is stated in note 1 to section 1167, Pom. Eq. Jur. thus: "Where land has been taken not by voluntary negotiation, but by the compulsory proceedings authorized by statute, and the money paid into court, it continues to be real estate until it is taken out by some person having a right to elect to treat it as money; that is, by some per-

son *sui juris* who is an unfettered owner. If the owner is an infant or a lunatic, or if the land is subject to a settlement, the money necessarily retains its character as real estate." But, however this may be, the defendant J. W. Dray, who is the only person beneficially interested in the proceeds of such sale besides the plaintiff, is estopped by the covenants in his deed from claiming either the land or its proceeds as long as the plaintiff's claim remains unsatisfied. He can have no beneficial interest in the land, or in its proceeds, as long as his debt remains unpaid.

It was argued that the circuit court had no jurisdiction to entertain this suit; and it is on that point that the trial court, doubtless, sustained the demurrer. But we think the objection not well taken. We concede to the county court the fullest jurisdiction over the subject-matter pending before it. It is to order the payment of all debts due by deceased, the settlement of the accounts of the administrator, and the distribution of the estate of said A. Dray; but the plaintiff's equity rests upon the acts and transactions of J. W. Dray, with him, and against J. W. Dray, only, except that the administrator is a party as a mere trustee, holding the disputed fund. The decree of the court below will be reversed, and the cause remanded to the court below for further proceedings not inconsistent with this opinion.

STATE v. HORTON.

(Supreme Court of Oregon. June 24, 1891.)

INTOXICATING LIQUORS—ILLEGAL SALE—REVOKING LICENSE.

Under Hill's Code Or. § 1913, providing that, if any person shall sell any intoxicating liquor to any minor in this state, he shall be punished by a fine of not less than \$50, and shall forfeit any license he may have to sell such liquor in less quantities than one gallon, the city license of one who is convicted of selling liquor to a minor therein must be revoked, although under its charter the city has exclusive authority "to license, tax, regulate, restrain, suppress, and prohibit bar-rooms, groceries, and tipping-houses," and also power "to impose forfeitures."

Appeal from circuit court, Umatilla county; MORTON D. CLIFFORD, Judge.

E. J. Horton was indicted for selling intoxicating liquor to a minor. He pleaded guilty, and was fined, but the court refused to revoke his license. The state appeals. Reversed.

Chas. F. Hyde, Dist. Atty., for the State.
Wm. M. Ramsey, for respondent.

BEAN, J. The defendant was indicted, and, on his plea of guilty, convicted of the crime of selling intoxicating liquor within the city of Pendleton to a minor, under section 1913, Hill's Code, and sentenced to pay a fine of \$75. From the record it appears that at the time of the commission of the crime, and of his conviction, the defendant had a license issued by the city of Pendleton to sell spirituous, malt, and vinous liquors by retail, in less quantities than one gallon, which the court refused to declare forfeited, and hence this appeal.

The indictment in this case was under section 1913, Hill's Code, which provides:

"If any person shall sell * * * any intoxicating liquor to any minor in this state, * * * such person shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars, * * * and shall forfeit any license such person may have to sell spirituous or intoxicating liquors in less quantities than one gallon." The contention of respondent is that the provisions of the above section, providing for the forfeiture of licenses to sell spirituous liquors in less quantities than one gallon, does not apply to licenses granted by the city of Pendleton. By its charter the city has power "to license, tax, regulate, restrain, suppress, and prohibit bar-rooms, groceries, and tipping-houses," and also power "to impose forfeitures." Laws 1889, pp. 218, 219. The argument is that these provisions confer upon the city, without limitation, the power to regulate, restrain, suppress, or prohibit the sale of intoxicants; that it has power to provide when, where, and to whom, and under what circumstances or conditions, intoxicating liquors can be sold, or prohibit such sales altogether; that it can permit the sale of liquors in less quantities than one gallon, without license, and can prescribe the conditions upon which licenses granted by it shall be forfeited; and that these powers are exclusively vested in the city. The authority to license, regulate, and control the sale and traffic in spirituous and intoxicating liquors is vested in the state as a part of its police system, and is exercised through the legislature. It is competent for that body, in its discretion, to annex any conditions to the granting of licenses which it may deem proper, and to prescribe causes of forfeiture. The granting of such licenses may be regulated by a general law, or it is competent for the legislature to delegate to municipal corporations the exclusive power to grant licenses for the sale of intoxicating liquors within their limits; but such licenses, when issued, either under the general law or by the municipal corporation, are subject to be forfeited for any of the causes prescribed by the legislature, unless it is otherwise clearly provided in the municipal charter or by some statute of the state. They have neither the qualities of a contract nor of property, but are mere temporary permits to do what otherwise would be an offense against either a general law or some municipal ordinance. They are issued in exercise of the police powers of the state, and are subject to the control of the legislature, which may, by appropriate legislation, modify, revoke, or continue them, as it may deem proper. Tied. Llm. 287; Board of Excise v. Barrie, 34 N. Y. 657; People v. Meyers, 95 N. Y. 223; Hurber v. Baugh, 43 Iowa, 514. The city of Pendleton, under its charter and the laws of the state, has the exclusive authority to grant licenses for the sale of intoxicating liquors within its limits. The state has delegated to it the power to prescribe the terms upon which such licenses shall issue, but, when granted, they are held subject to be forfeited for the violation of the law prohibiting the sale to minors.

Such a license is a permission, issued by authority of the legislature, to sell intoxicating liquors, on condition that the licensee shall not violate the law by selling to minors, and, if he does, and violates that condition, it operates under the statute to revoke or forfeit the license. This is the effect of the statute, when in judicial proceedings the party charged with the crime of selling liquors to a minor is convicted, and the fact is judicially established that the terms or conditions on which the license was permitted or allowed have been violated. That the provisions of section 1913 operate within the limits of municipal corporations, and upon their inhabitants, the same as elsewhere, has already been held by this court. *State v. Dupuis*, 18 Or. 372, 23 Pac. Rep. 255. It must necessarily follow that the penalty provided by this section for a violation of its provisions is also applicable to a crime committed within the limits of a municipality, unless otherwise provided by law. It follows, therefore, that the cause must be remanded to the court below, with directions to enter an order declaring the license of defendant forfeited.

HAHN V. BAKER LODGE No. 47, A. F. & A. M.

(*Supreme Court of Oregon. June 24, 1891.*)

GRANT OF ROOM IN BUILDING—DESTRUCTION BY FIRE—EXTINGUISHMENT OF EASEMENT.

1. Grants of rooms or apartments in a building, like leases of the same, must be construed according to the intention of the parties, and with reference to the subject-matter upon which they operate.

2. Where the language of the grant does not purport to convey an estate or interest in the land or building, or any portion of it, but only a certain room located in such building, namely, "the middle room or hall of the upper story," carefully distinguishing by its provisions the room granted from other rooms, and contains no stipulation as to rebuilding in case of fire or other casualty, and such building is destroyed by fire, and the identity and existence of the room as such were extinguished, there was nothing remaining upon which the conveyance could operate, and the rights of the defendant terminated.

3. If an easement for a particular purpose is granted, when the purpose no longer exists there is an end of the easement.

(*Syllabus by the Court.*)

Appeal from circuit court, Baker county, JAMES A. FEE, Judge.

Williams & Wood, for plaintiff. *Hyde, Johns & Olmstead* and *T. C. Hyde*, for defendant.

LORD, J. This is a suit in equity, brought by the plaintiff to restrain the defendant from interfering with certain alleged rights in certain premises claimed by the plaintiff. The facts out of which the question presented for our consideration arose are substantially these: The plaintiff was the owner of a certain lot in Baker City, upon which was erected a two-story building, the middle room or hall in the upper story of which was owned by the defendant, and used as a lodge hall, and, as appurtenant thereto, he owned an easement as a means of ingress and egress. The room owned by the de-

fendant, being a middle room, had front and rear walls and two lateral walls. A fire occurring, the whole building was substantially destroyed. The roof, floors, joists, windows, and doors were totally consumed by the flames; and at the same time the rear and front walls were entirely destroyed to their foundation, and only a portion of the lateral walls remained, which were fire-cracked, shaky, and unfit for use. So far as relates to the second story, only a portion of the lateral walls were left above the second story, and as they stood they were unsafe, and practically useless for rebuilding purposes. The other walls were destroyed, so that the middle room in the second story, used as a hall by the defendants, and its foundations, were practically destroyed by the conflagration, and its identity lost or extinguished. While there is some conflict in the evidence, there is none upon which to base the contention that there was any sufficient portion of the lateral walls remaining to preserve the identity of the middle room, or that such portions as remained were sufficiently safe for rebuilding purposes as they stood. The practical deduction from the evidence, considered as a whole, leaves no doubt that the middle room in the upper story, owned by the defendant, was wholly destroyed, and that the building itself was substantially destroyed. Upon this state of facts, the inquiry is, had the defendant the right, which it undertook to exercise, and which this suit is brought to enjoin, of rebuilding the walls for the purpose of reconstructing an upper story, and recreating a middle room, to be used as a lodge hall in the place of the one destroyed by the fire? By its conveyance the defendant had granted to it what was known and styled as the middle room of the upper story of the building, and an easement of ingress and egress. There is no provision in it, or right given to the defendant, in case of the destruction of the upper story by fire, or of the building itself, to rebuild it. It does not, in terms, grant or convey the land, and does not purport to grant or convey the building, but only the middle room or hall in the upper story, and without any stipulation as to rebuilding in case of fire. It seems to us that conveyances of this kind, like leases of apartments in buildings, must be construed according to the intention of the parties, and with reference to the subject-matter upon which they operate. As applied to a lease, the doctrine of the law is, when it is not the intention to grant any interest in the land further than is necessary for the enjoyment of the room leased, that when such room is destroyed there is nothing upon which the demise can operate, and that the lease terminates with the destruction of the thing leased. *Harrington v. Watson*, 11 Or. 143, 3 Pac. Rep. 173. The application of this doctrine is well illustrated in the case of *Stockwell v. Hunter*, 11 Metc. (Mass.) 448, in which this question was carefully considered. In that case the lessor of a three-story building leased the cellar or basement to a tenant for five years, and the other stories to other tenants; but the lease contained no

stipulation as to rebuilding in case of fire, and it was held that the destruction of the building terminated the lessee's rights in the premises. It was put upon the ground that such leases of distinct rooms or apartments do not carry any interest in the land beyond that connected with the enjoyment of the particular room; that the room was the thing leased; and that the destruction of the thing leased necessarily terminated the lessee's interest therein. The real question in all such cases, as it must be in the case at bar, is whether the intention of the parties, collected from the whole instrument, was to grant any estate in the land. The language in the conveyance precludes the idea that it was the intention to grant the building, or any portion of it, but only a certain room located in that building, ("the middle room or hall of the upper story,") which is the principal thing granted, and which is identified by description to distinguish it from other rooms.

As the conveyance does not purport, in terms, to grant any estate or interest in the land, and as the provisions of the conveyance carefully distinguish the room granted from other rooms or the building, and as it contains no stipulation to rebuild in case of fire or other casualty, there is nothing to be taken by implication to justify us in holding that any grant of an estate in the land was intended. It is not doubted that there may be a freehold interest in a part of a building. 1 Washb. Real Prop. 18. Nor do we wish to be understood as holding that the sale of an interest in a building may not be a sale of an estate or interest in the subjacent soil. What we are trying to indicate is that, by the terms of the interest, it is the middle room or hall of the upper story which was granted to the defendant, and not a part of the building; that the defendant did not acquire any right of ownership in the building, or any part of it, but in the room or space inclosed by that part of the building which was described and identified as the middle room or hall of the upper story. This it owned; and so long as it existed, and its identity was preserved, the defendant had the right to its enjoyment. But when the fire destroyed the building, and the identity of the room and its existence as such were extinguished and at an end, there was nothing remaining upon which the defendant's conveyance could operate, and its rights at once terminated. In *Thorn v. Wilson*, 110 Ind. 325, 11 N. E. Rep. 230, where a committee on behalf of the order of Freemasons had granted the right to construct a second story upon a building erected by the owner of the land, "to have and own said second story for their use perpetually," it was held that they did not acquire any proprietary interest in the freehold of which such second story became a part. In construing the instrument, the court say: "It is evident that the instrument relied on by the appellant does not convey an interest in the land;" and then adds: "For it is quite clear that, if the buildings should be totally destroyed, the rights of the appellants, and of their grantors as well, would at once

terminate." As the instrument grants the defendant no estate in the land, and contains no stipulation of the right to rebuild in case of destruction by fire or other casualty, it would seem to be plain that it was the intention of the parties, collected from their agreement and its subject-matter, that the agreement, and the relation created by it, should terminate with the destruction of the building.

The remaining question is whether the easement for the purpose of ingress and egress was extinguished by the destruction of the building. The facts show that such easement was granted for the particular purpose of affording ingress and egress to the building. Without it the principal thing (the room granted) would be practically useless. It was essential and necessary for the enjoyment of the room, and was granted on account of it. Nor is it of any use, within the purposes of the grant, without the existence of the room. In such case, the general rule, as stated by Mr. Washburn, is that, "if an easement for a particular purpose is granted, when that purpose no longer exists there is an end of the easement." Washb. Easem. pp. 654, 657. When the reason and necessity for the easement ceased, within the intent for which it was granted, as it did when the building was destroyed by fire, it would logically result there was an end of the easement. For these reasons we think there was no error upon the legal questions presented by this record, but that the damages awarded are not justified by the facts under the circumstances, and that the decree awarding them must be disallowed, but in all other things affirmed, and so it is ordered.

LOMAX et al. v BESLEY.

(Court of Appeals of Colorado. June 23, 1891.)

JUDGMENT—WANT OF SERVICE.

The judgment will be set aside where the record fails to show either issuance of a summons or publication.

Error to Park county court.

Bailey & Wilkin, for plaintiffs in error.
W. H. Nash and R. D. Thompson, for defendant in error.

RICHMOND, P. J. In January, 1883, defendant in error, Irving Besley, filed in the office of the county clerk of Park county a notice of a claim amounting to \$340.60 against plaintiffs in error, Lomax and Cowell, for work and labor done and moneys expended on the Coney lode in Mosquito mining district, property of the plaintiffs in error, and by said notice claimed alien upon the mine to the amount of his claim. July 4, 1883, he instituted an action to enforce the lien, and on the same day filed an affidavit in support of an application for service of summons by publication. Thereafter the court made the following order: "It is hereby ordered by the court that personal service cannot be had; that service be by publication in *Fairplay Flame*. Ordered July, 1883. V. G. HOLLIDAY, Judge." August 9th judgment was rendered against the plaintiffs in error for the sum of \$449.31 and costs. To

reverse this judgment this writ is prosecuted. The record fails to show the issuance of summons, nor does it appear that publication was made as required by law, no affidavit to that effect having been filed. Whether service could be obtained by publication in this class of cases we need not here decide, as the record fails to show compliance with the requirements of the Code, where service may be obtained by publication. Without service of some kind the judgment should not have been rendered, and so rendered was absolutely void. The judgment is reversed, and cause remanded.

MARKS V. ANDERSON et al., (MAYNARD, Intervenor.)

(Court of Appeals of Colorado. June 23, 1891.)

GARNISHMENT—INTERVENTION.

So far as concerns plaintiff's right to recover against the garnishee, it is immaterial whether the assignment under which the intervenor claims was upon sufficient consideration or not, where it was made by one who had acquired all defendants' interest in the fund held by the garnishee.

Appeal from district court, Chaffee county.

G. K. Hartenstein, for appellant. *C. S. Libby*, for appellees.

REED, J. The records and abstract in this case are both "defective." It appears by an allegation in the petition of the intervenor that at some time prior to the intervention of appellee appellant had obtained a judgment against Anderson & Son, but at what time and for what amount is not disclosed. An execution appears to have been issued and garnishee process served upon Bradbury. On the 3d of June, 1887, Bradbury was a contractor on the Midland Railroad. Anderson & Son were subcontractors under Bradbury, and were indebted to the firm of Wood Bros. in the sum of \$6,619, and to Maynard & Co. in the sum of \$3,000. That on that date Wood Bros., by an instrument in writing, assigned its claim and indebtedness to Maynard, (appellee.) That such claim was not purchased by Maynard, or at least no consideration passed, the object of the assignment being to transfer the claim, allowing the assignee to collect it, and pay it over to the assignor, or a due proportion of what should be collected, such payment to be applied ratably upon the entire indebtedness in the hands of Maynard, amounting to near \$10,000. On the same date, Anderson & Son, by an instrument in writing, assigned to Maynard all moneys due and to become due from Bradbury to them upon the subcontract to pay or secure the two claims in the hands of Maynard. It appears incidentally that Anderson & Son completed their contract, and that upon its completion there was a considerable sum of money in the hands of Bradbury, due by him for the work of Anderson & Son. What the amount was is nowhere shown. It also appears incidentally, in the judgment of the court only, that before the determination of this case Bradbury had paid a sum of money

into court to await the result. Whether it was all that was owing by Bradbury, or what the amount was, is not shown. The case was tried to the court without a jury, the only testimony introduced being that of the intervenor. The judgment of the court was as follows: "It is ordered that the clerk of this court pay over to the said intervenor the amount of the deposit in his hands, and it is further considered by the court that the said defendants do have and recover of and from the said plaintiff all their costs in this behalf expended, to be taxed, and have execution therefor." The only assignment of error is the following: "The court erred in rendering judgment in favor of the intervenor, because the testimony was not sufficient to entitle him to recover."

The only question is, "was the evidence sufficient to warrant the finding?" No question of fraud or collusion was made by the pleadings. It appears to have been conceded that the amounts claimed by Wood Bros. and Maynard were due, and were just debts. The main contention on the part of the appellant is that the assignment of Wood Bros. to Maynard, being only for collection,—no consideration having been paid,—did not vest the intervenor with a title, so that he was entitled to the assigned fund to the exclusion of other creditors. It is conceded that, so far as the original claim of Maynard was concerned, it was, by virtue of the assignment of Anderson & Son, entitled to priority from the fund assigned. The important question seems to have been overlooked by counsel, or made secondary. If the assignment of Anderson & Son of the entire fund for the payment of the two claims was legal and proper, there was a disposition by the assignors of the entire fund sought to be reached by the appellant, and, if that disposition was valid, it is unimportant whether the payment of the claim of Wood Bros. was direct or through the agency of the intervenor, whether there was a consideration paid by Maynard or not. In other words, if the fund in the hands of Bradbury had been properly and wholly disposed of, and nothing undisposed of remained with him, there was an end of the process of garnishment; and the arrangement between Wood Bros. and Maynard, in regard to the distribution of the fund, was one in which appellant had no concern, and the same may be said in regard to the question of whether a consideration passed for a transfer of the claim of Wood Bros. to Maynard. It was a matter resting entirely with them, which in no way affected the right of appellant to reach the fund in the hands of Bradbury. "The general rule is that the garnishee is not chargeable unless the defendant could recover of him what the plaintiff seeks to secure by garnishment." Wap. Attachm. 202; Drake, Attachm. § 453; Sickman v. Abernathy, 14 Colo. 184, 23 Pac. Rep. 447. Numerous cases might be cited, if necessary, in support of this rule. There is one notable exception to this general rule, where the garnishee is in possession of effects of the defendant under a fraudulent

lent transfer, but the principle is not involved in this case. Hence, if the assignment of Anderson & Son was such as to divest them of any interest in the fund remaining with Bradbury, and there was no money in his hands that Anderson & Son could reach by proceedings against him, there was nothing appellant could reach by garnishment. The execution of the instrument by which the assignment of Anderson & Son was made was properly proved, and it was put in evidence. All the evidence in regard to it was in support of its regularity; no attempt was made to impeach it. The court was warranted in finding that the assignors had transferred all their present and future interest in the fund, and had no claim they could assert against the garnishee; consequently, there was nothing appellant could reach by attachment and garnishment. That a debtor can prefer one creditor to the exclusion of others, where no question of *bona fides* or fraud is raised, is too well settled to need disposition. There being nothing in the record to show what the amount of the fund for distribution was, and that there was a balance remaining after the payment of the two claims, it is to be presumed that there was no surplus. The only question presented for review by the assignment of error being as to the sufficiency of the evidence to support the finding, the judgment is affirmed.

MARSH v. CRAMER.

(*Supreme Court of Colorado. June 18, 1891.*)

FRAUDULENT INTENT—EVIDENCE—INSTRUCTIONS.

1. Questions of fraudulent intent are generally questions for the jury.

2. Fraud must be proved, and is never to be presumed; but a resort to presumptive evidence may be had to establish it. Lest, however, juries should indulge in presumptions of fraud from insufficient facts or circumstances, appropriate instructions, if requested, should be given by the court.

3. The trial court may exercise a sound discretion as to the form and style in which instructions shall be given to the jury; and such discretion should be exercised with a view to promote substantial justice between the parties. It is error to refuse a request to charge, correct in legal effect, and clearly applicable to a material question of fact in controversy, unless the same be otherwise given in substance. Instructions to juries should, as far as practicable, be given in plain language; in concrete, rather than abstract, terms; in direct form, rather than by way of inference.

(*Syllabus by the Court.*)

Error to superior court of Denver; MERRICK A. ROGERS, Judge.

From the record it appears that one Brasher was engaged in business as a liquor merchant in the city of Denver prior to the commencement of this action in the court below, and that certain of his goods were stored with Graham, Weber & Hill, warehousemen. Brasher assigned the warehouse receipts to Marsh, plaintiff in error, to secure certain alleged indebtedness in favor of one Mrs. Howard and one Mrs. Smith, respectively. The trustee accepted the security; and the warehousemen, having notice of the assignment, con-

sented to hold the goods accordingly. While Brasher's affairs were in this condition, the Kentucky Distilling Company, claiming an indebtedness against Brasher, commenced suit against him, and attached the goods thus stored. Thereupon Marsh, as trustee, commenced this action against Cramer, the sheriff making the levy, to recover the value of the goods thus attached. The sheriff defended the action, justifying the seizure under legal process in favor of the distilling company on the ground that the assignment by Brasher to Marsh of the warehouse receipts was fraudulent, etc. The cause was tried to a jury, and verdict and judgment were rendered for defendant. The plaintiff brings the case to this court by writ of error.

Orlando C. Marsh, for plaintiff in error.
Wolcott & Valle, for defendant in error.

ELLIOTT, J., (*after stating the facts as above.*) In one of the defenses the fraud specially pleaded was to the effect that the assignment was not accompanied by an immediate delivery of the goods and chattels attached, and that said assignment was not followed by an actual and continued change of possession of said goods, but that Brasher continued in control of the goods, making sales of the same, etc. This defense was traversed by the replication. On the trial it was shown by the evidence that Brasher had something to do with making certain sales from the goods stored in the warehouse. It thus became a material question for the jury to determine whether Brasher, in the making of such sales, was acting in his own behalf and for his own interest, or whether he was acting solely as the agent of Marsh for the purpose of having the proceeds of the goods applied upon the indebtedness against him held by Marsh as trustee for Mrs. Howard and Mrs. Smith. The court, in its charge to the jury, specified certain circumstances under which the assignment might be upheld, as well as certain other circumstances under which the assignment should be deemed fraudulent. Plaintiff's counsel thereupon requested the court to charge the jury to the effect that if they should find, as matter of fact, that the assignment of the warehouse receipts to Marsh was made in good faith, as explained in the charge, then the fact that Marsh may have employed Brasher thereafter to procure purchasers of this property, or any part of it, would not defeat a recovery by plaintiff in this case, if the proceeds of such sales were for the benefit of Mrs. Smith or Mrs. Howard. The instruction thus requested was clearly pertinent to a material matter in controversy under the issues and evidence, and stated the law applicable thereto with substantial accuracy. There was an additional clause to such instruction, not stated above, which, considered alone, might perhaps be understood as indicating a conclusion by the court upon a controverted question of fact; but such clause, taken in connection with the language of the instruction immediately preceding it, could not have misled the jury. The instruction, as a whole, was not subject to fair legal criticism. *Cook v. Mann*,

6 Colo. 23; *Wilcox v. Jackson*, 7 Colo. 524, 4 Pac. Rep. 966. The verdict of the jury may have been controlled by the circumstance that Brasher did negotiate certain sales of the stored goods after the assignment of the warehouse receipts to Marsh. Hence plaintiff was entitled to have the jury instructed as to the circumstances and conditions under which Brasher might properly negotiate such sales without invalidating the assignment. Without such instruction the jury might draw a conclusive inference of fraud from the mere fact of his being permitted to take any part whatever in the sale of said goods. Other requests to charge as prayed by plaintiff, and refused, need not be discussed. The foregoing instruction relating to sales negotiated by Brasher was not embraced in the charge of the court, either in form or substance. The refusal to give the same was duly excepted to, and error is assigned thereon in this proceeding. It is the province of the trial court to exercise a sound discretion as to the form and style in which any proposition of law applicable to the issues under the evidence shall be stated to the jury, and such discretion should be exercised with a view to promote substantial justice between the parties; but it is error to refuse a request to charge which is correct in legal effect, and clearly applicable to a material question of fact in controversy, unless the same be otherwise given in substance. When a proper instruction is duly requested in reference to a material controverted matter, the jury should not be left without judicial guidance as to the law governing such subject. Instructions to juries should, as far as practicable, be given in plain language; in concrete, rather than abstract, terms; and in direct form, rather than by way of inference. *Sutton v. Dana*, 15 Colo. 98, 25 Pac. Rep. 90; *Payne v. Green*, 10 Smedes & M. 513; *State v. Dunlop*, 65 N. C. 288; *Improvement Co. v. Stead*, 95 U. S. 166; *Thomp. Trials*, § 2351.

It is claimed by counsel for defendant in error that the judgment of the lower court should be affirmed for the reason that the assignment included all of Brasher's property, and that such an assignment in favor of certain creditors to the exclusion of others was in violation of the act of 1885. *Sess. Laws*, p. 43. It is a sufficient answer to such claim to say that defendant did not in his answer plead any such fraud or illegality in the assignment, nor was any such question in any manner raised in the court below; so it need not now be determined whether such a defense can or cannot be successfully interposed in an action of this character.

It is assigned for error that there is no evidence that plaintiff or Mrs. Howard and Mrs. Smith participated in or had any knowledge of Brasher's fraudulent intent, even conceding that he was insolvent, and intended by the assignment to defraud his creditors. It has been well said that fraud must be proved, and is never to be presumed; but, as it can rarely be proved by direct evidence, a resort to presumptive evidence often becomes necessary. See remarks of Chief Justice BLACK in *Kaine v. Weigley*, 22 Pa. St. 183; also, *Grimes v.*

Hill, 15 Colo. 359, 25 Pac. Rep. 698. Lest, however, juries should indulge in presumptions of fraud from insufficient circumstances, or from circumstances which may be consistent with an honest and lawful purpose when properly understood, a party charged with fraud, as well as his antagonist, if he will take the pains to prepare and request correct and appropriate instructions, is entitled to have the same given in substance by the court in its charge, for the better protection of his rights and interests. It is well settled that the question of fraudulent intent is generally a question for the jury. Counsel for defendant in error, in his brief, pertinently says: "The evidence in such cases cannot be properly presented to an appellate court." Nevertheless, counsel for both sides have undertaken to discuss the merits of such question upon the evidence presented in this record. It is unnecessary to follow them in such discussion. The question should be left for the consideration of the jury, under proper instructions from the court, upon a further trial of the action. The judgment of the superior court is reversed, and the cause remanded.

(7 Utah, 441)

HONG SLING V. SCOTTISH UNION NAT.
INS. CO.¹

(Supreme Court of Utah. July 1, 1891.)

FIRE INSURANCE—ACTION ON POLICY—CONDITIONS
—PLEADING.

1. The insured in a policy against loss or damage by fire is entitled to recover for any loss or damage proximately caused by a fire, and, in case of a provision in the policy requiring an appraisal of the loss, is not concluded by an award, which, through the fault of the company's adjusters, is limited to damage to such goods only as are visible at the time of the appraisal.

2. In an action on a fire insurance policy conditioned that the company shall not be liable for loss by theft, defendant cannot rely as a defense on evidence of theft brought out without objection, unless the issue of theft is made by the pleadings.

Appeal from district court, first district;
JAMES A. MINER, Justice.

Evans & Rogers and Bennett, Marshall & Bradley, for appellant. *U. J. Wenner, J. N. Perkins, and Thos. Maloney*, for respondent.

ZANE, C. J. This action was instituted by the plaintiff in the district court upon a policy of insurance, to recover damages to his stock of goods in consequence of a fire. The facts of the case, so far as we deem it necessary to state them, are that a fire broke out in the Novelty Theater in Ogden City; that plaintiff's stock of goods, consisting of silks, china-ware, and other goods, was in a store-room on the first floor of the adjoining building; that the fire extended to the second floor of that building, and water thrown onto it ran down on the goods, and their destruction was imminent; that the firemen broke the door, and carried a large portion of them out; that the plaintiff, who was a Chinaman, was at the time absent from Ogden, and the store was in charge of his clerk, and when he returned, two or three days afterwards, he said, without knowing, that a portion of his goods had

¹Rehearing denied.

been stolen. The men in charge of them during and after the fire until they were returned to the plaintiff testified that they kept careful watch over them, and that none were stolen, to their knowledge. The policy provided that the insurance company should not be liable for loss by theft at or after a fire. This provision was not set out in the complaint, further than by making the policy an exhibit, and loss by theft was not denied, nor was loss by theft averred in the answer. If the defendant wished to rely upon the provision excepting loss by theft, he should have said so in his answer; he should have put that fact in issue. The rule as to the issues, and the evidence with respect to them, is laid down in the first volume of Greenleaf on Evidence, § 51, as follows: "The pleadings at common law are composed of the written allegations of the parties, terminating in a single proposition, distinctly affirmed on one side and denied on the other, called the 'issue.' If it is a proposition of fact, it is to be tried by the jury upon the evidence adduced; and it is an established rule, which we state as the first rule governing in the production of evidence, that the evidence offered must correspond with the allegations, and be confined to the point in issue." The testimony called out that the plaintiff said that his goods had been stolen was irrelevant to any issue made by the pleadings, and the fact that the plaintiff's counsel did not object to it did not authorize the defendant to rely upon it in defense. *Cassacia v. Insurance Co.*, 28 Cal. 629; *Wood, Ins. p.* 1141; *Tischler v. Insurance Co.*, 66 Cal. 178, 4 Pac. Rep. 1169; *Bittinger v. Insurance Co.*, 24 Fed. Rep. 549; *Williams v. Insurance Co.*, 54 N. Y. 577.

It has been held that evidence relevant only to a material issue, not made by the pleadings, admitted without objection, may be relied upon; that a material issue outside of the pleadings may be made in that way; that the attorney on one side of the case by asking an irrelevant question, and the attorney on the other by not objecting, may make such evidence relevant; in other words, that a material issue may be made and evidence become relevant by such questions and failure to object. We are disposed to hold, however, that an issue cannot be presented in that way, and that evidence not relevant to the issues formed by the pleadings should not be relied upon or considered by the court or jury, though not objected to; that such an issue should not be tried, or evidence with respect to it be considered, without the express consent of both parties, and the express approval of the court.

The policy sued on contained a provision requiring the loss or damage in case of fire to be appraised by two disinterested and competent persons, unless such loss or damage could not be agreed upon between the parties; and that the loss should not be payable until appraisalment should be made. It appears from the record that appraisers were selected and qualified, and that they made an award in which they found the amount of loss to be paid by defendant at \$117.95. But the jury returned for plaintiff \$793.59 damages,

and \$60.80 interest. Was the plaintiff's right of recovery limited by the award? The appraisers testified that Mr. Chalmers, the adjusting agent of the defendant, was present at the time of the appraisal, and instructed them to appraise only the damage to the goods selected, and on the tables, —those laid out and invoiced; that with respect to the china-ware they only assessed the damage to the pieces and parts of sets left, —nothing for the missing pieces or because of sets being broken. They stated that the adjusters said they were only authorized to appraise the visible damage to the goods present per the inventory, and that he told plaintiff that this was all the appraisers had authority to determine; and that he would consider any further claim for loss when such appraisalment was completed; and upon such a basis it appears from the record the appraisal was made, and that it was so made at the instance of the agent of the defendant. It is clear that this basis was too narrow. The policy covered any loss of property or damage to it by reason of the fire. The rule of damage is well stated in the first volume of *Wood on Fire Insurance*, p. 265: "When insurance is against loss by fire, the insurer is liable for any damage done to the property by reason of a fire, even though the property itself was not burned or in any wise injured by fire, if the fire was the proximate cause of such damage, and the damage arose in consequence of efforts reasonably made by the assured or others, in view of the imminence of the peril, to preserve the property from conflagration, which must be judged from the peculiar circumstances of each case." The fact that the award did not include all the loss and damage to which the plaintiff was entitled was the defendant's fault, and the company cannot be allowed to take advantage of it. In assessing the plaintiff's damages, the jury were not limited by the amount named in the award. The jury should have considered the entire loss and damage, and estimated them upon the principles as above stated. The law being as we have stated, we are unable to find any error in the charge of the court, or in the refusal of the requests asked by the defendant; and, in view of the evidence, we do not feel authorized to disturb the verdict of the jury. Other errors were assigned, but we do not deem it necessary to consider the case further. We find no error in the record sufficient to require a reversal of the judgment of the trial court. Judgment affirmed.

BLACKBURN, J., concurs.

(7 Utah, 441)

HONG SLING V. NATIONAL ASSUR. CO. OF IRELAND.

SAME V. PHOENIX ASSUR. CO. OF LONDON.

(Supreme Court of Utah. July 1, 1891.)

Appeal from district court, first district; JAMES A. MINER, Justice.

Evans & Rogers and Bennett, Marshall & Bradley, for appellant. *U. J. Wenner, J. W. Perkins*, and *Thos. Maloney*, for respondent.

PER CURIAM. The above-entitled cases were submitted together, and the issues, evidence, and errors assigned in them are substantially the

¹ Rehearing denied.

same as in the case of *Hong Sling v. Insurance Co.*, 27 Pac. Rep. 170, (heard at the present term,) and in which an opinion affirming the judgment appealed from in that case has been handed down. The decision in these two must therefore be governed by the decision in that one. The judgments of the court below are affirmed.

WERTZ v. WESTERN UNION TEL. CO.

(*Supreme Court of Utah*. July 1, 1891.)

TELEGRAPH COMPANIES—NEGLIGENCE.

A telegraph company cannot relieve itself from liability for mistakes or delay in the transmission of messages, caused by the negligence of its employes, by a condition on its blanks that it will not be so liable unless the message is repeated.

Appeal from district court, first district; **JAMES A. MINER**, Justice.

Evans & Rogers, for appellant. *Smith & Smith*, for respondent.

ZANE, C. J. The plaintiff delivered to the defendant, at its office in Ogden City, Utah, to be transmitted to Eagle Rock, the following message: "To Geo. H. Storer, Eagle Rock, Idaho: I will give one thousand cash, ball, six months. Answer." Which was delivered to the addressee at Eagle Rock in the following language: "I will give one hundred cases, balc six months. Answer." In consequence of the change, the evidence tended to show that the plaintiff lost a contract for the conveyance for \$4,000 of real estate then worth \$5,500. The message was written on a blank, on which was printed a condition that the company would not be liable for mistakes and delays in transmission, from negligence of its agents or otherwise, unless the message should be repeated, and requiring therefor an additional charge of one-half the regular rate. The message was not repeated. The jury returned a verdict under the charge of the court for the amount received for transmission, which the court, upon the motion of the plaintiff, set aside. From this order the defendant has appealed, and assigns the same as error. The cause of the failure to transmit the message as delivered is not expressly shown; but the probability is that the defendant's agents knew precisely how the failure occurred. If they did not, the defendant had the best means of finding out. If it was not the company's fault, it should have shown it. The presumption from the evidence is that the negligence of the defendant's agents caused the failure. This brings us to the question, did the contract exempt the defendant from liability for the negligence of its agents? If the senders of dispatches and telegraph companies were the only parties interested in such transactions, they might make such contracts. The public has an interest in the telegraph service. The property employed belongs to the company, as well as the proceeds of the business; but the property is used and business is conducted for the accommodation and convenience of the public. Public policy forbids contracts by telegraph companies exempting them from the consequences to others of the negligence of their agents in transmitting messages for their employers. Such liability promotes

promptness, skill, and care in that branch of business. Such companies may by contract exempt themselves from loss or damage to others not from their own fault. Notwithstanding such conditions, the companies are liable for ordinary negligence in transmitting dispatches. *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Gillis v. Telegraph Co.*, (Vt.) 17 Atl. Rep. 736; *Thompson v. Telegraph Co.*, (Wis.) 25 N. W. Rep. 789. In the case of *Express Co. v. Caldwell*, 21 Wall. 264, the court said: "Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as that of carriers. Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in case of a carrier." And in *Railroad Co. v. Lockwood*, 17 Wall. 357, the same court held that a common carrier cannot lawfully stipulate for exemption from responsibility from the negligence of himself or his agents. If the plaintiff lost the difference between the contract price of the land and its actual value at the time because of the negligence of defendant's agents, that difference was his damage. The decision of the court granting the new trial is affirmed, and the cause is remanded to the court below.

ANDERSON and BLACKBURN, JJ., concur.

Ex parte JONES.

(*Supreme Court of Washington*. July 10, 1891.)

CRIMINAL LAW—PLACE OF CONFINEMENT—PENDING APPEAL.

1. Under Act. Wash. 1891, p. 350, which provides that "an appeal by the defendant in a criminal action stays the execution of a judgment of conviction," one convicted of grand larceny, who gives notice of appeal, is entitled to remain in jail until the determination of his appeal, and cannot rightfully be taken to the penitentiary.

2. The sheriff of the county where the trial was had is the rightful custodian of the prisoner, and has authority to receive the prisoner from the warden, and return him to the county jail.

Original petition of C. S. Jones to be released from the penitentiary upon *habeas corpus*. Writ granted.

John C. Stalleup, for petitioner.

STILES, J. The petitioner was convicted of the crime of grand larceny in the superior court of Pierce county, and on the 24th day of June, 1891, was sentenced to be imprisoned in the state penitentiary at Walla Walla for the term of three years. He immediately gave notice of an appeal to this court, and his bail was fixed at \$5,000. But on the next day he was transported to Walla Walla, and delivered to the custody of the warden of the penitentiary, where he has since been confined. He seeks, by a writ of *habeas cor-*

pus, to be released from the custody of the warden. By section 40 of the act of March 9, 1891, (Acts 1891, p. 350,) an appeal by the defendant in a criminal action stays the execution of a judgment of conviction. By section 41 of the same act, upon giving the bail to be fixed by the court, this petitioner was entitled to be released entirely from confinement until the determination of his case on appeal. In the mean time his notice of appeal entitled him to remain in the county jail if he did not procure bail. It appears that there is some question as to the authority of the warden to return the prisoner to the jail of Pierce county, but there is no question about that of the sheriff of Pierce county, who is his rightful custodian, to go and get him, and return him there. Therefore the order will be that the warden, upon demand of the sheriff of Pierce county, within five days after service of the order upon him, deliver the prisoner to the sheriff, and that, in default of such demand, the warden release and discharge him forthwith. A copy of the order to be forthwith served on the sheriff.

ANDERS, C. J., and DUNBAR, J., concur.

McGOVERN v. FAIRCHILD, County Treasurer.

(Supreme Court of Washington. June 19, 1891.)

SCHOOL-DISTRICTS—EXTENSION OF CITY LIMITS.

SESS. LAWS WASH. 1889-90, § 1, provides, among other things, that whenever any city, together with adjacent territory annexed for school purposes, shall have a population of 10,000 or more, it shall constitute one school-district, and the board of directors shall constitute a city board of education, and the title of all property owned by any existing district shall immediately vest in the new district, and the board of directors thereof shall have exclusive control of it. Section 2 provides that existing boards of directors in such city shall continue to serve out their unexpired term, and shall constitute the board of education for the new district. *Held*, that a city of over 10,000 inhabitants may extend its limits so as to include adjacent territory in which there are independent school-districts, and that such districts are thereby abolished, and their directors do not become members of the existing board of education of the city, and that the city board acquires exclusive control of their funds and property.

Application by W. C. McGovern for *mandamus* to compel James C. Fairchild, county treasurer, to pay certain school warrants. The court granted a peremptory writ, and certified certain questions to the supreme court. Reversed.

SESS. LAWS WASH. 1889-90, § 1, provides, among other things, that whenever any city, together with adjacent territory annexed for school purposes, shall have a population of 10,000 or more, it shall constitute one school-district, and the board of directors shall constitute a city board of education, and the title of all property owned by any existing district shall immediately vest in the new district, and the board of directors thereof shall have exclusive control of it. Section 2 provides that existing boards of directors in such city shall continue to serve out their unexpired term, and shall constitute the board of education for the new district.

O'Brien & Hedges, for plaintiff. *Snell & Bedford*, for defendant.

HOYT, J. This was a *mandamus* proceeding to compel the county treasurer of Pierce county, as *ex officio* treasurer of school-district No. 60, to pay a certain school warrant purporting to be issued by the directors of said district. The court below granted a peremptory writ, and in so doing certified to this court certain questions of law which in the opinion of the court were involved therein, and were of such importance that the opinion of this court should be had thereon. These questions, as stated by said judge, are as follows: "In cities of more than ten thousand inhabitants, can the city limits be extended and embrace within its extended limits other school-districts which before were entirely independent districts, with boards of directors and other officers, and by such extension (when completed as required by law) abolish and prematurely end the official terms of such school trustees or directors and clerks, in the district or parts of districts so brought in? Or shall such directors and officers continue to serve until their term expires as a part of an enlarged board of education, consisting of the old board and all those residing in the extended limits? Or shall such districts continue as separate and independent districts, notwithstanding such extension of the city limits? What power has the old board of education of the city district to bind the enlarged district, or to control the funds and property of the said outlying districts?" It will be seen by the questions thus submitted to this court for decision that this controversy grows out of complications arising by reason of the annexation of certain outlying territory to the city of Tacoma, and its effect upon outside school-districts included in the limits so annexed to the said city. The learned judge of the court below was of the opinion that all such territory, when annexed to said city, became a part of school-district No. 10, comprising the city of Tacoma, and with this position I am entirely content, as I think it clearly warranted by the statutes relating to that subject. The judge of the court below was of the further opinion that, although said enlarged city comprises but one school-district, yet, under the provisions of section 2 of the act of 1889-90, relating to school-districts in cities of more than 10,000 inhabitants, the directors of the districts which were before the enlargement of the city limits outside of the same would continue in office, after being included therein, until their full term of office expired, and would become members of the board of education of said city, and that, until there had been an organization of the new board as thus enlarged, the old boards of the outlying districts should continue to act therefor. Appellant contends that this conclusion of the learned judge is erroneous, and with this contention I agree. In my opinion, the proviso to said section 2, upon which the learned judge below seems to have founded his opinion, has no relation to the question of territory annexed to a city as shown by the facts in

this case. The only office of that proviso was to provide for the first organization of districts in cities of more than 10,000 inhabitants which theretofore had comprised more than one district. Such district once formed, and its board of directors organized, such proviso, so far as that city was concerned, no longer had force. I am of the opinion that, so soon as said territory was annexed, it all became merged in the school district comprising the city, and that the officers of the district so annexed at once ceased to hold office, and that the enlarged district became subject to the control of the board of education of said city, as constituted before such enlargement. We therefore answer the first clause of the questions submitted in the affirmative; the second and third in the negative; and as to the fourth clause we say that the old board has plenary power as to the subjects therein enumerated. It follows that the action of the court in granting a peremptory writ of *mandamus* must be reversed, and the cause remanded, with instructions to deny the writ.

ANDERS, C. J., and SCOTT, STILES, and DUNBAR, JJ., concur.

BELLINGHAM BAY RAILWAY & NAVIGATION Co. et al. v. LOOSE.

(Supreme Court of Washington. July 1, 1891.)

EMINENT DOMAIN—ENTRY BEFORE CONDEMNATION—TRESPASS.

Code Wash. § 2455, as amended by Act Feb. 1, 1888, provides that "a corporation organized for the construction of any railway * * * shall have a right to enter upon any land * * * between the termini thereof, for the purpose of examining, locating, and surveying the line of such road, * * * doing no unnecessary damage thereby." Section 2456, as amended, provides that "such corporation may appropriate so much of said land * * * or premises as to enable such corporation to construct and repair its road, * * * compensation therefor to be made to the owner." *Held*, that a railroad company cannot enter upon land and destroy trees and shrubbery without any setting apart of the land to be taken, or notice to the owner of an intention to take it, and an action of trespass will lie where such has been done.

Appeal from superior court, Whatcom county.

Action of trespass by David A. Loose against the Bellingham Bay Railway & Navigation Company and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Code Wash. § 2455, as amended by act Feb. 1, 1888, provides that "a corporation organized for the construction of any railway * * * shall have the right to enter upon any land * * * between the termini thereof, for the purpose of examining, locating, and surveying the line of such road, * * * doing no unnecessary damage thereby." Section 2456, as amended, provides that "such corporation may appropriate so much of said land * * * or premises as to enable such corporation to construct and repair its road, * * * compensation therefor to be made to the owner."

Williams & Cole, for appellant. *Doolittle*,

Pritchard & Stevens, and *Harry A. Fairchild*, for appellee.

HOYT, J. Respondent brought an action of trespass against the appellants to recover damages for the destruction of certain trees and shrubbery situated upon land owned by him and in his possession. Appellants answered, admitting the trespass, but attempted to justify the same by alleging that the defendant the Bellingham Bay Railway & Navigation Company was a corporation duly organized to construct a railroad, and that it had appropriated said land, and entered upon the same, by virtue of the provisions of an act entitled "An act for the appropriation of property," passed February 1, 1888, and that the acts of the other defendants were done under its direction. Respondent had a verdict and judgment in the court below, from which appellants prosecute this appeal. The sole contention upon their part is as to the rights of railroad corporations under the act above quoted. Their claim is that both the railroad and the owner, are given the right to proceed under said act to have fixed the compensation to be paid the owner for property taken, and that by the terms of section 14 of said act the same is made exclusive of all other remedies, and that for that reason the action of trespass will not lie. It is somewhat difficult to understand just what the legislature meant by providing all the details for condemning property, and the method of fixing compensation therefor, and making it applicable to both owner and railroad company. The whole scope of the act is that of one designed only for the use of the corporation desiring to acquire land, and is largely inapplicable to the case of an owner desiring simply to obtain compensation therefor, and the only reasonable interpretation that can be given would seem to be that the owner could only make use of this means of obtaining compensation when the property had already been taken possession of and fully occupied by the railroad, either with his actual consent, or under such circumstances that his consent would be presumed. It is not necessary, however, for the purposes of this case, to decide just what the respective rights of the appropriator and owner of lands are under said act. It is sufficient for my purpose to decide that where, as in this case, the entry is made without any notice to the owner of an intention to take under the act in question, and without any setting apart of the land to be so taken, said act will not so apply as to defeat an action of trespass by the owner, and I think such must be the construction of said act. I am satisfied that it could not have been intended thereby to clothe a railroad or other corporation with the right to go upon the premises of any person, and destroy his trees and other property, without in any manner giving him notice that in doing such acts they were proceeding under the law for the appropriation of property for public use. Such would not be a reasonable provision of law. Under it an owner of property would be power-

less against the arbitrary and oppressive methods of a corporation. Before there would be given any opportunity on the part of such owner to contest the question as to whether or not such lands were necessary for the purposes of the corporation, all the acts of damage would have been accomplished. And if, afterwards, the owner should seek compensation under the act in question, how could he protect himself and intelligently maintain his contention that such taking was not necessary? Besides, the provision of our constitution, providing that no property shall be taken for public use without compensation being first paid therefor, might be entirely nullified. The corporation, after procuring the condemnation of the property and its possession thereunder, might long delay the payment of the award therefor; and while it is true that the constitution was not in force at the time of the trespass alleged, yet I think that substantially the same rule obtained under the organic act. If I were to construe the statute as contended for by appellants, I should think it clearly unconstitutional, as tending to render inoperative that provision of our constitution (and of the organic act) referred to above. It is true that it might not in terms and directly provide for taking one's property without compensation first paid, but its effect might be to practically accomplish that end. I think the more reasonable interpretation of the statute is to hold that a corporation desiring to appropriate land from another must, before entering thereon, (except for the purpose of survey as provided by statute,) proceed under said act to show the necessity for such taking, and have the compensation to be paid fixed and actually paid or secured before it would have a right to take possession of and work upon the same. Under it the owner, after a corporation had actually taken possession of his property so that the degree of its occupancy was fully shown, could probably proceed to have his compensation assessed, if he saw fit to do so, instead of bringing an action of trespass for his damages; and, if he had given express or tacit consent to such occupancy by the corporation, he would probably be bound to proceed under said act, and could not bring his action of trespass. Thus construed, the statute is reasonable, and not oppressive; but, construed as contended for by appellants, it is most unreasonable and oppressive, and, in my opinion, unconstitutional. It follows that the action of the court below was correct, and must be affirmed.

Some preliminary questions were made in regard to the state of the record in this case, but as the act under which it is contended certain portions of the record are here has been repealed so that the questions presented are not likely to arise in the future, and as we have seen above the result upon its merits is in favor of the ruling of the court below, the same as it would have been had such portions of the record been stricken, it is not necessary, and would perhaps be unwise, for us to decide the questions

raised by the motion to strike. Were the whole record before us, together with the testimony introduced upon the trial, it might be necessary for us to decide the question as to whether or not a corporation authorized to appropriate lands, when sued as in this case, in an action for willful trespass, could plead the act which I have been discussing, and thereby prevent a judgment against it for triple damages. But without the testimony we are not called upon to decide that question, and therefore decline to do so.

ANDERS, C. J., and SCOTT and DUNBAR, JJ., concur. STILES, J., did not sit at the hearing, he being disqualified.

HOUGHTON *et al.* v. CALLAHAN *et al.*

(Supreme Court of Washington. July 8, 1891.)

APPEAL—NOTICE—FILING TRANSCRIPT—LACHES.

Code Wash. § 460, provides that "notice of appeal must be served at least thirty days * * * before the first day of the next term of the supreme court," and the same docketed. Section 461 provides that if the appellant fails to file a transcript, and have the cause docketed, as provided in the preceding section, the appellee may have the appeal dismissed: provided, "that when the failure to file the transcript is owing to the fault of the clerk the cause shall not be dismissed," etc. *Held*, that where the court delivered his findings and decree to the clerk, and thereupon appellant gave notice of appeal, and ordered and paid for a transcript, but the same was not furnished because the clerk refused to enter the decree until the appellee paid his fees, the delay was not laches, when appellant gave new notice on the subsequent entry of the decree.

Appeal from district court, Spokane county.

Motion to dismiss appeal. Code Wash. § 460, provides that "notice of appeal must be served at least thirty days * * * before the first day of the next term of the supreme court," and the cause docketed. Section 461 provides that if the appellant fails to file a transcript, and have the cause docketed, as provided in the preceding section, the appellee may have the appeal dismissed: provided, "that when the failure to file the transcript is owing to the fault of the clerk the cause shall not be dismissed," etc.

W. C. Jones, for appellants. Turner & Graves, for appellees.

STILES, J. This was a motion to dismiss an appeal, and affirm a decree, for failure to cause a transcript to be prepared within 30 days after the notice of appeal. Upon the hearing of the motion it appeared that the judge of the court below, on the 17th day of February, 1891, in open court, handed to the clerk his findings of fact and conclusions of law, and the form of a decree in the cause (which was one of equitable cognizance) to be filed, and immediately thereupon the defendant gave notice of appeal, ordered a transcript, and paid the clerk his fees therefor. About March 12th, appellant applied to the clerk for the transcript, but was informed that he had not filed the judge's findings, or entered the decree, because the plaintiff had not paid the fees therefor, and declared that he would

not do so until the fees were paid. The fees were not paid until April 23d, nor was the decree entered until then. Defendant then gave a new notice of appeal. In our opinion, if the notice of appeal, when given, was of any force, there was no laches on the part of the defendant, and the motion cannot prevail. Motion denied.

ANDERS, C. J., and HOYT, SCOTT, and DUNBAR, JJ., concur.

(2 Wash. St. 537)

LEISURE V. KNEELAND *et al.*

(*Supreme Court of Washington. July 3, 1891.*)

INSOLVENCY—DISCHARGE—FORECLOSURE OF MORTGAGE.

A judgment and order of foreclosure was rendered against the debtor after his discharge in insolvency, but before the order of discharge was entered. The debtor did not ask that the judgment be limited to the sale of the mortgaged premises. *Held*, that an action may be maintained for a balance due on the judgment after sale.

Appeal from district court, Mason county.

Action by Elijah Leisure against William H. Kneeland and F. P. Kneeland on a judgment. Judgment for defendants. Plaintiff appeals. Reversed.

C. W. Hartman, for appellant. Allen & Ayer, for appellees.

SCOTT, J. In December, 1884, the respondents filed petitions under the insolvent debtor act, in the territorial district court of the second judicial district holding terms at Olympia, to procure a discharge from their indebtedness, and on June 9, 1885, they each obtained an order in said proceedings discharging them as prayed for. These orders were entered on the journal of said court June 17, 1885. Prior thereto an action was pending against them in said court, brought by appellant, to recover the amount due upon a certain note executed to him by the respondents, and to foreclose a mortgage upon lands given to secure the payment thereof. On June 16, 1885, judgment was rendered in the foreclosure suit in favor of appellant for the full amount of the mortgage debt, with interest thereon, thereafter, at the rate of 8 per cent. per annum. A sale of the lands mortgaged was ordered, and the proceeds arising therefrom directed to be applied upon the judgment. July 27, 1885, the real estate was sold, and the proceeds applied accordingly, leaving a balance of said judgment amounting to \$1,293.95 unsatisfied. August 12, 1889, appellant brought this suit to recover another judgment for said balance. The respondents answered, admitting that the judgment was obtained against them, and that the balance claimed had not been paid, but set up their discharges obtained in the insolvency proceedings as a bar to the action. Appellant replied, alleging fraud upon the part of respondents in procuring their discharges, and denying that his claim was among those included therein. A trial by jury was had, resulting in a verdict and judgment for the respondents.

No question was raised as to whether such an action would lie upon a domestic judgment. The main point raised by appellant being sufficient to dispose of the case, other questions presented will not be passed upon. Appellant contends that the discharges in insolvency were prior in point of time to the judgment rendered in the foreclosure suit, and that consequently they constituted no defense to this action. This point is well taken. The discharges took effect June 9, 1885, the day they were granted, and not at the later day, when they were entered in the journal. The appellant's said action was then pending, and, had the respondents been entitled to a release therein from any liability for a deficiency that might remain after a sale of the mortgaged lands, to have availed themselves thereof they should have applied to the court to limit the appellant's recovery therein to the proceeds of such sale. This was not done, and, the appellant's judgment being subsequent to the discharges, it was not barred thereby, even though such discharges were regularly obtained. See *Rahm v. Minis*, 40 Cal. 421. Judgment reversed.

ANDERS, C. J., and HOYT, DUNBAR, and STILES, JJ., concur.

(46 Kan. 746)

KANSAS FARMERS' FIRE INS. CO. V. HAWLEY.

(*Supreme Court of Kansas. April 11, 1891.*)

OBJECTIONS TO EVIDENCE—HARMLESS ERROR—INSTRUCTIONS.

1. An objection to a question because it is leading does not raise the question as to whether such question is competent or not.

2. The admission of evidence that does not materially prejudice the rights of a party is not sufficient ground for the reversal of a judgment.

3. Where the answer to a proper question is objectionable, the remedy is by a motion to strike it out.

4. An error predicated upon alleged erroneous instructions, not excepted to, cannot be examined in this court.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Pratt county; S. W. LESLIE, Judge.

N. B. Carskadon, for plaintiff in error. J. C. Ellis, for defendant in error.

GREEN, C. On the 2d day of September, 1887, Maria P. Hawley received from an agent of the Kansas Farmers' Fire Insurance Company a policy of insurance issued by said company for one year upon her residence and household goods, situated in the town of Cullison, in Pratt county, for \$1,050 upon her dwelling-house, and \$750 upon the household goods, etc., in said house. On the night of the 28th of September following the building, with most of its contents, was destroyed by fire. Suit was brought against the insurance company upon the policy, and a judgment was recovered for \$1,800. To reverse this judgment the plaintiff in error has brought this proceeding in error. The first point we are asked to consider is the testimony of the plaintiff below as to the

value of the articles set forth in the exhibit attached to the plaintiff's petition. The plaintiff stated that the list represented the articles lost in the fire, and their value. The question was then asked, "At what time?" and she answered, "I think at the time of the fire." This was objected to as incompetent, and the objection overruled. The witness was then asked to call over these articles, and testify as to the value of each item at the time of the fire. This question was objected to as leading. We see no error in this. It is now claimed that the witness had no knowledge of the value of the articles enumerated. The objection did not properly raise the question. Besides, the question of the value of the property mentioned in the schedule was peculiarly within the knowledge of the plaintiff. It was not such a class of property as could be said to have a market value. If the owner could not be allowed to fix a valuation, it would be very difficult to furnish evidence as to the value of such household goods and wearing apparel as persons usually keep in residences.

It is next insisted that the court erred in permitting the plaintiff to introduce evidence as to a conversation between the plaintiff and a soliciting agent of the defendant. The statement claimed to have been made by the agent was not prejudicial error. He was asked about the goods rescued from the fire, and said to the plaintiff: "Make yourself comfortable; you will have a week or ten days to make out a list, and in that time you will probably remember most of the things." The evidence did not prejudice the rights of the defendant.

The plaintiff in error complains of the admission of the evidence of the son of the plaintiff, in regard to the contents of the proof of loss, without having laid any foundation for the admission of such secondary evidence. The question was: "State the form you put the statement in. State the form of the proof of loss." The objection was made "that the proof of loss speaks for itself." We think the question was a proper one. The plaintiff had a right to show in what manner proof was made. The answer was perhaps objectionable, but no motion was made to strike it out. If the answer was objectionable, the remedy was by motion to strike out such portion as was not responsive to the question asked. *City of Atchison v. Rose*, 43 Kan. 605, 23 Pac. Rep. 561, and authorities there cited.

It is contended that the court erred in permitting the plaintiff to prove a conversation with the agent who took the policy. We see no material error in the evidence. The evidence indicated what the insured wanted covered by the insurance policy, and was not intended to change or enlarge the terms of the policy. As to the cross-examination of the agent, we think his direct examination authorized the questions complained of. He had been asked upon his examination in chief what statements or representations he made to the plaintiff or her son at the time he took the application, and it was proper for the plaintiff to question him upon all matters brought out on his direct

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examination. The evidence could not have had the effect to avoid the clause in the policy that the company should not be bound by any act or statement of the agent, and evidently was not introduced for that purpose, but was only a part of the legitimate cross-examination of the witness.

Our attention is next called to the ruling of the trial court in admitting the statements of the plaintiff and her son that they had no knowledge of any incumbrance upon the property at the time the application was made. The plaintiff in error sought to avoid the payment of the policy by showing that the plaintiff, in her application for the insurance, made the statement that the property was not incumbered, when, in fact, there was a mechanic's lien upon it: The defendant had introduced evidence to show that there was a mechanic's lien filed against this property upon the 25th day of August, 1887, for the sum of \$203.52. We think the evidence was immaterial. The defendant did not prove when the application was made, and it seems, from the special findings returned, that the jury, could not determine whether there was any incumbrance upon the property at the time the application was made, for the reason that it was not dated.

Complaint is made that the court below tried this case upon the theory that the statements in the application must not only have been false, but that such knowledge must be brought home to the plaintiff, and our attention is called to the instructions of the court. We cannot consider this assignment of error, for the reason that no exceptions were taken to the instructions or any portion of them. Instructions not excepted to will not be reviewed. *Mercantile Co. v. Fullam*, 43 Kan. 181, 23 Pac. Rep. 104; *Gafford v. Hall*, 39 Kan. 160, 17 Pac. Rep. 851.

The last assignment of error is the answer returned by the jury to the third special question submitted to them by the defendant below, as to the value of the house insured, exclusive of the lots, at the time the plaintiff made application for the insurance. The answer was, about \$1,200. We do not think this such an error as would justify a reversal of the judgment. Five special questions were submitted by each party, and, we think, answered intelligently. The judgment should be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 691)

HENDERSON v. HOVEY, Auditor.

HUBBELL v. STOVER, Treasurer.

(*Supreme Court of Kansas. July 9, 1891.*)

WARRANTS ON STATE TREASURY—PAYMENTS IN EXCESS OF APPROPRIATIONS.

1. No money can be drawn from the treasury of the state, except in pursuance of a specific appropriation made by law.

2. Where the legislature has made a specific appropriation of \$2,000 for the compensation of the secretary, stenographer, and other officers of the state senate during the sitting of the senate for an impeachment trial, neither the auditor

nor treasurer of state have the authority to allow or pay any compensation for such officers in excess of said specific amount so appropriated.

(*Syllabus by the Court.*)

Original proceeding in *mandamus*.

Chester I. Long, for plaintiff. *J. N. Ives*, Atty. Gen., for defendant.

HORTON, C. J., (*orally*.) These proceedings have been commenced in this court by *mandamus* to enable certain persons, who were employes of the senate, acting as a court of impeachment, to recover their compensation for their services. The state treasurer, in one case, has refused to register and countersign the warrant issued by the auditor and has refused to recognize it. In the other case, the auditor of state has refused to audit the claim of the employe, and has also refused to issue any warrant for his services. The court has examined the various provisions of the statute which have been referred to. The claim is first made that under section 3, c. 25, Sess. Laws 1891, the senate had authority to transfer, from the appropriation made to it of \$8,000 for the *per diem* and mileage of its members, any balance not necessary for the pay of its members. They passed a resolution transferring a portion of the \$8,000 for the secretary, stenographer, and other officers of the senate. The conclusion of the court is, after giving the matter as much attention as it has been able to do in the time allowed, that section 3 of chapter 25 is a specific appropriation for the various amounts for the purposes therein named. For instance, there is no general appropriation for any amount to pay the whole expense of the trial. There are specific appropriations only. First, for the *per diem* and mileage of members of the senate, and the president thereof, while sitting as a court of impeachment, \$8,000 is given. There is a specific appropriation for the compensation of the secretary, stenographer, and other officers of the senate of \$2,000 only. Had the legislature, as it had the power to do, simply provided that \$27,500, or any other general sum, was appropriated to pay the expenses of the trial, such an amount could be drawn out for that purpose. Section 3 of said chapter 25 reads as follows: "To pay the expenses incidental to the trial of Judge Theodosius Botkin, who has been impeached by the house of representatives of high misdemeanors in office, there is hereby appropriated the following sums, or so much thereof as may be necessary, to-wit: For *per diem* and mileage of the members of the senate and president thereof while sitting as a court of impeachment, eight thousand dollars; *per diem* and mileage of the board of managers of the house of representatives and counsel and stenographer, to be appointed by said board, fifteen hundred dollars; compensation of secretary, stenographer, and other officers of the senate, two thousand dollars; for service of process, one thousand dollars; *per diem* and mileage of witnesses, fifteen thousand dollars." Now, if the state senate had the right to transfer from the \$8,000 any balance thereof for the compensation of its officers or employes, it had

the same right, under said section 3, to transfer it for the purpose of paying counsel or any one else employed in the trial. The constitution of the state ordains that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." Section 24, art. 2. Upon an examination of section 3, we find that specific appropriations were made for several distinct and separate purposes, and this court has no authority to make any change in that section; and, the legislature having specified the particular amounts for the several purposes, they can be used for those purposes, but those only.

It is next argued that if section 3 of chapter 25 cannot furnish money for these employes, they ought to be paid from the general appropriation for the expenses of the legislature, under section 1 of said chapter 25. The cardinal rule of construction is that the intention of the legislature must control, and, where there is appropriated a certain sum of money for the pay of members of the legislature, and its officers and clerks, the ordinary conclusion would be that they are to apply to both houses of the legislature, and its officers, while in session as a legislature, and not while one body thereof is acting as a court of impeachment. Section 2 of said chapter 25 provides "that the pay warrants for the members of the legislature for the last ten days of service shall not be drawn by the auditor of state until three days after the expiration of the fifty days of regular session, or upon the final adjournment of the legislature previous to the date herein fixed." We think that the proper construction of said section 3 is that the legislature intended to make a specific appropriation for the expenses of the impeachment trial of Judge Botkin, and did not intend that any other moneys should be used for that trial than those appropriated in said section 3. In carrying out the intent of the legislature, we must hold that there is no money appropriated to pay any compensation for the officers or employes of the senate during the trial of Judge Botkin, excepting the specific sum of \$2,000. It may be possible that the legislature intended that \$2,000 should be the limit of the expenses for those purposes, and, having appropriated \$2,000 only, this court cannot now say that the employes should be paid out of some other appropriation, or that more should have been appropriated. The state treasurer and the auditor must act in accordance with the specific appropriation named in said section 3.

It is further urged that the auditor should be required to issue his warrant whether there is any balance of the specific appropriation remaining in the treasury or not. An examination of the provisions of the statute in regard to the duty of the auditor clearly shows that the auditor must take notice of what money has been appropriated for any specific purpose, and when that amount has been fully exhausted by claims presented and audited, he has no authority to allow or audit other claims, and issue warrants therefor. See paragraphs 6582, 6597, 6676, Gen. St. 1889.

The warrant issued by the auditor was not, in our opinion, issued in conformity with the provisions of said chapter 25. The treasurer properly refused to recognize it. The auditor has no right, in the absence of a sufficient appropriation, to issue warrants generally, to be provided for by some future legislature. Considering all the terms of chapter 25, we cannot find our way clear to allow this writ. "The laborer is worthy of his hire," and it is very unfortunate that provision was not fully made by the late legislature for the payment of all the expenses of the impeachment trial. They provided that \$2,000 should be appropriated for the officers or employees of the senate during the trial, and, until further action is taken by the legislature, no more than \$2,000 can be used to pay these parties. We cannot order the payment of the amounts prayed for, as this court cannot change the statute. The writs of *mandamus* in both cases will be denied. We regret this result, but we do not make the laws; we only interpret them. All the justices concurring.

(47 Kan. 89)

In re PINKNEY et al.

(Supreme Court of Kansas. July 9, 1891.)

CONSTITUTIONAL LAW—TITLE OF ACT—"ANTI-TRUST LAW."

The provisions of the "Anti-Trust Law," being chapter 257 of the Laws of 1889, so far as they relate to the business of insurance, are covered by the title of the act, and are therefore valid. HORTON, C. J., dissenting.

*(Syllabus by the Court.)*Original proceeding in *habeas corpus*.

On May 12, 1891, a complaint was made charging that the petitioners did, in Leavenworth county, on the same day, "unlawfully agree and combine together and enter into, and then and there were in, a contract, agreement, and combination with each, and each of them with certain other persons and corporations, the names of which are now unknown to this affiant, which said agreement, contract, and combination is and was designed and intended to control the cost and rate of insurance within said state by threatening persons and affiant in the insurance business with injury to their (said persons') business if such persons refused to demand the same cost and rate as should be named by said defendants, and by them and the other persons and corporations with whom they have combined, in violation of the laws of Kansas." A warrant was issued upon this complaint in similar terms, and the petitioners appeared before the justice issuing the warrant without being arrested, where a preliminary examination was had, at the conclusion of which the petitioners were held for appearance and trial at the next term of the district court, and bail was fixed at \$200 each. The petitioners refusing to give a recognizance, a commitment was issued, under which they were taken into the custody of the sheriff, and from this custody they seek release by the writ of *habeas corpus*.

Thomas P. Fenton and E. F. Ware, for

petitioners. Lucien Baker and J. H. Atwood, for respondent.

JOHNSTON, J., (after stating the facts as above.) The only question presented in behalf of the petitioners is the validity of what is known as the "Anti-Trust Law," so far as it relates to the business of insurance. See chapter 257, Sess. Laws 1889. The contention is that the portion of the act pertaining to insurance is not clearly expressed in the title, as required by section 16, art. 2, of the constitution, and is therefore void. The title is, "An act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor." Section 1 of that act embraces the provision with reference to the business of insurance, and is as follows: "Section 1. That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the state, or in the product, manufacture, or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorney's or doctor's fees, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to advance, reduce, or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of money to the borrower, or any other services, are hereby declared to be against public policy, unlawful, and void." Section 3 of the act provides as follows: "Sec. 3. That all persons entering into any such arrangement, contract, agreement, trust, or combination, or who shall, after the passage of this act, attempt to carry out or act under any such arrangement, contract, agreement, trust, or combination described in sections one or two of this act, either on his own account, or as agent or attorney for another, or as a trustee, committee, or in any capacity whatever, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than one hundred dollars and not more than one thousand dollars, and to imprisonment not less than thirty days and not more than six months, or to both such fine and imprisonment, in the discretion of the court." It thus appears that the body of the act contains a specific provision for the prevention of trusts or combinations which tend to control the cost or rate of insurance, and to punish all persons who enter into, or attempt to carry out, such trusts or combinations.

The question presented is, does the word "trade," used in the title, fairly indicate and include the provisions of the act with reference to insurance? It is argued that the usual meaning of the word should govern, and in that sense it has reference to the business of selling or exchanging some tangible substance or commodity for money, or the business of dealing by

way of sale or exchange in commodities; and it is said that the use of the word in connection with that of "products," in the title, qualifies the meaning of "trade," and makes it all the more apparent that the construction contended for is the correct one. This is the commercial sense of the word, and possibly may be the most common signification which is given to it; but it is not the only one, nor the most comprehensive meaning in which the word is properly used. In the broader sense, it is any occupation or business carried on for subsistence or profit. *Anderson's Dictionary of Law* gives the following definition: "Generally, equivalent to occupation, employment, or business, whether manual or mercantile; any occupation, employment, or business carried on for profit, gain, or livelihood, not in the liberal arts or in the learned professions." In *Abbott's Law Dictionary* the word is defined as "an occupation, employment, or business carried on for gain or profit." Among the definitions given in the *Encyclopædic Dictionary* is the following: "The business which a person has learnt, and which he carries on for subsistence or profit; occupation; particularly employment, whether manual or mercantile, as distinguished from the liberal arts or the learned professions and agriculture." A like definition of the word is given in the *Imperial Dictionary*. *Rapalje & Lawrence's Law Dictionary*, to which we are cited by the petitioners, gives the restricted definition: "Traffic; commerce; exchange of goods for other goods or for money." It is the only authority, however, which uses the word in its commercial sense alone. *Bouvier* limits the meaning to commerce and traffic and the handicraft of mechanics; and we are also cited by the petitioners to the definition given by *Webster*, which specifically is: "The act or business of exchanging commodities by barter, or by buying and selling for money; commerce; traffic; barter." This author, however, gives the more enlarged meaning of the word as well, as follows: "The business which a person has learned, and which he engages in, for procuring subsistence or for profit; occupation; especially mechanical employment, as distinguished from the liberal arts, the learned professions, and agriculture; as, we speak of the trade of a smith, of a carpenter, or mason, but not now of the trade of a farmer, or a lawyer, or a physician." The broader signification given to the word by most of the lexicographers would fairly embrace and cover the provision of the act with reference to the business of insurance. The title prefixed to an act may be broad and general, or it may be narrow and restricted, but in either event it must be a fair index of the provisions of the act; that is, the subject of the act must be clearly expressed by the title. Here a term is employed in the title which if given the broader meaning would render the provision in question valid; while by giving it the narrower, and perhaps more common, meaning, it would render the provision invalid. Which of these should be adopted? The mere generality of the title to an act does not render it ob-

jectionable, so long as the act has but one general object, and the title is such that neither the members of the legislature nor the people to be affected can be misled. Titles of a very general nature have been adopted in the legislation of this state, and their use has been encouraged and sustained. *Bowman v. Cockrill*, 6 Kan. 311; *Division of Howard County*, 15 Kan. 194; *Woodruff v. Baldwin*, 23 Kan. 491; *Commissioners of Marlon Co. v. Commissioners of Harvey Co.*, 26 Kan. 181; *State v. Sanders*, 42 Kan. 228, 21 Pac. Rep. 1073. That the broader meaning of the word "trade" was the one intended by the legislature is manifest from the incorporation of the insurance provision in the body of the act. The meaning given by the legislature to the terms used for expressing the subject of the act should be considered by the court in determining the sufficiency of the title. While the legislature cannot extend the scope of the title by giving to a word therein a definition which is unnatural and unwarranted by usage, still, if the word admits of the construction given to it by the legislature, and can be properly used in a sense broad enough to include the provisions of the act, the intention of the legislature is entitled to great weight in determining the sufficiency of the title. In *Woodruff v. Baldwin*, 23 Kan. 494, it was said: "Is it not more just and fair to say that the legislature has used the title in the broadest sense,—a sense broad enough to include the subject-matter of this article,—and that it meant by the expression 'criminal procedure' every proceeding resulting from crime, and not simply those for the prevention and punishment of crime? * * * The breadth and comprehensiveness of a title is a matter of legislative discretion. * * * The courts cannot modify a title, any more than they can change the body of the law. The title has to be construed, even, as the language of the act, and the courts may neither narrow nor enlarge the meaning which the legislature intended the title should have. Here is a title intrinsically broad and comprehensive. * * * Evidently the legislature intended by this title one whose scope was broad enough to include the article; and while there is a sense in which the article does not treat of criminal procedure, yet we must impute to the legislature an intent to use the title in a broader sense."

How can it be said that the business of insurance is foreign to the title of this act, when the subject expressed in the title, taken in its broadest sense, and the one intended by the legislature, would embrace such business? How can any one be misled as to this provision by the use of the word "trade," when the leading lexicographers and writers employ the word in a sense which is comprehensive enough to cover the provision? The fact that the narrower meaning of the word is the one most frequently used will not justify the court in restricting the meaning which the legislature intended it should have. Suppose the legislature had passed a law entitled "An act to prevent and punish the obstruction of highways," and in the body of the act included specific

provisions declaring it to be unlawful to place obstructions upon railroads, as well as upon county roads, streets, and alleys, and prescribed severe penalties for the violation of its provisions. Could it be said that the provision with reference to railroads was invalid because it was not indicated by the title of the act? The term "highway," as commonly used, applies to the public roads and streets over which all may travel, on foot, or horseback, or in carriages, and yet in its broader sense it includes railroads; and hence, when by the provisions of the act it appeared that the legislature used it in its broader sense, it could hardly be said that the provision with reference to railroads was unconstitutional because it was not fairly embraced in the title of the act. So, here, the legislature having employed the word "trade" in its broadest sense, and one which fairly covers the provision assailed, we do not feel warranted in adopting the narrower meaning, or in holding the act invalid. The rigid and technical rule contended for by the petitioners has never been applied to section 18, art. 2, of the constitution. Although the provision is mandatory, it has been repeatedly held by this and other courts that a liberal interpretation should be placed upon the construction of language employed in the title to express the subject of the act. In *Bowman v. Cockrill*, supra, the court said that the provision "should be liberally construed; otherwise, the legislature would be confined within such narrow rules that they would be greatly embarrassed in the proper and legitimate exercise of their legislative functions." In *City of Eureka v. Davis*, 21 Kan. 580, it was said that "it must be borne in mind that, while the constitutional provision is mandatory, it must be applied in a fair and reasonable way; otherwise, it would become a source of more injury than the ill it was designed to remedy." In *Philpin v. McCarty*, 24 Kan. 402, it was remarked that "this constitutional requirement is not to be enforced in any narrow or technical spirit. It was introduced to prevent a certain abuse, and it should be construed so as to guard against that abuse, and not to embarrass or obstruct needed legislation." In *City of Wichita v. Burleigh*, 36 Kan. 42,¹ it was said that "a slight inaccuracy in the description of a thing in an act of the legislature, or in the title to the act, will not render the act void where it may be known both from the act and the title thereto, and the circumstances then existing, what was meant and intended by the legislature." See, also, *Woodruff v. Baldwin*, supra; *Commissioners of Marion Co. v. Commissioners of Harvey Co.*, supra; *State v. Barrett*, 27 Kan. 213; *Cooley, Const. Lim.* (6th Ed.) 175, and cases cited. Another rule recognized and followed by all courts in determining the validity of legislative enactments is that they will not be declared void if they can be upheld upon any reasonable grounds. If their invalidity is a matter of any reasonable doubt, the doubt must be resolved in favor of the

act. *Commissioners v. State*, 36 Kan. 387, 13 Pac. Rep. 558.

Guided by these rules, we reach the conclusion—not without some doubt, however—that the provision of the act with reference to insurance is not foreign to the title of the act, nor violative of section 18, art. 2, of the constitution. We do not desire or intend to determine at this time the validity of the act as to any profession, occupation, or business beyond that of insurance. Having decided the provision to be valid, and all other questions being waived, it follows that the petitioners must be remanded.

VALENTINE, J., concurring.

HORTON, C. J., (*dissenting*.) I do not think the word "trade" in the title of chapter 257, Sess. Laws 1889, clearly or fairly indicates or includes lawyers, doctors, insurance agents, or insurance companies.

(47 Kan. 18)

ROSE v. NEWMAN.¹

(*Supreme Court of Kansas. June 6, 1891.*)

EJECTMENT—RIGHTS OF PERSON HOLDING UNDER TAX-DEED.

Where the holder of a tax-deed is defeated in an action for the recovery of land sold at the tax-sale and described in the tax-deed, and the successful claimant is adjudged to pay the holder of the tax-deed the taxes, interest, costs, etc., as allowed by law, before he is let into possession, such holder of the tax-deed is entitled to retain the possession of the land until the successful claimant pays the taxes, interest, costs, etc., as required of him by the judgment of the court.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Jackson county; ROBERT CROZIER, Judge.

Keller & Noble, for plaintiff in error. *James H. Lowell and Hayden & Hayden*, for defendant in error.

STRANG, C. Action of ejectment by E. D. Rose against Samuel Newman, to recover the possession of lot No. 20 in the city of Holton, Jackson county, Kan. One McHugh purchased said lot at a tax-sale in 1867, and afterwards sold the same to the plaintiff. The plaintiff leased said lot to Naylor & Williams, who agreed to pay the taxes on the lot for the use of it. Naylor & Williams erected a barn on the lot, and carried on a livery business therein. Afterwards Williams sold his interest in the business and the lease to a man named Tucker, who, with Naylor, carried on the business for some time, when they both sold out to the defendant, who, with the consent of the plaintiff, took possession of the premises under the lease of the plaintiff to Naylor & Williams. Before the said lease expired one Linscott brought an action against this plaintiff to recover the possession of the lot. In that case the court adjudged the tax-deed under which Rose claimed the land void, and that Linscott was the owner of the lot in fee, and also entitled to the sum of \$400 for the use of the land from Rose, but found that Rose was entitled to \$141.97 for taxes paid on said lot, and interest thereon, and adjudged that Linscott should pay to Rose

¹12 Pac. Rep. 832.

¹Rehearing denied.

said sum of \$141.97 before he should be let into possession of the premises. Execution was issued on said judgment against Rose for the \$400 adjudged to Linscott for the use of said lot, and that sum, with interest and cost of the execution, collected. Linscott did not pay Rose the \$141.97, nor did any one else ever pay Rose said sum or any part thereof. After Linscott recovered judgment against Rose, as above stated, he sold his interest in said land to one Wilson, and gave a bond for deed; and, after several transfers, the defendant, Newman, while still holding possession of the lot under the lease from Rose, purchased the Linscott title to said land, obtaining quitclaims from the several parties through whom it had passed, and also of Linscott and wife. Sometime afterwards, and after the expiration of the lease under which Newman was holding, Rose notified him to quit and surrender the possession of the premises to him, which Newman refused to do, and Rose brought this suit to recover the premises. The case was tried by the court without a jury, resulting in a judgment for the defendant. The plaintiff brings the case here for review.

The question is, was this judgment right under the evidence as it appears in the record? We do not think it was. It is conceded that Rose was in possession of the lot when he leased to Naylor & Williams, and that Newman went into possession under said lease as the tenant of Rose, and he should have surrendered his possession to Rose. Newman justifies his refusal to surrender the possession of the lot to Rose by asserting that during the life-time of the lease, and while he had a right to the possession under the same, the court, in the case of Linscott against Rose, had adjudged the land to Linscott in fee, and that he had purchased Linscott's title. This was true, but did that give him the right of possession of the lot? We think not. The same adjudication which decreed Linscott the owner in fee of said lot also declared that Linscott should not have possession of the same until he paid Rose the \$141.97 due him under the law for taxes paid and interest thereon. Who was entitled to the possession of the lot in the mean time until the \$141.97 was paid to Rose? Manifestly Rose was. Newman's right to the possession under the lease had expired, and there was no one else that had any claim of right to possession under the decree in the case of Linscott against Rose, except Linscott, and he could not obtain the possession of said lot until he had paid Rose his \$141.97. If Linscott could not get possession without first paying the amount adjudged to Rose, he could not, by selling his interest in the lot to Newman, give Newman any right to the possession, until the money was paid to Rose, and the condition upon which the possession could be obtained from Rose was complied with. It is asserted that Newman made a tender of payment to Rose of the amount of his lien on the lot. An examination of the evidence satisfies us that no tender was ever made. The evidence of Newman himself completely refutes any claim of tender. The offer of \$150 by Newman to Rose was

a mere offer to settle or compromise the matter relating to their conflicting claims to the lot. Newman testifies that at the time he talked with Rose, and offered to settle, and pay Rose \$150, he did not know how much the claim of Rose under the judgment of the court in the case of Linscott against Rose amounted to; that he had never figured it up. A little calculation of interest shows that the Rose claim amounted to more than \$150 at the time Newman told Rose he would give him \$150 to settle the matter. The evidence of Rose is that Newman offered him \$150 for a quitclaim deed to the lot, and the evidence of Newman on cross-examination harmonizes with this view. Rose being in possession of the lot by his tenant, Newman, when the suit of Linscott against him was brought and decided, and the court in that case having adjudged that Linscott should not have possession of the lot until he paid Rose the amount of his claim, and said claim never having been paid, Rose remained in possession, and had the right of possession that was wrongfully withheld from him by Newman after the expiration of the lease and the service upon him by Rose of notice to quit, and had, therefore, the right of possession at the commencement of this suit. It is therefore recommended that the judgment of the district court be reversed, and the case remanded for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 701)

ATCHISON, T. & S. F. R. Co. *et al.* v. LONG.¹
(Supreme Court of Kansas. June 6, 1891.)

CONSTRUCTION OF RAILROAD—OVERFLOWING LANDS—COMPENSATION.

When a railroad company, in the construction of its road across a natural water-course, covers up a spring from which a part of the supply of water issues, builds a large embankment, and by other means totally diverts the water from the land of a person, through whose land the water naturally flowed before the construction of the road, such person is entitled to a mandatory injunction against the railroad company.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Butler county; A. L. L. HAMILTON, Judge.

Geo. R. Peck, A. A. Hurd, and Robt. Dunlap, for plaintiffs in error. Haslitt & Harris and Redden & Schumacher, for defendant in error.

SIMPSON, C. The material facts in this case are substantially undisputed, and are that Long is the owner and has been in the possession of the land described in his petition for a long time prior to the commencement of this action, and to the building of the railroad by the plaintiff in error, and is still the owner, and in the possession and daily occupancy thereof. That into and over the land of Long there ran a natural water-course, which was fed largely, and in excessive dry weather entirely, from and by a spring on the land of an adjoining proprietor. The land is a part of the homestead of Long, and the

¹Rehearing denied.

spring furnished a never-falling flow of water through said land. When the plaintiff in error constructed its road through the land of the adjoining proprietor, this spring, being located within its right of way, was filled up by the building of an embankment from 20 to 30 feet high, and probably 100 feet wide at its base, and by that means the flow of the water was completely shut off and diverted from the land of Long. The railroad does not run through Long's land, but near his line. The spring was located about 200 feet from his land. The water of the spring branch was also diverted from its natural channel by a ditch dug by the railroad company to Four-Mile creek; so that the water was completely diverted from the land of the defendant in error at all times, and in any event, by the filling up of the spring and the construction of the ditch. The railroad was constructed about one year before the commencement of this action. The court below granted Long a perpetual injunction against the plaintiffs in error from stopping and diverting the flow of the water through the spring branch, and from the spring thereon, from his land. The railroad companies bring the case here for review and insist that the damages, both present and future, resulting from diverting the flow of the water, can be easily measured and assessed in one action; that the benefit to Long is small, and the inconvenience to the railroad companies great; that the courts will not issue a mandatory injunction without a very great necessity exists, and for other reasons.

1. A mandatory injunction is rarely granted. The case must be an extreme one to authorize its issue. It is universally restricted to cases where a court of law cannot grant adequate relief, or where full compensation cannot be made in damages. Is this such a case? It must be conceded that the defendant in error has the undoubted legal right to the use and enjoyment of the flow of the water in a natural water-course that runs through his land. This right is an immemorial one, and is protected by all courts. It may be conceded, also, that the railroad company had the right to construct its track along or over this water course, but in such construction it must observe the right of landed proprietors to the natural flow of the water. In this state there is a special statutory provision requiring a railroad company, "which constructs its track along or across a water-course, to restore the water-course to its former state, or to such a state as not necessarily to impair its usefulness." Gen. St. 1889, par. 1207, subd. 4, § 47. Long has the legal right to the uninterrupted flow of the water. The railroad company had the legal right to construct its road across the water-course on the condition that it did not impair the usefulness of the stream to Long. It is evident that the railroad company has deprived Long of his legal right, and at the same time violated the statutes of the state. Can the damages sustained by Long be estimated in dollars and cents,

and he be awarded a sum sufficient to remunerate him for the past, and compensate him for the future? It would be a perplexing question, and, with the varying conditions surrounding it, we doubt whether any just method or equitable admeasurement of his damages could be adopted so as to render exact justice. The railroad company by a culvert, probably by a pipe or in some other comparatively inexpensive manner, can permit the water to flow from the spring into the natural channel of the stream. The railroad company say that Long has a larger natural water-course running through the same land, and hence we ought not to grant the writ. That might affect the question of the damages, but, because Long has the right to the use and enjoyment of the two water-courses, it is no reason why the railroad company should divert one of them from his land. We are supported in the conclusion we reach by the cases of *Webb v. Manufacturing Co.*, 3 Sum. 189; *Corning v. Iron and Nail Factory*, 40 N. Y. 191; *Kerr, Inj.* 230; *High, Inj.* 478. We recommend that the judgment of the district court of Butler county be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 6)

KERNDT v. CASTLE et al.

(Supreme Court of Kansas. July 9, 1891.)

APPEAL—RECORD—DISMISSAL.

Where the record on appeal shows that the findings and judgment are entitled in another case, without any explanation other than by counsel for plaintiff in error in their brief to the effect that the same were adopted by the trial court from the other case, without changing the title, the petition in error will be dismissed.

Commissioners' decision. Error from district court. Cheyenne county; Louis K. PRATT, Judge.

S. B. Bradford and S. W. McElroy, for plaintiff in error. Webb & Lindsay and A. W. Comstock, for defendants in error.

SIMPSON, C. The record of this case is in a peculiar condition. Most of the proceedings are entitled in one case, while the findings and judgment are entitled in another case, with different parties plaintiff and defendant. This purports to be the record of the case of "Charles J. Kerndt v. Castle, Swartz, and McCullough, County Commissioners of Cheyenne County." The findings and judgment are entitled in the case of "Thomas J. McCarty and R. W. Joqua ex rel. v. Edwin N. Phillips, Clerk District Court." Counsel for plaintiff in error in their brief say that this is caused by the trial court adopting for his findings and judgment those of another case, without changing the title of the other case. The record itself does not contain any hint or reference to such adoption, and we are bound by that, rather than the statement of counsel outside the record. No briefs are filed by counsel for the defendants in error, and no stipulations filed explaining the record. We recom-

mend that the petition in error be dismissed.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 50)

BROWN v. IRWIN.

(*Supreme Court of Kansas.* July 9, 1891.)

TRESPASS—LOCAL ACTIONS—BILL OF PARTICULARS.

1. The action of trespass to real estate is a local action.

2. Where a bill of particulars states an action in trespass *quare clausum fregit* only, and the bill of particulars also shows that the action arose in the state of Nebraska, it is error to overrule a demurrer to such bill of particulars on the ground that it does not state a cause of action.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Norton county; LOUIS K. PRATT, Judge.

W. R. Hamilton, for plaintiff in error. Jones & Thompson, for defendant in error.

STRANG, C. This was an action on appeal from the judgment of a justice of the peace. The bill of particulars contained two counts; the first one stating a cause of action in trespass upon real property arising in the county of Norton and state of Kansas; the second count stating a cause of action in trespass to real property, arising in the county of Furnas and state of Nebraska. The defendant demurred to the first count, and also separately to the second count of the bill of particulars. The demurrer to each count was overruled, and exceptions allowed. The case was then tried by the court and a jury resulting in a general verdict for the plaintiff against the defendant for the sum of \$10, upon which the court entered judgment for that amount and costs of suit, amounting to \$61.10. Motion for new trial followed, and was overruled, and the defendant below brings the case here for review, and alleges that the court erred in overruling his demurrer. We think the court erred in overruling the demurrer to the second count of the bill of particulars. This count stated a cause of action in trespass to real estate arising in the state of Nebraska. The action of trespass to real estate is a local action. *Sumner v. Finegan*, 15 Mass. 280, 284; *Livingston v. Jefferson*, 1 Brock. 203; *Cooley, Torts*, 471, 472. The cause of action stated in the second count having arisen in the state of Nebraska, and being a local action, the courts of Kansas could not take jurisdiction of the same, and therefore the demurrer to the second count should have been sustained. The verdict is general upon both counts. The judgment follows the verdict. It must be reversed. It is so recommended.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 349, 748)

LIST v. JOCKHECK.

(*Supreme Court of Kansas.* Feb. 7, 1891.)

VACATING JUDGMENT — FINAL ORDER — APPEAL.

1. Where, under paragraphs 4669 and 4671 of the General Statutes of 1889, a petition is filed

to vacate a judgment, and the court makes an order vacating the judgment temporarily, such order is not final, and error will not lie therefrom.

2. Subdivision 2 of section 542 of the Civil Code, giving the supreme court authority to reverse, vacate, or modify an order that grants or refuses a new trial, has no application to an order vacating or suspending a judgment temporarily only, under the provisions of sections 568, 570, 572, and 578 of the Civil Code.

(*Syllabus by the Court.*)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

W. A. S. Bird, for plaintiff in error. *Hazen & Isenhardt* and *David Overmyer*, for defendant in error.

STRANG, C. This action was brought under the fourth subdivision of paragraph 4669, Gen. St. 1889, and pursuant to the provisions of paragraph 4671 of the same statutes. The object of the action was to vacate a judgment pending in the court of Shawnee county in favor of this plaintiff, and against this defendant. The case was tried, as is provided, by the court without a jury, March 3, 1887, resulting in an order vacating, temporarily, the judgment complained of, allowing the defendant to answer, and again setting the cause for trial. This plaintiff objected to the order of the court vacating the original judgment, and comes here with a case made asking this court to review said order. The defendant, by his counsel, challenges the right of the plaintiff to have said order reviewed in this court before the case is disposed of in the court below. His position is that the order complained of is not a final order, nor an order from which error will lie. The proceeding in this case was not under paragraph 4405, Gen. St. 1889, for a new trial, nor under any other paragraph of our Code providing simply for a new trial, but under the paragraph which relates to the proceedings to reverse, vacate, or modify judgments and orders in the courts in which they are rendered. This paragraph provides for reversing or vacating judgments — *First*, by new trial under section 310 of the Code of Civil Procedure; and, *second*, by new trial under section 275 of the Code; and also provides, *third*, for vacating judgments for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order; and, *fourth*, for vacating a judgment obtained by fraud practiced by the successful party in obtaining the judgment or order. An examination of the statutes satisfies us that the order complained of was not, strictly speaking, the granting of a new trial. It was an order vacating temporarily a judgment had in a case, for the purpose of letting the defendant therein interpose his defense, which he says he was prevented from making by the plaintiff in said cause. It would seem from the character and effect of the order that it was not final. The order simply opens the judgment, and lets the defense in. The plaintiff is not required to make his case over again as in a new trial. His case stands, and, if the defense fail, his judgment is unaffected by the proceeding. The vacation of the judgment is not ab-

solute, but merely temporary, the lien thereof remaining undisturbed all the while, if the defense fail. Further proceedings must be had, the defense must be heard, before the *status* of the judgment is finally determined, and until it is determined there is nothing from which error will lie. It is therefore recommended that this case be dismissed.

PER CURIAM. It is so ordered; all the justices concurring.

ON REHEARING.

(July 11, 1891.)

PER CURIAM. It is insisted that the original opinion handed down in this case is erroneous, because subdivision 2 of section 542 of the Civil Code authorizes the supreme court to reverse, vacate, or modify an order that grants or refuses a new trial. It is further insisted that a new trial has been granted in this case within the terms of section 542 of the Civil Code, and therefore that error to this court will lie therefrom. Said section 542 does not embrace orders of the district court vacating or suspending temporarily only a judgment under the provisions of sections 568, 570, 572, and 573 of the Civil Code. Unless the fraud alleged in the petition in this case shall be sustained upon the trial thereof, the original judgment will stand as if never suspended, and may be enforced as if this proceeding had never been instituted. Section 568 of the Civil Code is similar to section 534 of the Civil Code of Ohio, and the decisions of that state upon the construction of the provisions of that section and the following sections can be consulted with profit. Subdivision 4 of section 568, authorizing a statutory petition to set aside a judgment "for fraud practiced by the successful party in obtaining the judgment," does not impair the common-law right to make a motion, in proper time and form, to set aside judgments at law; nor does it deny the right to file a petition, to impeach judgments, as in chancery, for fraud; but it is a cumulative statutory substitute for such motion and petition. *Wheeler v. White*, 4 West. Law Month. 110. When the existence of a ground to vacate or modify a judgment is decided in favor of the petitioner, under section 571 of the Civil Code, the case is not yet reached for a final judgment of vacation or modification. If the petition be filed by the defendant in the original action, it must be adjudged that there is a valid defense to the action. Section 572, Civil Code. "In order that the validity of the defense may be adjudged, an issue or issues should be made up by proper pleadings. If the proceeding to vacate or modify be by motion, the defendant should be required to file his answer to the original petition, with leave to the plaintiff to reply. If the proceeding be by petition, in which the matters of defense are set forth in issuable form, it would be sufficient, no doubt, to take issue thereon by reply or demurrer. When the issue is thus made up, it should be tried as in other cases. *Frazier v. Williams*, 24 Ohio St. 625. After such trial, and not before, the court is authorized to render a final judgment or order of vaca-

tion or modification of the original judgment." *Fullenwider v. Ewing*, 30 Kan. 15, 1 Pac. Rep. 300; *Meixell v. Kirkpatrick*, 25 Kan. 15; *Taylor's Ann. Civil Code Pr.* 238, 241, and cases there cited; *Ames v. Brinsden*, 25 Kan. 746; *Yaple's Code Pr. & Prec.* 608, 609; *Watson v. Paine*, 25 Ohio St. 340. If the alleged fraud of the plaintiff in the original action is clearly established, then the trial court will be authorized to make a final order of vacation of the original judgment, not otherwise. If the alleged defense of fraud fails, the petition or application to vacate the original judgment must be dismissed, and the original judgment will be enforced as rendered. As was said in *Fullenwider v. Ewing*, 30 Kan. 15, 1 Pac. Rep. 300: "In one sense, this proceeding may be considered as a mere incident to the original action, or as a proceeding belonging to and growing out of the original action, but, in another sense, it must be considered as an action itself. * * * Such a proceeding, upon such petition, partakes, to a very great extent, of the nature of a suit in equity to vacate or set aside a judgment for fraud or otherwise; and, if the proceeding itself does not arise to the grade or dignity of an action, it partakes, to a very great extent, of the nature of an action. In section 4 of the Civil Code it is stated that 'an action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' Does not the present proceeding come within this definition? *Fullenwider* had a right in the original action to have the same tried fairly, and without deceit or fraud or perjury. That right, he alleges, was violated, and by means of this proceeding he seeks redress. Does not this answer the description of an action? But whether this proceeding is an action, or a mere special proceeding in another action, we think it partakes of the nature of an action, and should be tried by legal evidence, just as real actions are tried, and not upon affidavits, as is usually the case with respect to mere motions." "A party may have a good defense to an action, but, if he fail to make such defense when the case is called for trial, he will not be permitted to come in weeks afterwards, and say that the judgment was wrong, and ought to be set aside, simply because he had a good defense. The same rule applies to an order." Code, § 568: *Illiff v. Arnott*, 31 Kan. 672, 3 Pac. Rep. 525. But, of course, if a party is prevented by fraud from making his defense, the original judgment cannot stand. In *Soper v. Medberry*, 24 Kan. 128, the question here discussed and decided was not presented. Indeed, it was not necessary to do so in that case, in view of the decision rendered. The rehearing will be denied.

YORBA v. DOBNER. (No. 14,148.)

(*Supreme Court of California.* July 23, 1891.)

COST BILL—VERIFICATION—ORDER TO STRIKE OUT
—WHETHER APPEALABLE.

1. Code Civil Proc. Cal. § 1033, requiring a cost bill to be "verified by the oath of the party,

or his attorney or agent, or by the clerk of his attorney," is sufficiently complied with when the affidavit is made by one who is familiar with the facts, and assisted at the trial, although not an attorney of record.

3. An order striking out a cost bill subsequent to the rendition and entry of the judgment is appealable, and can be reviewed without an appeal from the judgment.

Department 1. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Brousseau, Hatch & Thomas, for appellant. *Victor Montgomery*, for respondent.

PATERSON, J. This is an appeal from an order striking out the defendant's memorandum of costs on the ground that it was not "verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney," as required by the provisions of section 1033, Code Civil Proc. The judgment was entered in the court below on July 24, 1890, and the order striking out the cost bill was made on August 21, 1890. The order is therefore appealable, and can be reviewed without an appeal from the judgment. *Empire Gold Min. Co. v. Bonanza Gold Min. Co.*, 67 Cal. 406, 7 Pac. Rep. 810. The motion to dismiss the appeal is denied. We think the court erred in its ruling. The memorandum was verified by Mr. West, a member of the bar of Orange county. Mr. West was not an attorney of record, but he assisted in the trial of the cause, and participated in the examination of witnesses and in the argument to the jury. Being the local attorney, he doubtless knew more about the costs and disbursements than the attorneys of record, who resided in the city of Los Angeles. The statute does not say that the attorney verifying the memorandum must be the attorney of record, and there is no reason for such a requirement. The object of the statute is to allow either the party or some representative who may be more familiar with the facts to verify the items of the bill. Formerly the statute required that the memorandum should be verified by the oath of the party. The court held that it could be done by his attorney, the legislature having intended no doubt to permit any one having knowledge of the facts to verify the account. *Burnham v. Hays*, 3 Cal. 119. That is certainly what was intended by the legislature in the enactment of the statute now in force. The order is reversed, with directions to hear the motion to tax costs on any other grounds named therein, but to overrule the objection we have considered.

We concur: HARRISON, J.; GAROUTTE, J.

(90 Cal. 323)

BRISON v. BRISON. (No. 14,031.)¹

(*Supreme Court of California*. July 22, 1891.)

CONSTRUCTIVE TRUSTS—FRAUD—UNDUE INFLUENCE—FINDINGS—NEW TRIAL—REVIEW ON APPEAL.

1. On the trial of an action by a husband to compel his wife to convey certain property to him he testified that, several years before, being about to be absent for several years, and wishing to provide for her in case of his death, he had conveyed to her, instead of making a will, certain lands, induced by his confidence in her;

that she promised to reconvey same to him in the event of his return; and that he intended that she should receive a beneficial interest therein in case he should die before returning. The lawyer who drew the deed swore that he stated to her the reasons why her husband was about to make the deed, and that she promised to reconvey to him on his return. Held sufficient to support a finding that plaintiff was induced to make such deed by his confidence in his wife, and that he made it with the distinct understanding that in the event of his return she would reconvey the property to him, and that she was to receive a beneficial interest therein only in case he died before returning.

2. Under Civil Code Cal. § 1575, which defines undue influence as the use, by one in whom a confidence is reposed by another, of such confidence to obtain an unfair advantage over him, the subsequent refusal of the wife to reconvey said property was a betrayal of her husband's confidence, and constituted a constructive fraud.

3. The finding of the trial court is presumed to be correct on appeal, and the burden of proof is upon the appellant to show error therein; and, if the language of a finding is susceptible of two constructions, the appellate court will give to it that construction which is supported by the evidence, rather than one not so supported.

4. Where the complaint alleged both actual and constructive fraud, and the court makes a finding of constructive fraud, failure to make any finding as to actual fraud is immaterial, since such finding, if made in favor of either party, could in no way affect the verdict.

5. Under Code Civil Proc. §§ 656, 657, defining a new trial as "a re-examination of an issue of fact in the same court after a trial and decision," and authorizing a new trial in certain cases in order to vacate "the former verdict or other decision," the supreme court, upon an appeal from an order denying a new trial, can consider only the sufficiency of the evidence to support the findings, and not the sufficiency of the findings to support the judgment.

In bank. Appeal from superior court, Sacramento county; PHILIP W. KEYSER, Judge.

Action to compel the conveyance of certain lands by one Brison against his wife. Judgment for plaintiff. Defendant appeals from an order denying a new trial. Affirmed.

A. L. Hart, for appellant. *A. P. Catlin* and *Add. C. Hinkson*, for respondent.

HARRISON, J. Upon the former appeal in this case (75 Cal. 525, 17 Pac. Rep. 689) it was held that the facts alleged in the complaint entitled the plaintiff to the relief sought, as well upon the ground of constructive fraud on the part of the defendant, arising out of the violation of the confidential relations between her and the plaintiff, as upon the ground of the actual fraud alleged, and that the demurrer to the complaint should have been overruled. After the cause had been remanded to the court below, the defendant answered the complaint, denying all the allegations of actual fraud, and alleging that the conveyance to her by the plaintiff was made with the intent to vest her with the absolute title to the property. Upon the trial of the cause judgment was rendered in favor of the plaintiff, and, the defendant's motion for a new trial having been denied, an appeal has been taken from that order, but no appeal has been taken from the judgment.

1. Upon an appeal from an order denying a new trial this court can consider

¹Rehearing denied.

the sufficiency of either the complaint or of the findings to support the judgment. "A new trial is a re-examination of an issue of fact in the same court after a trial and decision," (Code Civil Proc. § 656,) and is authorized for the purpose of vacating the former verdict or other decision, (section 657.) The "decision" which may be thus vacated is that which was given upon the original trial of the question of fact, (section 632,) and upon which the judgment is to be entered. The provision that the judgment is to be entered "upon" the decision (section 633) implies that it is subsequent to and dependent on the decision. The judgment itself can be reviewed only by a direct appeal, (Id. § 936,) taken after its entry, (section 939.) The proceedings for a new trial are, however, entirely independent of the entry of the judgment, and may be instituted either before or after its entry, and even while an appeal from the judgment is pending; and the motion may be granted even after the judgment has been affirmed on appeal. If granted, the decision is vacated, and necessarily the judgment dependent thereon falls with it. *Spanagel v. Dellinger*, 34 Cal. 476. "Under our system, from the entry of the verdict or filing of the findings of the court, the motion for new trial is a kind of episode, or, in a certain sense, collateral proceeding; a proceeding not in the direct line of the judgment, for the judgment may be at once entered, and even executed, while a motion for a new trial is pending in an independent line of proceeding, which ends in an order reviewable on an independent appeal. The motion may be heard and decided, and an appeal taken on its own independent record, while the proceedings on and subsequent to the judgment may be still regularly going on, and even an independent appeal taken in that line." *Spanagel v. Dellinger*, 38 Cal. 284. "The question whether the judgment is authorized by the pleadings or findings cannot be agitated on the motion for a new trial, for it is not involved in a re-examination of the issues of fact. The Code has provided other and sufficient modes for the determination of both branches of that question, and it is very clear that the question whether the issues of fact were correctly found does not depend in any manner on the question whether a pleading states sufficient facts to entitle a party to the relief granted by the judgment, or whether the issues as found sustain the judgment." *Martin v. Matfield*, 49 Cal. 45; *In re Doyle's Estate*, 73 Cal. 571, 15 Pac. Rep. 125. It follows that, as upon this appeal we can only review the action of the court below, we cannot consider whether the findings are sufficient to sustain the judgment, and that our examination of the evidence is limited to a consideration of its sufficiency to sustain the findings of fact.

2. When upon the trial of a cause the court renders its decision without making findings upon all the material issues presented by the pleadings, it is held that such decision can be reviewed upon a motion for a new trial. *Knight v. Roche*, 56 Cal. 15. In such a case there has been a mistrial, and the decision, having been

rendered before the case has been fully tried, is considered to have been a decision "against law." It will be observed, however, that this rule is applicable only in a case where the issues upon which there is no finding are "material;" that is, where a finding upon such issues would have the effect to countervail or destroy the effect of the other findings. If a finding upon such issues would not have this effect, the issues cannot be regarded as material, and the failure to make a finding thereon would not be prejudicial. *McCourtney v. Fortune*, 57 Cal. 619. If the findings which are made are of such a character as to dispose of issues which are sufficient to uphold the judgment, it is not a mistrial or against law to fail or omit to make findings upon other issues, which, if made, would not invalidate the judgment. If the issue presented by the answer is such that a finding upon it in favor of the defendant would not defeat the plaintiff's right of action, a failure to make such finding is immaterial. *Fontaine v. Railroad Co.*, 54 Cal. 654. If the complaint, as in the present instance, sets forth two or more grounds for relief, either of which is sufficient to support a judgment in favor of the plaintiff, a finding upon one of such issues is sufficient, and a failure to find upon the other does not constitute a mistrial, or render the decision "against law." In view of these principles, the failure of the court to make a finding upon the issue of actual fraud is not a ground for vacating its decision unless a finding upon that issue in favor of the defendant would have the effect to modify or overcome its other findings. Inasmuch as it was held upon the former appeal in this case that the plaintiff was entitled to the relief sought by him upon the ground of constructive fraud arising out of the breach by the defendant of the confidential relations existing between them, even if no actual fraud had been alleged, the failure to make a finding upon the issue of actual fraud is immaterial. If such finding had been made in favor of the defendant, it would not have impaired the effect of the finding upon the issue of constructive fraud, and, if made against her, it would have only given additional support to the judgment.

3. The plaintiff alleged in the complaint "that he had at all times confidence in his said wife, the defendant, and her devotion and fidelity to him, until he returned home" in September, 1886; and that he "was induced to and did make" the deed to her, "having confidence in his said wife, the defendant, and in her said representation and promise, [to reconvey to him upon request,] and relying upon the same." The only denial of these allegations by the defendant is the denial that the plaintiff was induced to make the said deed to her "by reason of any confidence in any representation or promise of this defendant, or relying upon the same." The relation of husband and wife between the parties is admitted, and also that the plaintiff had at all times confidence in his wife, and in her devotion and fidelity to him, and that he made the deed to her relying upon that confidence. Upon these allegations this

court said, (75 Cal. 529, 17 Pac. Rep. 691:) "The relation of the parties to each other, therefore, was confidential in fact as well as in the law. The plaintiff was induced to make the deed by the confidence which he had in his wife, and the belief thereby engendered that she would perform her promise. But for that he would not have made it. The betrayal of such confidence is constructively fraudulent, and gives rise to a constructive trust. This is independent of any element of actual fraud." At the trial the plaintiff testified that in May, 1881, he was about to go to Arizona, to be absent from California for several years, and, being solicitous that in case of his death his wife might enjoy this property, went to consult an attorney in reference to the matter, and in consequence of a suggestion by the attorney he determined to make the deed in question, instead of a will. "I started away from the State House Hotel on K street for the purpose of seeing a lawyer. While I was getting my boots blacked on J street, Mr. Addison C. Hinkson came along. I hailed him, and told him that I was going to Arizona, and the chances were that I might get killed, and I wanted to leave my family safe, and desired him to make my will. He studied a little while, and said, 'You had better, under those circumstances, make a deed, if you have implicit confidence that your wife will deed it back to you.' I said: 'My God, if I could not have confidence in my wife, who in the world would I have confidence in?' I said: 'Certainly, I have the utmost confidence in her. When can you attend to the matter?' He said, 'Right off.' I said, 'I will go and get my wife, and come over.' I had never spoken to her up to this time, or to any human being, about making a will, or about making a deed. I went over and got her, and on the way down told her the whole circumstances. She said to me that I had better not do it, and I said that I would. Mr. Hinkson stated the whole matter to her, and she said that she did not want me to do it, but said that she would deed it back to me. Mr. Hinkson sat down and wrote the deed, and I gave him a description of the premises. I then signed the deed, and she went back to the State House, and I went to the recorder's office and filed the deed. When I was on the way down with the defendant to Mr. Hinkson's office she said she did not want me to deed it to her, and she promised to deed it back to me. She made the same promises in the office of Mr. Hinkson, in his presence. Mr. Hinkson stated the matter exactly, and advised the making of a deed instead of a will. It was through Mr. Hinkson that I made the deed instead of the will. I had intended to make a will." On cross-examination the plaintiff testified: "The idea of making a will just struck my mind, and I started over to see a lawyer, and called Hinkson to me. I told him I was coming to see him about making a will, as I thought I might be killed. He said: 'If you have implicit confidence in your wife, deed it to her;' and I said: 'I have implicit confidence in her.' When I saw Mr. Hinkson I told him the reason I wanted him to make

a will, so that in case of my death the public administrator would not get hold of my property, and squander it; and he then said: 'If you would make a deed they could not get hold of it, and things would go right along, and nobody would touch the property. But,' he said, 'they might get hold of the will.' I intended to pass the estate to her, so that in case of my death there would be no administration, and it would be her property, and nobody could take it from her. I intended the property to be hers in case of my death. I did that on Mr. Hinkson's advice, and then, after I met him, I went over and told my wife what I intended to do. I had made up my mind to do so before I saw her. I did not wait to get any promise from her. If she had told me she would not give me back the deed when I came back I would not have given it to her at all. I would not have deeded it to her but for her promise. I had made up my mind that if she would agree to give it back to me I would give it to her. I had confidence in her word, and I thought she would do it. She did agree to do it. She told me she would on the way, and told me in Hinkson's office. When we got to the office Mr. Hinkson went over the same thing, and she repeated it to me in the office. He told her what he had said to me, and she said then that she would. He told her that I had told him that I was going to make a will, and he had advised me it was better to make a deed, if she would deed it back again, and he stated the reasons. She spoke, and said certainly she would; but she did not want me to deed it to her at all, and said I had better not do it."

Mr. Hinkson, in his testimony, stated: "I said to Mrs. Brison that her husband had said to me that he desired to make a will, and will his property; that he was going to Arizona, and, that being a rough country down there, he did not know what might happen to him, and wanted to arrange it so that his wife could have his property in the event of his death; and I asked him the question, why might he not make her a deed to the property, and he asked me if I could do that, and I said: 'Yes, you can do that if you have implicit confidence in your wife that she will deed the property back to you when you return, and so desire it.' I told her that Mr. Brison had answered me that he had unlimited confidence in her, and was satisfied she would deed it back to him if he returned, and so desired it reconveyed. Mrs. Brison answered me that Mr. Brison knew very well that she would deed it back to him if he asked her to do so. There was some other conversation in which Mr. Brison joined, and Mrs. Brison made the statement: 'Of course, if he wanted her to deed it back to him she would deed it on his return.' Whereupon I drew a deed, and Mr. Brison signed it, and I took the acknowledgment and returned it to Mrs. Brison, and I think she gave it to Mr. Brison to be placed on record."

Upon the evidence on this subject, the court, after finding the intention of the plaintiff to go to Arizona, further found: "Upon coming to said determination,

plaintiff at first, in view of the personal risk and dangers of said proposed undertaking, intended and proposed to make a will, and thereby to bequeath and devise all his estate, real and personal, to the defendant; and, for the purpose of having such will prepared, plaintiff consulted an attorney at law, and informed him of his said intention and desire, and thereupon said attorney advised him that the expense of probating such will, as well as the trouble of administering upon his estate, to his wife, the defendant, could be saved by making a deed absolute in form to her, if he had confidence in her, and believed that she would reconvey the property to him on his return from Arizona, if he should return home alive. Thereupon the plaintiff proposed to his said wife, the defendant, to make a deed absolute in form to her for said lands upon condition that she would reconvey the same to him if he should return home, and request the same; that thereupon, in the presence of said attorney, the said defendant represented to and promised the plaintiff that if he would make and deliver to her a deed absolute in form for said land she would, upon his return, if he returned from Arizona, or upon his request, convey the land back to him; and the said plaintiff then and there, having confidence in his said wife, the defendant, and in her said representation and promises, and relying upon the same, and to save the expense of probating such proposed will and of administration upon his estate in the event of his death while absent, was induced to and did make a deed absolute in form of said land to the defendant, instead of making said will, upon the conditions, and with this distinct understanding between them, that if he should return from Arizona, the defendant would convey back to him the said land."

It is alleged on behalf of the appellant that this finding is not justified by the evidence, inasmuch as it is in effect a finding that the conveyance was made in pursuance of an agreement therefor, resulting from negotiations between the parties wherein the plaintiff was induced to execute the deed by reason of some act of persuasion on the part of the defendant, whereas the evidence established that the conveyance was a voluntary act on the part of the husband, coupled with a mere promise on the part of the wife that she would reconvey to him on his return from Arizona. It may be conceded, as is claimed by the appellant, that the evidence of a verbal agreement between husband and wife that will create a constructive trust should be clear, satisfactory, and conclusive; but it must also be conceded that whether the evidence in any case is of this character must be determined by the trial court, and that this court must accept the determination of the trial court thereon as conclusive. In determining whether a finding is justified by the evidence it is necessary to take into consideration all of the evidence, rather than certain disconnected portions thereof. The finding of the trial court when brought here on appeal is to be deemed correct, rather than erroneous; and it is

incumbent on the appellant to point out the error and show the particulars wherein it is not supported by the evidence; otherwise it will be upheld by this court. If the language of a finding is susceptible of different constructions, one of which is supported by the evidence, and the other not, this court will give to the language that construction which finds such support, rather than a construction which would have the effect to defeat the finding.

It clearly appears from the evidence herein that it was not the purpose of the plaintiff, by the conveyance which he then executed, to make the defendant the absolute owner of the property conveyed to her, but that his sole purpose was to place it temporarily in her name, to be held in trust for him until his return from Arizona; and that only in case of his death before such return was she to have the beneficial enjoyment of it. His statement: "I intended to pass the estate to her, so that in case of my death there would be no administration, and it would be her property, and nobody could take it from her,"—must be read in connection with his statement immediately following: "I intended the property to be hers in case of my death;" and the additional fact must also be considered that the original purpose in his mind was to make a will in her favor, and that this purpose was changed upon the suggestion by his attorney that the object he had in view in carrying out this purpose would be as well effected by making a deed to her, if he had implicit confidence that she would deed it back to him. The confidence which he had in his wife was the inducement which led him to place the property in her name. The clause in the finding that the plaintiff was "induced" to make the deed to his wife does not necessarily imply any act of inducement on her part. The court does not find that she did or said anything with the purpose of inducing him to make the conveyance,—its finding being that the plaintiff "was induced" to make the conveyance by reason of the confidence which he had in her, and in her representation and promises; and that his purpose in making it was to enable her, in case of his death, to come into the immediate enjoyment of the property. The fact that as soon as he made this purpose known to her she advised against it, and said that she did not wish him to do it, but that she would deed it back to him, and that later in the day, when Mr. Hinkson recounted to her the interview between himself and her husband, she answered him that "Mr. Brison knew perfectly well that she would deed it back to him if he asked her to do so," was calculated to deepen the confidence which their relations justified him in reposing in her. This promise on her part to reconvey is not to be considered as the consideration upon which the plaintiff agreed to make the conveyance, but rather as an assurance on her part that the marital confidence which he reposed in her was not misplaced; and the "condition" named in the finding, upon which the conveyance was made, is to be regarded rather as the expectation springing from such confi-

dence, than a limitation upon the estate which the defendant was to receive by the conveyance.

While these acts, if the plaintiff had been dealing with a stranger, might not create an enforceable trust, yet with his wife they did, and her subsequent refusal to reconvey was not merely the breach of an agreement, but was the betrayal of a confidence, and the violation of a trust, constituting a constructive fraud, which a court of equity will remedy. The influence which the law presumes to have been exercised by one spouse over the other is not an influence caused by any act of persuasion or importunity but is that influence which is superinduced by the relation between them, and generated in the mind of the one by the confiding trust which he has in the devotion and fidelity of the other. Such influence the law presumes to have been undue, whenever this confidence is subsequently violated or abused. Civil Code, § 1575, subd. 1. Reading the evidence in the light of the relations existing between the plaintiff and the defendant, and of the confidence which the plaintiff at all times had in his wife, and in her devotion and fidelity to him, until her refusal to reconvey the property to him, we think that the finding of the court is fully justified, and its order denying a new trial is affirmed.

We concur: MCFARLAND, J.; DE HAVEN, J.; SHARPSTEIN, J.; PATERSON, J.; GAROUTTE, J.

BEATTY, C. J., being disqualified, did not participate in the foregoing opinion.

90 Cal. 147

JONES v. EDDY *et al.* (No. 14,020.)

(Supreme Court of California. July 2, 1891.)

PLEADING—CONJUNCTIVE DENIAL.

An allegation that defendants "assumed and agreed" to pay a debt, amounts merely to an assertion that they "agreed" to pay it, and hence a denial that they "assumed and agreed" is sufficient, though stated in the conjunctive.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Action by G. G. Jones against Jemima Eddy, R. Verch, and A. J. Sanborn, to foreclose a mortgage. Judgment for plaintiff. Defendants Verch and Sanborn appeal. Reversed.

The complaint alleged that "on the 29th day of October, 1887, defendants R. Verch and A. J. Sanborn jointly purchased the interest of said Jemima Eddy in said premises, and as a part of the consideration therefor assumed and agreed to pay said notes and mortgage according to the terms thereof, which assumption and agreement was made with said Jemima Eddy as a part of such transaction." The answer of defendants Verch and Sanborn denies "that as a part of the consideration of the purchase of said premises they assumed and agreed to pay the notes and mortgage described in said complaint; they deny that any assumption of said mortgage was made with said Jemima Eddy, as a part of said transaction; they deny that they as-

sumed and agreed to pay said notes and mortgage as a part of said transaction, or as a part of the consideration of her deed in conveying the said property to these defendants." The court found from the pleadings upon this issue: "And said court further finds from the pleadings herein that at said time last mentioned said defendants R. Verch and A. J. Sanborn assumed and agreed to pay said notes and mortgage according to the terms thereof, which assumption and agreement was made with said Jemima Eddy; and said assumption and agreement was to the benefit of George Scoville and Olive Scoville, and on said 27th day of October, 1887."

Thomas J. Carran, for appellants. Allen & Miller, for respondent.

FOOTE, C. This action was to foreclose a mortgage upon certain real property. The case comes here on appeal from the judgment rendered as prayed for, for the sale of the mortgaged premises, and, in case of a deficiency arising from said sale, for the deficiency balance as against the defendants. Mrs. Eddy, one of the defendants, does not appeal. The mortgage was made to secure certain promissory notes executed and delivered in favor of George and Olive Scoville, who have assigned the same to the plaintiff, Jones. Verch and Sanborn, who are the appellants here, were the purchasers from Mrs. Eddy of her interest in the mortgaged premises. Among other things, the court, in its fourth finding of fact, found from the pleadings that when Verch and Sanborn bought her interest they "assumed and agreed to pay said notes and mortgage according to the terms thereof, which assumption and agreement was made with said Jemima Eddy, and said assumption and agreement was to the benefit of George Scoville and Olive Scoville; and on said 27th day of October, 1887, said interest of Jemima Eddy in said premises was by her deed bearing date on that day, and since recorded in Book 321 of Deeds, page 287, of said Los Angeles county records, conveyed by said Jemima Eddy, together with P. G. Eddy, her husband, to defendants R. Verch and A. J. Sanborn, jointly, who are now in possession of said premises, except lot 12, hereinafter mentioned, since released from the operation of said mortgage." The appellants claim that they ought not to be held liable for a deficiency over and above what the mortgaged premises may bring at foreclosure sale. There would be no difficulty in affirming the judgment here, if finding 4 was justified by the pleadings. *Pellier v. Gillespie*, 67 Cal. 583, 8 Pac. Rep. 185. The appellants say that such finding, most of which we have heretofore quoted herein, is not sustained by the actual condition of the pleadings. They claim that the denial in the amended answer and cross-complaint, at paragraph 2, folio 73, of the transcript, is sufficient as against that of the complaint in paragraph 3, folios 11 and 12; and that, such being the case, finding 4 is not justified. If the averments in the answer were in the conjunctive, evasive, and raised no issue, they would

come under the rule laid down in *Doll v. Good*, 38 Cal. 200, and the trial court would have decided correctly in finding the allegation of the complaint to be true. But that tribunal has come to this conclusion by holding that, where it is said in the complaint the defendants "assumed and agreed" to pay the mortgage debt, they undertook to do two separate and distinct things essential to make them responsible to pay the mortgage debt, if the property resting under the mortgage lien was insufficient for that purpose. We cannot see that there is any difference whatever in this instance in saying that they "undertook and agreed" to pay the debt from saying that they "assumed and agreed" to pay it. There is only one proposition contained in the words "assumed and agreed," as here employed. The assumption to pay the debt is, as used here, the same thing as agreeing or undertaking to pay it; and the use of both words "assume and agree" is, as employed, no more the statement of two distinct propositions than if it had been stated that they "agreed and agreed" to pay the debt. For these reasons we think the finding is wrong, and that the judgment is erroneous, so far as the defendant's liability for a deficiency is concerned, and we advise that it be reversed.

We concur: TEMPLE, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

90 Cal. 238

EASTMAN v. COOK et al. (No. 14,238.)

(Supreme Court of California. July 17, 1891.)

APPEAL—REVIEW—REFUSING NEW TRIAL.

Where the evidence is sufficient to justify the findings and decision of the court below, and there are no errors of law apparent on the record entitling plaintiffs to a new trial, the judgment and order overruling a motion for a new trial will be affirmed.

Department 2. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

F. E. Johnson and John M. Gregory, for appellants. G. Frank Smith and Geo. A. Lamont, for respondent.

SHARPSTEIN, J. On the 19th day of January, 1876, Cyrus A. Eastman, then being the owner of a tract of land in Solano county, conveyed the same to defendant George Cook. The purchase price was the sum of \$3,200, of which \$200 was paid at the date of the conveyance, and for the residue Cook gave his promissory note, payable five years after date, and to secure the payment thereof executed a mortgage on the premises. On May 27, 1876, Cook conveyed the premises to one John White. That deed was recorded on June 7, 1876. On November 10, 1877, John White conveyed the premises to defendant Fanny White, his then wife, and the deed was recorded on the 29th of December, 1877. On the 19th day of December, 1883, defendant Fanny White conveyed the premises to defendant Charlotte Harriet Cook, wife of defendant George Cook. That deed was

never recorded. On the 22d day of September, 1887, defendant Fanny White executed another deed of the same premises to defendant Charlotte Harriet Cook, which was recorded February 1, 1888. On the 14th of January, 1885, Cook made another note to said Cyrus A. Eastman, for \$3,000, payable five years after date; and to secure the payment thereof executed a mortgage on said premises, which was recorded on January 30, 1885. At the same time the former mortgage of January 19, 1876, on the premises was released and discharged. This action is brought for the foreclosure of the mortgage of January 14, 1885; and to have it adjudged that the conveyances from George Cook to John White, and from John White to Fanny White, and from Fanny White to Charlotte Harriet Cook, were made at the request of George Cook, and in trust for him. The court found that they were, and made and entered a decree of foreclosure and sale, as prayed in plaintiff's complaint. The defendants George Cook and Charlotte Harriet Cook moved for a new trial upon "(1) insufficiency of the evidence to justify the findings and decision of the court, and the findings are and the decision is against law; (2) errors in law occurring at the trial, and excepted to by the said defendants making this application." The motion was made on a statement of the case. The motion was denied, and this appeal is from the judgment and the order denying said motion. The question of the sufficiency of the evidence to justify the findings and decision of the court can be determined only after a careful perusal and consideration of all the evidence in the case. For that reason we must decline to discuss the evidence in detail. After a careful consideration of all the evidence, we are satisfied that it is sufficient to justify the findings and decision. There are no errors of law apparent on the record which entitle appellants to a new trial. Judgment and order affirmed.

We concur: DE HAVEN, J.; MCFARLAND, J.

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PEYRE v. MUTUAL RELIEF SOC. OF FRENCH ZOUAVES. (No. 13,065.)

(Supreme Court of California. July 17, 1891.)

BENEVOLENT SOCIETIES—EXPULSION OF MEMBERS—JURISDICTION—DAMAGES FOR EXPULSION.

1. Where a member of a private corporation, formed by the voluntary association of its members, not for pecuniary profit, but to aid and sustain sick members, the by-laws of which provide for expulsion of members for misconduct, submits his case, when charged with misconduct, to the jurisdiction of the judiciary committee of the corporation, and, on being adjudged guilty, appeals to the whole body of its members, under the by-laws, he acknowledges the jurisdiction of the society.

2. In such case, if any irregularities occur in the procedure, they must be corrected by the society to which the member has submitted his case.

3. A member of a private corporation formed by the voluntary association of its members, not for pecuniary profit, but for benevolent purposes, cannot recover damages from the corporation, upon being improperly and unlawfully expelled from membership.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Louis F. Dunand and Lindley & Eickhoff, for appellant. *A. Comte, Jr.*, and *Van Ness & Roche*, for respondent.

FOOTE, C. The plaintiff sued the defendant, a corporation of which he was a member, for damages. The complaint was demurred to as showing no cause of action. The demurrer was sustained, and, the plaintiff refusing to amend, final judgment went in favor of the defendant, from which the plaintiff prosecutes this appeal. The corporation appears, from the complaint, to be a benevolent association, "for a purpose where pecuniary profit is not their object." It has no capital stock, nor any property except \$5,000 in cash, a fund made up of sums received from time to time of its members, from fees, fines, and assessments, which fund is under the control of the association, "to be used by it for benevolent purposes, to-wit, in and about pecuniarily aiding and sustaining those of its members who become sick or distressed." It is not alleged that the plaintiff is either sick or distressed. One of the articles of the constitution or instrument of association of the corporation is: "Art. 53. A member who violates one of his or any of his obligations towards the society: who is found guilty of intemperance whilst he receives benefits; who lends himself to habits tending to call forth either upon himself or the society contempt or reproach,—shall be for the said facts and reasons responsible to the society, and upon proof shall, according to the decision of the society, be condemned to pay a fine, suspended, expelled, or released of his trust, if holding a position of trust," etc. By virtue of this article the plaintiff was suspended from membership in this benevolent association for the period of five years, and on this account he seeks to recover, in this action, damages against the corporation, in the sum of \$10,000, alleged to have resulted from the sentence of suspension rendered against him. The offense charged against him by one of the members of the association, although called "forgery" in a communication to the society signed by the member making the charge, appears to have been that of false impersonation, in a matter between the association and the French authorities, where the plaintiff, in assuming to conduct its business as a member of the society, had falsely represented himself to the French minister of foreign affairs as the "captain in command of the company of French Zouaves." This charge, it seems, the society determined to be true, and that it was such misconduct as warranted the association in holding it a breach by the plaintiff of his obligation against the society, and punished him by suspension. The defendant being a private corporation, formed by the voluntary association of its members, not for pecuniary profit, but for benevolent purposes, had the right to provide in its by-laws for the suspension of a member for misconduct. Civil Code, § 599, subd. 4.

The plaintiff not only submitted himself and his case to the jurisdiction of the judiciary committee of the society, which was appointed under the "rules of conduct" of the corporation, but when the association, as a body, had acted on the report of that committee, and had by a vote of 38 ayes to 20 noes adjudged him guilty as charged, he, in accordance with those "rules of conduct," took an appeal under the fifty-seventh article of the constitution of the society, that the cause might be reheard by the whole body of the members of the corporation. This appeal came on to be heard before the members of the corporation, and was rejected, and notice thereof was given to the plaintiff. It is plain that the jurisdiction was complete on the part of the members of the corporation to hear and determine the matter in hand. The procedure seems to have been substantially that prescribed by the constitution and "rules of conduct," and, if any irregularity took place, it was for the tribunal to which the plaintiff submitted himself to correct it. But if we were to admit that on the statements in the complaint the defendant was improperly and unlawfully suspended, and that he ought to be reinstated as a member of the association, and that this can be done by a writ of mandate upon a proper showing, still there is no ground for an action of damages shown in the complaint. The plaintiff claims that his admission into the society was by virtue of a contract, which contention is without any force. He was admitted into the association because the members thereof chose to have him become a member, and when they, in accordance with their constitution and "rules of conduct," determined that he had violated his obligation to the society in the commission of the misconduct charged against him, they virtually declared that they wished their association with him to end for five years, and carried their will into effect. This is no ground for damages, even if the facts upon which this determination was predicated do not justify it; for, if the plaintiff's view were to prevail, then the 20 members of the corporation who were the friends of the plaintiff, and voted against his suspension, would become as responsible for any alleged damage as those who had voted to suspend him. We know of no case where any such manifest injustice has been declared to be lawful, and we are satisfied that none can be found. We are of opinion that the demurrer was properly sustained, and that the judgment should be affirmed, and so advise.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

STOVELL V. NEAL. (No. 14,103.)

(Supreme Court of California. July 16, 1891.)

MECHANICS' LIENS—ESTOPPEL.

Where the contract for erection of a building between the owner and contractor is void for

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failure to record the same, or other defects, the bond thereto attached, conditioned that the contractor will not permit any valid claim or lien to be placed on the building, is void also; and the fact that a material-man was surety thereon does not estop him from setting up a lien on the building.

Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

J. W. Mitchell and Graff, Gibbon & Creighton, for appellant. *Barclay, Wilson & Carpenter*, for respondent.

GAROUTTE, J. This is an action to foreclose a mechanic's lien against defendant, Neal, owner of the building, and one Goetzman, the contractor. Defendant, Neal, appeals from the judgment and order denying her motion for a new trial. The contract between the defendant, Neal, and Goetzman, the contractor, under which Goetzman began the erection of the building, was declared void by the court, owing to the failure of recordation and other defects. Attached to this contract was a bond in the sum of \$2,500, signed by the contractor, Goetzman, as principal, and the Shallert-Ganahl Lumber Company and Thomas Stovell, the plaintiff, as sureties, binding themselves in the aforesaid sum to defendant, Neal, and we quote therefrom: "The condition of the above obligation is such that should he, the said H. J. Goetzman, the above-named principal, duly and properly, well and truly, and faithfully comply with and perform all stipulations, acts, and agreements entered into and to be performed by the said H. J. Goetzman, as appears in the foregoing contract, and should he not in any wise permit any valid claim, debt, or lien to be placed upon the building in the erection thereof, or the incurring of any liability on the part of the said Mrs. Juana A. Neal, by reason of the erection, other than the amount to be paid by her to the said H. J. Goetzman for said building, as in said contract described and specified, then the above obligation to be void, otherwise to remain in full force and virtue." Defendant set out this bond in the answer, and relied upon it to constitute an estoppel against plaintiff. The trial court found as a conclusion of law that the said bond was dependent upon the aforesaid contract, and, the contract being void, the bond was void, and therefore constituted no defense to this action. This conclusion of the court is manifestly correct. The contract being void, no cause of action could be based upon it by either party. The bond was attached to the contract, and its conditions based upon it, and when the contract fell, the bond was left without support, and necessarily fell with it. According to the testimony of plaintiff's witnesses, materials to the amount of \$43.50 were neither furnished to be used nor used in the construction of defendant's building. Let the cause be remanded, with directions to the trial court to modify its judgment by striking from the amount thereof the sum of \$43.50, and in all other respects let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.
v.27p.no.4—13

ACOCK v. HALSEY et al. (No. 14,173.)

(Supreme Court of California. July 16, 1891.)

DISMISSAL OF ACTION—VACATION OF JUDGMENT—NOTICE—WAIVER.

1. In an action for possession of personal property, which is thereupon taken possession of by plaintiff after giving an undertaking for its redelivery, an answer asking for the return and redelivery of the property to defendants, or in case a redelivery cannot be had, then for the value of the property, and for damages and costs, asks affirmative relief, so that, after such answer is filed, plaintiff cannot dismiss the action.

2. Though the answer in such case is not filed within the time prescribed by law, the filing is not a nullity, and plaintiff's remedy is a motion to strike it from the files.

3. The date of the dismissal of an action is when the judgment of dismissal is entered, and not when the entry is made in the register of actions by the clerk that the action is dismissed by order of plaintiff.

4. Where the attorneys for both parties are present at the hearing of a motion to vacate a judgment, it cannot be objected that no notice of the motion was given.

Department 2. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Johnson & Johnson, for appellant. *A. L. Hart*, for respondents.

SHARPSTEIN, J. This appeal is by the plaintiff from an order setting aside a judgment of dismissal of the above-entitled action on motion of defendants. The record before us discloses the following facts: The action, which is for the recovery of the possession of personal property, was commenced on the 22d day of August, 1889, at which time the plaintiff gave an undertaking for the delivery to him of the property described in the complaint, and thereupon said property was upon proper process taken by the sheriff from the defendants by said plaintiff. On the 4th day of September, 1889, and after the defendants had given an undertaking for the redelivery of said property to them, the plaintiff, without redelivering said property to them, caused to be made by the clerk of the court in which said action was pending the following entry in the register of actions: "Dismissed by order of plaintiff's attorneys this 4th day of September, 1889. Attest: WM. B. HAMILTON, Clerk." On the 10th day of September, 1889, defendants filed an answer to said complaint, and at the same time: notice of motion to have said order of dismissal set aside, and to reinstatement said cause upon the records of the court, and for permission to file an answer. On the 21st day of September, 1889, said motion was heard by the court, and an order, of which the following is a copy, made: "Motion to set aside dismissal. T. L. Acock, Plaintiff, vs. Nellie T. Halsey et al., Defendants. Matter coming on for hearing, Johnson & Johnson appearing for plaintiff, and A. L. Hart, for defendants. Matter argued and submitted, and motion denied." Thereafter, on the 25th day of April, 1890, against the objection of plaintiff, said cause was at the instance of defendants set for trial on the 12th of June 1890. Thereupon, on said 25th of April, plaintiff, without leave of the court,

or notice to opposing counsel, procured to be entered by the clerk of said court a judgment of dismissal. On the 12th day of June, 1890, the day on which said action had been set for trial, said judgment was first brought to the attention of defendants' counsel and the court; whereupon, both parties being present by counsel, defendants' counsel, without notice, moved the court to set aside and vacate said judgment as being void, and as having been entered by the clerk, without authority of law, after the filing of defendants' answer; and on the 29th day of August, 1890, the court made an order vacating and setting aside said judgment, to which said order plaintiff then and there excepted, and from which this appeal is taken. If the judgment of dismissal was void, the court, on having its attention called to it, could summarily or otherwise vacate it. "An action may be dismissed, or a judgment of nonsuit entered, * * * by the plaintiff himself at any time before trial, upon payments of costs; provided, a counter-claim has not been made, or affirmative relief sought by the cross-complaint of defendant." It appears by the record that before and at the time of the entry of the judgment of dismissal in this case there was an answer of the defendants on file, in which the defendants, among other things, prayed "for the return and redelivery of said property to defendants, if a delivery thereof be had; or, in case a delivery thereof cannot be had, then for the value of said property in the sum of \$500; for damages in the sum of \$150; for defendants' costs in this action." We think the defendants by their answer clearly seek affirmative relief. But the answer, although filed before the entry of the judgment of dismissal, was not filed until after the entry in the register of actions that the action was "dismissed by order of plaintiff's attorneys." When was the action dismissed? This question is answered in Page v. Superior Court, 76 Cal. 372, 18 Pac. Rep. 385, in which it is held that an action which is directed to be dismissed by the plaintiff in the register of actions is not dismissed until the judgment is entered. Therefore the action in this case was not dismissed until after the answer of defendants, in which they sought affirmative relief, was filed. But the answer was not filed until after the expiration of the time within which the Code provides that an answer may be filed. But it could not be disregarded, or treated as a nullity, so long as it remained on file. The plaintiff's remedy was a motion to strike it from the files. "It was, perhaps, not strictly regular to file the answer after the time for answering had expired, without leave of the court; but, as the default of the defendant had not been entered, we think the filing was not a nullity." *Bowers v. Dickerson*, 18 Cal. 420. Appellant's counsel contends that no notice in writing of the motion to vacate said judgment was given. It does not appear that any such notice was given; but it appears that appellant's counsel were present at the hearing of the motion, and contested the same, which was a waiver of written

notice. The object of giving the notice was fully accomplished without giving it. *McLeran v. Shartzer*, 5 Cal. 70; *Reynolds v. Harris*, 14 Cal. 677. Order affirmed.

We concur: DE HAVEN, J.; MCFARLAND, J

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MOTT v. EWING et al. (No. 13,873.)

(Supreme Court of California. July 16, 1891.)
DIVERSION OF WATER—COURSE—INJUNCTION—PRACTICE—FINDINGS OF FACT.

1. It is not necessary that the findings of the court on material issues raised by the pleadings shall follow the pleadings, but if the findings, taken together, are such that the court can say that the ultimate facts necessarily result therefrom, they are sufficient.

2. Though the complaint, in an action to restrain the diversion of a stream from the course in which plaintiff claims he is entitled to have it flow, as prior riparian owner and prior appropriator, alleges that damages to the land will result from the diversion, the court need not find on the issue of damages, since plaintiff is entitled to an injunction, whether such damages result or not.

Commissioners' decision. In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Spencer & Raker and C. A. Raker, for appellants. H. L. Spargur, F. W. Ewing, and Jenks & Chaffin, for respondent.

FOOTE, C. This is an action to restrain, by injunction, the diversion from the plaintiff's lands by the defendants of the waters of a certain natural stream, the flow of which over and across her lands as a riparian proprietor, as also the beneficial use thereof for irrigation purposes as a prior appropriator, are claimed by the plaintiff through superior right. The defendants separately demurred to the complaint. Their demurrers were overruled. They then answered at great length. A trial being had, judgment was rendered for the plaintiff, from which this appeal is taken on the judgment roll. There are two main grounds upon which the defendants rely for a reversal of the judgment, as appears by their reply brief: (1) That the court has failed to find upon all the material issues raised by the pleadings; (2) that the findings, as made, do not support the judgment.

Under the first head, they assert that the amended complaint alleges, among other things: "And that plaintiff's rights as such riparian owner were acquired long prior, and are superior, to any right or claim of right of the defendants, or either of them, to the waters of said stream; that if said defendants continue, as by them and each of them threatened and intended, to obstruct and divert the waters of Powley creek, and to deprive plaintiff of the use thereof, the damage to plaintiff will be great, continuing, and irreparable, and pecuniary compensation therefor will not afford adequate relief for plaintiff's loss, damage, and injury, and that, if said defendants do so continue in such diversion of said waters from said ditch as by said defendants threatened and intended, the same will result in the destruction of the fertility and value of said

lands, and in great, continuing, and irreparable damage to plaintiff, and pecuniary compensation therefor will not afford adequate relief for plaintiff's loss, damage, and injury." They say that as these allegations were specially denied in the answer, and were "the gist of the plaintiff's cause of action for injunction," it "being in equity for an injunction only," there should have been findings upon the issues as raised, and that there were no such findings. It has been said by the appellate court: "It is not necessary that the facts found should follow the pleadings which they support. If the truth or falsity of each material allegation not admitted can be demonstrated from the findings, the requirements of the Code are met." *Clary v. Hazlitt*, 67 Cal. 289, 7 Pac. Rep. 701. "The findings of a court cannot be altogether detached from each other, and considered piecemeal. If a particular finding be doubtful or obscure, reference may be had to the context for the purpose of ascertaining the true meaning." *Millard v. Hathaway*, 27 Cal. 140, 141; *Kimball v. Lohmas*, 31 Cal. 156; *Polack v. McGrath*, 38 Cal. 669; *Water Co. v. Richardson*, 72 Cal. 604, 14 Pac. Rep. 379. "Where probative facts are found, and the court can declare that the ultimate facts necessarily result from the facts which are found, the finding is sufficient." *Water Co. v. Richardson*, supra. It is found "that the plaintiff and her grantors have continuously used the water of said stream for irrigation and for domestic purposes and the watering of stock ever since said year 1864, except when prevented by defendants as hereinafter found; that in the spring of the year 1867 plaintiff's grantor entered upon said stream at the point described in the complaint, and diverted from said stream a quantity of the waters thereof equal to 78 inches, measured under a four-inch pressure, and conducted the same by means of a ditch by him constructed to connect said stream with a natural ravine or sag, to and upon that portion of plaintiff's lands described as the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 13, and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 24; and thereafter, until he transferred said land to plaintiff, in 1884, he continued to so divert and use said quantity of water by said means; and the plaintiff, except when prevented by the defendants, as hereinafter found, has continued to so divert and use the same." And it appears from other findings that one of the defendants through whose land the stream flows, as an upper riparian proprietor, never possessed or occupied her land until 1873, and that the other defendant is not a riparian proprietor of the stream at all, and did not own or occupy his land until 1877, and that neither of these defendants ever continuously or uninterruptedly, for any period of time last past, used any portion of the waters of this natural stream upon their lands, and that they never constructed any ditch to divert water connecting with the natural channel of the stream, but did construct a ditch through which they diverted water from the natural ravine appropriated long before that time by plaintiff's grantor, and that this diversion and attempted appro-

priation was not commenced until April 25, 1888. It would certainly appear from these facts found that necessarily the riparian rights of the plaintiff were acquired long prior to those of the defendants, as well as her rights as an appropriator, and were both superior to any of the defendants; therefore a sufficient finding to meet the allegations of the complaint on that head was made.

There are no damages given by the judgment for an injunction. As to the matter of finding upon the question of the nature and amount of the damages and injury, as set up in the complaint, it may be said that if the facts found show that, if not prevented, the continuous trespass of the defendants might by time ripen into a right adverse to the plaintiff, this is sufficient to entitle her, as a lower riparian proprietor, to an injunction. *Lux v. Haggin*, 69 Cal. 278, 10 Pac. Rep. 674; *Moore v. Water-Works*, 68 Cal. 151, 8 Pac. Rep. 816. When the diversion, as in this case, is by one against the superior right of another, and to the extent of depriving her of all the water to which she is thus entitled, it is not necessary to prove damages to entitle her to an injunction. *Conklin v. Improvement Co.*, 87 Cal. 296, 25 Pac. Rep. 399. If not necessary to prove damages, it is unnecessary to find them. The continuous wrongful diversion of the water, which, if not stopped, might ripen into a right, was the thing from which injury not capable of being accurately ascertained might in the future result, and it was this which was sought to be and was enjoined, as it appeared from the findings to be threatened and likely to result. The plaintiff had the right to the use and enjoyment of her property, and that is sufficient to have this right protected against invasion by another. *Moore v. Water-Works*, 68 Cal. 150, 8 Pac. Rep. 816. We think the findings show this right, and the invasion of it, and that is sufficient to support the judgment to prevent such continued invasion. The right of one of the defendants to eight inches of the water is amply found and protected. We perceive no merit in any of the other points made, after careful examination, and do not think they require special mention. As no prejudicial error appears, we advise that the judgment be affirmed.

We concur: FITZGERALD, C.; VANCE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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In re GATES. (No. 14,342.)

(*Supreme Court of California.* July 17, 1891.)

BILL OF EXCEPTIONS—AMENDMENT BY PREVAILING PARTY.

Under Code Civil Proc. Cal. § 652, providing that, "if the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same," the supreme court has no authority to review the disallowance of amendments proposed by

the prevailing party to a bill of exceptions taken by the losing party.

In bank. Appeal from superior court, Stanislaus county; W. O. MINOR, Judge.

Application to the supreme court by Samuel Gates for leave to prove amendments to a bill of exceptions taken by the plaintiff in the case of Brusie against Gates, in which the plaintiff, Brusie, was nonsuited. Application denied.

W. E. Turner, for petitioner. *Stonesifer & Minor* and *Langhorne & Miller*, for respondents.

HARRISON, J. In the action of Brusie vs. Gates et al. a trial was had in the county of Stanislaus, wherein, at the close of the plaintiff's case a judgment of nonsuit was rendered. Thereafter the plaintiff prepared the draft of a bill of exceptions, to which the defendant proposed certain amendments. Upon the presentation of the proposed bill and amendments to the judge for settlement certain amendments were disallowed, and the bill was settled and allowed February 16, 1891. The defendant has presented to this court his petition, setting forth the foregoing facts, together with the amendments that had been prepared by him and disallowed, and the reason why in his judgment they should have been allowed, and praying "that he be allowed to prove the truth of the matters set forth in his application, and the materiality of the said amendments." The amendments which the defendant sought to have incorporated into the bill consist chiefly of exceptions taken on his behalf to the rulings of the court, either in excluding evidence offered by himself, or in admitting evidence offered on behalf of the plaintiff, and which in his petition he avers "should be allowed and made part of said bill to explain the exceptions taken by plaintiff, and incorporated therein." Section 652, Code Civil Proc., provides that, "If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same." "The party desiring the bill settled" is the one who has taken the exception and presented the bill to the judge for settlement. In the case of a bill of "exceptions taken at a trial" he is the one who, after the decision in the cause, prepares the draft of a bill, and serves it upon the adverse party, as is provided by section 650, Id. After the decision has been rendered in a cause, there would seem to be no occasion for any but the losing party to desire a bill of exceptions settled. The provision that "such draft must contain all the exceptions taken upon which the party relies," implies that it is only that party who relies upon some "objection upon a matter of law to a decision made by the court" (section 646) as a ground for reversing such decision that would "desire" the bill settled. There is nothing in the statute, however, which prevents the prevailing party from having the exceptions taken by him at the trial settled in a bill; but in such case he becomes an actor, and must prepare a draft of his bill, and serve it upon the adverse party. Inasmuch,

however, as in any review of the decision of the court any evidence which had been excluded could not be considered, or any evidence which had been admitted disregarded, it follows that any exception taken by the prevailing party, either to the exclusion of evidence offered by himself or to the admission of evidence against his objection, would be "useless and redundant matter," and should not be allowed by the judge as an "amendment" to a bill proposed by the losing party. The amendments which may be proposed to the draft of a bill relate to the "evidence or other matter," which section 648 authorizes to be stated in the bill for the purpose of explaining the "objection" taken, and do not include exceptions taken by the party proposing the amendments, or any evidence or other matter necessary to explain the same. Whether the matter which is proposed by way of amendments to a bill of exceptions shall be allowed is to be determined by the judge who tried or heard the case, and his action thereon must be regarded as final. The statute has provided no mode for reviewing his action in this respect, even if it were practicable or desirable that any review should be had. His familiarity with the trial, and knowledge of what then took place, better qualify him than any other tribunal for determining how much of the evidence or other matter is necessary to explain the objection. This court cannot, in advance of a hearing upon the appeal, determine whether any particular piece of evidence or other matter proposed as an amendment is necessary to explain the objection. A proper determination of that question would require an investigation of the whole case, including the pleadings and other evidence that had been admitted, as well as the state of the trial at the time when the objection was made. In *Hyde v. Boyle*, 86 Cal. 352, 24 Pac. Rep. 1059, we said: "The duty and power of settling statements and bills of exception rest generally and properly in the judge of the trial court. This court can interfere with such statement or bill only in the cases provided by statute, and the only case thus provided is found in said section 652;" and again, upon a kindred motion in the same case, (26 Pac. Rep. 1092:) "The settlement of a bill of exceptions is one of the duties imposed upon a judge by virtue of his office, and is to be performed by him under the sanction of his judicial oath. It is not to be presumed that he will, in any instance, so far violate his official obligation as either willfully or knowingly to insert in the bill any matter that is not properly there, or exclude therefrom any matter that should be inserted. This court is not the tribunal to determine whether he has in any instance violated his duty in this respect, or from which a litigant is to seek redress for any such violation." Section 652 limits the authority of this court to interfere in the settlement of a bill to the single instance in which the judge "refuses to allow an exception;" and we have no inclination, even if we had the power, to extend this authority beyond the limits prescribed by the statute. The petition is denied.

We concur: MCFARLAND, J.; DE HAVEN, J.; PATERSON, J.; SHARPSTEIN, J.

BEATTY, C. J., deeming himself disqualified, took no part in the decision.

(90 Cal. 276)

DYER v. PLACER COUNTY. (No. 14,283.)
(*Supreme Court of California.* July 18, 1891.)

PUBLIC OFFENSE—EVADING PAYMENT OF RAILROAD FARE—NEW TRIAL—IRREGULARITY OF NOTICE.

1. Act Cal. April 1, 1878, § 9, provides that "every person who shall fraudulently evade, or attempt to evade, the payment of his fare for traveling on any railroad shall be fined," etc. Held a violation of said act constitutes a public offense, within the meaning of Pen. Code, § 15, which provides that a "public offense is an act committed in violation of a law commanding or forbidding it, and to which is annexed * * * a fine."

2. Where a notice of motion for a new trial states that it will be made upon "a statement of the case," and the motion is heard without objection upon what was termed a "bill of exceptions," it is an irregularity which does not affect the substantial rights of the parties.

Department 2. Appeal from the superior court, Placer county; B. F. MYERS, Judge.

Action by Dyer against Placer county to recover for the care of prisoners. Judgment for defendant. Plaintiff appeals. Reversed.

L. L. Chamberlain and Ben P. Tabor, for appellant. *A. P. Tuttle and A. K. Robinson*, for respondent.

SHARPSTEIN, J. The plaintiff in his complaint alleges that he is a constable in and for the fourth township of the county of Placer, and that as such constable he performed and rendered official services for the defendant by serving and executing warrants and other legal writs and processes, transporting prisoners to and from the courts and county jail in said county, feeding prisoners while awaiting trial, conveying sick and indigent persons to the county hospital, aggregating in value the sum of \$518.93; that on the 8th day of October, 1890, he presented his claim therefor in an itemized bill, duly verified, to the board of supervisors of said county, for allowance, and said board failed and refused to allow the said claim, or any part thereof, except the sum of \$370.93. By the itemized account it appears that the items disallowed by the board were for services rendered in arresting, transporting, and feeding prisoners charged with fraudulently evading the payment of railroad fares. The authority for prosecuting persons charged with such delinquencies is found in section 9 of an act entitled "An act to create the office of commissioner of transportation," etc., approved April 1, 1878. Section 9 of the act reads as follows: "Every person who shall fraudulently evade, or attempt to evade, the payment of his fare for traveling on any railroad, shall be fined not less than five nor more than twenty dollars." That section is not repealed by the act entitled "An act to organize and define the powers of the board of railroad commissioners," approved April 15, 1880.

The bill of exceptions, among other

things, contains the following: "It was consented to by the court, and agreed by the parties, that the sole question for the court to decide was whether under section 9 of said act, viz., 'Every person who shall fraudulently evade, or attempt to evade, payment of his fare for traveling on any railroad, shall be fined not less than five nor more than twenty dollars,' a violation thereof was or was not a public offense, and whether plaintiff, as such constable, should or should not execute warrants of arrest placed in his hands charging violations of said section 9 of said act." The court below held that a violation of said section 9 did not constitute a public offense, and rendered its judgment for the amount allowed by said board of supervisors, and no more. From that judgment this appeal is taken. We think a violation of said section 9 constitutes a public offense, within the definition of section 15 of the Penal Code, which reads as follows: "A crime or public offense is an act committed or omitted in violation of law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: * * * third, fine." To hold that a law which makes it a finable offense to fraudulently evade the payment of railroad fare does not make such evasion a public offense, would we think, be going but skin deep into its meaning. *Qui hæret in litera, hæret in cortice.*

In his notice of motion for a new trial appellant stated that it would be "made upon a statement of the case." The motion was heard without objection, and denied upon what is denominated a "bill of exceptions." We think this did not in any way affect the substantial rights of the parties, and that it is an irregularity which must be disregarded. Judgment and order reversed, and cause remanded for a new trial.

We concur: DE HAVEN, J.; MCFARLAND, J.

(90 Cal. 220)

BARRY v. COUGHLIN et al. (No. 13,401.)¹
(*Supreme Court of California.* July 18, 1891.)

APPEAL—FINDINGS—EVIDENCE.

When the finding is sustained by evidence, it will not be disturbed on appeal.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by Barry against Coughlin and others to foreclose a mechanic's lien. Judgment for defendants. Plaintiff appeals. Affirmed.

A. Morgenthal, for appellant. *J. D. Sullivan*, for respondents.

SHARPSTEIN, J. Action for the foreclosure of a mechanic's lien. The plaintiff was employed to work on a building of defendant Coughlin's by the defendant Grace, who had contracted with defendant Coughlin to make certain repairs on said building. The defendants Coughlin, and Caldon answered the plaintiff's complaint by alleging that the claim and demand of the plaintiff has been fully paid and discharged. Defendant Grace

¹Rehearing denied.

does not answer. The only issue raised by the pleadings is that of payment, and upon that issue the parties went to trial. The court found in favor of the defendants, and entered judgment accordingly. Appellant moved for a new trial, on the ground that the decision is not justified by the evidence. There was some evidence tending to prove payment, and we cannot disturb the finding of the court on that issue, although, if sitting as a trial court, we might have found otherwise. Judgment and order affirmed.

We concur. MCFARLAND, J.; DE HAVEN, J.

90 Cal. 231

SPARGUR *et ux.* v. HEARD *et al.* (No. 13,820.)

(Supreme Court of California. July 16, 1891.)

WATER-RIGHTS—APPROPRIATION—RIPARIAN OWNERS—PLEADING—FINDINGS.

1. In an action to establish a water-right, a finding that plaintiff's grantor appropriated 20 inches of water in 1874, and in 1878 conveyed to plaintiff, and that for six years next succeeding such appropriation the use of said water by plaintiff and her grantor was with the full knowledge of defendants' grantors, continuous, open, and notorious under a claim of right, shows that plaintiff had acquired a prescriptive right to the use of 20 inches of water, and it is immaterial how long defendants and their grantors had owned their riparian lands in fee.

2. Where plaintiff has acquired a right to take water from a creek at a point above defendants' land, and defendants have wrongfully obstructed the flow into her ditch, and threaten to continue to do so, it is proper to grant a perpetual injunction without proof of damages, notwithstanding that defendants are riparian owners on the creek.

3. A denial that defendants threaten or will continue to do the acts complained of, "except as of right they are lawfully entitled thereto," is not a denial *in toto* of an allegation that defendants threaten and intend, and, unless prevented by injunction, will continue, to divert and obstruct the water of a stream.

4. A complaint in an action to establish a water-right, which alleged that plaintiff and her grantors had owned, possessed, and occupied the lands described for 15 years, and that she was then the owner, is sufficient to show title to the land.

5. Where it did not appear that taxes had been levied and assessed against the ditch and water-right it was not error to fail to make a finding upon that question.

6. It is not error to join the husband as co-plaintiff in a suit to establish a water-right belonging to the wife.

Commissioners' decision. In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Action by Henry L. Spargur and wife against K. G. Heard, Jr., and others to establish and obtain a perpetual injunction. Judgment for plaintiffs. Defendants appeal. Affirmed.

Spencer & Raker, Frank M. Sawyer, and Clarence A. Raker, for appellants. *H. L. Spargur, D. W. Jenks, and J. H. Stewart*, for respondents.

BELCHER, C. C. This action was brought to obtain a perpetual injunction restraining the diversion of water, and for damages. The court below granted the injunction, but without damages. The appeal is from the judgment, and rests on the judgment roll.

1. It is claimed by appellants that their demurrer should have been sustained, but we think it was properly overruled. The complaint stated a cause of action, and it was not ambiguous, unintelligible, and uncertain. The plaintiffs were husband and wife, but a husband may be joined as plaintiff with his wife in an action which concerns her separate property. *Calderwood v. Peyser*, 31 Cal. 333; *Corcoran v. Doll*, 32 Cal. 83. Plaintiffs alleged that Mrs. Spargur and her grantors had owned, possessed, and occupied the lands described for the periods named, and that she was then the owner thereof; and they deraigned her title to the ditch and water-right from the first appropriator. This was sufficient.

2. It is contended that the court did not find upon all the material issues raised by the pleadings. Under this head it is urged that there was no finding upon the issue tendered by plaintiffs' averment "that the defendants threaten and intend, and, unless prevented by the injunction of this court, they will continue, to divert and obstruct the waters of said stream, and prevent the same from reaching the lands of said plaintiff, and wholly deprive her of the use of said water. That the damage to said plaintiff for each day she is deprived of the use of said water is \$5," etc. It is said that this averment was denied *in toto*; but the only denial as to the first part of it was that defendants threaten or intend or will continue to do the acts complained of, "except as of right they are lawfully entitled thereto." This was clearly not a denial *in toto*, and yet the court found "that defendants, and each of them, threaten and intend, and, unless restrained, will continue, to divert the waters from said plaintiff's ditch, and thereby prevent any portion of the waters of said stream from flowing through said ditch to plaintiffs' said lands." The court was not required to go further and find as to the alleged resulting damages, for the reason that it was not necessary to allege or prove such damages. *Moore v. Water-Works*, 68 Cal. 146, 8 Pac. Rep. 816. The finding was therefore fully sufficient. It is also urged that there was no finding as to the bar of the statute of limitations pleaded by defendants. But the court did find "that plaintiffs' cause of action is not barred by section 318 of the Code of Civil Procedure, nor by section 343 of said Code, nor by section 319 of said Code, nor any of them." The sections named are the only ones pleaded, and the claim that the finding should be disregarded, because it is placed among the conclusions of law, is without merit. *Burton v. Burton*, 79 Cal. 490.¹ It is further urged that there was no sufficient finding as to the affirmative defense set up by the defendants, to the effect that they and their grantors had been the owners in fee-simple absolute of the land claimed by them since about the year 1869, and that Rutherford creek—the stream from which plaintiffs claim the right to take the water—naturally flows across their land, and that their right to the full flow and

use of the waters of the creek upon their said land is older and superior to any right of the plaintiffs thereto, or to any portion thereof. It is said the court found only that defendants' lands were agricultural in character, and that the said stream in its natural channel flowed across the same, and naturally irrigated portions thereof, but did not find how long they and their grantors had been the owners in fee-simple of the said land. But the court also found that in the fall of 1873 and the spring of 1874, one Wood constructed a ditch leading from Ruthford creek to certain lands situated near the creek, and which he then occupied and claimed, and thereby appropriated and diverted to his lands 20 inches of the water of the creek, measured under a 4-inch pressure, and thereafter continuously used the same for irrigating his lands during the irrigating season of each year, and for domestic purposes and the watering of stock during the whole of each year, until September, 1878, when he conveyed his lands, with the ditch and water-right, and privileges appurtenant thereto, to the plaintiff Mrs. Spargur; that she thereupon took possession of the land, ditch, and water-right, and has ever since continuously claimed and used the water so appropriated for the same purposes as her grantor had used it, except when prevented from doing so by defendants and their grantors; and "that for six years next succeeding said appropriation such use of said water by plaintiff and her grantor was, with the full knowledge of defendants' grantors, continuous, uninterrupted, peaceable, open, and notorious, under a claim of right adverse and in hostility to all, and particularly to defendants and their grantors." These findings clearly show that Mrs. Spargur had acquired a prescriptive right to divert and use the 20 inches of water which she claimed, (*Water Co. v. Hancock*, 85 Cal. 219, 24 Pac. Rep. 645;) and, this being so, it was immaterial how long defendants and their grantors had owned their land in fee, and no finding as to that matter was required. It is further urged that there was no finding that plaintiff and her grantor had paid all taxes levied and assessed against the said ditch and water-right; but it does not appear that any such taxes had been levied or assessed, and therefore no finding upon this question was necessary. (*Heilbron v. Ditch Co.*, 75 Cal. 117, 17 Pac. Rep. 65; *Coonrad v. Hill*, 79 Cal. 587, 21 Pac. Rep. 1099.)

3. It is contended that the findings were not sufficient to justify the issuance of a perpetual injunction against defendants, for the reason that they were riparian owners on the creek, and the court only found that plaintiff had been damaged in the nominal sum of one dollar. The answer is that it appears that the defendants' lands were situated on the creek below the head of plaintiff's ditch; that plaintiff had acquired a right to appropriate from the creek the amount of water claimed by her, and that the defendants had wrongfully obstructed the flow of the water into her ditch, and threatened to continue to do so. Under such circum-

stances plaintiff was entitled to an injunction, without proof of damages. (*Moore v. Water-Works*, 68 Cal. 146, 8 Pac. Rep. 816; *Conkling v. Improvement Co.*, 87 Cal. 296, 25 Pac. Rep. 399.)

Some other points are made for a reversal of the judgment, but they do not require special notice. In our opinion the proper judgment was entered, and we advise that it be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

BEATTY, C. J. I concur in the judgment.

(90 Cal. 188)

PEOPLE ex rel. BOARD OF STATE HARBOR COMMISSIONERS v. FAIRFIELD *et al.* (No. 13,466.)

(*Supreme Court of California*. July 13, 1891.)

EVIDENCE—OFFICIAL BOOKS — SHOWING GENERAL INACCURACY.

Where, in an action upon the official bond of a wharfinger, the books kept by the secretary of the board of state harbor commissioners are introduced to prove that certain sums of money received by him had not been paid to the board, it is error to exclude evidence that the secretary had received large amounts from other persons in payment of harbor dues, which were not accounted for in the books, to impeach the accuracy of the books, although Code Civil Proc. Cal. § 1920, makes official books or records "*prima facie* evidence of the facts stated therein."

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by the people on relation of the board of state harbor commissioners against Fairfield, Hendry, and Ray, upon an official bond given by Fairfield as wharfinger, and signed by the others as sureties. Judgment for plaintiffs. Defendants appeal. Reversed.

W. H. H. Hart and Aylett R. Cotton, for appellants. F. S. Stratton, (T. C. Coogan, of counsel,) for respondent.

McFARLAND, J. This is an action upon the official bond of defendant Fairfield, upon which the defendants and appellants Hendry and Ray were sureties. Before the trial Fairfield died, and by the consent of parties the action was as to him dismissed as of a date prior to his death. Judgment was rendered against Hendry and Ray for \$1,911.05, from which, and from an order denying a new trial, they appeal.

1. There are some 25 points made by appellants, which we do not deem necessary to notice in detail. It is sufficient to say that the court below did not commit any error except with respect to the matters hereinafter mentioned.

2. The plaintiffs introduced evidence to the point that Fairfield, while holding the office of wharfinger, for which said official bond was given, received certain sums of money in his official capacity at various times within the period stated in the complaint; and, for the purpose of showing that he had not paid said money to the board of state harbor commissioners as his official duty required, they introduced

certain books which the secretary of said board is required to keep by section 2522 of the Political Code. These books are made by statutory law "*prima facie* evidence of the facts therein stated," (Code Civil Proc. §§ 1920, 1926;) and they were introduced by plaintiffs to prove that Fairfield did not pay any of said moneys to the board, because said books did not contain any account of such payment, which they should have contained if such payment had been made. It is quite evident that plaintiffs were called upon to prove something more than the mere fact of the receipt of the moneys by Fairfield; for the presumption would have been that he performed his official duty, and disposed of the money as such duty directed. The defendants, for the purpose of overcoming the *prima facie* character of evidence afforded by said books, offered to prove that one Gray, who was secretary of the board during the time when Fairfield was wharfinger, had incorrectly, falsely, and fraudulently kept said books. In this connection they offered to prove false entries and fraudulent omissions in the books with respect to business done with the board by persons other than Fairfield. For instance, they offered to show numerous bank-checks for large amounts which had been received by Gray from various persons in payment of harbor dues, and indorsed by him, of which there was no account whatever in the books. This class of evidence was ruled out by the court upon the ground that "it does not connect itself in any way with the deficit charged against the defendant by the evidence introduced on the part of the plaintiff," and because it "did not relate to any items upon which the plaintiffs seek to recover in this action." In this ruling the court committed error for which the judgment must be reversed.

A *prima facie* case may be rebutted from any stand point within the boundary of legitimate evidence. A merchant's or shop-keeper's books, after some slight preliminary proof of their correctness, are *prima facie* evidence of the sale and delivery of goods. Under our Codes, these books of the secretary of the harbor commissioners are made *prima facie* evidence of certain facts, without any preliminary proof. But the same rule applies in both cases, that is to say: The books are to be taken, in the first instance, as competent evidence of the truth of certain statements therein contained, because they are presumed to have been correctly and honestly kept, and to be truthful and creditable, until the contrary be shown. But the contrary may be shown by proof that they have not been fairly and honestly kept, and that their character is such as to render them unreliable and valueless as evidence. And this may be done by proving false and fraudulent charges and entries against persons other than the party to the suit on trial. If such proof were confined to items of the particular account against the defendant in the action it would be of little value; for if the defendant could, by independent evidence, disprove the entries made against him, he would have little cause to assail the gen-

eral character of the books. A case strictly in point is that of Funk v. Ely, 45 Pa. St. 444. There Ely had introduced his books, and the trial court had ruled out all evidence touching their character, except such as related to the items of Funk's account. The court in considering this ruling say: "The only error we see upon the record is in excluding from the jury all evidence tending to impeach Ely's books, except such as related to the account against Funk. Such a rule of evidence amounts to nothing in its practical application. If a defendant can disprove his particular account, he has no occasion to assail the general character of plaintiff's books. It is only when he has no other means of meeting a false charge that he assails the general character of plaintiff's books. * * * It is the general character which is thus brought into issue, and general character is formed by numerous particulars." Having stated that, if it appears on the face of the book that it should not be admitted in evidence, the court may reject it, the opinion proceeds as follows: "If this does not clearly appear, it is to be submitted to the jury to judge of; and then it is competent for the adverse party to show its general character by pointing to charges and entries affecting other parties, and by calling witnesses to prove such entries false and fraudulent. That this investigation may not run into excessive departure from the issue on trial, the court should limit it to the time, or near the time, covered by the account in suit, or should suffer no more examination of collateral cases than would bear directly on the general character of the book. * * * The jury may form some opinion from such examination how far it is entitled to weight in the scales which they are holding. While they should make all due allowance for mistakes, for ignorance and unskillfulness in book-keeping, and for peculiarities in the plaintiff's business, they should insist on the general honesty and accuracy of the book made in secret by one party against the other, and now offered as a guide to the conscience of the jury." It would be a harsh rule, indeed, that would prevent the defendants in the case at bar—who are mere sureties entitled to stand on their strict rights—from showing that the omissions by which they are sought to be concluded are in a book full of omissions which are false and fraudulent. Of course, when they shall have introduced all their evidence on that point, it will be for the jury, or the court sitting as a jury, to determine how far such evidence has weakened the credibility of the books; but that such evidence is admissible we have no doubt. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

90 Cal. 213

PEOPLE v. STEWART. (No. 20,783.)
(Supreme Court of California. July 15, 1891.)

RAPE—EVIDENCE.

Where, on a trial for assault with intent to rape, complainant, a girl of 12 years of age,

testifies to facts which, if true, prove the crime, and her statements as to most of the accompanying circumstances are corroborated by other witnesses, and defendant admits that he was present, but denies the assault, a conviction will not be disturbed.

Commissioners' decision. In bank. Appeal from superior court, Colusa county; E. A. BRIDGFORN, Judge.

Appeal of G. W. Stewart from a conviction of assault with intent to rape. Affirmed.

T. J. Hart, for appellant. W. H. H. Hart, Atty. Gen., for the People.

BELCHER, C. C. The defendant was convicted of the crime of assault with intent to commit rape, and has appealed from the judgment and an order refusing him a new trial. The only points made for a reversal of the judgment are that the court erred in its instructions to the jury, and that the evidence was insufficient to justify the verdict. No particular errors are pointed out, and, after carefully reading the instructions, we have been unable to discover that any error was committed. Taking the instructions as a whole, they seem to state the law applicable to the case fully, fairly, and clearly. The complainant was a girl 12 years of age. She was a witness, and testified to facts which, if true, necessarily lead to the conclusion that the offense charged was committed; and her testimony as to most of the accompanying circumstances was corroborated by other witnesses. The defendant testified in his own behalf, and, while admitting that he was with the complainant at the time and place named by her, denied that any assault was committed. A conviction of such an offense may be had upon the uncontradicted evidence of the prosecutrix, the weight to be accorded the evidence being a question for the jury. *People v. Mayes*, 66 Cal. 597, 6 Pac. Rep. 691. Under the circumstances shown here, we do not think the judgment can be reversed for insufficiency of evidence, and we therefore advise that the judgment and order be affirmed.

We concur: FITZGERALD, C.; VANCELIER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(90 Cal. 190)

FAIRCHILD v. MULLAN *et al.* (No. 13,210.)¹ (*Supreme Court of California*. July 14, 1891.)

VENDOR AND VENDEE—BOND FOR DEED—SUBSEQUENT DECLARATION OF TRUST—TENANTS IN COMMON.

Where a vendor gave a bond for a deed and received part of the purchase price, the fact that he afterwards entered into an agreement with the vendee and others, declaring that the vendee held the same in trust for the use of all the parties, did not make the vendee a tenant in common with the vendor, as he only took an equitable estate by the bond, which might be foreclosed on failure to comply with its terms.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Harriet M. Fairchild, execu-

trix of A. A. Ritchie, deceased, against John Mullan, Henry F. Williams, P. M. Randall, and Joseph M. Nougues, to quiet title. Judgment for plaintiff. Defendants Mullan and Randall appeal. Affirmed.

Joseph M. Nougues and Mich. Mullany, for appellants. J. F. Wendell, for respondent.

TEMPLE, C. The defendants Mullan and Randall take this appeal from the judgment and an order refusing them a new trial. The action is brought by the executrix of A. A. Ritchie, deceased, to quiet title to a tract of land in Lake county, and to have it adjudged that the defendants have no right to purchase under a contract made with Ritchie, October 19, 1877. Defendants Nougues and Williams filed a disclaimer. The judgment quiets the title absolutely against all of the defendants except Mullan, and permits him to complete the purchase within 90 days, by paying certain moneys, and, failing so to do, cuts off all claim on his part. On the 19th day of October, 1877, Ritchie executed to Mullan a bond, by which he agreed to convey to Mullan the land on or before May 5, 1882, for \$40,000. It recites the payment of \$10,000, but it appears that only \$3,000 was actually paid at the time. The next day, October 20, 1877, Mullan, Nougues, Randall, and Williams entered into a written agreement, which begins as follows: "Whereas, on the 19th day of October, 1877, A. A. Ritchie, of Lake county, California, did in a bond obligate himself to deed and convey to John Mullan, of San Francisco, Cal., his certain property situate in the county of Lake and state of California, and which property is specifically set forth and particularly described in said bond, and to which reference is herein made, and said bond is hereby made a part of this instrument: Therefore, the object of this agreement is to witness and to declare that said property is by said John Mullan held in trust and for the parties hereinafter named, and in the manner and for the purposes hereinafter stated, and not otherwise, to-wit: One-fifth part thereof for A. A. Ritchie, of Lake county, California, and one-fifth part thereof for Henry F. Williams, one-fifth part thereof for Joseph M. Nougues, one-fifth part thereof for P. M. Randall, and one-fifth part thereof for John Mullan, all of San Francisco, California, so that each of said five named parties shall be mutually interested in each and all and every part and parcel of the afore named and described property; it being mutually understood and agreed, however, between the parties thereto, that the interest of each of said parties in and to the aforesaid property shall be and is in direct proportion to the amount of money paid and to be paid by each of the aforesaid parties to A. A. Ritchie on account of the purchase money in making and securing the purchase of said property, and not otherwise." The writing proceeds to specify what sums shall be paid by each, and when. A. A. Ritchie was to pay \$8,000, May 5, 1888. Ritchie was to retain possession, and for one year the use was to pay the interest and taxes on

¹ Rehearing denied.

the sum which remained due after the payments specifically provided to be paid before the final payment, to-wit, \$22,000, which was to be paid October 19, 1882. It further specifies as follows: "It is further mutually understood and agreed that it is the intention of the parties hereto in due time to organize a corporation under the laws of the state of California for the purpose of introducing water into the city of San Francisco from the Putah Creek water-shed, and from other sources of water supply in the state of California; that it is the ultimate intention and purposes of said parties to use the property so purchased and as described in said bond as one of the reservoir sites in the development of said water project; and that it is for such ultimate use and purpose that said property has been negotiated and purchased and paid for, and in the manner and for the benefit of the parties hereto, and wherefore this agreement has been made and entered into by these parties at the city of San Francisco, this 20th day of October, 1877." It was provided that Mullan should pay for Randall, but, if Randall failed to repay by May 5, 1882, his interest should pass to Mullan for the benefit of himself and the other parties, if they proportionately reimbursed Mullan the amounts paid for Randall. It does not appear that Randall ever paid anything, or that Mullan was reimbursed for moneys paid on his account. Nougues and Williams assigned their interest to Mullan, August 15, 1878. At the time of Ritchie's death, November, 3, 1879, he had been paid, at the date of the contract, October 19, 1877, \$3,000; December 1, 1877, \$2,000; April 11, 1878, \$2,500; and Ritchie had a note from Mullan for \$2,500,—thus making up the \$10,000 payment which is acknowledged in the bond. Mullan had expended, on account of the proposed water company, \$3,188.53. After Ritchie's death Mullan presented a claim against his estate for one-fifth of this sum. Five hundred and ninety-one dollars was allowed by the executrix, and credited on the note, November 1, 1881. Mullan advanced to her \$1,000, which she needed to pay interest upon a mortgage given by Ritchie upon the land. At this time Mullan contracted with the executrix to purchase Ritchie's interest in the property for \$8,000, to pay the balance due on his note and the bond by November 1, 1883. He made no further payments, and this suit was commenced February 3, 1884.

Appellant contends that by the terms of the agreement made on the 20th day of October, 1877, he became an owner as tenant in common with Ritchie in proportion to the amount paid by him upon the purchase of the property. Whether this is a correct construction of that agreement is really the only question in the case. By the terms of the bond to Mullan, Ritchie held the legal title as security for the purchase money still unpaid. By the contract of the next day he became jointly interested with the defendants in their enterprise, and that instrument was evidently intended to define the interest of each in the joint undertaking and the joint property. There is nothing indicat-

ing an intent on the part of Ritchie to affect his security for his debt, or to change the terms of the purchase. The natural and obvious construction would be that the contract was intended to define the interest of the parties *inter sese* as purchasers, and, indeed, the instrument expressly so declares. "Therefore, the object of this agreement is to witness and declare that said property is by the said John Mullan held in trust for the parties hereinafter named, and in the manner and for the purpose hereinafter stated, and not otherwise;" and then follows the language under consideration. It is quite obvious that the property to be held as specified was the estate in John Mullan, or to be acquired by him under the bond, which is made part of the agreement. Mullan having failed to complete his purchase, the proceeding to foreclose his rights under the contract is strictly in accordance with the practice in equity, and has been expressly sanctioned in this court. *Keller v. Lewis*, 53 Cal. 118. By the terms of the contract Randall has ceased to have any interest in it. If he has rendered service to the associates, it would constitute no claim against Ritchie to be set off against this bond. No such services were shown, nor was any claim against the estate on account of such service presented to the executrix. We think the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

90 Cal. 201

TOMKIN V. HARRIS, Judge of Superior Court. (No. 14,235.)

(Supreme Court of California. July 15, 1891.)

MANDAMUS TO JUDGE — PLACING CAUSE ON CALENDAR.

On petition for *mandamus* to compel a judge to place a cause on the calendar, it appeared that such case had been begun six years before for the dissolution of a partnership and the division of partnership lands. A certain third party claiming an interest in such lands was made a defendant. Both defendants, having filed general denials, died, and their interests in the property passed into other hands, and their administrators closed up their estates without having been substituted as defendants. Six years after its commencement, the case not having been brought to trial, certain *amici curiæ* moved to dismiss for lack of prosecution, showing that they wished to purchase and procure good titles to the lands clouded by such action. *Held*, that it was within the discretion of the circuit court to entertain such motion, and while having it under advisement *mandamus* will not lie, at the instance of a substituted defendant, to compel such court, by placing the cause on the calendar, to decide such motion within any specified time.

Application for *mandamus*.

J. C. Bluck and B. L. Ryder, for petitioner. Walker C. Graves, for respondent.

McFARLAND, J. This is an original proceeding here in *mandamus* by which petitioner seeks to have the respondent commanded to place on the calendar a certain action pending in his court entitled "Thad-

deus Harper v. Thomas Hildreth et al.," and to set said action for trial on a day certain, or to appoint a referee therein, and to proceed with the trial of said action. An alternative writ was issued; and, upon the filing of respondent's answer, the case was argued and submitted on the petition and answer. There is no doubt that a superior court may be compelled by *mandamus* to proceed, in regular course, to the trial of a cause, when without any legal reason it flatly refuses to do so. But the writ can be used for this purpose only when the action of the lower court is a plain refusal to perform a clear duty which the law specially enjoins; and the party invoking its aid must show a case where the duty of the court to do the thing asked is pure and simple, and unmixed with discretionary power or the exercise of judgment. Such a case the petitioner in the case at bar has not shown. It appears that the said action of Harper vs. Hildreth et al. was commenced in the court of respondent in June, 1884. The purpose of the action was to dissolve a partnership between Harper and Hildreth, which had been engaged in raising cattle and other live-stock, and in buying, selling, and improving lands, and for an accounting; Harper alleging that Hildreth was largely indebted to him on account of said partnership. It was averred in the complaint that said Harper and Hildreth, as partners, were the owners of more than 13,000 acres of land in Fresno county; and Kate L. McLaughlin, as executrix and devisee of Charles McLaughlin, deceased, was made a party defendant to the action as claiming an interest in said lands. No answer appears to have been filed in the case until May 14, 1885, when Hildreth filed an answer admitting the partnership, but denying any indebtedness to Harper, and alleging that, upon an accounting, Harper would be indebted to him (Hildreth) in the sum of \$33,000, for which amount he prayed judgment against the plaintiff, Harper. Nothing further seems to have been done, or asked to be done, in the case before June 29, 1886, when the defendant Hildreth died in Santa Clara county. He left a will, in which his widow, Laura L. Hildreth, was named as executrix; and on January 20, 1887, she was substituted as defendant in the case. It appears that at some time, not stated, a referee was appointed, but he died without making any report. Afterwards, in October, 1887, the said Laura was discharged of her trust of executrix by the superior court of Santa Clara county. Afterwards one Dunphy was appointed administrator, but he was also discharged as administrator by the superior court of Santa Clara county in April, 1890, without ever having been substituted as a party to the action. In the mean time the defendant Kate L. McLaughlin had died, and no one had been substituted in her place as defendant. The action slept along until April, 1890, when Horace Hawes and W. C. Graves, in the character of *amici curiæ*, upon notice to plaintiff, moved the court to dismiss the action for want of prosecution. In support of their motion they showed by affidavit that both of the

defendants were dead; that their estates had been administered upon and the administrations closed; and that no claim for the matters set up in the complaint had been presented to either estate. Plaintiff appeared by counsel, and opposed the motion, and showed by affidavit, among other things, that the said defendant Kate L. McLaughlin, during her lifetime, and after the commencement of the action, entered into a written contract with W. W. Davis and D. P. Edwards, by which she agreed to convey to them all her title to the lands described in the complaint, upon their compliance with certain conditions; that in like manner the original defendant, Thomas Hildreth, had entered into a written agreement to convey all his interest in said lands to said Davis and Edwards; that said Davis had, by a recorded deed, conveyed the undivided half of a part of said lands to J. G. James and J. R. White; and that said Kate L. McLaughlin had afterwards, by a recorded deed, conveyed to said James and White all the interest which, in her own right, or as executrix as aforesaid, she had in any and all of the lands described in the complaint. Thereupon plaintiff's counsel gave notice that on April 22, 1890, he would move the court for an order that said Davis, Edwards, James, White, and others be brought in as parties defendant, and for leave to file an amended and supplemental complaint. By consent of the parties, both of said motions were continued from time to time until the 15th day of August, when they were finally submitted upon briefs, all of which were to be filed within 25 days. Afterwards, on October 15, 1890, and while said motions were still under advisement, the petitioner herein, Alfred R. Tomkins, having procured himself to be appointed administrator of said Thomas Hildreth, deceased, appeared by his attorney, and asked to be substituted as defendant. To this Milton E. Babb, one of the attorneys of record for plaintiff, consented, and on December 17, 1890, an order for such substitution was made. On December 22d the petitioner, by his attorney, J. C. Black, appeared, and asked the court orally to place the cause upon the calendar for trial on a day to be fixed by the court, or to appoint a referee, and to allow the plaintiff and defendant to amend their pleadings as per stipulation on file. This stipulation was signed by said Babb, as attorney for plaintiff, and by said Black and B. G. Ryder, as attorneys for the substituted defendant, Tomkins, and provided that the said parties might amend their pleadings at any time "as they may elect." This motion having been denied, it was renewed in writing on December 23d; and the written motion was consented to in writing by said Babb, as attorney for plaintiff. The motion was denied; the judge saying that whenever any amendment to a pleading should be proposed he would pass upon it, but that he would not make the order for amendments in the general way proposed by Black and consented to by Babb. (We gather from the record that the court suspected collusion between the said two apparently hostile

parties.) The court refused to place the case on the calendar at that time, but said that it would "place the case on the calendar if the matters heretofore submitted are determined before that time," and there were issues to be tried. At that time the pleadings in the case had disappeared, and there had been no application to supply them. According to the rules of the court, the civil calendar was called at certain times for the purpose of setting cases for trial, and when the said motion was made cases had already been set up to January 21st. There was another setting of the calendar on January 10th, of which the usual notice in the newspapers was given; but no motion was made at that time to set the said case of Harper v. Hildreth. On January 2, 1891, the court made an order reciting the facts above stated as to the said Davis, Edwards, James, and White, and directing that they be brought in and made parties to the action. Under these circumstances, we do not think that the petitioner presents a clear field for the exercise of the extraordinary remedy of *mandamus*. Waiving all other considerations, we think that the court had the right to entertain the motion of *amici curiæ* to dismiss the action for want of prosecution. The object of the motion, as stated by them, was to purchase and procure good titles to lands which were embraced in and clouded by the action. The suit had been pending for six years, and no effort had been made by either of the parties to bring it to a trial. There was not—and for a long time had not been—any person representing either of the defendants; and the interests of the defendants in the lands affected by the suit had been long since transferred and conveyed to others. Whether or not, under these circumstances, the motion of Hawes and Graves—though not parties to the action—should be entertained was a question which we think addressed itself to the judicial discretion of the court. It had the right to entertain the motion if it chose to do so. Parties have no right to perpetually incur the records of a court with suits which they never intend to prosecute. And having entertained the motion, and taken it under advisement, the court cannot be compelled, by *mandamus*, to decide it within any specified time. For these and other reasons apparent on the face of the record, the peremptory writ must be denied. It is not to be presumed that the respondent will indulge in any unnecessary delay in disposing of the preliminary questions before him. The application of petitioner is denied, and the proceeding dismissed.

We concur: DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.; SHARPSTEIN, J.

(90 Cal. 207)

In re SIERING. (No. 14,341.)¹

(Supreme Court of California. July 15, 1891.)

APPEAL—MATTERS NOT ON RECORD.

Matters which occurred in the court below, subsequent to the entry of judgment, should appear on the record, and cannot be shown by affidavit in the first instance in the appellate court.

¹Rehearing denied.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

M. J. Platshek and R. Percy Wright, for appellant. Marcus Rosenthal, for respondent.

PATERSON, J. There is nothing in the transcript to show that the appellants ever filed any claim against the insolvent debtors. The judgment recites that all the creditors of the insolvents who had filed claims and the assignee appeared at the hearing of the contest, and mutually agreed upon an adjustment and settlement of all matters of difference between them. If the appellants afterwards, by filing claims, acquired the right to move to set aside the judgment or to appeal therefrom, the record should show the facts. What occurred in the court below subsequent to the entry of the judgment should appear in the record. It cannot be shown by affidavit in the first instance in this court. The appeal is dismissed.

We concur: BEATTY, C. J.; MCFARLAND, J.; HARRISON, J.; GAROUTTE, J.; SHARPSTEIN, J.; DE HAVEN, J.

(90 Cal. 195)

PEOPLE v. BAWDEN. (No. 20,744.)

(Supreme Court of California. July 14, 1891.)

HOMICIDE—INSTRUCTIONS—INSANITY—BURDEN OF PROOF—WAIVER OF OBJECTIONS.

1. On indictment for murder, an instruction to find defendant guilty of murder in the first degree if the jury find that he willfully, deliberately, and with premeditation "murdered" deceased at the time and place named, is not erroneous because it leaves out the element of malice aforethought, if the court in other instructions charged that malice aforethought was necessary to constitute murder in the first degree.

2. On indictment for murder, an instruction that, if the jury find defendant guilty of murder in the first degree, and also find some extenuating circumstance, it is within their discretion to relieve him from the death penalty, and fix his punishment at imprisonment for life; but that, if no extenuating circumstances are shown, they should allow the death penalty to be imposed,—is not erroneous. Pen. Code Cal. § 190, does not give the jury the entire power of fixing the punishment, influenced by the court.

3. On indictment for murder the burden is on defendant to prove insanity by a preponderance of the evidence, and an instruction that the jury must acquit if on the whole evidence they have a reasonable doubt of defendant's sanity is properly refused.

4. After judgment of conviction of murder defendant cannot avail himself of the fact that there was no preliminary examination and commitment by a magistrate before filing the information, either by motion for a new trial or in arrest of judgment.

5. Under Pen. Code Cal. §§ 990, 995, 996, defendant, upon arraignment, may move to set aside the information upon the ground that before the filing thereof he had not been legally committed by a magistrate; and if the motion be not then made, he is precluded from afterwards taking the objection.

In bank. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge. Ernest Serier and J. N. Gillett, for appellant. A. J. Monroe, T. H. Selva, and W. H. H. Hart, for the People.

McFARLAND, J. The appellant was convicted of murder in the first degree, and was sentenced to suffer the death penalty; and he appeals from the judgment, from an order denying a new trial, from an order denying his motion in arrest of judgment, and also from an order denying his motion "to dismiss the information, and all subsequent proceedings."

1. The first contention of appellant is that the court erred in giving the following instruction: "If you find from the evidence, and beyond a reasonable doubt, that at the time and place mentioned in the information the defendant did then and there willfully, deliberately, and with premeditation murder one Lillie M. Price, then your verdict should be murder in the first degree." The main criticism of this instruction is that it "leaves out the element of malice aforethought." But in this instruction the court was not giving a definition of murder. That it had done very fully in previous instructions, and had told the jury that murder was "the unlawful killing of a human being with malice aforethought," and had given the statutory definitions of malice. In the instruction under review it was, therefore, not necessary to repeat the definition of murder. It is true that a court should be very careful in framing an instruction which concludes with the words, "then your verdict should be murder in the first degree;" but in this instance the court merely said that such result should follow if the defendant murdered the deceased willfully, deliberately, and with premeditation. In this language no error can be detected. The Code provides that such kind of murder is murder of the first degree. In the cases cited by appellant (*People v. Gibson*, 17 Cal. 283; *People v. Woody*, 45 Cal. 289; *People v. Ah Lee*, 60 Cal. 85) the jury had been instructed that from the mere killing of the deceased the law presumed murder in the first degree. In *People v. Hunt*, 59 Cal. 433, the court had given an instruction to the effect that, if the deceased died from a wound inflicted by defendant with malice aforethought, the jury should convict him of murder. The appellant contended that the instruction should have informed the jury of which degree of murder the defendant should be convicted; and this court, of course, held that no such proposition should have been included in that instruction. None of the other cases cited are in point.

2. Appellant contends for a reversal on account of the instructions given by the court numbered 23, 24, and 25. By these instructions the jury were told, substantially, that, if they found the defendant guilty of murder in the first degree, and also found some extenuating fact or circumstance, it was within their discretion to relieve him from the extreme penalty of death by fixing the punishment at imprisonment for life; but that, if the evidence did not show such extenuating circumstance, then they should allow the death penalty to be imposed. If the question here presented were a new one, there would be strong reasons for holding that by section 190 of the Penal Code the legis-

Cal. Rep. 26-28 P.—23

lature intended to give to the jury the entire power of fixing the punishment in such a case, uninfluenced by the court; and that there is no warrant in the Code for any distinction in this regard between one kind of murder in the first degree and another. But these instructions are literal copies of instructions given and approved by this court in *People v. Brick*, 68 Cal. 190, 8 Pac. Rep. 858. The same rule was also substantially stated in *People v. Jones*, 63 Cal. 168, and in *People v. Murback*, 64 Cal. 369, the language of the instructions approved was almost identical with that used by the court in the case at bar, although it may be said that in the *Murback* Case the opinion of the court was hardly in consonance with the instructions approved. The same rule seems to have been approved in *People v. Olsen*, 80 Cal. 128, 22 Pac. Rep. 125. Similar instructions have no doubt been given in other cases now on their way here by appeal; for it is to be observed that whenever a doubtful instruction has been approved by this court, it has generally been seized upon and injected into future cases. Great confusion would therefore occur if we should enter into a new examination of this question, and should come to a conclusion opposite to that heretofore reached. Moreover, as was said by the court on another subject in *People v. Myers*, 20 Cal. 520: "We do not think this question has practically so much importance as is sometimes attributed to it;" for a juror exercising the responsibility of choosing between the imprisonment of a defendant and his death will act upon his own discretion, and not upon that of another. Therefore we decline to reopen the question; and hold that the instructions, under the authorities, were not erroneous. It is to be hoped, however, that trial courts will not make further excursions into this doubtful domain.

3. The court gave some instructions on the subject of insanity, and refused others on the same subject, asked by appellant; and it is contended that the court erred in its rulings on that subject. It is unnecessary to consider these instructions in detail. They present this difference between the views of the court and those of appellant, viz.: The court instructed that the burden was on defendant of establishing insanity by a preponderance of evidence, while the appellant unsuccessfully requested the court to instruct that, if the jury upon the whole evidence had a reasonable doubt of his sanity, they should acquit. The rule as stated by the court has always been held to be the law in this state; and in the recent case of *People v. Travers* we held that such rule was not disturbed by *People v. Bushton*, (80 Cal. 160, 22 Pac. Rep. 127, 549.) and subsequent cases. See *People v. Travers*, (Cal.) 26 Pac. Rep. 88, and cases there cited. There was, therefore, no error in the rulings of the court on these instructions.

4. Appellant seeks to avail himself of the alleged fact that there was no preliminary examination and commitment of defendant by a magistrate before the filing of an information, (1) by a motion for a new trial; (2) by a motion in arrest of judg-

ment; and (3) by a motion to set aside the verdict and dismiss the proceedings for want of jurisdiction. As to the first, it is sufficient to say that the matter here presented is not one of the grounds of a motion for a new trial. Pen. Code, § 1181.¹ As to the second, it is also true that it is not a ground for a motion in arrest of judgment under section 1185, Pen. Code. If the point sought to be presented goes to the jurisdiction of the superior court, it could probably be made after verdict by appellant's third motion under section 1012. But it is stated in the bill of exceptions that it is "admitted by counsel for defendant upon and for the purpose of said motion that said Charles H. Bawden, before the filing of the information against him, had a regular and legal preliminary examination before a committing magistrate, and was regularly committed, except as to defendant's mental condition during such examination, as set out and claimed in the affidavits in support of said motion hereinbefore set out, all of which affidavits are denied by the people." The bill contains several affidavits used on the motion, some on behalf of appellant, and some on behalf of the people. Among others is the affidavit of the committing magistrate, from which it appears that the complaint against defendant was made February 10, 1890; that on March 10th defendant was brought before the magistrate, and informed of his right to have counsel; that defendant asked to have a continuance until March 17th, and his request was granted; and that on said March 17th the preliminary examination was had. Some of the affidavits tend to show that at the examination defendant was in a state of great nervous excitement and mental derangement, and oblivious to what occurred; others of the affidavits tend to show that this was not the fact, but that he was merely simulating or "putting on" an appearance of mental derangement. These matters do not raise a question of jurisdiction. The preliminary examination and commitment, and the information based thereon, being regular on their face, gave full jurisdiction to the court to try the case. It was an "information after examination and commitment by a magistrate" within the provision of the state constitution. Ex parte McConnell, 83 Cal. 558, 23 Pac. Rep. 1119. Moreover, a defendant, upon arraignment, may move to set aside the information upon the ground "that before the filing thereof the defendant had not been legally committed by a magistrate;" and if the motion be not then made, the defendant is precluded from afterwards taking the objection. Pen. Code, §§ 990, 995, 996; Ex parte McConnell, supra; Ex parte Moan, 65 Cal. 218, 3 Pac. Rep. 644. See, also, Hamilton v. People, 29 Mich. 173; People v. Coffman, 59 Mich. 1, 26 N. W. Rep. 237. The foregoing are the main points discussed by appellant, and there are no others necessary to be noticed. We see no error in the record. The judgment and orders appealed from are affirmed.

¹ Pen. Code, § 1185, prescribes the cases in which a new trial may be granted.

We concur: BEATTY, C. J.; GAROUTTE, J.; SHARPSTEIN, J.; HARRISON, J.; PATERSON, J.

DE HAVEN, J. I concur in the judgment. I think the instruction referred to in the opinion of Mr. Justice MCFARLAND, in which the jury were told what their verdict should be in case they found the defendant guilty of murder in the first degree, and without any extenuating circumstances, was correct. Such an instruction does not in any degree interfere with the discretion which is given the jury in this class of cases. This would be my view if the question were a new one; but, as similar instructions have been many times approved by this court after it has given the matter the careful consideration which cases involving the life of a person must always receive, I think the correctness of such a direction to a jury ought not to be considered an open question. The law on this point ought to be deemed settled. As to the other questions discussed in the opinion I fully concur.

90 Cal. 202

MALCOLMSON V. HARRIS, Judge. (No. 14,320.)

(Supreme Court of California. July 17, 1891.)

MOTION FOR NEW TRIAL—STATEMENT OF EVIDENCE.

When a cause has been tried without the presence of an official reporter, and when no notes of the evidence and proceedings have been filed or reduced to writing, the losing party can move for a new trial on the minutes of the court, relying on the recollection of the judge as to the evidence and proceedings, and can thereafter secure a statement of the case, including the evidence, under Code Civil Proc. Cal. §§ 658-661, providing that when a motion for a new trial, on the ground of insufficiency of the evidence, is made on the minutes of the court, a statement to be subsequently prepared forms a part of the record.

In bank. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Edward Lynch, for petitioner. Church & Cory, for respondent.

BEATTY, C. J. This is a petition for a writ of mandate to compel the judge of the superior court of Fresno county to settle a statement on motion for a new trial. The case has been submitted upon a general demurrer to the petition, the substance of which is that in an action in which Pauline Fincher was plaintiff and petitioner a defendant, a judgment was entered in said court in favor of the plaintiff; that thereafter, in due time, the petitioner gave notice of his intention to move for a new trial, upon the grounds, among others, that the evidence was insufficient to justify the decision, and that it was against law, and stating in said notice that the motion would be based upon the minutes of the court; that afterwards the motion for a new trial was made and overruled, and thereupon a correct statement of the evidence and proceedings at the trial was prepared and served in due time; that the respondent struck out of said statement everything relating to the trial, including the evidence, and refused

to settle or act upon the same upon the ground that there were no minutes thereof, that is to say, there were no short-hand notes of the evidence, no reporter having been present at the trial, and no notes of the evidence filed or taken in writing by either the clerk or judge; that petitioner has appealed from said order, and requires a statement of the case to support his appeal.

The question presented for decision is, therefore, whether when a cause has been tried without the presence of an official reporter, and when no notes of the evidence and proceedings at the trial by reporter, judge, or clerk have ever been filed or reduced to writing, the losing party can move for a new trial on the minutes of the court, relying on the recollection of the judge as to such evidence and proceedings, and can thereafter secure a statement of the case, including the evidence, for the purposes of an appeal from the order. By section 658 of the Code of Civil Procedure it is provided that when an application for a new trial is based upon the ground, among others, of insufficiency of the evidence to justify the verdict or other decision, or that it is against law, it may be made at the option of the moving party, either upon the minutes of the court or upon a bill of exceptions, or upon a statement of the case. The notice of intention to move for a new trial must be filed within 10 days after verdict or notice of decision, and must designate the grounds of the motion, and whether it will be made upon the minutes of the court, bill of exceptions, or statement. If upon bill of exceptions or statement, the bill or statement must be proposed, amended, settled, engrossed, and filed before the motion is heard, and must contain a specification of the particular deficiencies of the evidence upon which the moving party will rely; but when the motion is to be made on the minutes of the court, the notice itself must specify the particulars in which the evidence is alleged to be insufficient; otherwise the motion will be denied. Code Civil Proc. § 659. If the motion for a new trial is to be heard on the minutes of the court, it must be made at the earliest practicable period after notice, (Id. § 660,) and on appeal from the order granting or refusing the motion, a statement to be subsequently prepared forms a part of the record, (Id. § 661.) By these various provisions a very simple, plain, and expeditious practice is prescribed, by which the trouble, expense, and delay of settling statements or bills of exceptions may be entirely avoided in all that large class of cases in which the order of the trial judge granting or denying a new trial is accepted as final, as it always must be—so far as the ground we are considering is concerned—when there is a substantial conflict of evidence. And even where the losing party wishes to appeal it will generally be easier and more convenient to make a statement after than before the order; for the argument of the motion will generally eliminate many of the points, as its decision will always do away with the

necessity of setting out evidence upon points as to which there is an admitted conflict. The wonder is that a practice so convenient, so saving of time, trouble, and expense, is so little resorted to. Possibly the explanation is to be found in the fact that the terms of the statute leave it doubtful whether, in a case like the present, where there are no written notes of the testimony capable of being placed on file, the moving party can have any advantage of the testimony actually adduced at the trial, and necessarily resting alone in the recollection of the judge. If so, it is fortunate that an occasion has arisen for removing any misconception on that point, for we have no doubt that a party moving on the minutes of the court may rely on all matters that could be legitimately included in a statement prepared in advance of the motion. It is true that the statute enumerates depositions, documentary evidence, and phonographic report of testimony, as matters to which reference may be had on the hearing of the motion, (section 660;) and there is some force in the argument that such an enumeration should be regarded as exclusive, but there is much more force in the consideration that since the judge has the undoubted right to include testimony actually given, though not reported, in a statement prepared in advance of the hearing, there is no reason why his recollection of the evidence should not be equally resorted to in making a statement after the hearing. The statement, at whatever time prepared, ought to be a correct presentation of so much of the testimony as is material,—derived from the reporter's notes, if there are any, and, if not, from the recollection of the judge, assisted by such notes as he may have taken; and the mere fact that there is no short-hand report of the trial ought not to be held to deprive the losing party of the privilege of moving for a new trial in the speediest and most convenient mode prescribed by the statute, unless its terms are such as to admit of no doubt that such was the intention of the legislature. We think the law demands no such construction. The enumeration of section 660 is not necessarily exclusive, and it is contrary to all considerations of justice and convenience to hold that it was intended to be. That a judge may and must consider on a motion for a new trial, made in advance of a statement, all evidence material to the grounds and specifications of the notice, whether reported or not, is something which the legislature may well have deemed too obvious to call for express enactment; and, if such evidence is to be considered, it must go into the statement. It is ordered that a peremptory writ of mandate be issued, directed to respondent, and commanding him to settle said statement according to the facts, including therein the evidence material to the motion as given at the trial of said action.

We concur: SHARPSTEIN, J.; PATERSON, J.; DE HAVEN, J.; MCFARLAND, J.; HARRISON, J.

(90 Cal. 280)

SOMMER v. SMITH. (No. 13,970.)*(Supreme Court of California. July 17, 1891.)***VARIANCE BETWEEN PLEADING AND PROOF.**

In an action by a principal against his agent to recover the difference between what the agent paid for certain stock and what he said he paid, and was repaid to him by the principal, the complaint alleged that the agent purchased the shares of stock, while the proof showed that he purchased certain agreements of a syndicate to furnish the shares of stock. *Held*, that the variance was immaterial.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Waters & Gird, for appellant. *Willis, Cole & Craig*, for respondent.

TEMPLE, C. Appeal from judgment and order denying defendant a new trial. The question on this appeal is as to the materiality of a variance between the allegations of the complaint and the proof. It is averred that defendant, as plaintiff's agent, purchased certain shares of stock in the Semi-Tropic Land & Water Company of California. The proof is that as such agent he purchased for plaintiff certain agreements of a syndicate to furnish the shares of stock. This seems a plain case of an immaterial variance, under section 469, Code Civil Proc. In its general scope, the proof corresponds with the allegations of the complaint. It was a purchase of shares of stock, but not the immediate purchase of certificates of stock, as would be inferred from the complaint. The object of the suit was to recover the difference between what the agent reported he had purchased the stock for, and which plaintiff had paid the agent, and the price which, as plaintiff afterwards discovered, the agent had actually paid. An examination of the record shows quite conclusively that the defendant was not misled by the variance. A full defense was made as though the complaint had accurately stated the facts. We think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(90 Cal. 289)

HICKS v. THOMAS. (No. 13,761.)¹*(Supreme Court of California. July 18, 1891.)***RESCISSION OF DEED—FRAUD—EVIDENCE—PLEADING—FINDINGS.**

1. A complaint in an action to set aside a conveyance showed plaintiff to be an old, unprotected, feeble-minded woman, and alleged that, after having made a verbal contract with defendant for the sale of her property for its reasonable value, he, with intention to cheat and defraud her, falsely represented and insisted that the price agreed to be paid was much smaller, and that he could prove such assertion, and compel her to perform the contract, as he claimed it, and that, if she did not deed it, he would get it on a tax-deed; that he threatened her with violence if she did not execute a deed of the property to her; that relying on and believing such false representations, and because of the threatened violence, she executed the deed. *Held*, that the complaint was not founded on fraudulent repre-

sentations alone, but upon oppression and undue influence, calculated to overcome the judgment and will of such a person, and was sufficient.

2. The action being based on a charge of fraud in procuring the deed, proof of the verbal contract could not be barred on the ground that negotiations precedent to the deed were merged therein.

3. It is not necessary that a complaint, founded on fraudulent representations, should minutely detail the conversations by which the fraudulent representations are proven.

4. An offer to restore the consideration received for a deed which is sought to be set aside, when averred in the language of the statute, is sufficient on general demurrer.

5. The finding of facts inconsistent with and contradictory of the representations made is sufficient, without a specific finding that the representations were false.

6. The representations having been accompanied by threats and duress, it is not necessary to find that plaintiff believed them, though the general finding that the deed was procured by fraud implies this fact.

7. That plaintiff was injured appears from the finding that the price paid was grossly inadequate.

Commissioners' decision. In bank. Appeal from superior court, Shasta county; AARON BELL, Judge.

John F. Ellison, for appellant. *Clay W. Taylor and J. Chadbourne*, for respondent.

TEMPLE, C. Defendant appeals from judgment and order refusing a new trial. The action is to set aside a conveyance of real estate, and a bill of sale of personal property, on the ground of fraud and duress. The complaint shows that plaintiff is a widow upwards of 68 years old, of feeble understanding and limited business experience, and at the time of the execution of the instruments she was living alone, remote from friends or relatives, in ill health, and in a state of great mental depression and despondency; that at the urgent solicitation of the defendant she verbally contracted to sell to him her property, consisting of a tract of land and the stock on it, for \$3,500. After this verbal agreement was made, defendant, intending to cheat and defraud her, falsely represented, insisted, and asseverated that the verbal contract was not that he should pay \$3,500 for all the property, but \$1,000 for the land only; that he could prove such assertion, and compel her to perform the contract as he claimed it to be; that he had an unredeemed certificate of sale for taxes, and unless she sold to him he would get a tax-deed, which would be as good or better than a deed from her; that he represented that her creditors would attach her personal property, and to save the same she must convey to him for \$220; that at that time, or before, he told her he would make her sign the deed, and if she would not he would throw her out and break her God damned neck; that it would not take long to get rid of her; "that relying upon and believing the said false and fraudulent representations of the defendant, and by means thereof, and pursuant to and because of said threatened personal violence to plaintiff from the defendant, and plaintiff's fear thereof, he then and there, without giving the plaintiff any time for reflection and consultation with

¹Judgment modified on rehearing, 37 Pac. Rep. 376.

others, induced, influenced," etc., her to make a deed to him of the land for \$1,000, and a bill of sale of the personal property for \$220. She alleges an offer to restore to defendant everything she had received from him, and a demand for a reconveyance. The offer was made October 31, 1888. She discovered the fraud January, 1888, and immediately commenced a suit against defendant for the cancellation of the conveyances, which suit, owing to some defects, had been dismissed. The deed and bill of sale were made December 21, 1887. A general demurrer was interposed to the complaint, which was overruled. If the action were based upon the fraudulent representations alone, the complaint would be insufficient, but it is not based upon such representations alone. Circumstances are stated which show great oppression and undue influence, well calculated to overcome the judgment and will of such a person as the plaintiff. An intelligent, strong man would not be likely to be influenced by such representations and threats, and the plaintiff must have known that his assertions as to the verbal contract were untrue, but they were accompanied by threats that he could prove his assertions, and would compel her to adopt his version of the contract, and if she did not he would get the property from her upon a tax-deed. Representations which are very unreasonable, accompanied by threats, may well be held to have influenced a sick, weak-minded, foolish woman, who was without advisers or friends. The material question in such cases is whether by such fraudulent practices she has in fact been wronged, although, as a general rule, where people are so reckless of their own interests, courts may not interfere to relieve them from their folly. The weakness of the plaintiff constitutes a very important element in her case. It is averred that the property was worth \$3,500. The price was therefore grossly inadequate.

The defendant at the trial reserved many exceptions to the admission of evidence. A large number of these are to evidence of conversations proving the verbal contract, on the ground that all verbal precedent negotiations were merged in the deed. Of course, the action being based upon a charge of fraud in procuring the deed and bill of sale, no such rule obtains. Another objection taken was that the representations were not specifically averred. We think there is nothing in this objection. The acts of fraud must be specifically set out. But this rule does not require or justify a minute detail of all the conversations by which fraudulent representations are proven. It is enough if averred in substance and legal effect as proven. And then it is proper to prove corroborative statements. The offer to restore is averred in the language of the statute. If that requires a specific tender, the allegation would imply one, and would be sufficient, at least in the absence of a special demurrer, which is sometimes in the nature of a motion to require a pleader to make his averment more definite, as the practice is in some states where code pleading prevails. Is the finding sufficient

which fails to find specifically, (1) that the representations were false; (2) that plaintiff believed and relied upon them; and (3) that she has been injured? These objections are taken by appellant, and to them may be added that it is not specifically found that she believed that defendant would execute his threats, and signed and delivered the papers under the influence of such fear. All the above facts, however, although not specifically found, do appear from the findings: (1) That the representations were false is shown by facts found which are inconsistent with and contradictory of the representations made. (2) It was not necessary to find that she believed them, because they were accompanied by threats and duress, but the general finding that the deed and bill of sale were procured by fraud implies this fact. (3) That she was injured appears from the fact which is found that the price paid was grossly inadequate. We must not be understood as holding that, under the circumstances of this case, it was necessary to show damage. There is a general finding that the deed and bill of sale were procured by defendant "by duress, menace, undue influence, and fraud." This is not as specific as it ought to have been, but it is a finding of the ultimate facts upon which the judgment depends, and the defendant has not been injured by the failure to find more specifically. We think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

90 Cal. 208

Ex parte VANCE. (No. 20,863.)

(*Supreme Court of California.* July 15, 1891.)

RELEASE FROM JAIL—SATISFACTION OF SENTENCE.

Where one sentenced to pay a fine and to be imprisoned until such fine is paid in the proportion of a day for every dollar of the fine, is released by the sheriff without authority, the time of his absence cannot be considered as spent in jail in satisfaction of the judgment.

In bank. Application for writ of *habeas corpus*.

A. H. Carpenter, for petitioner. C. S. Denson and Wilson & Wilson, for respondent.

DE HAVEN, J. The return to the writ of *habeas corpus* issued herein shows that the petitioner, D. M. Vance, was on October 18, 1889, adjudged by the superior court of Sacramento county to be guilty of contempt, and to pay a fine thereof of \$300, and to be imprisoned in the county jail of Sacramento county until such fine was paid, in the proportion of one day for every dollar of the fine. The petitioner was on that day committed to jail under said judgment, and there remained until October 22, 1889, when he was released by the sheriff, and remained at liberty, free and without confinement, until June 10, 1891, at which date he was rearrested under an order of the superior court made June 9, 1891, directing that its former judgment be enforced. The release of

petitioner by the sheriff was not by any order of the court, but upon an undertaking given by petitioner on appeal to the supreme court from said judgment of contempt, and it may be assumed that both the sheriff and the petitioner acted upon the belief that the execution of said judgment was stayed by said appeal and undertaking. The petitioner now claims his release upon various grounds which assail the validity of the original judgment for contempt, and also because "the term of such imprisonment has long expired, and there having been no legal or authorized suspension of said judgment." In regard to the first claim of petitioner it will be sufficient to say that the affidavits charging him with contempt were such as to authorize the order which directed him to show cause why he should not be punished for the contempt therein alleged, and the subsequent proceedings ending in the judgment for contempt were regular, and the judgment itself valid. The remaining ground upon which the petitioner claims his release presents the single question whether his release from jail under the circumstances here stated, and thereafter remaining at large with free and perfect liberty, for a length of time sufficient to have satisfied said judgment if he had remained in jail, operate as a complete execution of the judgment; and it would seem from the mere statement of the proposition that the contention of petitioner on this point cannot be sustained. The sentence of the court was that he pay a fine, and that part of the judgment relating to imprisonment was merely incidental to the judgment of fine, and in the nature of an award of execution directing the particular way in which that judgment should be enforced, in the event of the non-payment of the fine imposed, and it seems clear to us that such judgment can only be satisfied by a compliance with its terms. In this case it is admitted that the judgment of fine has not been paid, and that the defendant has not suffered the alternative of actual imprisonment. The judgment therefore remains in full force. The act of the sheriff in releasing the petitioner was unauthorized, and petitioner's departure from the jail to which he had been lawfully committed, without having been discharged by due course of law, was equally so, and was in effect a technical escape, from which he can derive no advantage. The time of petitioner's absence from jail, in violation of law, cannot be considered as having been spent in jail in satisfaction of the judgment which required his actual imprisonment. This question, although presented here for the first time, is not a new one. In *Re Edwards*, 43 N. J. Law, 555, the petitioner had been committed to state-prison for the term of 10 years at hard labor. He made his escape, and remained at large for 7 years, and he claimed that, notwithstanding such fact, he was entitled to his discharge at the end of the term of 10 years; but the supreme court, in an elaborate opinion, held otherwise. The same question came before the supreme court of Kansas in the well-considered case of *Hollon v. Hopkins*, 21 Kan.

638, and was disposed of adversely to the contention of the petitioner here. In that case the petitioner had been sentenced to the state-prison for three years "from the 19th day of September, A. D. 1874." On the next day after sentence he made his escape, and was not recaptured until 1878, and he insisted that the judgment had expired by its own limitation, but the court held that the essential part of the judgment was that petitioner be imprisoned for three years, and that the time fixed by the court for its commencement was not such a material part thereof as to permit an evasion of the judgment by the wrongful act of the prisoner. The court there said: "The only way of satisfying a judgment judicially is by fulfilling its requirements. Of course, if Hollon had died, or been pardoned, the sentence would be at an end. But, as those things have not happened, and as the sentence has not been disturbed by any judicial decision or determination, there is no way of satisfying its requirements, or of exhausting its force, except service by Hollon of the time required in the penitentiary." In *State v. Cockerham*, 2 Ired. 204, the defendant had been sentenced to be imprisoned for two months "on and after the first day of November next," and did not go into prison according to the sentence, and at a subsequent term of the court it was directed that the sentence should be immediately executed, and it was held that the order was proper, and that the essential part of the judgment was not the time when it should be executed, but the extent of the punishment fixed. So, also, in *Dolan's Case*, 101 Mass. 219, the same conclusion was reached, the court holding that "expiration of time without imprisonment is in no sense an execution of the sentence." Other cases might be cited to the same effect, and, indeed, our attention has not been called to the decision of any appellate court holding to the contrary. We are satisfied with the law as thus declared. Petitioner remanded.

We concur: HARRISON, J.; SHARPSTEIN, J.; MCFARLAND, J.

(90 Cal. 319)

WILSON v. FOURTEENTH-ST. R. CO. (No. 13,270.)¹

(Supreme Court of California. July 21, 1891.)

PERSONAL INJURIES—ALIGHTING FROM STREET-CAR—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

Where, in an action against a street-car company for personal injuries, the evidence showed that the car steps were defective, and the driver grossly negligent in starting the car before plaintiff had alighted, an instruction that the company, if guilty of gross negligence, was liable, even though plaintiff herself was negligent, could work no injury to defendant, where there was no evidence of plaintiff's negligence.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action by Marilla D. Wilson against the Fourteenth-Street Railroad Company. Judgment for plaintiff. Defendant appeals.

Fox, Kellogg & King, for appellant. *Thos. H. Smith, Edward C. Robinson*.

¹Rehearing denied.

Wells Whitmore, and M. C. Chapman, for respondent.

FOOTE, C. This is an action for damages caused by the carelessness of the driver of a street-car, drawn by horses, belonging to the defendant corporation; and a defect in the steps of the car, by means of which the plaintiff was thrown from it as she was attempting to alight therefrom, when it had stopped for her to get off. The evidence showed, as we think, beyond any controversy, that the injury, which is very serious, was caused in this manner, viz.: The plaintiff, when the car stopped, placed one foot on the ground, and had the other still resting on the step, when the driver suddenly started the horse-car. The step was jerked from under her foot planted thereon, and she was precipitated violently to the ground, and her hip severely injured. The evidence is ample to show both the carelessness of the corporation in having such a defective step on its car, and the gross negligence of the driver of the car in starting it just as the passenger, the plaintiff, was stepping from it. The only matter about which there is really any serious question in the case is the instruction which reads thus: "If you believe from the evidence that at the time of the accident the plaintiff was guilty of negligence upon her part that contributed to produce the injuries, and you also believe from the evidence that the defendant was guilty of gross negligence, and that such gross negligence caused the injuries complained of, then the court instructs you that the defendant is liable notwithstanding the contributory negligence of the plaintiff." The instruction could work no injury to the defendant, for the reason that there is no evidence tending to show any negligence on the part of the plaintiff. She was proceeding, after due warning to the driver where to stop, and when he had stopped the car, to get off. While so doing, standing upon one foot on a defective step, and attempting to plant the other foot firmly on the ground, having no reason whatever to suppose but that her right to have time to get off would be allowed her, she is suddenly hurled to the earth by the starting of the car, jerking the step from under her foot resting thereon, and seriously injured. A more careless proceeding on the part of the employee of the corporation defendant can hardly be imagined. No prejudicial error is perceived in the record, and we advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(90 Cal. 245)

CURTISS v. AETNA LIFE INS. CO. (Nos. 12, 939, 13,013.)¹

(*Supreme Court of California. July 17, 1891.*)

INSURABLE INTEREST—ASSIGNMENT OF POLICY AS COLLATERAL—STATUTE OF LIMITATIONS—STATUTE OF FRAUDS.

1. In an action on a policy for \$10,000 taken by a creditor upon the life of his debtor it ap-

¹ Rehearing denied.

peared that shortly before it was issued the debtor had made an unqualified admission of an existing indebtedness of between \$5,000 and \$6,000 in a written request for further advances. The creditor had promised to make advances up to \$10,000, although not bound by written contract to do so. The facts were fully stated in the application, and the insurer continued to receive premiums for several years up to the death of the assured, during which the creditor, on the faith of the policy, made advances, which, with the original debt and interest, exceeded the amount of the policy. *Held*, that the evidence showed an insurable interest in the creditor sufficient to sustain a verdict for \$10,000, although at the date of the policy his interest did not amount to that sum.

2. In an action for the insurance by one to whom the creditor had assigned the policy as collateral security for his own debt, it is immaterial, as between the assignee and the insurer, that, after loss, the creditor, prior to his death, had paid the debt, since that question can only arise between the assignee and the heirs or personal representatives of the creditor.

3. Where the complaint alleges that the insured became indebted to the beneficiary more than four years prior to the date of the policy, a defense that the beneficiary had no insurable interest because the debt was barred by the statute of limitations must be raised by plea, and not by demurrer, since the averment of indebtedness is not inconsistent with the fact of an original promise in writing to pay at a date within four years.

4. An averment that the beneficiary agreed to make further advances to the insured, for which the policy was to stand as security, will be presumed, on general demurrer, to imply that the agreement was written, and hence not void under the statute of frauds.

5. Where a creditor takes a policy on his debtor's life for a sum exceeding the debt, a binding agreement to make further advances on demand to the full amount of the policy gives him an additional insurable interest.

6. A proviso in a policy payable to one of his assigns, providing that a claim "by an assignee shall be subject to proof of interest" does not apply to one who holds it as collateral security for a debt, since the assignee is a mere trustee for the debtor, and must account for any surplus proceeds after paying the debt, and it is not necessary for such assignee to allege that he had an insurable interest in the life of insured.

7. Code Civil Proc. Cal. § 839, providing that actions on written contracts executed out of the state are barred in two years, does not apply to an action on an insurance policy which provides that it shall not be operative until countersigned by the general agent of the insurer in California, and which was countersigned in the latter state after being signed in Connecticut by the insurer.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Gilbert L. Curtiss against Aetna Life Insurance Company on a policy of insurance on the life of one Tucker. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Fox & Kellogg, for appellant. Chas. F. Hanlon, for respondent.

BEATTY, C. J. These are separate appeals in the same case; the first from the judgment, and the second from an order denying a new trial. The action is by the assignee of a policy of life insurance effected by his assignor upon the life of a third person, and the principal grounds upon which it is defended are want of interest in the insured at the date of the policy,

and in plaintiff at the date of the assignment. The points involved in these and other grounds of defense are raised by demurrer to the complaint, motion for nonsuit, and by numerous exceptions to the admission and exclusion of evidence and to the allowance and refusal of instructions to the jury. It is scarcely practicable to notice each separate exception contained in the record and referred to in the briefs, but we shall endeavor not to overlook anything essential to a proper consideration of the merits of the appeals.

First, then, as to the points raised by the demurrer. It appears from the complaint as amended that the policy was issued April 5, 1871, to Esther C. Curtiss, for the sum of \$10,000 on the life of one Tucker; and with respect to her interest in Tucker's life it is alleged "that at the time said application was made the said Esther Cordelia Curtiss had an insurable interest in the life of Alfred W. Tucker, which interest was as follows: The said Tucker, at the time, was indebted to the said Esther C. Curtiss in the full sum of \$4,000, for so much money which she had before that time, to-wit, in the year 1866, loaned to the said Tucker in United States gold coin, at his special instance and request, the whole of which, together with the interest thereon from the time of said loan, was due and unpaid on said last-mentioned date, and was also on said last-mentioned date further indebted to the said Esther C. Curtiss in the sum of \$500, or thereabouts, for so much money before that time, and since the year 1866, paid, laid out, and expended for and on account of the said Tucker by the said Esther C. Curtiss, at his special instance and request, together with the interest thereon. "And on the day application was made as aforesaid, and immediately prior to the making of the same, the said Esther C. Curtiss, for valuable consideration, agreed with the said Tucker to loan and advance money thereafter at such times as he might demand till the amounts so loaned and advanced, in the aggregate, and the interest thereon, together with other sums so due as aforesaid, and the interest thereon, should amount to the total sum of \$10,000. And plaintiff avers, on his information and belief, that afterwards, to-wit, subsequently to the making of said application and the issuance of said policy, and in pursuance of said agreement between the said Esther C. Curtiss and the said Tucker, she (the said Esther C. Curtiss,) at various times loaned and advanced to said Tucker various sums of money, which, together with the interest thereon, and the said sums of \$4,000 and \$500 and the interest due thereon, amounted in all to the sum of \$10,000, and the whole of which was unpaid and due from said Tucker to said Esther C. Curtiss at the time of his death as herein stated, and no part of which has ever been paid. All of which was communicated to and known by the defendant at the time said application was made, and before and at the time of the issuance of the said policy." Appellant contends that these allegations disclose no insurable interest in Mrs. Curtiss within the meaning of sec-

tion 2763 of the Civil Code. It is to be observed, however, that at the date of the policy the Civil Code had not been enacted, and the question is not whether the policy is obnoxious to the provision referred to, but whether it was rendered invalid by any rule or principle of the common law. There may be no difference between the two; and, indeed, it may be allowed that the Code provision is an indication of what, in the opinion of the legislature, the common-law rule was; but if there is a difference it is by the common law, and not by the Code, that the validity of the policy must be tested.

Bearing this in mind, we proceed to consider the specific objections of counsel for appellant to the statement of Mrs. Curtiss' interest. He claims that it appears from the allegations of the complaint that her right to recover the \$4,000 loaned in 1866 and the \$500 advanced after 1866 was, at the date of the policy, barred by the statute of limitations, and consequently that Tucker was under no legal obligation to repay any part of these sums or of the interest thereon, and he contends that the alleged agreement to advance other money sufficient with the sums previously advanced to amount to \$10,000, was void under the statute of frauds, because, presumably, it was not in writing, and not to be performed within one year. As to the first proposition, the cases seem to hold that a debt, even though not legally collectible, by reason of the bar of the statute, gives an insurable interest. 1 May, Ins. § 108; Bliss, Ins. § 28, and cases cited. But, aside from this, we think it does not appear from the complaint itself that at the date of the policy the obligations of Tucker to Mrs. Curtiss were barred by the statute. The case of *Dorland v. Dorland*, cited by counsel, (Cal.) 5 Pac. Rep. 77, is not in point. It was merely held in that case as a rule of evidence that, an advance of money being proved, and no time for repayment mentioned, the presumption is that it is payable on demand, and that the statute begins to run immediately. Here, however, the question is as to a rule of pleading, and we do not understand that a complaint showing money to have been loaned at a date sufficiently remote to admit of the running of the statute raises a presumption that it has run. On the contrary, when the allegation is consistent with the opposite conclusion, *i. e.*, that the debt is not barred, the defense must be raised by plea. *Kraner v. Halsey*, 82 Cal. 210, 22 Pac. Rep. 1137; *Don v. Sanger*, 78 Cal. 151, 20 Pac. Rep. 366; *Wise v. Hogan*, 77 Cal. 187, 19 Pac. Rep. 278, and cases cited. Here the allegation that Tucker became indebted more than four years prior to the date of the policy is entirely consistent with the fact of an original promise in writing to pay at a date within four years, or with a written acknowledgment of the debt subsequently made, and an express or implied promise to pay it.

As to the proposition that the agreement of Mrs. Curtiss to advance other moneys was void, the rule of pleading is also against the contention of appellant.

If the agreement to be valid must have been in writing, then the allegation that it was so agreed is held to imply that it was so agreed in writing. *Broder v. Conklin*, 77 Cal. 336, 19 Pac. Rep. 513, and cases cited. So far, then, as the complaint is concerned, it clearly shows an indebtedness from Tucker to Mrs. Curtiss at the date of the policy, amounting to \$4,500, exclusive of interest, and to that extent there can be no question that it shows her to have had an insurable interest in his life.

But did she have any interest beyond the amount of the then existing indebtedness? In other words, did her agreement to advance Tucker, on his demand, the balance of \$10,000 create an additional interest? It has been held that a surety on an official bond has an insurable interest in the life of his principal, although there has been no breach of the bond at the date of the application for the policy; and that he may recover the full amount of the sum insured, although no breach of the bond has ensued. *Scott v. Dickson*, 108 Pa. St. 6. This conclusion was based upon the ground that the contingent liability of a surety brings him within the common-law principle that the only thing essential to relieve the policy of the character of a gaming or wagering contract is "that it shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the assured has no interest," citing *Insurance Co. v. Schaefer*, 94 U. S. 457. Upon the same principle it must have been held at common law that a binding contract by Mrs. Curtiss to advance money to Tucker, on his demand, gave her an insurable interest in his life.

We come next to the question whether the complaint was bad because of a failure to allege that plaintiff, at the date of the assignment to him, had an insurable interest in the life of Tucker. The allegation of the complaint is that on the 12th day of January, 1880, said Esther C. Curtiss, for a valuable consideration, to-wit, the sum of \$10,000 and upwards, and in accordance with the terms of said policy, assigned, etc., to plaintiff, and a copy of the assignment, attached as an exhibit to the complaint, is referred to and made a part thereof. Referring to the assignment, it appears from its terms to have been made as collateral. There may be some ambiguity or uncertainty about the meaning of this allegation construed with reference to the terms of the assignment as set out in the exhibit, but no such objection was specified in the demurrer, and upon a general demurrer we think the complaint must be held to allege an assignment of the policy as collateral security for the repayment of \$10,000 and upwards advanced by plaintiff to the assured. So far as it is affected by the law of this state, as it existed at the date of the assignment, there can be no doubt of the validity of the transfer. By section 2764 of the Civil Code it is provided that "a policy of insurance on life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it

whatever the insured might have recovered." It may be, however, notwithstanding this provision, that the parties to a life policy can make a valid stipulation against an assignment to one who has no insurable interest in the life insured; but, whether they could or not, we have no doubt that such a stipulation in a policy issued as this policy was, before the enactment of the Code, remains of binding force. It is necessary, therefore, to consider the terms of the policy in disposing of this point. By its express terms the amount insured is made payable "to Esther C. Curtiss, her executors, administrators, or assigns, within ninety days after notice and proof of the death of the insured," etc., but it is, in another clause, provided that any claim "made by any assignee shall be subject to proof of interest." Does this proviso apply to an assignee who holds the policy merely as collateral security for the repayment of money advanced to or for the insured? We hold that it does not. The law against assignments to parties without interest (where such is the law) and stipulations against such assignments are based upon the same motives and policy, and neither one nor the other applies to assignments by way of security. The assignee, in such case, is a mere trustee for the insured. What he collects on the policy he collects for him, and must apply it to the payment of the debt secured, accounting for any surplus. So regarded, such assignments do not involve the mischief which the common law or the contract of the parties was designed to prevent, and are consequently not within the meaning of the proviso in this policy. In the case of *Warnock v. Davis*, 104 U. S. 775, where it was held that an assignment to one who had no insurable interest was invalid in other respects, the assignee was nevertheless allowed the advances for which the policy was security. The principle of that decision sustains our conclusion on this point. It was not necessary, therefore, that the plaintiff should allege any interest in the life of Tucker. If it was necessary that he should allege an indebtedness from the insured to him, we think the fact was sufficiently alleged as against a general demurrer, and, if it was necessary to allege preliminary proof to defendant of such indebtedness, we think that allegation is comprised in the general allegation that "all conditions on the part of E. C. Curtiss and plaintiff have been performed." The demurrer to the complaint was properly overruled, and this conclusion disposes of the appeal from the judgment, which is accordingly affirmed.

With respect to the appeal from the order denying a new trial, it is clear, if our conclusions above stated are correct, that the superior court did not err in overruling defendant's objection to the admission of any testimony in support of the complaint. Nor did the superior court err in overruling the motion for a nonsuit.

Only one of the grounds of this motion remains to be noticed, the others being disposed of by what has already been said. This action was commenced more than two years after the liability of defendant

accrued, and if the policy was executed out of this state the right of action was barred by section 339, Code Civil Proc. The complaint alleges that the policy, a copy of which is made part thereof, was executed in California, April 5, 1871. The answer admits the genuineness and due execution of the policy, a copy of which is annexed to the complaint, but denies that it was executed in California, alleging, on the contrary, that it was executed in Connecticut on the 14th of March, 1871, and pleading the bar of the statute. The plaintiff did not introduce the policy in evidence at the trial, and the contention of the defendant is that he, therefore, did not prove a policy executed in California, and consequently that he should have been nonsuited on the plea of the statute of limitations. But even if we admitted that with respect to this plea the burden of proof was on the plaintiff, which we do not, the contention of defendant could not be sustained. The last clause of the policy was in these words: "In witness whereof the said *Etna Life Insurance Company* have, by their president and secretary, signed and executed this contract in the city of Hartford this 14th day of March, 1871, but the same shall not be operative until countersigned by M. P. Morse, general agent at San Francisco, Cal.,"—following which came the signature "E. A. Bulkeley, President; T. O. Center, Secretary;" and then the following: "Countersigned at San Francisco this 5th day of April, 1871. M. P. MORSE, General Agent." All this appeared by the copy set out in the complaint, the correctness of which was expressly admitted by the answer. It appeared, therefore, on the face of the pleadings that the policy, although partly executed at Hartford on March 14th, was not fully executed or operative until countersigned some time afterwards by the general agent at San Francisco. The plaintiff also testified at the trial that Morse countersigned the policy at San Francisco after it was returned from Connecticut, and this testimony was admitted without objection. The motion for a nonsuit was properly denied.

There are numerous specifications of particulars in which the evidence is insufficient to support the verdict of the jury, as to which we say that it appears very plainly from the testimony that the procuring of the policy in question by Mrs. Curtiss was a perfectly honest and legitimate transaction. She had advanced large sums to Tucker, and there is very satisfactory evidence that shortly before the issuance of the policy Tucker, in applying for an additional advance, had distinctly acknowledged in writing subscribed by him an existing indebtedness of between five and six thousand dollars, and this acknowledgment was not qualified by any promise to pay upon a contingency, as in *Curtis v. City of Sacramento*, 70 Cal. 414, 11 Pac. Rep. 748, or by any declaration inconsistent with an intention to pay. It does not appear that Mrs. Curtiss was at the date of the policy bound by any

contract in writing to advance Tucker the balance of the \$10,000, but she had promised advances to a considerable amount, and there is evidence that she made them. It also appears that her written answers to questions contained in or accompanying her application for the policy were filled in by the agent of defendant, after a full and correct statement of all the facts as they existed. This is clearly and distinctly proved by the testimony of the agent who took the application. With this knowledge, which must be imputed to the company, it issued the policy, and continued to receive the premiums during the life-time of Tucker, *i. e.*, for a period of nine years, during which time Mrs. Curtiss, on the faith of the policy, made advances which, with the old debt and interest accruing, must have exceeded \$10,000. Under these circumstances we think it does not lie in the mouth of the defendant to charge her with misrepresentation in stating in her application that she had an insurable interest to the full amount of the policy, although, as matter of strict law, her interest at that time may not have amounted to so much. Her interest was, we think, sufficiently proven to sustain the verdict.

As to the alleged failure to prove an insurable interest in plaintiff at the date of the assignment, we have shown that none is required to support an assignment by way of collateral security. It was clearly proved that Mrs. Curtiss was largely indebted to plaintiff at the time of the assignment, at the time of Tucker's death, when the policy became payable, and at the time of her own death. This gave plaintiff a right of action on the policy, and all the questions which defendant attempts to raise about the payment or release of the indebtedness from Mrs. Curtiss to plaintiff, subsequent to the time when the loss became payable, are out of place here. Those are questions which can only arise between plaintiff and the heirs or other representatives of Mrs. Curtiss, they alone being concerned in a proper application or distribution of the proceeds of the policy. After a loss and fixed liability attached it is of no concern whatever to the insurer whether an assignee has or has not an interest in the life insured.

As to the alleged errors of law, many of them are disposed of by what has already been said. Some evidence, admitted against the objection of defendant, was immaterial at the time it was so admitted, but the complaint was subsequently amended before the close of the trial so as to make this evidence material. This cured the error. We find no material error in the instructions upon which the case was submitted to the jury, except that they are in some respects too favorable to the defendant. Judgment and order affirmed.

We concur: MCFARLAND, J.; DE HAVEN, J.; PATERSON J.; SHARPSTEIN, J.; HARRISON, J.

20 Cal. 266

COHEN v. KNOX *et al.* (No. 13,316.)

(Supreme Court of California. July 18, 1891.)

FRAUDULENT CONVEYANCE—KNOWLEDGE OF GRANTEE—QUIETING TITLE—ANTENUPTIAL CONTRACT.

1. A conveyance of land by a father to his daughter to encourage her marriage will not be set aside, although he was insolvent at the time, when she had no knowledge of fraud, and he had no intent to defraud.

2. An execution having been subsequently issued against such land by a judgment creditor of the father, the daughter filed a complaint to prevent a sale thereof, averring that she was the owner of "a portion of W. A. B.'s Oak Tree farm tract, as surveyed for W. A. B. by * * *, as per map," etc.; that such creditor had levied thereon as the property of said B.; and that such sale will cast a cloud upon her title. Held, that the defect of not showing that plaintiff obtained title from W. A. B., her father, if it existed, was cured by the averment in defendant's cross-complaint of a conveyance to her by the father, and a trial upon such pleadings; and the fact that a demurrer was interposed is immaterial.

3. The fact that the antenuptial contract was not in writing is immaterial.

Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action by Emma B. Cohen against Charles C. Knox and another to prevent a sale of property levied upon by execution. Judgment for plaintiff. Defendant Knox appeals. Affirmed.

Wm. B. Sharpe and S. C. Devson, for appellant. Scrivner & Boone and Garber, Boalt & Bishop, for respondent.

McFARLAND, J. In the year 1883 there was a treaty or agreement of marriage pending between the plaintiff, then a young unmarried woman, and Alfred H. Cohen. Cohen was then a young lawyer just beginning the practice of his profession, and having no income or means sufficient to procure a home and support a family, and they were both unwilling to get married until they had a home. These facts coming to the knowledge of Watson A. Bray, the father of plaintiff, he concluded, in order to encourage the consummation of said marriage, to convey to plaintiff a lot of land and build a house thereon as a home for the young couple, provided the father of said Cohen would furnish it. After some conferences between the said Bray and the father of said Cohen, the proposition was accepted by the latter; whereupon Bray, on July 12, 1883, conveyed a lot of land, being the premises described in the complaint herein, to the plaintiff, (then Emma Bray,) and proceeded immediately to build a house thereon, which was completed in the early part of 1884. This was done with the knowledge of Cohen, and he was consulted about it. The house was furnished by said Cohen's father. In February, 1884, plaintiff and Alfred H. Cohen were married, and moved into the house, where they have lived ever since. It is found by the court, and clearly established by the evidence, that the said conveyance of said lot to plaintiff, and the construction of said house thereon, were the consideration which induced said marriage, without which it would not then (if ever) have been consummated. The value of the lot and the cost of the

house amounted at the time to about \$16,000, and the present value of the property is \$18,000. At the time of the conveyance of said lot to plaintiff and the building of said house, the said Bray was the owner of several hundred thousand dollars' worth of property, and supposed himself to be worth a quarter of a million of dollars. The conveyance was not made with any design on his part to hinder or defraud creditors, (whether that fact be material or not;) and it is entirely clear that plaintiff and her husband believed him to be a man of large means, and fully able to make the said provision for her marriage, and that she accepted the same without any intent of hindering or defrauding his creditors. It turned out afterwards, however, that said Bray was, in fact, insolvent at the time said conveyance was made to plaintiff. On said July 12, 1883, the date of said conveyance to plaintiff, said Bray was indebted to the defendant Charles C. Knox in an amount exceeding \$60,000; and on August 12, 1885, said Knox recovered judgment against said Bray for \$79,218. On April 26, 1887, Knox caused an execution to be issued on said judgment, and delivered the same to the sheriff with instruction to levy it upon said lot conveyed by said Bray to plaintiff as aforesaid, as the property of said Bray. The sheriff made said levy, and was about to sell said lot, when the plaintiff brought this present action to restrain such sale, upon the ground that it would cast a cloud upon her title. The court gave judgment for plaintiff according to her prayer, and from said judgment, and from an order denying a new trial, the defendant Knox appeals.

The main question presented is whether the said conveyance from Bray to his daughter, under the circumstances above stated, was void as against the creditors of Bray. This question has been very ably and elaborately discussed by counsel, and a multitude of authorities have been cited. We will not undertake here to review these authorities, but will merely state the conclusions to which they clearly lead. Where one party conveys land to another for a valuable and adequate consideration, the conveyance will be good against the creditors of the grantor, although the latter intended thereby to defraud his creditors, if the grantee had no knowledge of such intent, and was in no way a participant in the fraudulent purpose. Marriage is the highest and most valuable of considerations; and when a conveyance is made upon such consideration, the grantee, if guiltless of fraud herself, is in, at least, as firm and sure a position as if she had paid in money the full value of the property conveyed. It has even been held that a voluntary conveyance to a daughter, intended as a settlement, and without present reference to her marriage, will become *ex post facto* valid against creditors and purchasers with only implied notice, if upon the credit of the conveyance a person has been induced to marry her. Marriage being in its nature permanent, and being the most important of all civil relations, the law will not lightly allow the inducements

which have led to it to be disturbed. And the dowry of a bride, without special proof, is presumed to be an inducement to her marriage. The law does not require a delicate investigation into the *quantum* of influence which her property has had with hersuitor. A few of the many authorities which establish the principles above stated are the following: *Bump, Fraud. Conv.* pp. 305, 306, and cases cited; *Wait, Fraud. Conv.* § 212, and cases cited; *Magniac v. Thomson*, 7 Pet. 348; *Prewitt v. Wilson*, 103 U. S. 22; *Wood v. Jackson*, 8 Wend. 9; *Herring v. Wickham*, 29 Grat. 633; *Huston v. Cantril*, 11 Leigh, 146, 155; *Sterry v. Arden*, 1 Johns. Ch. 260, 271; *Brown v. Carter*, 5 Ves. 877, 878; *Otis v. Spencer*, 102 Ill. 622; *Dugan v. Gittings*, 43 Amer. Dec. 806. The case at bar presents a clear field for the application of these principles. It has none of those peculiarities or complications of facts which often make it difficult to determine what rule of law applies. It is a plain case of a conveyance upon the express consideration of marriage, which was the direct and immediate inducement of the marriage, and made, not only without any knowledge of fraud by the grantee, but without any intent to defraud on the part of the grantor. The court was therefore right in upholding the said conveyance against appellant, claiming as a creditor of Bray.

2. Appellant contends that the judgment should be reversed, because the complaint does not state facts sufficient to constitute a cause of action, and because his demurrer on that ground was erroneously overruled. The point is, as we understand it, that facts constituting a cloud on plaintiff's title are not stated, because it does not appear that plaintiff derived her title from Bray, against whom the execution runs. The complaint shows, among other things, (in brief,) that since July 12, 1883, plaintiff has been the owner and in possession of a certain described lot of land; that said land is "a portion of W. A. Bray's Oak Tree farm tract, as surveyed for W. A. Bray by James T. Stratton, April, 1869, as per map," etc.,—"all of which was and is well known to the defendants herein;" that defendant Knox recovered judgment against Bray, caused an execution to be issued, and levied on said land as the property of Bray, and is about to have the same sold, as in this opinion heretofore stated; and that said sale will cast a cloud upon plaintiff's title, and greatly damage and impair the value thereof. It is not necessary to definitely determine whether this complaint is so totally defective in its statement of a cause of action as to be bad on general demurrer, or whether it merely presents a case of defective averments, assailable only on special demurrer; because defendant, in addition to his answer in which the averments of the complaint are denied, filed a cross-complaint in which he asked for affirmative relief, and in which he averred specifically the very facts which he contends should have been averred in the complaint of plaintiff. In his cross-complaint he avers that on said July 12, 1883, and for a long time prior thereto, the said Bray was the owner in fee and in possession

of said land; that on said day he conveyed the same by deed to plaintiff, who is his daughter; that the deed was voluntary and without consideration; that plaintiff holds under said deed, and not otherwise; and that the deed was made to hinder and delay creditors, and particularly defendant. He prays that the deed be declared fraudulent and void, and that he be allowed to proceed with the execution. To this cross-complaint plaintiff filed an answer, in which she admitted said deed from Bray, and that she held under it, but denied that it was voluntary, or without consideration, or fraudulent, and averred the consideration of marriage, and the facts concerning said marriage, as heretofore stated. Upon these pleadings the case went to trial; and it would be a vain thing to reverse the judgment, and allow plaintiff to amend her complaint by averring facts already averred in the cross-complaint, and to again in that form present issues which have already been raised and determined. The appellant made no objection to the introduction by plaintiff of the said deed to her from Bray; and the issue of the validity of said deed, raised by the cross-complaint and answer to it, was the one issue tried; and therefore, if it be conceded that the complaint failed to state sufficient facts, such failure was cured by the statement of the omitted facts in the other pleadings, which present a case of "express averment." And the fact that there was a demurrer does not take it out of the rule. There was a demurrer in *Schenck v. Insurance Co.*, 71 Cal. 23, 11 Pac. Rep. 807; but the court held there that the omission of a material fact in the complaint was cured by its averment in the answer. That case, in principle, cannot be distinguished from the case at bar. See, also, *Pom. Rem.* § 579. Many cases to the same point are cited by counsel for respondent.

3. We see nothing in the point that an ante-nuptial contract must be in writing. No question arises here as to the enforcement of a verbal contract which ought to have been in writing. There are no other points necessary to be specially noticed. The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

90 Cal. 279

DORRIS V. SULLIVAN. (No. 13,959.)

(Supreme Court of California. July 18, 1891.)

EASEMENT BY VERBAL AGREEMENT—PARTIAL PERFORMANCE.

1. Plaintiff purchased the right to build a ditch across certain land from the owner, but before its construction the latter conveyed to defendant. *Held*, in an action to enjoin the latter from using a portion of the water of said ditch, that a verbal agreement between plaintiff and the original owner, whereby the latter was entitled to a perpetual easement in a portion of such water, was within the statute of frauds, and evidence thereof was incompetent.

2. The fact that plaintiff had partly performed such agreement cannot avail defendant as a defense, unless he pleads facts sufficient to entitle him to specific performance thereof.

3. Such owner testified that by the verbal

agreement he was to receive 20 inches of water, and pay \$800 therefor; that, as the ditch built by plaintiff brought the water from a nearer stream than that agreed upon, he paid him only \$175; but that he claimed and conveyed to defendant a ratable proportion of the water in such ditch. Defendant testified that he understood at the time of the conveyance that the owner could not sell or assign any right to the water without a settlement with plaintiff. No such settlement was ever had, and neither defendant nor the original owner ever offered to pay the balance of the purchase money. The evidence also failed to show any legal assignment to defendant of the original owner's alleged contract with plaintiff. *Held* insufficient to entitle defendant to specific performance.

4. Where, under such circumstances, it does not appear that plaintiff is not able fully to perform the contract on his part, defendant cannot enforce a specific part performance.

5. The instrument under which defendant claimed purported to convey to him all the original owner's right and interest in said ditch, without alluding to any contract by which he claimed such interest. *Held* insufficient to show any legal assignment of the original owner's alleged contract with plaintiff.

Commissioners' decision. In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Action for an injunction and damages by C. G. Dorris against John Sullivan. Judgment for defendant. Plaintiff appeals. Reversed.

Spencer & Raker and *C. A. Raker*, for appellant. *J. D. Goodwin* and *Jenks & Claflin*, for respondent.

VANCLIFF, C. Action to recover damages for the diversion of water by the defendant from plaintiff's water ditch, and to perpetually enjoin the defendant from diverting water from said ditch in the future. Judgment for defendant, and plaintiff appeals from the judgment, and from an order denying a new trial. Plaintiff's ditch was completely constructed in 1887, and ran through the W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, and E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, of section 7, township 42 N., of range 13 E., owned by F. S. Chapman. Before the construction of the ditch, Chapman, on June 1, 1885, by an instrument in writing, granted to plaintiff, "for value received," the right of way for the ditch through this land. Thereafter, on December 7, 1885, before the ditch was constructed to or upon this land, Chapman conveyed the land and appurtenances to the defendant. On the following day, December 8, 1885, Chapman executed to defendant an instrument in writing, purporting to sell, assign, and convey to defendant all his (Chapman's) "right, title, and interest" in the ditch, (describing it as then being constructed by C. G. Dorris,) "which interest is the right to have twelve inches of water flow through said ditch to and upon said ranch, and there to be used by me for irrigation and domestic purposes as I may require; and I do hereby authorize the said John Sullivan, [defendant,] in his own name, to demand, use, and in all proper and legal manner maintain and exercise, the said right to the use of said water as it flows through and over said ranch belonging to me." The ditch was not extended to the Chapman land until 1887. The answer of the defendant denies that

plaintiff owns the right of way through said land, and "denies that defendant, at the commencement of this action, or at any time, unlawfully kept or maintained, or either, any cut or flume in said ditch, or either, or threatens or intends to forcibly or unlawfully, or either, keep or maintain any cut in said ditch in the future, or at any time, or threatens or intends, or either, to deprive plaintiff of the use or benefit, or either, of said water ditch, or of the water thereof, (except so much as belongs to defendant,) or either, or continuously or permanently, or at all."

* * * Denies that defendant has no interest in or right to said water ditch, or either, or that defendant has no right to or interest in the waters of said ditch, or either. Denies that defendant has no right to take any portion of the waters flowing therein." The answer contains nothing except the foregoing denials and parenthetical statement, indicating that defendant owns any portion of the ditch, or is entitled to divert any water therefrom. It does not allude to any right to, or interest therein, derived from Chapman.

On the trial, after plaintiff had proved a *prima facie* case against him, the defendant offered in evidence the above instrument of December 8, 1885, executed by Chapman to him, purporting to grant and assign all Chapman's right, title, and interest in and to the ditch, and to the use of the water flowing therein. To this plaintiff's counsel objected, on the grounds that it was not relevant to any issue made by the pleadings, and that it did not appear that Chapman had any title or interest in the ditch or water. The court overruled the objection, and plaintiff's counsel excepted, and the instrument was admitted. As evidence of Chapman's interest in the ditch and water, defendant offered Chapman's deposition as to an oral agreement between Chapman and plaintiff, under which Chapman claimed whatever right he had to the ditch or water. Plaintiff's counsel objected to the deposition on the grounds (1) that the agreement was irrelevant; (2) that the agreement was not in writing; and (3) that it does not relate to the ditch described in the complaint. The court overruled the objections, and plaintiff's counsel excepted. After the deposition was read, plaintiff's counsel moved to strike it out on the grounds last stated; and the court overruled the motion, to which ruling an exception was taken. So far as it relates to the agreement between Chapman and plaintiff, the deposition is as follows: "Question. Did you ever enter into an oral contract with said Dorris for an interest in the waters of the Pitt-River ditch? Answer. I did. Q. State, as near as you can, the time when said agreement was made, and as fully as you can the terms of the same. A. About the month of February, 1885, Mr. Dorris came to my office, and stated he wanted to bring in the water of Parker creek in a ditch to use on land situated on North Fork of Pitt river, on the north side of the river. He stated he wanted assistance to carry the water across Pitt river in a flume. I told Dorris that I wanted water to irrigate my ranch;

about twenty inches, measured under a four-inch pressure; and I asked him how much per inch he would charge me for the same. He [Dorris] stated that he would charge me \$15 per inch. I accepted his offer at that price. Dorris then went to work constructing the flume across Pitt river, hired men to work, etc., and I paid the bills of the hired men, provisions, and lumber to the extent of \$175 or thereabouts. It was distinctly understood between Dorris and myself that any advances I might make in paying for labor and materials in constructing the ditch should be applied by him [Dorris] in payment for my water. As an additional consideration, which I was to pay Dorris for my twenty inches of water, was the right of way across my land for his ditch." On cross-examination: "Q. State if you ever had any conversation with the plaintiff, C. G. Dorris, with reference to the use of water from Pitt-River ditch, for irrigation on the land formerly claimed by you. * * * If so, state what it was in full, and what you did. A. I did. Q. Did you ever have any agreement with said Dorris about having water from said Pitt-River ditch for irrigation? If so, was said agreement ever reduced to writing? A. I did. No. Q. If you were to have any water from said Pitt-River ditch at any time, state upon what conditions you were to have it. What were you to do, if anything, before you could have water to irrigate the land? State in full. A. I was to pay \$15 an inch, measured under a four-inch pressure, to the extent of twenty inches; and also give Dorris right of way across my land for his ditch. Q. Now, tell what you did to fulfill each and all of those conditions. A. I paid \$175, and gave him the right of way across my land. Q. Is it not a fact that you refused to have anything to do with the construction of the said ditch, and refused to pay anything towards the completion of such ditch, and used words to this effect: That 'I had all I want of the business, and do not want any water from the ditch, and do not want anything further to do with it, and do not intend to comply with any agreement in the premises,' to the plaintiff, C. G. Dorris, in the town of Alturas, Modoc county, near the Goose Brewery building, on or about the 1st day of June, 1885? A. I did not. No. Q. State if you did not have a similar conversation with John A. Free, of the same place, about the same time, and that you told him about the same, as above set out, as being said to said Dorris. A. No. Free presented an order from Dorris, I think, for hauling lumber. I refused to pay it until I saw Dorris. Q. Did you not refuse to pay an order on you from C. G. Dorris and in favor of said Free, for the reason you had nothing more to do with the matter, and did not intend to go any further in complying with your agreement with said Dorris, with reference to your getting water from said ditch for said land? How much were you to give said Dorris for water from said ditch to irrigate said land? State in full. A. No; I was to give \$15 per inch to the extent of twenty inches and right of way across my

land. Q. How much did you pay him? And why did you not pay him the agreed price? State in full. A. I paid him about \$175. He [Dorris] failed to get the water across the river, and I did not propose to advance the balance until he performed his part. Q. From what stream did the water come that was to be turned into said Pitt-River ditch? A. Parker creek. Q. What disposition, if any, did you make of said land, and to whom, and when? A. I sold to John Sullivan in February, 1886. Q. Had said Pitt-River ditch been completed when you disposed of said land to John Sullivan? If so, how long before? A. It had not. Q. Did you ever turn any water from said ditch on the said land at any time? If yes, how much? A. No. Q. Had there ever been any water turned in said ditch when you disposed of said land to John Sullivan? A. No. Q. How much water was you to get, and what to pay for it, if anything? How much did you pay? State why you did not pay the full amount agreed upon between you and Dorris, if there was any such agreement. A. Dorris never performed his part of the contract. I was to get twenty inches of water, at \$15 an inch. I paid about \$175. Dorris failed to perform his part of the contract. Q. Did not the plaintiff, Dorris, come to you while you lived in Alturas, and about the last of May or the first of June, 1885, and request you to enter into writings with reference to your getting water to use from said Pitt river for said land, and you refused to sign any writing, and then declared you desired to have nothing further to do with the ditch and use of water on said land, and that you were through? A. No. Q. State whether you were not owing said Dorris at that time something over three hundred dollars on your verbal agreement with him with reference to getting water for said land, and that you failed to pay any of that amount for the reason that you were not going to comply with the agreement, if any. A. I did not owe Dorris anything until such time as he might furnish the water to me. I advanced about \$175 to Dorris. The facts are stated in the foregoing answer."

The defendant, among other things, testified: "The reason I didn't get this deed of water the same time I got the deed to land was that Chapman was trying to get a settlement with Dorris that day, and I didn't get it. Chapman said he must have settlement with Dorris that day, and didn't get it. Chapman told me when he gave me the deed to land that he would have to have a settlement with Dorris to find out about the water, and the same before I got the deeds. I can't say whether Chapman ever had any settlement with Dorris before he gave me the deeds or not; both deeds had none that I knew of." Conceding that the testimony of Chapman was sufficiently definite to prove even a verbal contract, such contract must be construed to be a contract for 20 inches of water to be taken from plaintiff's ditch and used by Chapman for irrigating his ranch, perpetually, or as long as water should be conveyed through the ditch. Such a contract, if in

writing, would have created a servitude upon, or an easement in, plaintiff's ditch property, (Civil Code, § 801, and by analogy, section 552; Washb. Easem. p. 379;) but such servitude or easement upon plaintiff's real property could not have been granted or created by a verbal contract.

It is claimed, however, that, as the verbal contract was partly performed by Chapman, he was entitled to enforce a specific performance thereof. In the first place, the defendant could not avail himself of this defense at the trial, without having affirmatively pleaded facts sufficient to entitle him to a specific performance, which he failed to do. *Arguello v. Bours*, 67 Cal. 450, 8 Pac. Rep. 49; *Kentfield v. Hayes*, 57 Cal. 411; *Miller v. Fulton*, 47 Cal. 147. In the second place, admitting the testimony of Chapman and defendant to be true, it does not prove facts sufficient to entitle defendant to a specific performance of any contract, even though the facts thus proved had been pleaded. The verbal contract was for 20 inches of water, at \$15 per inch, amounting to \$300. Chapman testified that he paid only about \$175, and then refused to pay more because plaintiff had failed to perform his part of the contract,—failed to build the flume to convey the water from Parker creek across Pitt river, according to his first project, and the understanding when the contract was made; but, as plaintiff afterwards constructed a ditch conveying water from Pitt river to and across his land, Chapman claimed an interest in the ditch and water in proportion to what he had paid, and conveyed this interest to defendant. But it appears by the testimony of the defendant, which must be taken as absolutely true against him, that when Chapman conveyed the land he understood that he could not grant or assign any right to the water without a settlement with plaintiff; and defendant was never informed of any such settlement, nor was there any evidence of such settlement; but, on the contrary, plaintiff testified that no such settlement was ever made. There is no evidence that Chapman or the defendant ever offered or intended to pay the balance of the purchase money. *Frixen v. Castro*, 58 Cal. 442. Nor does the evidence show any legal assignment of Chapman's alleged contract with plaintiff to the defendant. The instrument of December 8, 1885, only purports to convey Chapman's right and interest in the ditch, entitling him to 12 inches of water, without alluding to any contract by virtue of which he obtained or claimed such interest in the ditch, or such right to the water. By virtue of that instrument, the defendant claims an absolute legal right and title to the water which he has taken and intends to take from plaintiff's ditch in the future, and not a mere equitable right by virtue of an equitable assignment of Chapman's contract for the water. Since it does not appear that plaintiff is not able fully to perform the contract on his part, the defendant is not entitled to enforce a specific part performance by the plaintiff. In order to enforce specific performance at all,

the defendant should have tendered full performance on his part, and asked full performance by the plaintiff, unless he made it appear that plaintiff was unable to perform some part of his contract.

It is suggested by respondent's counsel that the contract between plaintiff and Chapman may be regarded as an irrevocable license to Chapman to divert from plaintiff's ditch the quantity of water claimed, which, though granting no interest in the ditch or water flowing in it, by reason of the statute of frauds, would yet be a defense to the alleged trespass of cutting the ditch and diverting water therefrom. In answer to this, for the mere purpose of disposing of this appeal, it is only necessary to say that no license of any kind has been pleaded. *Alford v. Barnum*, 45 Cal. 483. But, as the cause must be remanded for a new trial, it is proper to say that this action is more than a mere action to recover damages for a past trespass. The complaint alleges, not only that the defendant broke and cut the bank of the ditch and put a box or flume therein, through which he diverted water from the ditch, and has forcibly maintained said cut and flume up to the commencement of the action, but further alleges "that said defendant threatens and intends to so forcibly maintain and keep said cut and flume in said ditch in the future, and thereby to deprive plaintiff of the use and benefit of said water ditch and of the waters thereof, continuously and permanently in future," etc. The prayer of the complaint is that defendant be perpetually enjoined from these threatened and intended future acts. As to this quoted averment of the complaint, the answer simply denies that defendant threatens or intends, unlawfully, to keep or maintain the cut in the ditch in the future, or to deprive the plaintiff of the use or benefit of the ditch, or of the water thereof, "except so much as belongs to defendant," continuously or permanently or at all. This is an admission that defendant threatens and intends to keep and maintain the cut and flume in the bank of plaintiff's ditch, and thereby deprive the plaintiff of the use of the ditch and water to an indefinite extent, "so much as belongs to the defendant." Under these pleadings, the principal issue to be tried relates to the permanent right of the defendant to continue to divert water from plaintiff's ditch in the future,—the right to a permanent easement in plaintiff's real ditch property,—and this was the issue actually tried, and to maintain which, on his part, the defendant was permitted to introduce in evidence the verbal contract between Chapman and the plaintiff. To admit a verbal contract, under the guise and name of a license, to prove a permanent easement in or servitude upon real property, would be to evade and defeat the statute of frauds. *Browne, Frauds*, §§ 22-30, 133. I think the trial court erred in admitting the deposition of Chapman as to the verbal contract between him and plaintiff, and that for this error the judgment and order should be reversed, and a new trial granted.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted.

GARDNER v. GILLIHAN.

(Supreme Court of Oregon. July 8, 1891.)

ADMINISTRATORS — ACTIONS — JURISDICTION OF COUNTY COURT—INCONSISTENT DEFENSES.

1. Though, under the laws of Oregon, both the administrator of a partnership estate and the administrator of an individual are appointed by and are under the control of the county court, that court, in the absence of a statutory provision, has not exclusive jurisdiction of an action between them to determine the title to certain property, but such action is within the jurisdiction of the circuit court.

2. Where the administrator of a partnership estate sues the administrator of a deceased member thereof for live-stock which he claims as partnership property, and of which defendant alleges he came into possession as property of his intestate, and bases his defense on such possession, he cannot also defend on a lien that he individually has thereon for pasturage, and evidence of such lien is inadmissible.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This is an action brought by the plaintiff, as administrator of the partnership estate of J. N. Gardner, Presley Gillihan, and M. E. Gillihan, deceased, against the defendant, as administrator of the individual estate of M. E. Gillihan, deceased, to recover possession of certain personal property alleged to belong to said partnership estate. The complaint is in the usual form. The defendant first filed an answer alleging his appointment as administrator of the individual estate of M. E. Gillihan, deceased, and that the property described in the complaint was at the commencement of the action, and at the time of filing such answer, in his possession as such administrator. This answer having been adjudged by the court insufficient to constitute a defense, he answered to the merits, in which he denied the existence of the partnership, and plaintiff's right to the possession of the property described in the complaint, or any part thereof. He also denied that said property, or any part thereof, belonged to the partnership estate, but alleged that the same was the property of the estate of M. E. Gillihan, deceased, and that certain specified articles of said property never came into his possession. As a further and separate defense, he averred "that, at the request of the late M. E. Gillihan, who was the lawful possessor of the live-stock mentioned in the complaint, he, defendant, depastured, agisted, and fed said live-stock, and supplied fodder to same, on defendant's farm, from the 1st day of September, 1889, up to and until the death of said M. E. Gillihan, which took place on or about the 4th day of February, 1890, and ever since; that the said late M. E. Gillihan promised to pay defendant for such depasturing, agisting, feeding, and fodder what the same was reasonably worth, and the same were and are reasonably worth three dollars per month a head of said live-stock; that no

part thereof was ever paid, and defendant had possession of said cattle from the commencement of the time of agisting and feeding same, up to the time of the death of said Gillihan, and ever since, and has a lien on said live-stock for such depasturing, agisting, feeding, and fodder. A reply having been filed, the trial resulted in a verdict and judgment in favor of plaintiff, from which this appeal is taken. C. J. McDougall, for appellant. H. T. & E. W. Bingham, for respondent.

BEAN, J., (after stating the facts as above.) The first question presented by this record is the right of an administrator of a partnership estate to maintain an action against the administrator of the estate of an individual member of such partnership to recover possession of personal property alleged to belong to said partnership, and in possession of the latter as such administrator. The contention of defendant is that the county court has exclusive jurisdiction in such cases. The question in issue in the case at bar is the title to the property in controversy; and unless the county court is by law given exclusive power, in the first instance, to try and determine that question, defendant's contention cannot prevail. The fact that both administrators were appointed by and are under the control of the county court does not necessarily confer upon that court authority to try disputed questions of title to property claimed by each as belonging to their respective estates. Such power or authority can only be conferred by statute or by necessary implication, in order to carry out the functions expressly pointed out, and to accomplish the express purposes for which such courts are created. 1 Woerner, Adm'n, § 151. We are aware of no provision of the statute conferring such power, either expressly or by necessary implication, upon the county court. It is true sections 1121-1124, Hill's Code, provide for proceedings in the nature of a discovery against persons charged with secreting or refusing to account for property belonging to the estate; but with the discovery the power of the county court ends. There is no provision, as in many of the states, for compelling the delivery of the property so discovered upon the decree or order of the county court. The administrator is then left to his remedy by the proper proceedings in a court of ordinary jurisdiction. 1 Woerner, Adm'n, § 151; 2 Woerner, Adm'n, § 325; Gibson v. Cook, 62 Md. 356; Ex parte Casey, 71 Cal. 269, 12 Pac. Rep. 118; Edwards v. Mounts, 61 Tex. 398. The functions of the county court, as respects administrators and executors, are limited to the control of the transmission and disposition of property upon the death of the owner, and cannot adjudicate upon collateral matters. The right or title of the decedent to property claimed by the administrator, as against third persons, or by third persons against him, must, if an adjudication becomes necessary, be tried in courts of ordinary jurisdiction. He is entitled to the possession of the property of his decedent, but, if it is in possession of some person

who refuses to surrender to him, the county court cannot aid him in obtaining such possession. It may call him to account for not doing so, but he must seek his remedy in some other court. Nor can we see any sufficient reason for his not maintaining such action, because the property is in the possession of another administrator. An administrator is not entitled to the possession of property, unless it belonged to his decedent, nor is he accountable to the county court for the property seized or claimed by him as part of the estate and belonging to others, because he does not hold such property as the representative of the estate, but as one who has trespassed upon the rights of others. The machinery and proceedings of the county court are wholly inadequate to the trial of disputed questions of title. Such issues are properly triable in the circuit court, where the aid of a jury can be had, and must, we think, under our statute, be tried in that court.

The next assignment of error is in the refusal of the court to allow the defendant to give evidence tending to prove the lien for feeding and agisting the live-stock described in the complaint. From the record it appears that the evidence on the part of the defendant showed, and it was admitted, that he was the duly qualified and acting administrator of the estate of M. E. Gillihan, deceased; that he had possession of the property in controversy before and at the time of Gillihan's death; that he included said property in the inventory of the estate, had the same appraised, and returned to the county court as belonging to the estate of his decedent; and that he is defending this action as administrator, and not in his individual capacity. It must be admitted that defendant must either defend as an individual or in his representative capacity. He cannot do both. He cannot at one instant claim that he has possession of this property in his representative capacity, and at the next that he holds such possession as an individual. He has elected to defend as administrator, and cannot therefore avail himself of the defense that he has a private lien on the property, because his possession of this property in his representative capacity is inconsistent with a possession under a lien personal to himself. Besides, he does not allege that he has or claims possession by virtue of any lien he has or holds thereon. He avers that he has an agister's lien, and that he had possession of the property prior to the death of Gillihan, and still has possession; but he does not plead that he holds possession by virtue of his lien, while his pleadings and entire course in the trial indicates that he claims possession as administrator. Having taken possession and inventoried this property as belonging to the estate of M. E. Gillihan, and assumed the relationship of administrator thereto, and having undertaken to defend this action as such administrator, he assumed a relation to the property not consistent with the lien claimed by him, and must therefore be regarded as having waived his lien. 18 Amer. & Eng. Enc. Law, 623; Guille v. Wong Fook, 13 Or. 577, 11 Pac. Rep. 277;

Mexal v. Dearborn, 12 Gray, 336; Railroad Co. v. McGuire, 79 Ala. 395. There was no error, therefore, in refusing to admit the evidence offered. The other alleged errors do not require any extended notice. The order of the county court appointing plaintiff administrator of the partnership estate, however erroneous it may have been, is not subject to collateral attack, (Ramp v. McDaniel, 12 Or. 198, 6 Pac. Rep. 456;) and under the rule laid down in Prescott v. Heilner, 13 Or. 200, 9 Pac. Rep. 403, and Guille v. Wong Fook, supra, the description of the property contained in the complaint is sufficient after verdict. Judgment affirmed.

JUDKINS v. TAFTE.

(Supreme Court of Oregon. June 24, 1891.)

APPEAL—TIME OF FILING TRANSCRIPT—RETROACTIVE LAW.

Laws Or. Feb. 16, 1891, provide that transcripts in all appeals from Wasco, Crook, and Sherman counties, unless otherwise stipulated by the parties, shall be forwarded to the next succeeding term of the supreme court after the appeal shall be perfected; and, if such term be held at Salem, the cause shall be heard there, and, if such term be held at Pendleton, the transcript shall be sent to that place. *Held*, that the statute relates only to remedies, and is retroactive, and hence the appeal of one who had time after the passage thereof to file the transcript at Salem, but neglected to do so, must be dismissed.

Appeal from circuit court, Wasco county.

Action by H. P. Judkins against I. H. Taffe. Plaintiff had judgment, and defendant appealed. Appeal dismissed.

George Watkins, for appellant. J. L. Story, for respondent.

BEAN, J. This is a motion to dismiss the appeal in this case because the transcript was not filed at Salem by the first day of the March term of this court. On June 13, 1890, respondent recovered a judgment against appellant for the sum of \$500 in the circuit court of Wasco county, from which he duly appealed to this court, by filing his notice of appeal on December 8, 1890, and on the next day his undertaking, but the transcript was not filed in this court until the 29th day of April, 1891. By the act of February 15, 1890, (Laws 1889, p. 4.) it was provided that there shall be two terms of this court held annually at the capital, commencing on the first Monday in March and the first Monday in October in each year, and at such other times as the court may appoint; and one term at Pendleton, commencing on the first Monday in May in each year; and that the transcripts in all appeals taken from any circuit court in any county lying east of the Cascade mountains, except in Klamath and Lake, shall be forwarded to the clerk of this court at Pendleton, and shall be heard and determined there, unless otherwise stipulated between the parties, or ordered by the court. And appeals taken from the circuit court in all other parts of the state shall be heard and determined at the capital. By an amendatory act approved February 16, 1891, and which took

effect from the date of its approval, it was provided that "the transcripts in all appeals taken from Wasco, Crook, or Sherman counties, unless otherwise stipulated by the parties, shall be forwarded to the next succeeding term of said supreme court after the appeal shall be perfected; and, if said next succeeding term after the perfection of said appeal shall be held at Salem, then the cause shall go to that place for hearing and decision, and the transcript shall be forwarded there by the first day of said term of court, as aforesaid; but in case the next succeeding term of the supreme court after such appeal shall be perfected shall be held at Pendleton, such transcript shall be forwarded by the first day of said term at Pendleton." The appeal in this case having been perfected before the passage of the amendment of 1891, the contention of appellant is that such appeal is not in any way affected by this amendment, but must be heard and determined at Pendleton, as provided in the act of 1889. The language of the amendment does not expressly refer to appeals already perfected, and it is claimed that it should not receive a retroactive construction at the hands of the court. Legislation which prejudicially affects vested rights or the legal character of past transactions will not be construed as retroactive unless it is declared so in the act, and the courts will give to such enactments a prospective, rather than a retroactive, construction, if possible. As was said by Mr Justice CLIFFORD in *Twenty Per Cent. Cases*, 20 Wall. 187: "Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of actions, or vested rights, unless the intention that it shall so operate is expressly declared, or is to be necessarily implied; and that, pursuant to that rule, courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation." This rule rests upon the presumption that the legislature does not intend what is unjust and oppressive, and therefore "every statute," it has been said, "which takes away or impairs vested rights acquired under existing laws, or creates new obligations, or imposes a new duty or attaches a new disability in respect to past transactions or considerations already past, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation." *End. Interp. St. § 273*. But this presumption against retrospective construction has no application to enactments which affect only the mode of procedure and practice of the courts. No person has a vested right in any form of procedure. He has only the right of prosecution or defense in the manner prescribed for the time being, and, if this mode of procedure is altered by statute, he has no other right than to proceed according to the altered mode. Indeed, the rule seems to be that statutes pertaining to the remedy or course and form of procedure, but which do not destroy all remedy for

the enforcement of the right, are retrospective, so as to apply to causes of action subsisting at the date of their passage. *Id. § 286*. *Converse v. Burrows*, 2 Minn. 229, (Gil. 191.) Statutes which relate to the mode of procedure, and affect only the remedy, and do not impair the obligations of contracts or vested rights, are valid; and it is no objection to them that they are retroactive in their operation. It is competent for the legislature at any time to change the remedy or mode of procedure for enforcing or protecting rights, provided such enactments do not impair the obligations of contracts, or disturb vested rights, and such remedial statutes take up proceedings in pending causes, when they find them; and when the statute under which such proceedings were commenced is amended, the subsequent proceedings must be regulated by the amendatory act. *People v. Herklimer*, 4 Wend. 211; *Suth. St. Const. § 482*; *Kille v. Iron-Works*, 134 Pa. St. 225, 19 Atl. Rep. 547. Thus an act limiting the right of appeal to 60 days, where no limitation before existed, held to apply to judgments rendered prior to its enactment. *Slocum v. Fayette Co.*, 61 Iowa, 169, 16 N. W. Rep. 61. So an act granting appeals from certain enumerated judgments and orders applies to such judgments and orders made prior to its passage. *McNamara v. Railway Co.*, 12 Minn. 398, (Gil. 269.) So an act providing that whenever a final judgment in any criminal case shall be reversed on account of error in the sentence, the court may render such judgment therein as should have been rendered, held to apply to past as well as future judgments. *Jacquins v. Com.*, 9 Cush. 279. So an act of congress enlarging the jurisdiction of the circuit court applies to cases pending and undetermined at the passage of the act, unless excluded by its terms or necessary implication from the language of the act. *Larkin v. Saffrans*, 15 Fed. Rep. 147. As was said by Chief Justice POLAND in *Richardson v. Cook*, 37 Vt. 603: "It is clearly within the legislative power of the state to make such changes and alterations in the forms and modes of administering justice by its tribunals as they may deem most conducive to the general welfare, and that the legislature may change and modify remedies, forms of proceedings, or the tribunal itself, as they choose; but they shall not, directly or indirectly, destroy or abolish all remedy whatever by which the performance of any class of valid legal contracts may be enforced." So in *Mayne v. Board, etc.*, 123 Ind. 134, 24 N. E. Rep. 80 it is said: "Where, however, the new legislation does not impair or take away the previously existing right, nor deny a remedy for its enforcement, but merely modifies the proceedings, while providing a substantially similar remedy, the jurisdiction continues under the forms directed by the latter act, in so far as the two acts are different." In fact, the rule as gathered from all the authorities seems to be that, "where the enactment deals with the procedure only, unless the contrary be expressed, the enactment applies to all actions, whether commenced be-

ore or after the passage of the act." *Broom, Leg. Max.* 35.

Applying these principles to the question before us, its solution is easy. The act of 1891 relates solely to remedies, and appeal is purely remedial. It only changes the place where appeals from Wasco county shall be heard and determined. It does not interfere with any vested rights of appellant, since he had no vested right to have his appeal heard at Pendleton, rather than at Salem, if indeed, it can be said, he had a vested right to have it heard at all. The law does not deny the right of appeal, but affects only the mode of procedure. The right of appellant to have his appeal heard and determined was only partially acquired when the act of 1891 was passed. The jurisdiction of this court had not attached, because no transcript had been filed. His right was inchoate at the time of the latter enactment, changing the method of its prosecution and perfection; and the procedure prescribed by this act must be pursued. He had time after the passage of the act of 1891 in which he could have filed his transcript before the next ensuing term of this court at Salem, and, if not, he could have applied for an order enlarging the time. Code, § 541. Not having done so, the appeal is to be deemed abandoned, and the effect thereof terminates. *Id.* § 541. The motion is therefore allowed, and the appeal dismissed.

BENNETT V. TAFFE.

(*Supreme Court of Oregon.* June 24, 1891.)

Appeal from circuit court, Wasco county; J. H. Bird, Judge.
George Watkins, for appellant. J. L. Story, for respondent.

BEAN, J. The judgment in this case was rendered on the 23d day of December, 1889; the notice of appeal filed May 28, 1890; and the undertaking filed on the 31st of the same month. The transcript was not filed in this court until April 29, 1891. The motion to dismiss appeal is made for the same reasons as in *Judkins v. Taffe*, (Or.) 27 Pac. Rep. 231, and the decision in that case must control in this. Motion allowed, and appeal dismissed.

DRAY V. DRAY.

(*Supreme Court of Oregon.* June 24, 1891.)

TRUST—RIGHTS OF TENANTS IN COMMON—EXECUTION SALE—RIGHTS OF PURCHASER.

1. If one party obtains the legal title to property not by fraud or by violation of confidence or of fiduciary relation, but in any other unconscientious manner, so that he cannot equitably retain the property, which really belongs to another, equity will impress a constructive trust upon the property in favor of one who in good conscience is entitled to it, and who is considered in equity as the beneficial owner.

2. When one tenant in common removes an incumbrance from the common property, or acquires the legal title when the same is outstanding, such acquisition inures to the benefit of all the persons interested in such common property.

3. When one tenant in common induces a cotenant to deed to him his interest in the common property, which had been sold under an execution under the promise that such tenant will redeem such common property for the benefit of all the tenants in common, and then permits the time for redemption to expire, and on the next day

takes a deed in his own name from the execution purchaser, such deed is constructively fraudulent, and the title thus acquired inures in equity to the benefit of all such tenants in common.

4. After the sale of real property on execution the legal title remains in the judgment debtor until the sheriff's deed is executed. As long as this statutory right of redemption continues, the purchaser's title at the execution sale is inchoate, and may be defeated by a redemption under the statute; but this right is not an equitable, but purely a legal, right.

(*Syllabus by the Court.*)

This cause comes here on appeal from a decree of the circuit court of Union county in favor of the plaintiff and against the appellant, requiring him to convey an undivided one-third of the land in controversy to the plaintiff within 30 days, or, in default of such conveyance, then that the decree stand in lieu thereof, and operate as such conveyance. The grounds upon which the court below proceeded in making this decree appear in the findings of the referee, which are as follows:

"(1) That Andrew Dray died intestate in Union county, Or., on the 19th day of May, 1887, leaving real estate and personal property in Union county and real estate in Washington county, Or. [Here follows a description of said real property, not necessary to be here reproduced.] (2) That plaintiff, Henry C. Dray, defendant, J. W. Dray, and S. A. Dray are the only heirs at law of Andrew Dray, deceased, and are each over the age of twenty-one years, and are brothers. (3) That said real estate was incumbered by mortgage at the time of the death of said Andrew Dray to the amount of about \$1,200. (4) That there were other debts of said deceased at the time of his death, amounting to the sum of \$300, and some personal property of said estate, of the value of about the sum of \$1,400. (5) That about the 20th day of August, 1887, defendant, J. W. Dray, was appointed administrator of the estate of Andrew Dray, deceased, by the county court of Union county, Oregon, and was such administrator thereafter until the month of June, 1889. (6) That on the 12th day of April, 1888, plaintiff, Henry Dray, executed to the defendant, J. W. Dray, a quitclaim deed, releasing to the defendant all the right, title, and interest of the plaintiff in the said real property, to-wit, the undivided one-third interest in the property described in finding No. 1 hereof, which deed has a *habendum* clause in the following words: 'To have and to hold the same, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, forever.' (7) That said deed was not delivered by Henry C. Dray to defendant, J. W. Dray, until about the 28th day of May, 1888. (8) That the consideration of said deed, expressed on the face thereof, was the sum of \$500, the receipt whereof is, by the terms of said deed, duly acknowledged. (9) That in fact there was no pecuniary consideration paid therefor by the defendant, but the actual consideration and inducement therefor was as follows: (10) That on January 2, 1888, all the right, title, and interest of plaintiff, Henry C. Dray, in and to the real property of the

estate of Andrew Dray, deceased, which was situated in Union county, was sold upon execution issued out of the circuit court of Union county in the case of J. B. Worster v. Henry C. Dray, in the sum of \$1,170.96, to J. W. Shelton, for the sum of \$450, and that on or about the same time the portion of said land situated in Washington county was sold on a like execution on said judgment to the same purchaser for the sum of \$950; that the said sale of the property situated in Union county was thereafter, on February 20, 1888, duly confirmed by said circuit court of Union county, and about the same time the sale of the real estate situated in Washington county was also confirmed. (11) That during the spring of the year 1888 plaintiff was attempting to procure money upon his interest in the real estate of A. Dray, deceased, by mortgage or otherwise, for the purpose of redeeming said real estate from said execution sales, and did obtain offers of such a loan on condition that the debts of said estate be paid and the administration discharged. (12) That the defendant, J. W. Dray, disapproved of plaintiff's getting the money, and represented to the plaintiff that it would be less dangerous to the plaintiff's interests, and less expense, and it would result in keeping the property in the family, for the plaintiff to convey to the defendant and then the defendant borrow the money to pay all the debts of the estate and plaintiff's judgment also, and proposed to plaintiff that if he would so convey to the defendant he would procure the money and redeem plaintiff's interest in said estate lands so sold on execution, and pay the debts of the estate, and he would then reconvey to plaintiff said real estate charged with his share of said debts. (13) That the plaintiff was unable to redeem the property from the said execution sale, or borrow the money for that purpose, except by means of or out of his interest in the said estate of Andrew Dray, deceased; and on about the 28th day of May, 1888, plaintiff did accept said offer of the defendant, and, for the purpose of carrying out such arrangement, plaintiff delivered to the defendant the deed referred to in finding No. 6 hereof, which had been previously executed in contemplation of such purpose. (14) That the offer and acceptance thereof, contained in findings Nos. 12 and 13 hereof, were the consideration for such deed. (15) That the said offer and acceptance were not in writing, and were proven by parol testimony under the objections of the defendant's counsel. (16) That subsequent to the delivery of said deed by plaintiff to defendant, referred to in finding No. 13, defendant procured from one A. J. Nickum, grantor of A. Dray, deceased, a deed to a portion of said real estate situated in Washington county, to be executed to himself for the purpose of perfecting the title thereto on account of a misdescription in the original conveyance thereof to said A. Dray, deceased. (17) That the execution purchaser of said plaintiff's interest in said property gave to plaintiff an offer in writing that said property might be redeemed within thirty days, to-wit, from the 20th day of

May, 1888, for the sum of \$1,200. (18) That the defendant, J. W. Dray, procured the money, to-wit, \$1,200, from Dan Marx to redeem plaintiff's interest in said property so sold on execution prior to the expiration of the time for redemption thereof, to-wit, about the 18th of June, 1888. (19) That he failed to redeem said real estate from said execution sale, but on the day after the expiration of the time for the redemption thereof procured a quitclaim deed from the property from the execution purchaser thereof, for which he paid the sum of \$1,000, and executed a mortgage on the property for \$200, which he has not paid. (20) Defendant claims that he is the owner of said property by virtue of the said deed of plaintiff to him, and by virtue of said deed from the execution purchaser thereof to him denies the alleged oral agreement. (21) That defendant failed so to redeem said property from said execution sale, or to pay out the indebtedness of said estate, or to reconvey said property to the plaintiff, and claims that he is the absolute owner thereof."

The learned referee also submitted the following conclusions of law:

"(1) That on and prior to the 28th day of May, 1888, plaintiff was the owner of the equity of redemption in and to an undivided one-third interest in the real property described in finding of fact No. 1, theretofore sold on execution issued on the judgment of the circuit court of the state of Oregon for Union county, in the case of J. B. Worster v. Henry C. Dray, this plaintiff, and that the equity of redemption expired on the 20th day of June, 1888. (2) That the conveyance executed by Henry C. Dray, the plaintiff herein, to the defendant, J. W. Dray, of date April 12, 1888, by its terms, is an absolute and unconditional transfer of the title or equity of redemption in the said real estate. (3) That by reason of the fact that the defendant, as administrator of the estate of Andrew Dray, deceased, had the possession and control of the property of the estate, and the plaintiff, his brother, being in a financial strait, that defendant occupied a fiduciary relation to the plaintiff in the taking of said deed. (4) That the promise of the defendant in this case to reconvey the property to the plaintiff was void by the statute of frauds, and cannot be enforced as such. But the trust may be established by parol testimony of constructive fraud, or by reason of the existence of a fiduciary relation, notwithstanding the express promise. (5) That the conduct and promises of the defendant in inducing the plaintiff to change his plans and release to the defendant an interest in the land for the purpose of enabling the defendant to accomplish the redemption of the land, and the payment of the estate debts, and then diverting the property to other uses, will raise a constructive trust in favor of the plaintiff. (6) That no debt has been created by the defendant in his favor against the plaintiff's interest in the property with which the plaintiff is chargeable under the agreement, because the agreement was wholly disregarded by the defendant. (7) That the defendant is a trustee *ex maleficio* of

the title he obtained from the plaintiff of date April 12, 1888. (8) That the defendant, being a trustee of the plaintiff's equity of redemption for the purpose of redeeming the same from said execution sale, the title that he procured by the deed from the said execution purchaser should result to the plaintiff's benefit, charged with the amount paid therefor, to-wit, \$1,000. (9) Equity will require the plaintiff to do equity, hence he must reimburse the defendant for the amount advanced by him on the said property to the said execution purchaser, to-wit, the sum of \$1,000, with interest thereon from the 21st day of June, 1888. (10) That the plaintiff is entitled to a decree of this court declaring the defendant, J. W. Dray, to be a trustee for the plaintiff of an undivided one-third interest in all the real estate described in finding of fact No. 1 hereof, and that he be decreed to convey the same to plaintiff upon the payment by the plaintiff to the defendant of the sum of \$1,000, with interest thereon from the 21st day of June, 1888."

Plaintiff excepted to the finding of law requiring him to pay defendant \$1,000 as a condition precedent to his being restored to his estate for the reason that defendant had mortgaged the property for the money with which he purchased the same of the execution purchaser, and the mortgage remains unsatisfied, which exception was allowed by the court. The defendant excepted to the 7th, 11th, 12th, 13th, 14th, and 18th findings of fact, for the reason that neither of them is supported by the evidence. He also excepted to the 3d, 4th, 5th, 6th, 7th, 8th, and 10th, and the last clause of the 9th conclusion of law, on the ground that neither is warranted by the facts found. These exceptions were overruled, and a decree having been entered for the plaintiff, the defendant appeals.

J. W. Shelton, for appellant. *C. H. Flinn*, for respondent.

STRAHAN, C. J., (after stating the facts as above.) The appellant presented in the court below a number of exceptions to the referee's report, which we need not notice *seriatim*. The exceptions to the referee's findings of fact cannot be sustained. They appear to be based mainly on the ground that the evidence is incompetent because it tends to prove an agreement in relation to the transfer of land without writing. Some of the evidence is undoubtedly incompetent if it were relied upon for that purpose; but the transfer of the plaintiff's title to the defendant, under the particular circumstances of the case, was sufficient to raise a resulting trust in the plaintiff's favor in the interest transferred. The defendant did not purchase the land. The plaintiff made no gift of his interest to the defendant. The defendant acquired the naked legal title, to be used by him in raising money to relieve the estate, in which he and his brothers were alike interested, from financial embarrassment, and good faith as well as the plainest principles of honesty required that it should be used for that purpose alone, and when that is accomplished the plaintiff's inter-

est should be returned to him. The particular facts of the case add much strength to this view. The plaintiff and defendant are brothers. The defendant was the administrator of their father's estate, who had then recently died, and the defendant was in possession of the land in controversy, which had descended to the plaintiff and defendant and another brother burdened with their ancestor's debts. The plaintiff was financially embarrassed, and the defendant represented to him if the entire title were vested in him he could and would raise money on the credit of the estate to discharge its debts. To allow the defendant to retain the title under the facts would give the sanction of the court to a fraud, not, perhaps, an actual fraud, but to a transaction that is constructively fraudulent if consummated in accordance with the defendant's contention. 1 Pom. Eq. Jur. § 155, states one phase of the rule under consideration thus: "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property, which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." But the appellant contends that he is entitled to hold the property by virtue of the deed which he took from Shelton, the purchaser at the execution sale. It is true, this is not a statutory redemption, because the time for redemption under the statute had expired; nor had it at that time been enlarged by the purchaser. But the plaintiff and the defendant, as between themselves, had a common interest in the property, the plaintiff's interest being only equitable, it is true, but still a beneficial interest, and any acquisition of title by the defendant, under the circumstances, must inure to the benefit of all persons having an interest in the title. In addition to this, the inference from all the facts is too strong to be resisted that the defendant's conduct in waiting for the time for redemption to expire and then taking a deed from the execution purchaser was for the express purpose of defeating and cutting off any supposed interest which the plaintiff might have in said property. Viewed in this light, the defendant's act in taking said deed to himself, whether so designed or not, was constructively fraudulent. By that act he sought to gain an unconscientious advantage which he cannot be permitted to retain. There is no specific exception to the referee's conclusions of law on the part of the defendant. We think some of the findings are open to criticism. For instance, the right of redemption which a judgment debtor has after sale of his realty on execution is not an equity of redemption. It is purely a statutory right of redemption. The legal title still remains in the judgment debtor until the sheriff's deed is executed. As long as this statutory right of redemption continues, the purchaser's title at the execution

sale is inchoate, and may be defeated by a redemption under the statute; but this right is not an equitable, but purely a legal, right. But this misuse of terms does not affect the conclusions to be drawn from the findings, or in any manner affect the defendant. The general result of the findings is in harmony with what we conceive to be the equities of the case, and we find no sufficient reason in the record for disturbing them. We therefore affirm the decree appealed from.

STATE V. WATSON.

(Supreme Court of Washington. July 1, 1891.)

ASSAULT WITH INTENT TO KILL — INFORMATION — ALLEGATION OF INTENT.

1. An information, reciting in the formal beginning that the prosecuting attorney gives the court to understand that the defendant "is guilty of the crime of assault with intent to commit murder," but not charging the intent to murder in the body of the information, charges simple assault only.

2. Where, on such information, defendant is convicted of assault with intent to murder, he will not be discharged on appeal, but the case will be remanded, with instructions that he be sentenced for simple assault.

McGinn and Sears & Simon, for appellant.

HOYT, J. Appellant was placed upon trial in the superior court of Lewis county, on an information substantially as follows: "Comes now W. A. Reynolds, prosecuting attorney for said Lewis county, state of Washington, the said superior court of the said Lewis county being in session, and the grand jury for said county not being in session, and now here said prosecuting attorney gives the said superior court to understand and to be informed by this information that the above-named Thomas Watson is guilty of the crime of assault with intent to commit murder, committed as follows: The said Thomas Watson, in said Lewis county, state of Washington, to-wit, the 19th day of April, A. D. 1890, feloniously, purposely, and of his deliberate and premeditated malice, and in a rude, insolent, and angry manner, did then and there assault, and unlawfully attempt to touch, strike, beat, wound, and shoot C. A. Morgan, then and there having the present ability so to do, by then and there feloniously, purposely, and of his deliberate and premeditated malice, and in a rude, insolent, and angry manner, shooting at said C. A. Morgan with a revolver, which he, the said Thomas Watson, then and there held in his hands." A verdict of guilty was rendered in the action, and the court proceeded to pass sentence thereon. At that time, and before sentence had been imposed, counsel for appellant suggested to the court that the information only charged the crime of assault, and asked that sentence be imposed for that crime only. The court, however, was of the opinion that the information sufficiently charged the crime of assault with intent to commit murder, and sentenced the appellant to imprisonment in the penitentiary at hard labor for three years. To

such judgment and sentence appellant duly excepted, and the case is now here for review; the only question involved in the appeal being as to whether or not such information charges the crime of assault with intent to commit murder. It will be seen that the question as to the sufficiency of this information was raised by the appellant at the first opportunity. He could not demur thereto because it sufficiently charged the crime of assault, and therefore the question is not here presented as to what would be the effect of laches on the part of the defendant in seasonably raising objection to an information defective like the one in this action. The simple and only question is as to the sufficiency of the information to resist a seasonable attack. The crime of assault with intent to commit murder is made up of two distinct substantive elements: *First*, there must be an assault; and, *secondly*, there must be the intent to commit murder. The intent is said to be the gist of the offense, and all the authorities concur in holding that, without a sufficient allegation and proof of such intent, there can be no conviction for the aggravated assault. 1 Whart. Crim. Law, § 641; 2 Bish. Crim. Proc. §§ 77, 651; *State v. Neal*, 37 Me. 468. There is nothing better settled in the law than that in criminal pleading all the facts necessary to constitute the offense must be charged in the information, and, applying that rule to the crime attempted to have been charged in this cause, it will be seen that, to constitute a good information, there must have been an affirmative allegation of acts constituting an assault, and a like allegation that by such acts the person charged intended to murder the injured party. An examination of the information above set out will show that the only place therein, where intent is at all mentioned, is in the formal part where the name of the alleged offense is given. Can such a simple naming of the offense be said to charge that the acts constituting the assault were committed with the necessary intent? I think not. It might as well be said that the acts constituting the assault were sufficiently charged in the same clause, as included in the name of the crime, for, as we have seen, an affirmative allegation of the intent is equally as necessary as that of the assault. Of course, no one would contend that the crime of assault would be sufficiently charged by simply naming it as the offense which had been committed, without in any way setting out the facts constituting the same, and I think it equally clear that the simple naming of the intent as a part of the name of the crime is likewise insufficient. When the prosecutor says that he charges the defendant with the crime of an assault with intent to commit murder, the most liberal system of pleading will not allow such allegation to be treated as an affirmative allegation that an assault has been committed, and that the defendant in doing the acts constituting the assault did them with the intent to commit murder. The only crime charged in the information is that of assault, and the court should have imposed sentence therefor only. The sen-

tence to imprisonment for the term of three years was beyond the power of the court to impose for such crime, and therefore was unwarranted. Such being the condition of the cause, counsel for appellant contends that this court should not only reverse the judgment and sentence, but should remand the cause, with instructions to discharge the defendant. I do not think that such should be the result of the appeal. When a criminal cause brought here by the defendant on appeal is reversed, the usual result is only to have the cause remanded, with instructions, express or implied, to correct the error, and then proceed; and the fact that the defendant has pending the appeal been confined has no legal bearing upon the after proceedings. As a matter of fact, however, the courts usually take into consideration all the circumstances of the case in imposing punishment, and, as one of such circumstances, the time defendant has been in jail. When an appeal is taken the finality of the judgment is suspended, and, if such appeal results in a reversal, the cause stands as though no judgment had been rendered. For these reasons I think that the cause should be reversed and remanded, with instructions to the court below to sentence the defendant as upon conviction for simple assault.

ANDERS, C. J., and SCOTT, DUNBAR, and STILES, J.J., concur.

(2 Wash. St. 394)

KENYON v. KNIPE *et al.*

(*Supreme Court of Washington. June 2, 1891.*)

ESTOPPEL—RECORDED PLATS—STREETS.

Where a recorded plat shows the lots, streets, and alleys without showing that any of them are below high tide, the purchaser of a lot lying partially below high tide cannot enjoin the use of a platted street which is wholly below the line of high tide in front of his lot and between other platted lots lying wholly below high tide. STILES, J., dissenting.

Appeal from district court, third district.

Howe & Corson and Finch, Snook & Glasgow, for appellant. *Thomas Burke and C. H. Hanford*, (*Andrew Woods*, of counsel,) for appellees.

HOYT, J. The discussion in this case has extended over a broad range. Nearly every question connected with the subject of tide or shore lands, and the rights of riparian or littoral proprietors thereto, has been ably briefed and argued by counsel for the respective parties. Also the questions growing out of the making and recording of town plats, and the effect of the same, have been likewise presented. The conclusions to which we have come as to this second matter will make it unnecessary for us to decide the questions presented by the former, and, as they have been lately considered by this court in cases where a decision thereof was necessary, we shall here say nothing in regard thereto. The facts, so far as they are necessary to the decision of this case, are substantially as follows: Arthur A. Denny made and recorded his plat of an addition to the city of Seattle, upon which certain lots, streets, and alleys appeared, and were sufficiently described to show the in-

tention of the maker of the plat in regard thereto. It nowhere appeared upon such plat where the line of ordinary high tide was. On the contrary, so far as could be gathered therefrom, all the territory covered by said plat was upland. As a matter of fact, however, the line of ordinary high tide so crossed said plat that a portion of lots 6 and 7, hereinafter mentioned, were above the line of ordinary high tide, and the remainder of such lots, and all of lots 5 and 8, together with the alley dividing the same, were below such line. After the making and recording of said plat the said Denny sold and conveyed to plaintiff herein lots 6 and 7, in block B, of said plat, after which said Denny sold and conveyed lots 5 and 8, in said block, and said defendants, by mesne conveyances, became possessed of the title thereby conveyed. Under said last-named conveyance from Denny, possession was taken and improvements made on said lots 5 and 8, and the alley dividing those lots from the lots of plaintiff was planked over and used as a street several years before the commencement of this action. Under these circumstances we do not think it lies in the mouth of the plaintiff to object to such improvements as being an infringement upon his rights as a littoral proprietor. The effect of the plat made by Mr. Denny was to separate the tract thereby covered into distinct lots having definite, ascertained boundaries, and into streets and alleys as marked upon said plat, and to vest in the public such streets and alleys for the purposes therein designated. That such would be the effect as to such streets and alleys if the territory covered was upland, and owned by said Denny, is conceded, but it is contended that, as he had no title to the land below the line of ordinary high tide, his plat, so far as it purported to cover such lands, was absolutely void for any and every purpose. With this contention we cannot agree so far as Mr. Denny himself is concerned. It is perhaps true that as to anybody having rights adverse to him such would be the effect, but it does not lie in his mouth to say that that which he has made of record is a nullity. He is estopped by the making of such plat from alleging its invalidity, and so far as he is concerned would not be heard to complain of the use by the public of the territory covered by streets and alleys, especially after the same had been taken possession of and improvements thereon made. This being the condition of Mr. Denny, and his relation to the title of the lots bounded and described in said plat, we think that one purchasing lots from him, by reference to said plat, could acquire no better title than he had. Of course, if one could acquire title independent of or adverse to that represented by Mr. Denny at the time of the making of the plat this reasoning would not obtain; but such is not the condition of plaintiff. Whatever title he has he obtained from Mr. Denny, and we think it elementary that under the circumstances of this case he could get no better title than that of his grantor. A deed conveying property by reference to a plat, or map thereof, adopts such plat or map as a part of such

deed, and one purchasing thereunder becomes bound by the boundaries of the lot purchased as they appear on said plat or map. Applying this rule to the case at bar, it will be seen that the plaintiff herein did not purchase lots bounded by tide-water, but those bounded by a definite and defined line 120 feet from the front of said lots, so that the lots he purchased were bounded and concluded on the one side by Front street, and on the other side by the alley next westerly thereof, and we think he is estopped by such fact from claiming any rights beyond such boundaries as against the rights of the public in said alley, and of those in possession of the lots beyond such alley. Unaided by such plat, his deed is uncertain and void. Aided by it, it becomes a valid deed, but of a lot with definite boundaries, and he must be bound thereby. It follows that the plaintiff is not entitled to the relief prayed for, and the decision of the lower court in so holding must be affirmed, and it is so ordered.

DUNBAR and SCOTT, JJ., concur.

ANDERS, C. J. I concur in the result.

STILES, J., (*dissenting*.) Both parties in this case assumed that the riparian right of wharfage existed when the action was commenced. Substantially their only difference on that subject was that the appellant took the position that such rights were not severable from the ownership of the upland excepting by a conveyance clearly showing that to be the purpose of the grantor. The appellee, on the other hand, claimed that any deed describing upland, or upland and shore land, by metes and bounds, though the high-water mark in either case should be the actual boundary, was sufficient for the severance of the right of wharfage and access to the sea from the upland. From the opinion of the court it does not appear clearly, as the fact was, that the land owned by Denny constituted a mere strip of some 40 feet in width between Front street on the east and the line of mean high water on the west. This strip seems to have been a remnant left after the original plat of lands owned by Denny had been filed, and which he thereafter undertook to subdivide into lots. His plat was in the usual form, and had nothing upon it which indicated that there was any navigable water embraced within its limits. To the westward of the line of high water, and 120 feet from Front street, he noted on his plat what appeared to be an open strip, but without any designation upon it that it was to be an alley, and to the westward of that other lots were noted, and numbered the same as those which embraced the upland. Kenyon met Denny in Olympia, before the former had ever seen the plat, and spoke to him about the purchase of some of his "water lots." Denny told him he would reserve him two. Afterwards, in pursuance of this conversation, Denny executed to Kenyon a conveyance of lots 6 and 7 in one of these platted blocks. Across these lots, from north to south, the meander line extended. It does not appear wheth-

er Kenyon had at any time seen Denny's plat. Kenyon went into possession of the two lots by his tenant, and erected upon the lots, and extending therefrom over the shore some 60 feet, a building on piles, and used the building thus erected to the time of the commencement of this suit. The appellee took from Denny a quitclaim deed of lots 5 and 8 on the same plat, which lots were immediately to the westward and in front of the lots of the appellant. The appellee thereafter (and just when is not discernible) extended southward from other lots, in the same block which he had purchased from Denny in like manner, a wharf over the area of lots 5 and 8. This action was brought to abate what appellant conceived to be both a public and a private nuisance in front of his lots and of his building and premises. I am unable to understand upon what principle, in the light of the decision of this court in the case of *Eisenbach v. Hatfield*, 26 Pac. Rep. 539, the position is now taken that the appellant's main contention was not a good one. In that case it was decided—*First*, that a riparian owner now has no rights whatever as against the state or its grantee or licensee beyond the boundary of his land; and, *secondly*, that the act of 1854 was merely a permissive license which is not available unless it had been taken advantage of by the shore owner before the adoption of the constitution. This ruling denies any claim that Denny might have had that he had any right whatever beyond his shore line, excepting as a licensee, under the act of 1854. He took no advantage of that license, and had no title, interest, or claim whatever in the waters or the soil beneath them beyond the line of his land at the time he filed his plat. His plat, therefore, was utterly void for every purpose as to all that part of it which extended beyond the upland; and now to say that, notwithstanding he was not the owner of any land beyond the water line, nevertheless he could, by the mere filing of a plat, exercise an authority which would not only dedicate a street or alley out in the water, but also reserve to himself a title or a right still further in the water, which he could convey to a grantee by a quitclaim deed, is incomprehensible to me. It was not decided, nor do I think it was intended to be intimated, in the case of *Eisenbach v. Hatfield*, that the owner of upland, who had availed himself of the act of 1854 by erecting a structure in the nature of a wharf from his land into the water, could not prevent a mere stranger, such as was the appellee, who confessedly acquired no title whatever from Denny, from creating a nuisance in front of him towards the deep water. The effect of this decision is to say that Denny, by his mere plat, could set aside the act of 1854, and, while giving to Kenyon more than the act of 1854 contemplated up to the west line of his lots, could absolutely deprive him from going therefrom to the deep water. In a word, this court, having rejected all forms of riparian rights, now concedes to a shore owner prior to the constitution rights which have never been conceded to him outside

of Rhode Island and Minnesota, where he is said to have substantially the whole title to deep water.

I think the court is entirely mistaken as to the effect of such a plat. Section 2328 and following sections of the Code do not say who may make or file a plat of a town, but simply provide that whoever shall thereafter lay off any town shall, previous to the sale of any lots, record a plat, and that the effect of such a plat shall be to all intents and purposes the same as a quitclaim deed. Now, it is the first principle of platting, that the one who plats must be the owner in fee of the land platted. Says Angell on Highways, (section 132:) "Dedication is an appropriation of land to some public use, made by the owner of the fee;" and in section 134: "A primary condition of every valid dedication is that it shall be made by the owner of the fee." Herman on Estoppel, (section 1143,) says: "A primary condition of every valid dedication is that it shall be made by the owner of the fee, or of an estate therein." In *Lee v. Lake*, 14 Mich. 12, Judge COOLEY said: "The plat put in evidence was made by Brooks and Crane at a time when they do not appear to have had any interest in the land, and if the execution [of the plat] had been in all respects in due form it could not have had the effect which the statute gives to plats executed and acknowledged under its provisions. The statute then in force provided for the making, acknowledging, and recording of town plats by the proprietors, and it is impossible to give the peculiar statutory effect of a present conveyance to a plat made by persons who at the time had no title to convey, even though they may have afterwards become the owners. And as the healing act of 1850 was confined in its scope to imperfect acknowledgments, it could not give effect to a plat which no acknowledgment could have made effectual at the time it was made." This decision was concurred in by Judges CHRISTIANCY and CAMPBELL. The case of *Hoole v. Attorney General*, 22 Ala. 180, is considered a leading case upon this subject, and therein the court held not only that it must be the owner of the fee who could make a lawful dedication which the state even could take advantage of, but that if the land, at the time of the attempted dedication, was covered by a mortgage, that the mortgagor could not dedicate without the acquiescence of the mortgagees. In *Bauman v. Mann*, 59 Ill. 492, which was an injunction to prevent one who held title under Sprague, who, it was alleged, had dedicated an alley in the rear of appellee's premises, it was said: "The evidence fails to show title in Sprague. Unless he owned the fee he could make no dedication to public use. A primary condition of every valid dedication is that it must be made by the owner of the fee." In *Porter v. Stone*, 51 Iowa, 373, 1 N. W. Rep. 601, the court said: "The party who lays out a town-site, the effect of which is to donate to the public streets, alleys, and public grounds, must of necessity have some title to the property to be affected by his act. A grant to the public is not established by simply

showing that a town-site has been laid out. The party claiming benefits of a grant must go further, and show the title of the party laying out the town, and thus undertaking to make the grant." In *Leland v. City of Portland*, 2 Or. 47, where the question was whether a dedication of land in front of the city of Portland, between the Willamette river and the westerly side of the street, which was made before September 27, 1850, was of any validity, the court said: "The next question presented is, did the court below err in refusing to instruct the jury that a dedication of the property in question, to be binding, and to divert the title from the donor to the public, must have been since the 27th day of September, 1850? I regard this question as settled by the case of *Lounsedale v. Parrish*, 21 How. 290, which case arose on the question of the dedication of the levee in the same city of Portland, and by these same proprietors of a town-site, and was governed by the same considerations in this respect as govern this case, where it was held that a dedication made prior to act of September 27, 1850, was void for want of any title in the donors at the time of dedication, the title then being in the United States." In England the rule has been the same, the leading case being *Wood v. Veal*, 5 Barn. & Ald. 454, where it was held that a tenant for 99 years could make no dedication to the public, nor could any one else excepting the owner in fee. The latest case upon this subject, and one which is almost exactly the same as the case at bar, is that of *Ruge v. Oyster, etc., Co.*, 25 Fla. 656, 6 South. Rep. 489. It seems that the original plat of the city of Appalachicola, located on the bay of that name, showed an open space, which was denominated on the plat "Florida Promenade," and it was contended by the owner of land in the neighborhood that the dedication of the promenade carried with it the right to the public to have the waters of the bay in front kept clear of all obstructions. The court said: "The dedication of the promenade by the Appalachicola Land Company was more than fifty years ago. What right had the company to make a dedication extending into the bay? Even if the promenade reached the bay, the company had no right in the submerged lands thereof, and could not dedicate these. Admitting that accretions to the soil of the promenade had become a part of it, that was a contingency which did not authorize the dedication of lands under the water in front of the promenade." Denny's plat was good to the water's edge. Beyond that it was void. Even Denny himself was not estopped to say as much. In such cases there is no question of estoppel. The real question is, do the facts show a dedication either statutory or common law? *Hayes v. Livingston*, 34 Mich. 394. Having had absolutely no title, or shadow or claim of title, the maker of the plat was free to deny it at any time, and so could any of his grantees of the upland, although their deeds purported to convey something which had an existence. Perhaps, on the whole case, the judgment of the court is right, however,

as there was evidence tending to show laches on the part of Kenyon in prosecuting his suit for injunction until the structures he complained of had been erected and used for a considerable period, and on this ground I can concur.

(2 Wash. St. 405)

DEARBORN V. MORAN et al.

(*Supreme Court of Washington. June 2, 1891.*)

Appeal from superior court, King county; I. J. LICHTEBERG, Judge.

Gale & Fay, for appellants. *Struve, Haines & McMicken*, for appellees.

HOTT, J. The court below, in deciding this case, gave the same effect to a town plat, part of which covered upland and part tide-land, that we have given in the case of *Kenyon v. Knipe*, 27 Pac. Rep. 227, (just decided,) and it follows that its decision must be affirmed, and it will be so ordered.

DUNBAR and SCOTT, JJ., concur.

ANDERS, C. J. I concur in the result.

STILES, J., (dissenting.) This case was commenced in September, 1889, before the constitution went into effect, and by his complaint the appellant showed that he was the owner in fee and in possession of certain property in Plummer's addition to the city of Seattle, and that his land extended to and upon the waters of Elliot bay, a navigable arm of the sea. He further showed that defendants were driving piles and erecting other obstructions between him and the deep water. Other allegations made a good complaint, conceding that the defendants were mere trespassers without rights in themselves. A demurrer to the complaint was sustained, and judgment went against the appellant, from which judgment this appeal was taken. I am unable to see why, under the decision in the case of *Eisenbach v. Hatfield*, (Wash.) 26 Pac. Rep. 539, and that of *Kenyon v. Knipe*, 27 Pac. Rep. 227, the demurrer should not have been overruled unless, as seems to be hinted at in the briefs on both sides, the court below looked beyond the record in the case, and considered that, inasmuch as the plaintiff's property was shown to be certain lots and blocks in the city of Seattle, there must be other lots, blocks, and streets beyond him, covering part of the tide-lands, and which were also embraced in Plummer's addition. This feature was not in the case, and was not disclosed by plaintiff's complaint. The suit having been commenced before the constitution became operative, and before any subsequent laws on the subject were passed, I think appellant was entitled to have some relief under the pleadings, even under the holdings of this court in the cases above mentioned. *Van Dolsen v. Mayor, etc.*, 17 Fed. Rep. 817.

(2 Wash. St. 491)

PARRISH V. REED, Auditor.¹

(*Supreme Court of Washington. June 26, 1891.*)

MINING BUREAU—POWERS—GEOLOGICAL SURVEY.

The act (Laws Wash. 1889-90, p. 249) creating a mining bureau, and defining its duties, does not authorize the bureau to direct or superintend a geological survey of the state; nor does the act of March 7, 1891, appropriating \$50,000 for a geological and mineralogical survey of the state, authorize the mining bureau to expend the money. **STILES, J., dissenting.**

Application for mandamus.

D. E. Bailey, Wm. S. Church, and B. F. Dennison, for petitioner.

ANDERS, C. J. This is an application by the plaintiff, upon motion and affidavit,

¹Rehearing denied.

for a writ of mandate commanding the respondent, who is state auditor, to draw his warrant upon the state treasurer in favor of plaintiff for the payment of a voucher certified to by the president and secretary of the mining bureau for \$150, alleged to be due and owing to plaintiff for services as assistant state geologist for the month of May, 1891. It appears from the affidavit accompanying this motion that the mining bureau, at a regular meeting held at Olympia, on April 9, 1891, at which a majority of its members was present, directed a geological survey of the state to be made, and that, in furtherance of that determination, at a subsequent regular meeting, held on April 20, 1891, the said mining bureau, by a majority of its members, employed the plaintiff, the said H. E. Parrish, to perform labor and services in the field in assisting to make such survey, at a compensation of \$150 per month, payable monthly; that, in pursuance of said employment, the plaintiff performed labor and services in the field in assisting to make such survey during the entire month of May, 1891; that at a regular meeting held at Olympia on June 13, 1891, the said mining bureau examined, audited, and allowed the voucher, bill, and claim of plaintiff for his said services during said month, which voucher, bill, and claim amounted to the sum of \$150, no part of which has been paid; and that the same, after having been so examined, audited, and allowed, and after having been indorsed and signed by the president and secretary of the said mining bureau as correct, was presented to the respondent at his office in the city of Olympia, and a warrant therefor upon the state treasurer demanded of said auditor, who refused to draw any warrant therefor, and rejected said voucher. It further appears from the said affidavit that the reasons assigned by the respondent for rejecting the voucher and refusing to draw a warrant upon the state treasurer, as requested by plaintiff, were "that, upon an examination of the law creating a mining bureau, and defining its duties, approved February 25, 1890, I fail to find any provision whereby it is authorized to superintend a geological survey of the state, or is given the power to audit the claims incurred by parties engaged in the performance of such service;" and that "the provision in the general appropriation act of March 7, 1891, making an appropriation for a geological and mineralogical survey of the state, does not designate any officer or commission whose duty it shall be to expend the same; and I am therefore of the opinion that the appropriation herein referred to cannot be drawn until further legislation has been had upon the subject." From the foregoing it is apparent that the controversy in this case is simply the result of a difference of opinion between the plaintiff and respondent as to the powers and duties of the mining bureau, as defined and prescribed by law. It was the manifest duty of the auditor to draw the warrant demanded by plaintiff, if there is any law authorizing the issue of the same, and if the claim or voucher of the plaintiff is properly audited and al-

lowed; but, if there is no such law, then such refusal was in every sense proper, and strictly in accordance with his official duty. See Laws 1889-90, p. 637, § 6. As has been seen, the respondent claims that no provision has been made by the legislature authorizing the mining bureau to direct or superintend a geological and mineralogical survey of the state, or to audit or allow any claim against the state, incurred by parties engaged in the performance of such service. The powers and duties of the mining bureau are defined in the act of the legislature entitled "An act to create a mining bureau, and to define its powers and duties, and declaring an emergency," approved February 25, 1890, (Laws 1889-90, p. 249,) and are as follows: "Sec. 3. It shall be the duty of the mining bureau to collect reliable statistical information concerning the production and reduction of all precious and useful minerals of this state, and examine the different processes for the treatment of ores used in the state; to inquire into the merits of other processes alleged or demonstrated by practical experience elsewhere to be the most successful; to inquire into the relative merits of the various inventions, machines, and mechanical contrivances now in use, or which may hereafter be introduced for mining and metallurgical purposes; to keep on file in their office reports and papers which may be published from time to time, and all correspondence on the subject of mines and milling and reducing ores, with the view of eliciting and collecting such information for the public use. They shall address circulars to corporations and individuals engaged in mining, and shall correspond with the school of mines in other states in reference to the mining and metallurgical interests. They shall make a report to the governor, for transmission to the legislature, of the operations of the bureau on or before the fifteenth day of January in each year for the year ending on the thirty-first day of December of the preceding year, which report shall contain all statements of accounts, money received and expended, statistics, and other information which may tend to promote the development of the mineralogical resources of the state, and such other reports from time to time as they may deem necessary. They shall examine, audit, and allow all bills which relate to expense of money received by or appropriated for this purpose. They shall co-operate with the bureau of statistics, agriculture, and immigration. They shall be allowed to employ such clerical assistance as may be necessary to carry out the full intent of this act." Upon a critical examination of this act, it will be seen that there is no expression of the legislature therein indicating an intention to authorize the mining bureau either to direct or superintend a geological or mineralogical survey of the state, or to disburse the moneys appropriated for such purpose. It is simply authorized to collect certain reliable statistical information, specified in the act, and to examine, audit, and allow all bills which relate to expenditure of money received by or appropriated for that pur-

pose, the expenses under its provisions being limited to \$1,500. Nor do we think the powers or duties of the mining bureau have been in any way enlarged or changed by any provision contained in the general appropriation act of March 7, 1891. By that act the sum of \$50,000 was appropriated "for making a geological and mineralogical survey of the state, and making and publishing maps and reports of the same," but the act is silent as to the method or agency whereby the same is to be expended. Indeed, if the legislature had attempted to enlarge or define the powers and duties of the mining bureau in the general appropriation act, the provision would have been nugatory, as being in contravention of that portion of the state constitution which declares that "no bill shall embrace more than one subject, and that shall be expressed in the title." Const. § 19, art. 2. It was no doubt the intention of the legislature when it made this liberal appropriation for the purpose of ascertaining and thereby assisting in the development of the mineral resources of our state, to further provide for the expenditure thereof, and it is probable that it intended to impose that duty and responsibility upon the mining bureau. But we find nowhere in the law any express, or even implied, indication of that intention. Owing to its importance and its probable effect upon the mining interests of this state, we have carefully considered this case, and we are unable to resist the conclusion that the appropriation above referred to cannot be disbursed, or warrants thereon legally drawn, without further legislation upon the subject. It follows, therefore, that the motion of the plaintiff must be denied.

SCOTT and DUNBAR, JJ., concur.

STILES, J., (*dissenting*.) Section 26 of article 2 of the constitution provides that the legislature shall direct by law in what manner and in what courts suits may be brought against the state. Upon this subject no legislation has been had, and it is therefore assumed that there is no present way by which a claimant against the state may have his rights adjudicated. In the present case the petitioner claims to have performed services for the state, and seeks as his only remedy a *mandamus* against the auditor. Under such a state of facts I think that the courts should be somewhat liberal in the granting of alternative writs, and that in this case the alternative writ should be issued, as it is only after the issuance of the alternative writ that the petitioner has any real opportunity to have his cause presented by counsel and argued to the court. For this reason I do not agree to the decision of the court, and express no opinion on the merits of the application.

HOYT, J., (*concurring*.) I fully concur in what has been said by the chief justice in deciding this case, and I do not desire to add anything as to the merits of the controversy; but, in view of what was said by the attorneys for the petitioner at the time of the application for the writ, to the

effect that they supposed the alternative writ would issue almost as a matter of course, I desire to say a word as to the course and practice of this court in matters of this kind. The writ of mandate is not a writ of right of as high an order as a writ of *habeas corpus*. The latter writ is, of course, of the very highest right, and is regarded of such importance that it is secured and protected by the constitutions of nearly all the states. Yet even the writ of *habeas corpus* does not issue as a matter of course. The facts alleged in the petition therefor must be such that, if true, they would, in the opinion of the court, warrant the discharge of the petitioner. The facts stated in the petition are taken as true, and the court determines therefrom whether or not they would warrant a discharge of the petitioner, and if, in its opinion, they would not do so, then the courts do not hesitate to refuse even this writ of highest right. See *Church, Hab. Corp.* § 99. If this is true as to the writ of *habeas corpus*, it follows that the courts will scrutinize somewhat carefully the allegations of the petition for a writ of mandate, which is not a writ of such high right, and will only grant the alternative writ when, in its view of the law, the facts stated in the petition, if uncontradicted, will authorize the issue of the peremptory writ. Such has been the practice of the courts of nearly all the states of this Union. The practice of this court has been to allow counsel for the petitioner at the time he makes application for the alternative writ to make such brief suggestions as he may think proper, and with such suggestions the court takes the papers, and if, in its opinion, a *prima facie* case is established, orders the issue of the alternative writ; and if, in its opinion, such petition does not set out facts constituting a *prima facie* case for the issue of the mandatory writ, it denies the application for the alternative writ, and dismisses the petition. In this case, however, the court realized the great importance of the questions involved, and, although upon an inspection of the papers it was satisfied that a *prima facie* case was not made out, departed from its usual custom, and notified counsel for the petitioner that they might present arguments in support of the petition, which was done; and able counsel, at such length as they saw fit, argued as to the sufficiency of the petition to warrant the issuing of the writ. After such argument, the court being still of the opinion that the petition did not state facts warranting the issue of the writ, could not do otherwise than refuse it. It cannot be held that the legislature intended in providing for writs of mandate that any person simply by coming into court and filing a petition without any merit therein could properly put a public officer to the expense of employing counsel and making a return to an alternative writ issued upon such insufficient petition. Besides, in this case the reasons why the auditor had refused to do the acts sought to be compelled by the petitioner fully appeared in the petition, and, in the opinion of this court, were warranted by the law of the case. This

being so, there was but one duty for the court to perform, and that was to sustain the auditor in his refusal to do said acts.

Ex parte LOWMAN & HANFORD STATIONERY & PRINTING CO.

(*Supreme Court of Washington. June 12, 1891.*)

NEW TRIAL—JOINT DEFENDANTS.

Where default judgment is entered against one of three defendants, and judgment is recovered against the other two, the fact that a motion for a new trial is made in the names of all of the defendants does not deprive the court of the power to grant it as to the two who answered and deny it to the defaulting defendant.

S. M. Bruce, for petitioner.

HOYT, J. This is a proceeding by the petitioner for a writ of *certiorari* to the superior court of the county of Whatcom, by which the petitioner seeks to bring into this court that portion of the record in a case therein pending which relates to the motion for a new trial filed therein, and the action of the court in granting the same, and seeks upon such record to have the action of such court vacated and set aside. It appears from the petition that, in an action pending in said court against D. P. Mason, D. W. Mason, and H. K. Stewart, default and judgment were duly entered against said D. P. Mason, and that some months afterwards a trial was had as to the cause of action alleged, as against the other two defendants, upon issues made by their several answers thereto. A verdict for the plaintiff was rendered, and a motion for a new trial filed. All of said defendants in form joined in said motion. The court denied the same as to said defendant D. P. Mason, and granted it as to the other two defendants, and for that reason it is alleged by the petitioner that the action of said court was erroneous, and that, as it has no other adequate remedy, it is entitled to the writ of *certiorari*. Its contention in this regard is that the motion being joined in by all three defendants it must be sustained as to all, or denied as to all, and that, as the judgment against said D. P. Mason had been rendered months before, he could have no relief by said motion, and therefore no relief could be given to his co-defendants joined with him in said motion. That such is the general doctrine is undoubtedly correct, and if said D. P. Mason was so far a party to the verdict sought to be set aside by such motion for a new trial as to be at all recognized in connection therewith, the contention of petitioner as to the action of the court upon such motion would be correct; but we think that D. P. Mason was, so far as the trial had in said cause and the verdict rendered was concerned, an entire stranger to the proceeding; and for that reason his joining in the motion had no effect thereon, and the mention of his name therein should have been and probably was treated as a nullity. This being so, the motion was, in substance, made only by two of said defendants, and the contention of petitioner as to the error of the court in its action thereon falls to the ground. It

follows that it is not entitled to the writ prayed for. It is an open question in this state as to whether or not this court has power, under the constitution, unaided by legislation, to grant a writ of *certiorari* to the superior courts of the state; and, if it has, whether such writ will be granted until after final judgment in the court below. The view we have taken, however, as to the effect of the motion set out in the petition herein, makes it unnecessary for us to decide these questions here. The writ will be denied.

ANDERS, C. J., and STILES, SCOTT, and DUNBAR, JJ., concur.

(2 Wash. St. 470)

STATE ex rel. QUADE v. ALLYN, Judge.

(Supreme Court of Washington. June 18, 1891.)

APPEAL—RECORD—SETTLING STATEMENT—EXHIBITS IN EQUITY.

1. Under a statute requiring the judge who tries a case "to settle between the parties what is the proper statement, and to certify the same," it is no excuse for the judge refusing to settle and certify the statement that the transcript is in the hands of the stenographer, and held by him for the purpose of securing his fees, where it appears that the transcript has been filed, and afterwards taken from the files with the judge's permission.

2. In equitable cases the original exhibits should be sent up on appeal.

Mandamus to superior judge, Pierce county.

H. W. Lueders, for relator.

When the superior judge refuses to perform his duty in signing or settling a statement of facts or bill of exceptions regularly tendered him for that purpose, or to adjourn the settlement thereof, or to order the same to be restored to the files of the court when wrongfully taken away by a stranger to the record, the supreme court has jurisdiction to compel him to perform his duty and exercise his discretion by means of a writ of *mandamus*. See Code Wash. §§ 689-691, and 693; Sess. Law 1889-90, § 6, p. 322; Const. art. 4, § 4. The writ of *mandamus* in this case is necessary and proper, because the relief asked is necessary and proper to the complete exercise of the appellate and revisory jurisdiction of the supreme court in the premises; and there is no other speedy and adequate remedy by which the relief can be obtained. See *State v. Murphy*, 19 Nev. 89-97, 6 Pac. Rep. 840, and authorities there cited. *Railway Co. v. Lane*, (Tex. Sup. Ct., not yet officially reported,) 16 S. W. Rep. 18; *Swartz v. Nash*, (Kan., not yet officially reported,) 25 Pac. Rep. 873; *U. S. v. Windom*, 137 U. S. 638, 11 Sup. Ct. Rep. 197; *Reichenbach v. Ruddach*, 121 Pa. St. 18, 15 Atl. Rep. 488; *Com. v. McLaughlin*, 120 Pa. St. 518, 14 Atl. Rep. 377; *Careaga v. Fernald*, 66 Cal. 351, 5 Pac. Rep. 615; *State v. Slick*, 86 Ind. 501; *State v. Hawes*, 43 Ohio St. 16, 1 N. E. Rep. 1; *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. Rep. 274. It is the statutory duty of the superior court judge who tried the cause to sign and settle between the parties the bill of exceptions or statement of facts; and, if contested or controverted, it is his duty to determine the correctness thereof, and to settle the

controversy, and to certify the same. Laws 1889-90, p. 334, §§ 4-6. And such power to settle statements of facts or bill of exceptions seems to be solely vested, in the first instance, in the judge who tried the cause. Id. p. 335, §§ 8, 11. And the supreme court, by virtue of said act, (section 7,) seems to be authorized only to allow amendments and additions thereto on suggestion of diminution of the record to supply omitted portions of the record under appropriate rules. See *Swartz v. Nash*, (Sup. Ct. Kan.) 25 Pac. Rep. 873. *SIMPSON*, Commissioner, says under a similar statute: "It is made the statutory duty of a court to settle and sign a bill of exceptions. If the bill is not a true one, the court should correct it, or suggest the correction to be made. We hold it to have been the plain duty of the contest court in this case, when the bill of exceptions was presented to it, to have correctly settled and signed it. If the bill as provided was defective in any respect, the defect should have been remedied then and there. It is a clear legal right, belonging to any party, when a case is decided against him, to have a bill of exceptions settled and signed by the court, and it amounts to an absolute denial of a legal right and of justice for a trial court to arbitrarily refuse to settle a true bill of exceptions." In *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. Rep. 97; *Morgan v. Fleming*, 24 W. Va. 186,—the supreme court of West Virginia says: "When a bill of exceptions is presented to the court to settle and sign, the court should carefully examine the bill of exceptions, and, if any of the statements are incorrect, he should correct them; and, upon his refusal, *mandamus* will lie to compel him to do so." See, also, *State v. Field*, 37 Mo. App. 83; *Hawes v. People*, 129 Ill. 123, 21 N. E. Rep. 777; *State v. Murphy*, 19 Nev. 89-97, 6 Pac. Rep. 840. Settling and signing a statement of facts is a ministerial and not a judicial act. *Flournoy v. Jeffersonville*, 17 Ind. 173. This is true, because the jurisdiction in the cause appealed is, by virtue of the appeal, vested in the supreme court; and it remains only as a matter of duty that the judge who tried the cause should verify the record of his judgment and proceedings before him, and send the same to the appellate tribunal for review. There is no discretion to be exercised on the part of the trial judge; he merely certifies the true facts of the proceedings had and the matters which transpired before him during the pendency and the trial of the cause, according to his best recollection, and there his duty ends; and this duty is imposed upon him by statute, and cannot be avoided by him; and his certificate, as to verity, is not absolutely conclusive, though *prima facie* sufficient. *Givens v. Bradley*, 3 Bibb, 192; *Taylor v. Gillette*, 52 Conn. 216.

ANDERS, C. J. On May 25, 1891, upon motion of the relator, supported by affidavits, an alternative writ of mandate was duly issued out of this court directed to the respondent, commanding him immediately after the receipt of said writ to order the time for settling a statement

of facts in a certain cause tried before the respondent as judge of said superior court, wherein Warren & Hines were plaintiffs and Otto Quade and D. S. Moore & Co. were defendants, to be adjourned to a certain day, as required by law, and to forthwith cause to be restored to the files of said superior court the transcript and evidence which were filed in said cause, with a statement of facts attached thereto as part thereof, on the 20th day of February, 1891, which, as appeared by the affidavit on behalf of the relator, had been allowed to be segregated and taken from the files of said court by the respondent, and to forthwith sign, settle, and certify the statement of facts filed in said cause by the relator in accordance with the true facts in the premises, or to show cause before this court, at the court-room thereof, in the state capitol at the city of Olympia, state of Washington, on Monday, the 1st day of June, 1891, at the opening of the court on that day, why he had not so done. On the return-day of the writ the respondent did not appear, either in person or by attorney, but filed his return in writing, wherein he states his reasons why he has not complied with the commands of the writ. The relator objects to the return on the ground of insufficiency, and moves the court to issue a peremptory mandate.

The substantive portion of the respondent's answer and return is as follows: "He returns herewith the affidavit of C. B. Eaton, stenographer in the case of 'Warren and Hines, Plaintiffs, vs. Otto Quade et al.,' which he asks to have made a part of this answer, as if copied in full herein. From said affidavit and this answer your honors will see the trouble arises only because of the refusal of Otto Quade or his attorney to fully pay the legal fees of a stenographer for his work, the stenographer therefore retaining the work to secure twelve dollars due to him. For further answer respondent says the judge of this court could not properly attach his certificate to a paper as containing all the testimony on which the case was tried below, in the absence of the report of the stenographer in an equitable cause like this, as, under the act of March 22, 1890, entitled 'An act for the removal of causes from the superior to the supreme court,' all the testimony was required to be and was taken down by the stenographer, and no notes or memorandums were preserved save those taken down by the stenographer, this cause being one of equitable cognizance, as stated. The attention of the supreme court is called to section 5 of said act of March 22, 1890, found at page 333 of the Session Laws of 1889-90, as follows: 'Sec. 5. The certificate of the judge that said statement contains all the material facts in the cause or proceeding shall be sufficient. In causes of equitable cognizance, where the appeal is from the final judgment, the said statement of facts shall contain all the testimony on which the cause was tried below, together with any objection or exceptions taken to the reception or rejection of the testimony.' This being a case of equitable cognizance, and the evidence having

been taken by a stenographer as contemplated by section 5, above quoted, and having been preserved in no other way, by notes or memorandums taken by any other person which were reliable, it will readily be seen that it would be impracticable for this court to certify to anything as the evidence in the cause, except the report or transcript of the stenographer. This report is shown by the affidavit of the stenographer to be in his hands, and properly held by him, for the purpose of securing his fees for doing the work. The transcript is not before this court, and cannot be certified to by this court until the usual and customary course is pursued by the relator of paying (as he should have done in the first place) the proper fees of the stenographer, obtaining the report, and presenting it to this court for certification. When that is done the court will be pleased to certify it in the customary way, and cannot make any further return than herein stated and shown by the affidavit of the stenographer hereto attached as part of this answer." It will be seen by an examination of this return that the main reason alleged for not settling and signing the statement of facts as required by the alternative writ is because the "transcript is not before this court, and cannot be certified to by this court until the usual and customary course is pursued by the relator of paying (as he should have done in the first place) the proper fees of the stenographer, obtaining his report, and presenting it to this court for certification." But the law clearly makes it the duty of the judge who tries a case "to settle between the parties what is the proper statement, and to certify the same." The judge is presumed to know what the facts are in every case tried before him, and it is no sufficient reason or excuse for not settling and certifying a statement of facts to say that the transcript of the evidence is in the hands of a stenographer, and "properly held by him for the purpose of securing his fees for doing the work." How properly held? It is alleged in relator's affidavit, and is not disputed by the respondent, that a transcript of the testimony was filed in the cause, and was subsequently permitted to be taken and segregated from the files by the respondent. This being true, it must still be treated as being under his control, and we see no reason why the court could not order and compel its restoration to the custody of the clerk with whom it was filed, if deemed necessary by the judge to the discharge of his official duty. The stenographer in this case is not an officer of the court, and, even if he were, he would have no right to withhold any of its records or papers from the proper custodian thereof. By going into court at its request or by its permission, and writing down the testimony in the cause, he became the hand and servant of the court, and it would be announcing a strange doctrine indeed to say that he had a right, by virtue of a supposed lien, to take and retain the testimony thus preserved after the same had been filed in the cause.

There seems to be some controversy in this proceeding concerning copies of exhibits introduced in evidence at the trial, and which the relator desires to embody in his statement of facts; and we will state here, for the benefit of the parties and of the bar generally, that in causes of equitable cognizance the original exhibits should be sent up on appeal, and not copies thereof. This we believe to be the law, and this court has uniformly so held. It is the absolute legal right of the relator to have a complete record of his case brought to this court, in order that justice may be done between the parties. A statement of facts is necessary to a full and complete record. The respondent refused to settle, sign, and certify the one presented by counsel for relator on the ground that it did not speak the truth, but at the same time refused to correct it so as to make it conform to the real facts in the case, as it was his duty to do, because, as it appears, it was not a statement which had been certified by the stenographer. The return is manifestly insufficient upon its face. Let the peremptory writ issue.

HOYT, STILES, DUNBAR, and SCOTT, JJ., concur.

ARMSTRONG, Water Commissioner, v. LARIMER COUNTY DITCH CO.

(Court of Appeals of Colorado. July 7, 1891.)

IRRIGATION—APPROPRIATION OF WATER—PRIORITIES—DOMESTIC AND AGRICULTURAL USES.

Const. Colo. art. 16, § 6, providing that "the right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied," and that "priority of appropriation shall give the better right as between those using the water for the same purpose, but that, when the waters of any natural stream are not sufficient for the service of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming for any other purpose," does not authorize an interference with the rights of prior appropriators for irrigation purposes, vested before the adoption of the constitution, in order to supply water for domestic purposes to later comers.

Error to district court, Larimer county; T. M. ROBINSON, Judge.

Defendant in error is a corporation operating under the general incorporation law of the state for constructing, operating, and maintaining a ditch for irrigation, agriculture, domestic, and manufacturing purposes. In April, 1881, it commenced the construction of its ditch from the Cache la Poudre river, at a point near the foot of the mountains, to run in an easterly and south-easterly direction. There were also seven contemplated or projected reservoirs for the storage of water. The ditch was in process of construction for several years, and some time during the year 1888 was 60 miles in length, having at its head a carrying capacity of about 470 cubic feet of water per second. At the time of the institution of this suit very few, if any, of the contemplated reservoirs along the line of the ditch for storing the supply of water had been built. By an adjudication in April, 1882, to establish the priorities to the use of water in the

district where the ditch was located, in which a decree was entered, and by subsequent and supplemental proceedings, one in April, 1884, and one in October, 1885, in which the decree was amended, it was finally adjudicated and decreed that the ditch of the defendant in error should be ditch No. 63, with priority No. 100, with capacity computed at 463 cubic feet per second. Between the time of the commencement of the construction of the ditch and the bringing of this suit a large number of settlers, estimated at near 200, many with families, settled under the ditch, dependent upon the defendant for water for irrigating and domestic purposes to be supplied from its ditch under contracts made with the corporation. It is shown in evidence that the large extent of country through which the ditch was excavated was an arid, alkaline waste,—a veritable desert. Before the supposed appropriation of water to the ditch in question there had been from the Cache la Poudre river 99 appropriations of water, dating from the earliest settlement of the country down to that time, and each and all had been decreed priority over the ditch in question. Priorities from 1 to 78 inclusive were for water appropriated prior to January 1, 1876, and aggregated over 2,300 cubic feet of water per second. On the 4th day of May, 1888, as shown by the evidence, there was but 360 cubic feet of water per second in the river. From that time on to the close of the irrigating season, with the exception of two short freshets, lasting but a few hours, the water varied from 250 to 800 cubic feet per second. The plaintiff in error, during the year 1888, was water commissioner of the district in which defendant's ditch was situated, and, in his official capacity, charged with the apportionment and distribution of water according to the appropriations and priorities, as adjudicated and decreed. Early in the season, by reason of the scarcity of water in the stream, and its inadequacy to supply earlier appropriations, he ordered the head-gates of defendant's ditch closed, and the water was shut out.

This suit was instituted against the water commissioner, plaintiff in error, by filing a complaint on the 4th day of May, 1888, for an injunction restraining him from closing the ditch, and for a decree that the ditch be entitled to water sufficient for the domestic use of those who were alleged to be dependent upon it. On the day the complaint was filed the following order was made: "Upon the filing of this complaint in the office of the clerk of the district court of Larimer county, Colorado, and also upon the filing of an undertaking in the sum of one thousand dollars, conditioned as required by law, with good and sufficient sureties, to be approved by the clerk, that a writ of injunction issue commanding the defendant, his associates and employees, immediately to raise the head-gate of the ditch or canal mentioned in the complaint, so that a sufficient amount of water may enter and flow into said ditch to supply the consumers of water therefrom with water for domestic purposes, according to its priority."

ty No. 100, as heretofore determined by the decree of the court, and also commanding him and them to keep said head-gate raised until further order in the premises. Allowed at Fort Collins this 4th day of May, 1888,"—and a preliminary writ of injunction was issued and served. A trial was had, and, on November 5th, the following final decree was entered: "This cause having heretofore come on to be finally heard upon the pleadings and the evidence, as well that on part of the defendant as that in behalf of the plaintiff, and the court having heard the same and the argument of counsel thereon, and having taken the matter under consideration for further advisement, and having duly considered the same, and being now fully advised in the premises, doth find the issues for the plaintiff. And the court doth specially find from the pleadings and evidence aforesaid that, at the time of the commencement of this action, the plaintiff was, and still is, a corporation duly organized for, and, among other things, engaged in, the business of conveying and distributing from the Cache la Poudre river, to and for the use of persons residing along the line of its canal, water for domestic purposes; that the plaintiff's said canal is situate in water district No. 3, and is some sixty miles in length; that the persons aforesaid residing along the line of said canal, at the time of the commencement of this action, were and still are, to a great measure, dependent upon the plaintiff and its said canal for water suitable and fit for domestic purposes, and, in many instances, are wholly dependent thereon for water for such purposes; that, at the time of the commencement of this action, there was flowing in and down said river sufficient water to supply the reasonable needs and demands of all appropriators and users of water therefrom for domestic purposes, if carefully distributed, and with no more waste than is naturally incident to the customary manner of distributing water through open ditches and canals, but the water of said river was insufficient for the service of all desiring the use of the same for various other beneficial uses; that the plaintiff has and controls a large reservoir for the storage of water situate upon the said river above the head-gate of its said canal, wherein it is wont, from time to time, to store a large amount of surplus water, to be afterwards drawn off and turned into its canal for beneficial uses; that the defendant, as water commissioner of water district No. three, (3,) had shut down and closed, and threatened to keep shut down and closed, the head-gate of the plaintiff's said canal, and had thereby deprived the plaintiff of the means of obtaining water wherewith to supply the same to the persons so dependent upon it for water for domestic purposes, save at such times when, by reason of increased flow of water in the river, the plaintiff may be entitled to take water therefrom under and by virtue of its appropriation thereof for agricultural purposes. And the court doth further find, as a matter of law, that, when the waters of said river are not sufficient for the service of all those desiring

the use of the same, those using the water for domestic purposes are entitled to divert and take the same, according to their respective priorities of appropriation thereof, for such purposes, notwithstanding any appropriation thereof by persons using the same for any other purpose. And the court doth further find and declare, as a matter of law, that the uses to which water may be applied, which are comprehended by the term 'domestic purposes,' hereinbefore employed and occurring in the constitution of this state, are as follows, and none other, that is to say: Household purposes, including water for drinking, washing, bathing, culinary purposes, and the like; water for such domestic animals as are used and kept about the house, such as work animals and cows kept to supply their owners and their families with dairy products; and such other uses, not being either agricultural or mechanical, as directly tend to secure and promote the healthfulness and comfort of the home. Wherefore, it is ordered and decreed by the court that the injunction heretofore allowed herein and served upon the defendant be, and the same is, hereby so modified as to operate and be effectual only as hereinafter decreed. It is ordered and decreed by the court that the defendant, John L. Armstrong, water commissioner in and for water district No. three, (3,) his successors in office, deputies, agents, and servants, do absolutely desist and refrain from closing or keeping closed the head-gate of the canal of the plaintiff, the Larimer County Ditch Co., for any period exceeding twenty (20) days at a time, and he is and they are strictly enjoined, required, and commanded, whenever water has been by them or any of them prevented from flowing from the Cache la Poudre river into said canal for the period of twenty (20) days, and he or they are thereunto requested by the plaintiff, to permit sufficient water to flow into said canal from said river for a period of not less than five (5) days, to supply water for domestic purposes to all persons residing along the line of said canal and dependent thereon for water for such purposes, and to enable such persons to fill cisterns and such like receptacles for the storage of water for such purposes: provided, that there be water flowing in said river to which other persons are not entitled by prior appropriation thereof for domestic purposes, and, further, that the plaintiff shall not have water at such time stored in its said reservoir. It is ordered and decreed that the plaintiff shall not, as against the rights of any prior appropriation of water for agricultural purposes, at any time when it has water stored in its said reservoir, be entitled to divert or take any water from the said river, not flowing down from its said reservoir. It is further ordered and decreed by the court that, except as herein and hereby modified, the injunction heretofore allowed be, and the same is, made perpetual; saving and reserving, however, to each party the right to move the court at any time so to modify this decree as to make it conform to the provisions of any law that may hereafter be enacted by the

general assembly of this state prescribing regulations relating to the distribution of water for domestic purposes. It is further ordered that each party pay its and his own costs incurred herein."

J. M. Freeman and H. N. Haynes, for plaintiff in error. Frank J. Annis and Lyman Porter, for defendant in error.

REED, J., (after stating the facts as above.) The question presented in this case for determination is of very grave importance,—purely a question of law; there was no controversy in regard to the facts. The testimony in this case establishes the facts that, prior to the inception of the scheme to construct the ditch of the defendant in error, and prior to January 1, 1876, water from the stream had been legally appropriated exceeding in volume 2,300 cubic feet per second, while the volume of the stream for the irrigating season of 1888 did not average over 700 cubic feet per second. Perhaps that season was an exceptionally dry one, but it is not so shown. The canal in question, at its easterly extremity, 60 miles in a desert from the source of supply, was built in 1885 or later; and taking the testimony of the defendant in error as true, that that section of the country is absolutely uninhabitable unless supplied with water for domestic purposes from the canal, we must conclude that the settlers for whose use water was required in this suit settled in those years, as, from the facts shown, such settlements could not have antedated the completion of the canal, from absolute lack of water to sustain animal life. Here we find at a time when the stream was not supplying to those who had legally appropriated the water from 10 to 25 years before to exceed one-third of the supply adjudicated and decreed, the defendant in error applying to the courts for a further reduction and diversion for the benefit of the latest comers. All such attempts, especially when successful, are subversive of natural and statutory law and rights and the constitution of the state, and could not possibly be tolerated in a court of equity except upon the ground of the inexorable necessity of having water to sustain human life. On no other ground could the original plaintiff have had any standing in a court of equity.

The question to be determined is, did the court err in decreeing the right of defendant in error to divert the water of the stream for distribution to settlers and patrons for domestic use, paramount and superior to the rights of those who had appropriated the same water for purposes of irrigation? In examining the right to the use of water for domestic purposes, under the facts of this case, and under the climatic and physical conditions incident to an arid, semi-desert country, very little assistance can be obtained from common-law sources, or the adjudications of older states where the same conditions do not exist. Doctrines of common law declaratory of the rights of riparian proprietors have very limited, if any, application. Before any general organization, territorial or otherwise, was or could have been had, a tide of emigration poured into the

region comprised in the present state, and over the entire west. It was found an arid, semi-desert country. The land could only be made productive by the artificial use of water. The country was without law, but each individual brought with him the principles of equity and justice which were a part of his education. It was soon found that the water of the streams was inadequate to supply all the land. They found a new climate, new conditions calling for new laws applicable to the conditions. The first comers settled near the stream. In the absence of surveys he designated by landmarks the boundaries and extent of his occupation of land. He diverted—appropriated by such diversion—a certain amount of water from the stream, supposed to be sufficient. Others settled near him upon the same stream, and made a like appropriation. In time there were agricultural settlers enough to organize and establish a local government, and a series of rules or laws were adopted, perhaps in many instances crude and artificially drawn, but embodying principles of equity and justice. They were recognized and obeyed, the settlers recognizing, as before stated, a fact which later corporations and settlers have not yet apparently recognized, or, if recognized, have disregarded, that the supply of water in the streams was not sufficient for all the land. Instead of parceling it out generally and making it practically valueless to any, following the course of California and other earlier settled territories where the same conditions existed, they adopted the only rule founded in equity that could be rightfully adopted in the premises, viz., that of prior appropriation, such appropriation to be controlled and limited. Such prior appropriation was so much as could be beneficially used upon the land for which the appropriation was made. This was the general well-regulated custom, hence a law, prior to and at the time of the organization of the territory; and, in the organic act creating the territory, it is said, (section 6:) "Nor shall any law be passed impairing the rights of private property." The right to water by prior appropriation was recognized by the first legislature of the territory, (see Laws 1861, p. 67;) and such rights continued to be recognized during the entire territorial existence. The general government, in which was the fee to both land and water at the time of the settlement, and for many years after, acquiesced in the disposition of the water according to local customs, and, in July, 1866, passed an act in which it provided (section 9) "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." The right to the water in the streams of Colorado, by prior appropriation, antedated any legislation. It was the common law of the people, and legislation, both national and territorial, was but a

recognition declaratory of the right as it had theretofore and then existed. Neither in any territorial or national legislation do we find any provision or declaration of rights to water by appropriation, or to be acquired in any other manner, for domestic use. It is first found in the constitution of the state.

Although water for domestic purposes is a necessity, and its use for that purpose a primary use, it seems that, from the small quantity required, and its use so inconsiderable compared with the quantity required for irrigation, it was regarded as incidental. Article 16, § 5, is as follows: "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." And article 16, § 6: "The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but, when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes." The error into which the learned judge seems to have fallen was in regarding these constitutional provisions as retrospective, and so far retroactive as to impair, if not destroy, property rights acquired long before its adoption. Such cannot be its construction. It must be construed to be declaratory of, and not destructive of, the rights and powers enjoyed by the people before its adoption. In the language of Mr. Webster, the great expounder of constitutional law: "Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former." 2 Webst. Works, 392. In *Hamilton v. County Court*, 15 Mo. 13, it is said: "What is a constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the frame-work of the political government, and necessarily based upon the pre-existing conditions of laws, rights, habits, and modes of thought." And the language is quoted and adopted by Judge Cooley. Const. Lim. 47. And in regard to water-rights by prior appropriation the supreme court of this state has asserted the same general principle in *Coffin v. Ditch Co.*, 6 Colo. 446, in terse and comprehensive language, where it is said: "The right itself and the obligation to

protect it existed prior to legislation on the subject of irrigation." See, also, *Strickler v. City of Colorado Springs*, (Colo.) 26 Pac. Rep. 313, (not yet officially reported.) By section 5 it will be seen that the prior appropriations of water were recognized, and in no way attempted to be affected, by the provisions of the constitution. The language is, "the water of every natural stream, not heretofore appropriated, * * * is hereby declared to be the property of the public," etc., and, by section 6, "the right to divert any unappropriated waters of any natural stream," etc., clearly showing that the provisions of the constitution were only to operate in the future, and only upon the water that was unappropriated at the time of their adoption. It is a well-settled rule of construction that all parts of an instrument are to be construed together, and harmonized if possible. To give the clause of section 6 the construction claimed would not only make it contradictory to the first part of the same section, but contradictory of section 5, and directly in conflict with section 15 of article 2, (bill of rights,) which declares "that private property shall not be taken or damaged for public or private use without just compensation." It follows from what has been said that the court erred in construing the section of the constitution as authorizing an interference, impairment, or injury of the rights of prior appropriators for irrigating purposes vested before the adoption of the constitution, for the purpose of supplying water for domestic purposes to later comers. See *Strickler v. City of Colorado Springs*, (Colo.) 26 Pac. Rep. 313. The suit as made should have been at once dismissed for want of equity. The right to the use of water is property; the title accrues by legal appropriation, and becomes vested as of the date of such appropriation. To divest such right and confer it upon another without compensation would be clearly an infraction of constitutional guaranties, and the inequitable character of the decree becomes at once apparent.

For the reasons above stated the decree should be reversed, and the suit dismissed.

CANNON COAL CO. v. TAGGART.

(Court of Appeals of Colorado. July 7, 1891.)

CONTRACT OF AGENCY — RESCISSION BY AGENT — VALID EXCUSE — MEASURE OF DAMAGES.

1. A contract obligating one of the parties to push the sale of the other's coal for one year, and to pay for all he may order at an agreed price, but not requiring him to take any definite amount, is not a contract of purchase and sale, carrying with it an implied warranty of quality, but an agency; and, although the principal is bound to furnish merchantable coal, a single failure to do so will not warrant a rescission of the contract, but for this purpose it must appear that the coal was generally unsalable.

2. Where the agent of a coal company abandons the sale of the latter's coal, and the company procures another agent at some cost, and, so far as may be, themselves endeavor to sell the coal at an added expense, this is the principal damage which they are entitled to recover in an action for such breach; and, although they may be injured in the matter of the price at which, after the renunciation of the agent's engagement,

they are compelled to dispose of their product, such difference does not furnish the true basis of recovery.

Appeal from district court, Arapahoe county; O. B. LIDDELL, Judge.

In 1889, Taggart brought suit against the coal company to recover certain moneys which he claimed to have loaned the concern, and which were due at the time of the bringing of the suit. It was substantially agreed that the amount of his claim (if he was entitled to recover at all) was \$272.80. The defense made by the company consisted of denials and a counter-claim. The counter-claim which the company set up was based upon the transactions had between the parties under the following contract: "This agreement, made this first day of September, A. D. 1888, by and between the Cannon Coal Company, party of the first part, and E. R. Taggart, party of the second part, both of Denver, Arapahoe county, Colorado: For and in consideration of the covenants hereinafter to be mentioned, the party of the first part agrees to furnish to the said party of the second part coal from their mines, situated in Boulder county, Colorado, at the following prices, said prices to be on cars at mine: For lump coal, 2,000 lbs., the price shall be \$1.85; for screen nut coal, 2,000 lbs., 90c.; for mine nut coal, 35c. per ton. Said coal to be weighed on railroad track scales, at the mine of the first party, owned and to be operated by the party of the first part, and shall be the weight by which all coal shall be sold. The party of the first part hereby agrees to place the lump coal on board cars in a good marketable manner. That the coal shall run over screens 1½ apart, or as much wider as the Association of Miners in force in our district will allow. The screened nut coal will be the coal passing from the lump coal through an additional screen, set as the law of the association decides, and the mine nut coal will be the coal that passes through the screen from the lump coal, containing the slack from the mine. The party of the first part hereby agrees to furnish all the coal that they are liable to do to the party of the second part, or their orders, at the above price. The party of the first part do not bind themselves, nor lay themselves liable to damages or redress, for inability to furnish the said party of the second part coal beyond their ability to do so. The said party of the second part hereby agrees with the said party of the first part to receive at all times any coal shipped to them in consequence of orders that they may make to the above first party, either by letter, telephone message to the office of the said party of the first part, situated in Denver, Colorado, or to the office at the mine, situated in Boulder county. In consideration of the above price, the said party of the second part hereby agrees to push the sale of said coal with energy. And the said party of the second part agrees to pay for all coal procured from the party of the first part, on or before the 10th day of each month, at the price per ton named above. And it is further agreed by the party of the first part that the party of the second part

shall have the preference on all shipments of coal from the mine to Denver. And it is moreover agreed that in no case will the party of the first part sell coal in Denver to retail dealers at less rates than those established and now in force, unless a break is made by the Colorado Fuel Co., the Colorado and Texas Coal Co., or the Marshall Consolidated Coal Co. The true intent and meaning of this clause is that to the end that perfect unity of action may be preserved and demoralization prevented. The party of the second part shall be placed on an equal footing, in regard to the sale of coal in Denver, as the chief office here: so that buyers may elect to select either the party of the first part or the second part to purchase from. In case of an advance in mining, or a general advance of the trade, the party of the second part agrees to an equitable advance, and the same to apply in case of a decline. The agreement shall continue one year from present date, and longer if mutually agreed upon. In witness whereof we have hereunto set our hands and seals this first day of September, A. D. 1888." Evidence was introduced tending to show that the parties had proceeded under the contract for some months, and that considerable coal had been delivered under it to Taggart, who had either paid for it at the time of its delivery or by his previous advances, and that these transactions left the balance which he claimed. He ceased to take coal under the agreement some time in April of the ensuing year, and evidence was introduced by the company tending to show that they had been put to some expense in procuring other persons to handle their coal, and that there was some loss of trade by reason of the alleged breach. These resulting damages were the basis of the claim which they made. Upon the conclusion of the trial the court instructed the jury upon two propositions. The first, in substance, told the jury that this was a contract for the sale of goods to be produced by the vendor, and that there was an implied warranty under the law that what should be delivered should be of a merchantable character. He further instructed them that the measure of damages was the loss of the sale of coal, and the loss of the profit which might result from the sales as made, and the jury might take into consideration the prices at which the coal was sold, whether that named in the contract or any lower figure; substantially telling them that this was the sole measure of defendant's recovery under that cause of action as it had pleaded it. Exceptions were taken to the instructions as given, and errors are predicated upon these exceptions.

H. B. Johnson, for appellant. F. A. Williams, for appellee.

BISSELL, J., (after stating the facts as above.) The right construction of the contract into which the parties entered will determine this appeal. The interpretations put on it by the trial court led to the giving of the instructions which are complained of. If it was a contract for the sale of personal property not in existence at the time of the bargain, and to be

produced by the vendor, it would be necessary to decide whether such a sale carried with it an implied warranty that the goods sold were merchantable. The *nisi prius* court so regarded it, and told the jury that the coal must be of a merchantable quality, and, should they find otherwise, it would justify the defendant in refusing to receive the coal tendered. The matter was not put on the basis of a right to terminate the agency, which was created by the agreement, because of a breach of its terms by the principal, but on the theory of a sale, and a rejection of the goods. This was wholly unwarranted by the legal obligations which the parties were under, and by the case as it was made, and it must have misled the jury. In no sense which permits the application of that rule can it be said that the contract was one of purchase and sale. There was no sale of a specific quantity of coal, or of the output of the mine. Taggart was not bound to buy a ton of coal. He might buy a thousand tons a month, all that the mine produced, or none. What he ordered he was bound to receive, and pay for at the price agreed on. In some respects, chiefly relating to the obligation to pay for what he might order, it was like a contract of sale. In the absence of an obligation to order, take, or purchase any amount, definite or indefinite, it lacked an element which always accompanies a contract of sale. The company was obliged to fill any orders which Taggart might send, to the extent of their output, at so much per ton. The correlative promise by Taggart was in reality the assumption of an agency to dispose, as far as he might be able, of what the company might produce. The pith of the agreement, which was of advantage to the coal company, was the contract to work up a trade for their coal, which Taggart assumed. His compensation was in the price at which he was permitted to buy. Any breach of this agreement by Taggart without a legal excuse would necessarily subject him to a liability enforceable by action. The time specified in the contract for the duration of the agency is not essential to the liability. As a general thing, an agent may at any time renounce his employment, but he must do it in good faith, and in such fashion as not to injure his principal. When once he has entered on his employment, he may not renounce it without reasonable cause; and, failing in this, he will render himself liable for the consequences. *Story, Ag. § 478; White v. Smith, 6 Lans. 5; U. S. v. Jarvis, Davis, 274; Elsee v. Gatward, 5 Term R. 143.* When the agreement is that he shall continue for a definite period, and he commences to do what he has promised, *a fortiori* will he be liable to respond in damages if he break his engagement without legal excuse. When the company averred, and offered evidence tending to show, that Taggart had broken his contract in this particular, they were entitled to go to the jury on the question of damages without the burden of a stated liability, that the sale was one which carried with it an implied warranty of quality. The plaintiff could doubtless insist that he had

a right to withdraw from the engagement because of the failure of the company to furnish coal which was salable in the market; but he must assume the burden of showing that the coal was in general unsalable in the market. He might reject any particular lot sent on his order if it was not fairly within the designation of "merchantable coal," but a single failure would not warrant a rescission of the contract. He must show that it was not within the reasonable limits of the trade in coal, and that from its frequency it would be unjust to require him to continue his agency. This limitation should have been expressed to the jury in connection with the statement of the obligation to deliver merchantable coal.

A like difficulty arises from the rule of damages laid down. The difference between the price at which coal was to be sold to Taggart and that which the company realized after he renounced his engagement does not furnish the true basis of recovery. Whatever may hereafter be said of it as an element in the problem, it is not the principal term. That is to be found in the services agreed to be rendered, plus the cost of replacing them on the abandonment. The company introduced evidence which tended to show that, on Taggart's refusal to further continue to "push the sale" of their coal, they procured another agent to fill his place at some cost, and, so far as might be, themselves endeavored to sell the coal, at an added expense. This was the principal damage which they were entitled to recover, and it was error for the court to state the law otherwise. There might possibly have been an injury sustained in the matter of the price at which the company were, after the change, compelled to dispose of their product; but the difference in price is not *per se* a measure by which to determine the injury. In a special and limited sense it might be. Should the proof demonstrate that the company was only able to procure an agent to handle their production by conceding less advantageous terms to them in the matter of the price which the agent would pay, whereby their profits were diminished, such proof would entitle them to go to the jury on the question of a loss of profits as shown in the matter of price. On the other hand, if the new bargain was a more advantageous one to the company, it would, on a similar principle, reduce their recovery. The question of sales to purchasers generally, and the matter of profits resulting therefrom, can in no manner be said to properly enter into the solution of the question of damage. The jury was not properly instructed upon either of these matters, and the error of the court in these particulars compels a reversal of the judgment. Reversed.

SEYMOUR v. FISHER *et al.*

FISHER *et al.* v. SEYMOUR.

(*Supreme Court of Colorado. May 31, 1891.*)

MINING CLAIM—CONTEST—FRAUD—FIDUCIARY RELATION—EVIDENCE—PLEADING—AMENDMENT.

1. The fact that one has properly located a mining claim does not of itself relieve him from

the necessity of contesting in the land-office the issue of a patent to another for a portion of it, and his rights under such location will be deemed waived unless it be shown that knowledge of proceedings to procure the patent was fraudulently withheld from him.

2. The facts that in the amended location certificate the boundaries of the claim to which the patent issued were changed so as to include a larger portion of the conflicting claim of another without his knowledge; that the patentee was a co-owner of such party in another adjacent claim, and his confidential adviser in respect thereto; and that the conflicting lode was patented in the name of "Tiger," omitting the prefix "Little," by which name it had previously been located,—will not of themselves constitute such fraud.

3. Where the complaint does not allege that the patentee of a mining claim sustained fiduciary relations to plaintiff, it is error to admit evidence of such relations in an action to declare the patent to be held in trust, on the ground that the patentee fraudulently caused to be included therein a portion of a conflicting mining claim owned by plaintiff; and such error is not cured by a declaration in the decree permitting plaintiff to amend his complaint to conform to the evidence.

4. Where the complaint alleges that defendant procured a patent to a mining claim, a portion of which had been previously located by plaintiff, and fraudulently withheld knowledge of his proceedings from plaintiff, an amendment alleging that he was the agent of plaintiff for the sale of his claim, although it introduces a new element of fraud, does not constitute a new cause of action.

5. Where a patent to a mining claim was issued to one who, by previous agreement with the original locators, was to convey one-half of it to them they are necessary parties to an action by a third party whose claim was fraudulently included therein, to declare a trust as to such portion.

Cross-appeals from district court, Lake county; L. M. GODDARD, Judge.

Action in chancery by Jennie A. Fisher and Nicholas Finn, trustee, against G. M. Seymour, to declare a trust in favor of plaintiffs in a certain mining claim patented by defendant. Decree granting the relief sought in part, and denying it in part. Both parties appeal. Reversed.

Both of these appeals are from the same decree in the court below. By stipulation they are considered and determined together. In 1880, Mrs. Fisher and Nicholas Finn, trustee, etc., were the owners of the "American Flag," a mining location near Leadville. Messrs. Bloss, Ilginfritz, and Herbert were likewise owners of a conflicting mining location known as the "Little Tiger." Seymour and Mrs. Fisher were co-owners with other parties in the "General Shields," a mine adjacent to the foregoing properties. Some time during the summer of 1880 the latter parties met and conversed freely with reference to the "General Shields," having some talk also about the "American Flag," and in correspondence between them afterwards, when Mrs. Fisher had returned to Tennessee, the "American Flag" was mentioned. Mrs. Fisher asserts that she made Seymour her agent to sell this claim. Seymour denies such agency. In October, 1880, Bloss, Ilginfritz, and Herbert made a contract in writing with Seymour whereby he was to patent the "Little Tiger" in his own name, and then deed one-half of the property to them. In pursuance of

this contract, an amended location certificate of the "Little Tiger" was filed, changing the name to the "Tiger," and surveying in a large additional portion of the "American Flag." Patent was obtained without the knowledge of Mrs. Fisher or Finn; and in 1881 they brought suit against Seymour for the purpose of having him declared a trustee holding title to that portion of the "American Flag" included in the "Tiger" patent for them. From the decree in their favor as to half of the property Seymour appealed; from the decree against them as to the other half of the property, viz., that deeded to Bloss, Ilginfritz, and Herbert, in pursuance of Seymour's contract before patenting, they appealed. The remaining essential facts sufficiently appear in the opinion.

Taylor & Ashton, for plaintiff. *S. D. Walling and Rucker & Ewing*, for defendant.

HELM, C. J., (after stating the facts as above.) The complaint on which this cause was tried is framed upon the theory of a constructive trust. Relief is sought on the ground that Seymour, who was defendant below, holds the legal title, conveyed to him by patent, to a large part of the "Tiger" lode, in trust for the benefit of plaintiffs. The leading question to be considered is, did the failure of plaintiffs to institute adverse proceedings in the land-office on behalf of the "American Flag" location, and to contest by suit defendant's claim to a patent of the "Tiger" lode, operate to waive or forfeit their prior rights in the conflicting ground, if such rights they had?

1. The first contention of plaintiffs' counsel is that, regardless of the statutes providing for adverse contests and suits, and notwithstanding the failure of his clients to proceed thereunder, the single conceded fact of a valid and subsisting location of the "American Flag" during the "Tiger" patent proceedings is decisive of the present controversy. He asserts that the territory embraced in the "American Flag" location was so segregated from the public domain as to be absolutely protected from patent by any other party, though plaintiffs made no effort to invoke the benefit of the statutes mentioned. No proposition connected with the disposal of mineral land is more conclusively established than that such land, when held under a valid mining location, is no longer subject to exploration and entry. The locator thereof is entitled to the present exclusive possession and use as against all the world, including even the United States, which prior to patent retains the legal ownership. *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110. A stranger going thereon for the purpose of discovering veins, of cutting and removing timber, or of otherwise interfering with the locator's possession and use, is a trespasser. The interest acquired by compliance with the mining statutes is, until a failure to perform annual labor, or until abandonment in some other way, for most purposes, as valuable and effective as if the title had actually passed by patent. Such interest, in this state, is subject

to taxation, and is liable to levy and sale under execution in satisfaction of the owners' debts. It has been designated by the supreme court of the United States a "grant" of the present exclusive right to possession. *Gwillim v. Donnellan*, supra. The foregoing legal propositions lend support to counsel's contention. His able argument predicated thereon would possess great force were it not for the statutes relating to adverse proceedings. The different laws providing for the locating and patenting of mines are to be considered together, and the enactments giving the miner certain exclusive rights to mineral claims which he has located in compliance therewith must be construed in connection with the adverse provisions alluded to. It is a matter of such grave importance as to become the settled policy of the general government that all controversies relating to conflicting mining claims be, so far as possible, adjudicated prior to patent. The statutes providing for adverse proceedings in the land-office and adverse suits in the courts conclusively recognize this importance and express this policy. They do not deprive the locator of his interest, nor do they necessarily lessen its completeness and value. They simply point out a particular method by which he is to assert his priority and maintain his advantage. The government, being the paramount owner of the soil, gives the prior claimant fair and adequate notice that he must assert his interest in a certain prescribed manner. If he does not avail himself of the proceedings thus provided for him, the superior advantages obtained by virtue of his priority of discovery and compliance with the location statutes may be lost. Failing to invoke the statutory remedy given, and permitting his adversary to secure a patent covering his location or a part thereof, he will be treated in law as having voluntarily waived his prior and superior rights. *Lee v. Stahl*, 9 Colo. 208, 11 Pac. Rep. 77. The existence of a valid and subsisting location of the "American Flag" at the time of the patenting of the "Tiger" lode, even if the priority of such location be conceded, did not *ipso facto* protect plaintiffs. The principal purpose of adverse proceedings is to determine just such controversies as arise upon conflicting claims of this kind. Plaintiffs' prior valid location, if such they had, did not exonerate them from the duty of invoking the remedy given by the adverse statutes.

2. The foregoing views proceed upon the theory that all requirements of patent statutes relating to notices have been fairly complied with; and where, therefore, if the complaining party has failed to avail himself of the statutory adverse provisions, the fault is chargeable to himself, or at least cannot be imputed to the patentee. But if, by reason of the fraudulent conduct of the patentee, the would-be contestor is kept in ignorance of the pendency of patent proceedings, and is thus prevented from availing himself of the statutory remedy, a court of equity may, in our judgment, interfere. Let it be carefully borne in mind that in this branch of the discussion we do not consider a case

where there has been adverse proceedings and a contest before the land department; we refer to a case where such contest and hearing have been prevented by the fraud of the patentee, whereby the complaining party, without fault on his part, is kept in ignorance of the application for title till the patent issues. Great consideration is given to the decisions of the land department in all matters there passed upon antecedent to patent, and the necessity for instituting contest proceedings has been strenuously insisted upon. But we have authority fairly supporting the foregoing view concerning judicial cognizance of injuries arising from such frauds as the one mentioned. "In those cases [cases where conflicting claims between private parties involve the effect to be given to the determination of officers of the land department with reference to the public domain] it has indeed been held, as claimed, that if the executive officer has made a mistake of law in his administration, if he has exercised power without authority of law, if his determination has been procured by the fraudulent practices of one party upon the officer or upon the opposite party, or if the officer has himself fraudulently decided in favor of one and against the other, a court of justice will give effect to the rights of the parties as between themselves, notwithstanding the errors and the frauds alleged and shown. The principle is 'that the decision of the officers of the land department, made within the scope of their authority, upon questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice when the title afterwards comes in question; but that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions.'" *Craig v. Leltensdorfer*, 123 U. S. 189, 8 Sup. Ct. Rep. 85, and cases cited. It is needless to say that an investigation by a court of equity in the case now supposed is not for the purpose of attacking or annulling the patent itself; its object is to give the benefit of the patent to the proper party,—the party who in equity is entitled to the premises; and when the foundation is laid by proof showing clearly the fraud of the applicant whereby the complaining party has been kept in ignorance of the existence of the patent proceedings, the court may consider the right of such party to the ground in controversy. The determination of the foregoing question is not controlled or affected by the congressional statute of March 3, 1881. The government, being the owner of the soil, requires as a prerequisite to the receiving of its bounty through patent the performance of certain acts and the expenditure of a certain sum of money upon each and every mining claim. Prior to the year 1881, in adverse suits, even where the applicant had not complied with these precedent requirements, he frequently secured title; for the adverse party, being plaintiff in the resulting suit,

had the burden of the issue, and under the familiar rule in ejectment was required to recover on the strength of his own title, regardless of the weakness of that of his adversary. If he failed to establish a valid prior location, verdict and judgment went for defendant, (the applicant,) though the latter had not shown compliance with the law. To avoid this anomalous and illogical result the statute in question was adopted. By authorizing a verdict and judgment in the adverse suit that neither party has shown "title to the ground," it protects the United States from the evasion of these just conditions precedent to the grant; but upon issue of patent this statute has spent its force. In chancery proceedings like that now before us, the government is not a party; it is not asking that the court determine for it, under the statute of 1881, whether either claimant is entitled to patent. The technical sufficiency of the patentee's location of his conflicting claim, and the sufficiency of his subsequent acts in connection therewith, are not necessarily involved. The questions tried are: Did the complaining party have a valid and subsisting location prior, and therefore superior, to that with which it conflicted, and upon which the patent is based? and did the fraud of the patentee keep him in ignorance of the patent proceedings? If these questions be affirmatively answered, plaintiff may recover the ground in conflict. His suit in equity presupposes the proper passage of the title from its owner to the patentee, including the legality of the conveyance. He does not assert his right to the patent from the government; he accepts the instrument already given as in all respects sufficient to convey the legal title, but says: "Owing to my superior interest in the premises, which entitles me to the exclusive possession and use, even as against the United States, and owing to the fraud perpetrated upon me by the patentee, I occupy the *status* of a beneficial owner. My equitable rights are under the law superior to the naked legal rights of the patentee. If the government, the original owner of the paramount title, is dissatisfied with the proceedings whereby this title was divested, let the proper steps be taken to secure the annulment of the instrument; but, so long as the government does not complain, I demand in equity a determination favorable to me of the private controversy between the patentee and myself." Equity must recognize his right and enforce his demand, or else, admitting its justice, must decline to notice the fraud and refuse relief.

The complaint in the case at bar substantially avers that plaintiffs were fraudulently kept in ignorance of the pendency of the patent proceedings until after the period for interposing objection in the land-office had expired. The specific grounds upon which the alleged fraud is rested may be stated as follows: *First*, that in the amended location certificate the surface boundaries of the "Little Tiger" were changed without the knowledge of plaintiffs, so as to include a much larger proportion of the "American Flag;" *second*, that in the patent notices posted

and published no mention was made of the adjoining claimants; *third*, that defendant Seymour was then a co-owner with plaintiffs in the "General Shields," an adjoining property, and was acting during the absence of plaintiffs as their confidential adviser in connection therewith, and professing to protect their interests therein through feelings of kindness and friendship; and, *fourth*, that in the amended location certificate, and in the patent notices, the name of the original claim was changed from the "Little Tiger" to the "Tiger," the prefix "Little" being omitted. Upon these averments we make the following observations: *First*. The law permits a change of boundaries when amended location certificates are filed; and, if the superior rights of others are thus interfered with, such interference should be pointed out and relied upon in opposition to the trespasser's claim to a patent, if not before. This injury is as effectually waived by a failure to adverse as are prior conflicting rights where no change of surface boundaries has taken place. *Second*. The provision requiring patent notices to mention the names of adjoining claimants appears only in the land-office rules. It does not specifically exist in the statutes; but, viewing the omission as an important defect, we need only advert to the fact that the abstract before us fails to disclose any proof received or offered, tending to show that the notices in question were imperfect in this particular. *Third*. The fact that defendant was a co-owner with plaintiffs in other property, and was acting as their confidential adviser in connection therewith, furnishes no legal ground cognizable either in a court of law or equity for the complaint that he did not protect their interests in the "American Flag." Besides, it clearly appears from the evidence that plaintiffs were not both absent, and that defendant was not acting during any of the period mentioned as the confidential adviser of both. Plaintiff Finn was in Leadville most, if not all, of the time, and he is not shown to have had any business relationship whatever with defendant. *Fourth*. The omission of the prefix "Little" in the name of the lode patented, we do not think, in and of itself, is sufficient excuse for the alleged ignorance of plaintiffs. It appears that the "Little Tiger" was known and always spoken of as the "Tiger." The habit of omitting the adjective prefix to the names of lodes seems to have been general in that mining district. The "American Flag," for instance, was known as the "Flag," and the "General Shields" is continually referred to by witnesses testifying at the trial on both sides as the "Shields." It does not appear that the description of the property was in any other way defective. The mining district, the locality, the reference to natural objects or permanent monuments, we are bound to assume were unobjectionable. One of the corners is described as "Corner No. 1-831," of the "General Shields." Neither the sufficiency of the posting of the plats and notices on the claim and in the land-office nor the adequacy of the news-

paper advertisements is successfully challenged. We cannot say, nor did the jury or court find, that plaintiffs, including Finn, who was present in Leadville, were deceived by the change of name, and thus prevented from instituting a proper contest by adverse proceedings.

3. But the questions submitted to the jury, together with the findings of the trial court, show that the decree against Seymour and in favor of plaintiffs is predicated largely upon a fiduciary relationship. The theory in this regard is that Mrs. Fisher employed Seymour to act as her agent and confidential adviser as to the value and sale of the "American Flag;" that having accepted such agency, and while conferring and corresponding with her in relation thereto, he took advantage of her absence, and through her trust and confidence, coupled with his fraudulent conduct, kept her in ignorance of his intention and acts until a patent issued to himself covering a large part of the trust-estate. The existence of this fiduciary relationship is most strenuously denied by Seymour, and the evidence upon the subject is not as satisfactory as could be desired; but we do not propose to determine its sufficiency to support the findings and judgment, embarrassed as the investigation would be by the fact that our facilities for correctly weighing the credibility of witnesses are greatly inferior to those possessed by the trial court, for the most careful scrutiny of the complaint upon which the cause was tried wholly fails to reveal any averment setting up, or tending to set up, the alleged agency. It would be an unwarranted assumption for us to hold that the allegation concerning defendant's co-ownership and agency in the "Shields" pleads, or was intended to plead, a similar fiduciary connection with the "American Flag." The admission of the evidence bearing upon Seymour's agency as to the "American Flag," over his repeated objections, was, therefore, error. This error is not cured by the declaration in the decree that "plaintiffs herein be granted leave to amend their pleadings to correspond with the facts proved, and that the pleadings be, and the same are hereby, considered so amended." Under our system of procedure the amendment of pleadings during the progress of the trial is, in the exercise of a reasonable judicial discretion, liberally allowed, and sometimes such amendments are permitted after verdict. But in the *first* place, the manner of amending adopted in this instance, waiving considerations as to the lateness of the order, is hardly consistent with the method provided in the Civil Code; and, *secondly*, such an important change as the one now under consideration should not, without acquiescence, be made for the first time in a final decree. Defendant Seymour did not consent to the alleged amendment by the decree, and we must presume that it operated as a surprise and hardship upon him.

4. Prior to the commencement of the trial an amended complaint was tendered, setting up, among other things, the very agency in question. The court refused to

permit the filing of this pleading, and the cause proceeded, as we have already seen, upon the original complaint. Thus defendant was affirmatively apprised that this particular question would not be involved; he was deprived of the privilege of denying by answer, and thereby putting in issue this important allegation; he was thrown off his guard, and the legal inference is that he did not prepare himself to meet the proofs offered by plaintiffs, which the court afterwards received as if the issue had been properly made. It is needless to speculate at length concerning the particular ground upon which the court based his rejection of the amended complaint, or the motives that afterwards influenced him in receiving evidence upon the averments rejected. If his refusal in the premises was predicated upon the view that by reason of their laches in waiting five years after beginning suit before tendering the amended complaint, plaintiffs were not entitled to a favorable exercise of judicial discretion, it is apparent from his order in the final decree concerning amendments that subsequent developments produced a change of mind in this regard. If, on the other hand, the ruling referred to rested upon the belief that the amended complaint pleaded a new cause of action, the court was wrong, and his subsequent conduct shows that he discovered his error. This pleading stated much more elaborately all that the original complaint contained, and it also covered a vast amount of surplusage in the way of purely evidential instead of ultimate facts; but we do not think that, at least as to Seymour, it necessarily averred a different cause of action. "The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or wrong." Pom. Rem. § 453; Bliss, Code, Pl. § 113. Notwithstanding the seeming clearness of the foregoing definition, embarrassment is sometimes encountered under the present objection, and our conclusion with regard to the pleading before us has not been reached without difficulty and misgiving. Plaintiffs, being the prior locators of a mining claim, were entitled to the exclusive possession, and, upon compliance with the law, to the ultimate absolute ownership. It was Seymour's duty, when applying for a patent covering a part of the "American Flag," not only to give the notices required by law, but also to refrain from acts intended or calculated to keep plaintiffs in ignorance of the patent proceedings. His alleged failure to perform this duty produced the wrong for which plaintiffs seek to recover. The alleged injury resulting from this wrong is that plaintiffs were kept in ignorance of the events transpiring, whereby they lost their property rights. The spoken language, written correspondence, and acts of Seymour, it is claimed, were intended to and did prevent them from discovering the situation and protecting themselves. The fact,

If it be a fact, that throughout the transaction Seymour occupied the position of a trusted agent in connection with the property, is an additional important element of bad faith on his part. It is a material fact, supplemental to the other facts constituting plaintiffs' primary right and defendant's corresponding duty. It introduces into the case a new element of fraud, and involves the application of a new equitable principle, but it does not so alter or supersede the original primary facts as to constitute a new cause of action. It is hardly necessary to add that the transaction relied on, the procedure invoked, and the ultimate relief sought, remain precisely the same.

5. The questions presented in the remaining case may be briefly disposed of. Before the decree was rendered in the court below, Seymour conveyed the undivided one-half of the "Tiger" lode to Messrs. Bloss, Ilginfritz, and Herbert. These parties were the original locators of the "Little Tiger," and it was with them he made the contract to procure a patent, in pursuance of which contract the deed was executed. This contract constituted an express trust in their favor as to one-half of the property; and the trust-estate thus created existed prior to the commencement of suit and filing of *his pendens*. The deed executed after that date simply conveyed the legal title to property which these parties owned before being made aware by the commencement of suit that plaintiffs asserted any interest in such property. It is not claimed that they occupied the position of agency towards plaintiffs. One theory, however, of the amended complaint as to them is that, knowing of Seymour's fiduciary relationship with plaintiffs, they conspired and confederated with him to keep plaintiffs ignorant of the patent proceedings, and, thus participating in his fraud, hold title also as trustees. The court below found that as to the moiety conveyed to them no trust existed. Bloss, Ilginfritz, and Herbert were not parties to the suit, though they would have become such had the amended complaint been filed. No issues were made by the pleadings as to them, and their rights were not before the court for consideration. Their title to one-half of the property, resting as it did upon an express trust, the foundation of which existed antecedent to the perpetration of the alleged wrong, would not necessarily depend upon the success or failure of Seymour. It was clearly error to adjudicate the rights of these persons, either favorably or unfavorably, without making them parties and requiring appropriate pleadings; and even if it were true, as their counsel contend, that such adjudication could only have been predicated upon the introduction of a wholly new and different cause of action, it does not follow that for this reason the court was authorized to enter a decree in their favor. Through the absence of proper parties and pleadings, plaintiffs may, as asserted by counsel, have been prevented from offering legitimate proofs tending to establish the necessary knowledge on the part of Bloss,

Ilginfritz, and Herbert, and their connection with the conspiracy whereby the alleged fraud was perpetrated. The decree is reversed. Both causes will be remanded for such further proceedings as may be consistent with good practice and the views herein expressed. We offer no suggestions concerning the exercise of judicial discretion should application be made for leave to file an amended complaint. As to Bloss, Ilginfritz, and Herbert, our view is that, if the attempt is made to adjudicate their rights, they should at least be made parties, and such trials should be had upon proper issues. Reversed.

KANNAUGH v. QUARTETTE MIN. CO.

(Supreme Court of Colorado. June 18, 1891.)

DEPARTURE IN PLEADING — MINING CLAIM — ADVERSE POSSESSION.

1. Where the facts relied upon in the replication constitute a departure from the cause of action stated in the complaint, the defendant waives his right to take advantage of the same by voluntarily going to trial without objection. Both at common law and under the Code a departure in pleading can only be taken advantage of before trial by demurrer or otherwise.

2. It is the policy of the law to require the claims of all parties to mining claims to be adjusted prior to the issuance of a patent. The proceedings before the land department to procure patent are judicial in character, and the publication of notice, as provided by the statute, brings all parties into court; and if they stand by and allow the statutory time for filing adverse claims, or for bringing suit in support thereof, to elapse, their rights, so far as the same might have been determined in such proceedings, in the absence of fraud or mistake, are forever lost.

3. A party who files his adverse claim in due time, but afterwards allows the same to be dismissed for failure to prosecute, stands in no more favorable position than if he had failed entirely to file adverse proceedings.

4. The defendant in this case, having failed in his adverse proceedings, cannot be permitted to show in the courts that the party applying for a patent had not fully complied with the law.

(Syllabus by the Court.)

Appeal from district court, Lake county; L. M. GONDARD, Judge.

Action for possession of and damages to real property. Appellee, as plaintiff below, filed its complaint against the appellant, in which, after alleging its own corporate existence, it is declared in substance that it was, and since August 15, 1886, had been, the owner and entitled to the possession of the Little Winnie lode mining claim, situated in said county, basing its ownership upon a full compliance with the local laws and rules of miners, the laws of the United States and of the state of Colorado, and actual prior possession; that about December 5, 1886, the defendant obtained possession of a shaft on the Treasure Vault claim, near the side line of the Little Winnie, from which it ran a certain drift into the latter claim, and at once proceeded to extract, remove, and sell ore belonging to plaintiff's claim, converting the proceeds to its own use; and that the defendant also since said time has withheld the possession of the premises in dispute, to the plaintiff's damage, etc. Special damages are also claimed, based upon the value of the ore alleged to have been

extracted. The answer, after denying the trespasses complained of, denies that the plaintiff ever had been, or then was, the owner or entitled to the possession of the so-called "Little Winnie" claim, either by virtue of compliance with any local laws or statutes, or otherwise. Defendant also denies that the said claim was ever located as required by law, or that it ever had any existence as a lode mining claim. He admits that he was in possession of the Treasure Vault claim, but denies that he wrongfully or otherwise committed the trespass or ouster, or made the entry complained of. The defendant also filed a cross-complaint, setting forth the location, discovery, and ownership of the Treasure Vault lode mining claim, and alleging that the owners of the same had, prior to the said trespass, made a lease to him of the same, from a portion of which he had been ousted by the appellee. A replication was afterwards filed, in which, after denying all the allegations of the cross-complaint, the following is pleaded: "Plaintiff, further answering said cross-complaint, says that on the 19th day of February, A. D. 1880, the United States Gold & Silver Mining Company, the owner of the Little Winnie lode mining claim mentioned in the complaint herein, filed its application in the district land-office of the United States for patent for said Little Winnie claim; that notice of such application was duly published for the period of sixty days required by law. That during said period of publication, to-wit, on the 3d day of April, A. D. 1880, the claimants of the said Treasure Vault mining claim filed in said land-office a protest and adverse claim against said application for patent, and that other adverse claims in behalf of other mining locations were also filed in said land-office against said application; that within thirty days after the filing of their said adverse claim the said claimants, being the parties mentioned in the said cross-complaint, commenced their action in the district court of Lake county to try and determine the title to that portion of said Little Winnie claim claimed by them as a part of said Treasure Vault claim, which said action was afterwards removed to the circuit court of the United States for the district of Colorado, sitting at Denver, and that said action was, in said circuit court, afterwards, on the 20th day of July, A. D. 1886, by said court dismissed, at the costs of the plaintiffs therein, the said claimants of the Treasure Vault claim; that the said adverse claims of said parties were thereby waived, and the adverse claims of all other parties were also waived, and on the 5th day of November, A. D. 1886, there were no suits pending or determined in any court against said United States Gold & Silver Mining Company, involving the title to the said Little Winnie lode mining claim, and this plaintiff, the grantee of the said United States Gold & Silver Mining Company and its grantees, was and is entitled to pay to the receiver of said land-office for said Little Winnie mining claim, and receive a United States patent therefor; that by reason of the premises the defendant, or any other person or persons under

whom he claims, is estopped and barred from denying that the plaintiff is the owner of said Little Winnie claim, or from asserting title to any portion of the land included within its boundaries." The cause was tried to the court without a jury. Judgment for plaintiff for possession and costs. The remaining facts sufficiently appear in the opinion.

*Patterson & Thomas, for appellant.
C. I. Thompson, Rucker & Ewing, and
Sayer & Blake, for appellee.*

HAYT, J., (*after stating the facts as above.*) Although there are a large number of errors assigned, the determination of two questions will, we think, dispose of all of them.

1. Could plaintiff under the pleadings show title by purchase? In actions of this character it is provided by the Code that when "plaintiff claims the legal right to occupy and possess the premises under the local laws and rules of any mining district, or of the United States, the state of Colorado, or otherwise, the complaint shall contain a brief statement of such possessory claim, and whether the right claimed is by pre-emption or purchase, or by right of actual prior possession on the public domain of the United States." Code 1887, § 267. Plaintiff in his complaint in this case bases his claim upon his prior possession and location of the property under the mining laws of the state and of the United States, etc., the claim by purchase first appearing in the replication. If it be conceded that the claim of title by purchase as set up in the replication is a departure from the cause of action as pleaded in the complaint, this could only have been taken advantage of by demurrer, motion, or otherwise before trial. If this had been done, the complaint might have been amended, and the omission supplied. It was not done. By voluntarily going to trial with the pleadings as they were, the defendant must be held to have waived such objections. This is true at common law as well as under the Code. *Bliss, Code Pl. § 396; 2 Chit. Pl. (16th Ed.) p. 678; Keay v. Goodwin, 16 Mass. 1; Andrus v. Waring, 20 Johns. 153; New v. Wambach, 42 Ind. 456.*

2. By the answer and cross-complaint the Quartette Mining Company claim the right of possession to the property in controversy by virtue of a lease of the Treasure Vault lode; hence it becomes important to determine the effect of the patent proceedings upon the title to said claim. This raises the second question, which may be stated thus: May the owners of the Treasure Vault mining claim, notwithstanding their failure to adverse, present in this action claims which they or their grantors then had to the ground included in the application for a patent to the Little Winnie lode mining claim? The facts in reference to the patent proceedings and adverse suit were admitted or conceded upon the trial practically as set forth in the replication. It thus appears that the owners of the Treasure Vault lode filed within the time given by statute its protest and adverse against the issuance of a patent to plaintiff's grantor, the

then owner of the Little Winnie claim; and that in due time said parties commenced an action in support of said adverse claim, which action was pending for a number of years, and then dismissed at appellant's cost for failure to prosecute. Appellant, after permitting the suit instituted by him to be dismissed for want of prosecution, certainly stands in no more favorable position here than if he had failed entirely to file adverse proceedings. The act of congress declares that if no adverse claim be filed within 60 days "It shall be assumed that no adverse claim exists." The object of the law is to require the claims of all parties to be adjusted prior to the issuance of a patent. The proceedings before the land department are judicial in character, and the publication of notice as required brings all parties into court; and if they stand by and allow the statutory time for filing adverse claims, or for bringing suit in support thereof, to elapse, their rights, so far as the same might have been determined in such proceedings, in the absence of fraud or mistake, (neither of which are here pleaded,) are forever lost. *Lee v. Stahl*, 9 Colo. 208, 11 Pac. Rep. 77; *Hunt v. Mining Co.*, 14 Colo. 451, 24 Pac. Rep. 550; *Seymour v. Fisher*, 16 Colo. —, 27 Pac. Rep. 240; *Wight v. Dubois*, 21 Fed. Rep. 693. The case last cited is directly in point. It received the sanction of this court in *Hunt v. Mining Co.*, supra. It is not necessary to repeat the reasoning, or give in detail the conclusions there announced. It is absolutely decisive of this case. The defendant, having failed in his adverse proceeding, cannot in this action be permitted to show that the discovery shaft of the Little Winnie claim was not within the boundaries of such claim, or to take advantage of any failure on the part of said United States Gold & Silver Mining Company to file its articles of incorporation, together with the laws of the state of Illinois, in the office of the secretary of state, before the purchase of the property in the controversy. It is only necessary in conclusion to say that the trial below seems to have been conducted in accordance with the foregoing views. The evidence justifies the judgment, and it must be affirmed.

WARD *et al.* v. WILMS.

(*Supreme Court of Colorado. May 21, 1891.*)

SECURITY FOR COSTS — OBJECTIONS TO EVIDENCE.

1. Whether or not a resident plaintiff shall be required to give security for costs is a matter in the sound discretion of the court.

2. An objection to testimony will not, in general, be considered in a court of review, unless the record shows that the grounds of such objection were fairly presented to the trial court. It is only where the testimony offered is wholly inadmissible for any purpose in the case that a general objection will suffice.

(*Syllabus by the Court.*)

Appeal from district court, Washington county; THOMAS J. ROBINSON, Judge.

This was an action by Samantha J. Wilms against Benjamin Ward and his sureties upon his official bond as constable. The complaint charges, in substance, that,

by virtue of a certain execution against one F. W. Wilms, the defendant Ward had illegally and forcibly taken possession of a stock of merchandise belonging to plaintiff, and had wrongfully appropriated the same, to her damage, etc.; that said acts were done by Ward under color of his office as constable. The defense relied on was that the merchandise so seized was in fact the property of F. W. Wilms, the defendant in the execution. The trial resulted in a finding and judgment in favor of plaintiff. The defendants appeal.

Quitman Brown and Markham & Dillon, for appellants. *Stuart Bros. & Andrews*, for appellee.

ELLIOTT, J., (*after stating the facts as above.*) Whether or not a resident plaintiff shall be required to give security for costs under the act of 1885, (Sess. Laws, 156,) is a matter in the sound discretion of the court. See *Knight v. Fisher*, 15 Colo. —, 25 Pac. Rep. 78, and cases there cited.

The remaining assignments of error requiring consideration relate to the admission of testimony in behalf of plaintiff. The plaintiff claimed title to the property in controversy through conveyance from her husband, Frederick W. Wilms. She sought to establish her claim by proof to the effect that, in 1877, her husband was the owner of a certain hotel property in the state of Nebraska, and, being entirely out of debt, conveyed the same to her as a gift; that, in 1886, he repurchased the same from plaintiff, giving her his note for \$4,000 therefor, and that he then traded the hotel property for the stock of merchandise, and moved the same to this state; that, in 1887, plaintiff being desirous of collecting the note against her husband, and he being unable to pay in money, she took from him a bill of sale of the merchandise in controversy in payment of the note, and that she took immediate and absolute possession of the merchandise thus purchased, and retained open, notorious, exclusive, and continued possession and control thereof, until the same was seized in execution by the defendant constable, for the debt of her husband. In support of her claim plaintiff identified and offered in evidence the \$4,000 note, together with certain correspondence between herself and her husband relating to the alleged transaction by which she claimed title to the property. To this offer the defendant's counsel objected. The objection was overruled, and exception was taken, and the ruling is assigned for error. As the note was technically admissible in evidence, we need not consider the question of the admissibility of the letters, for, as the objection was general to the whole offer, it was unavailing. The bill of exceptions does not show that any ground of objection whatever was brought to the attention of the trial court. The language of the bill upon this point, as certified to us, is, "to which offer counsel for defendant objected." Nothing more. The note and the correspondence were not offered separately, nor was any separate objection interposed. It is always the better and safer practice to state the grounds of objection to the ad-

mission of testimony, and have the same incorporated into the record by bill of exceptions. The omission so to do often renders the objection nugatory in the appellate court. 1 *Thomp. Trials*, 693, 696, 843; *Elliott v. Peirsol*, 1 *Pet.* 328; *Moore v. Bank*, 18 *Pet.* 802. It is further assigned for error that plaintiff was permitted, against the objection of defendant, to testify to the value of the merchandise in controversy without showing that she was properly qualified as a witness on that point. The assignment is not well taken. The record does not show that the grounds of objection were in any manner suggested at the trial. If they had been, the objection might have been obviated or sustained. This is another pertinent illustration of the rule that an objection to testimony will not, in general, be considered in a court of review, unless the record shows that the grounds of such objection were fairly presented to the trial court. It is only where the testimony offered is wholly inadmissible for any purpose in the case that a general objection will suffice. *Higgins v. Armstrong*, 9 *Colo.* 57, 10 *Pac. Rep.* 232; *Gilpin v. Gilpin*, 12 *Colo.* 517, 21 *Pac. Rep.* 612, and authorities there cited. The bill of exceptions does not purport to contain all the evidence. Hence, we must presume that plaintiff's title to and possession of the property in controversy were abundantly sustained by the evidence. The finding and judgment of the court must accordingly be affirmed.

WRAY V. CARPENTER.

(*Supreme Court of Colorado*. April 20, 1891.)

REAL-ESTATE AGENTS — RIGHT TO COMMISSION — IMPEACHING VERDICT — EXCEPTIONS.

1. Where a real-estate agent, in whose hands land is placed for sale on commission, furnishes a purchaser, who, after negotiating with the owner, purchases the land, the owner will be held to have favorably determined the purchaser's responsibility, and, though he may turn out to be irresponsible, the agent will be entitled to his commission.

2. Affidavits of jurors stating the theory or ground on which they rendered their verdict will not be received for the purpose of impeaching the same.

3. In an action by a real-estate agent to recover commissions for the sale of land, where defendant claims that no sale was consummated to the purchaser furnished by plaintiff, evidence that, after suit brought, defendant sold the land to another person would tend to corroborate defendant's theory, and, even if erroneously admitted, could not prejudice him.

4. Where the giving of an instruction is assigned as error on appeal, the record must show that by some proper objection the trial court's attention was called to the alleged error, and that he was thus given an opportunity to correct it at the time.

Appeal from district court, Arapahoe county; VICTOR A. ELLIOTT, Judge.

Long & Johnson, for appellant. *Robt. Given*, for appellee.

HELM, C. J. Appellee brought suit in the court below against appellant, and recovered \$1,000 as commission for services rendered in procuring the sale of certain realty in Nebraska. The admitted facts show that appellant placed the property

in the hands of appellee for sale at a certain figure, allowing him the sum recovered in case of success; that appellee found Corregen, the alleged purchaser, and introduced him to appellant; also, that negotiations between Corregen and appellant were carried on for a considerable period.

The rule contended for by appellant is undoubtedly correct, viz., that when, under circumstances such as are here presented, the agent has introduced to his principal an acceptable purchaser, willing and financially able to buy on the terms named by the principal, he is entitled to his commission, even though, through the fault of the principal, the sale does not actually take place. *Buckingham v. Harris*, 10 *Colo.* 455, 15 *Pac. Rep.* 817, and cases cited. But appellee did not, in the court below, base his recovery upon this rule of law; nor does he do so here. His contention is that the sale was actually consummated. Appellant vigorously combats this contention. He asserts that the negotiations between him and Corregen entirely failed, because Corregen proved to be financially irresponsible; and upon this controversy the case, so far as the evidence is concerned, will be determined. The proofs offered by appellee to establish the sale are not perfectly satisfactory. If sitting as a trial court without the aid of a jury, we might hesitate before finding affirmatively upon this question of fact; but the record is not wholly devoid of evidence to sustain the verdict returned. The testimony of both appellee and the witness Davis tends to show a completed sale to Corregen. It is strongly contradicted by appellant and Corregen; and there are circumstances corroborating, to some extent, the position of appellant in this regard. But we cannot say that the preponderance of evidence in appellant's favor is so great as to warrant our interference with the verdict of the jury, or the judgment pronounced thereon by the trial court, who also met the witnesses face to face. If the sale to Corregen were actually completed, appellant must be held to have favorably determined the latter's financial responsibility. And appellee was entitled to his commission, even though it may afterwards have transpired that Corregen was unable to meet deferred payments as they became due.

In support of his motion for a new trial, appellant offered to prove by the affidavits of two or more jurors who tried the cause "that the jury arrived at their verdict upon the theory that defendant, Wray, and R. A. Corregen concerted together to make the sale afterwards to J. C. Davis; that the jury believed that Corregen was wholly irresponsible, but that Carpenter had brought Corregen and Wray together, and that they afterwards made the sale." The court did not err in refusing to receive or consider these affidavits. As a general rule, affidavits of jurors stating the theory or ground upon which they rendered their verdict will not be received for the purpose of impeaching the same. *Thomp. & M. Jur.* § 440, and cases cited.

If the court erred in receiving evidence

tending to show that subsequent to the commencement of the present suit appellant sold the premises in question to a third party, (a point we do not determine,) such error could not have injured him; for the effect of such evidence, if it were given any effect whatever, would be to corroborate appellant's theory that the sale to Corregen was never consummated. Nor do we perceive how the supposed aid of Corregen in bringing about the alleged sale to Davis could make any difference. Being error without prejudice to appellant, the matter constitutes no ground for reversal.

The second instruction given stated correctly the law applicable to a completed sale. It was not intended to cover the rule authorizing a recovery of commissions where the agent has introduced a purchaser acceptable to the owner, and able and willing to buy upon the owner's terms, but by fault of the owner the sale is not consummated. This rule had already been fully and fairly stated in the preceding instruction. Besides, appellant is not in position to raise this question; for, while the formality of noting his exception to the charge is done away with, the record should, nevertheless, show that by some proper objection he invited the trial court's attention to the alleged error, and thus gave an opportunity for its correction at the time. All the matters urged in this court by counsel for appellant having been noticed, and no material error appearing, the judgment will be affirmed.

GREEN v. TANEY.

(*Supreme Court of Colorado.* April 17, 1891.)

ADMINISTRATION — PAYMENT OF CLAIMS — DISCHARGE OF ADMINISTRATOR.

1. Where a party dies pending his appeal from a judgment against him, and his administratrix is substituted in his stead as appellant, an affirmance of the judgment makes it a judgment against her as administratrix, and a conclusive and established claim payable out of the estate prior to distribution; and the discharge of the administratrix before its payment, unless there is an insufficiency of assets, is invalid.

2. Gen. St. Colo. § 138, (3618,) p. 1055, provides that, on recovery of a judgment at law in any court other than the county court against a personal representative for a demand due from his testator or intestate, no execution shall be issued thereon, but the party recovering it shall cause a "transcript of the record of the judgment entry" to be filed in the county court, and the same shall be classed and paid as other demands. *Held*, that it is a sufficient compliance with the statute if a "transcript of the judgment docket" is filed.

Commissioners' decision. Appeal from district court, Arapahoe county; WESTBROOK S. DECKER, Judge.

On the 14th day of June, 1881, appellee recovered a judgment against Michael Green, in the district court of Arapahoe county, for the sum of \$1,624 and costs, from which Green appealed to this court. Pending such appeal, about March 1, 1883, he died. On the 20th of the same month, appellant, widow of Green, was appointed administratrix of the estate. In February, 1884, appellant appeared by her counsel in this court, suggested the death of

Michael Green and the appointment of herself as administratrix, and asked to be substituted in her representative capacity as appellant in the case pending, which was agreed to in writing by the respective counsel, and the substitution made by the court. On the 14th day of March of the same year the judgment of the district court was affirmed. 8 Pac. Rep. 423. The estate of Michael Green, real and personal, exceeded \$50,000 in value. The claims allowed against it amounted to about \$17,000. It is alleged in the complaint that, after the affirmance of the judgment, counsel for appellee filed in the county court, where the estate was being settled, a transcript of the judgment of Taney vs. Green, and asked that the same be paid; and, although this specific averment is denied in the answer, yet it is expressly admitted therein that said judgment of the district court had been affirmed previous to the commencement of this suit. Payment of the judgment was resisted and refused by appellant. It remained unpaid, and in May, 1885, appellant filed a petition to be discharged as administratrix, alleging, as is averred in the complaint, that she had paid all the just debts and liabilities due and owing by the estate, which petition was granted, and her discharge ordered. It is further alleged that, at the time of her discharge, there was remaining in her hands for distribution assets of the estate to the value of \$33,951.86. The prayer is for judgment against appellant, as administratrix, for the amount of the judgment, \$1,624, interest, and costs. The defendant made several admissions in pleading, among them being that she was made, by substitution, party appellant in this court in place of her deceased husband; that the estate was solvent and valuable, as alleged in the complaint. She alleges the language used in her petition for discharge as executrix to be "that all claims and demands presented and allowed against the said estate had been paid in full." An allegation in the answer deemed important, and relied upon in argument, was a denial that any transcript of the judgment record in the district court was filed in the county court; and an averment that the document filed was "a transcript of the judgment docket in the district court;" and a denial that appellee prosecuted the claim before the county court; an allegation that on the day she filed her report and asked to be discharged she showed to the judge of the county court the transcript of the judgment docket filed by appellee as a claim against the estate, and asked the county court "to dismiss and disallow the claim for the failure of plaintiff to prosecute the claim as required by the statute, and that the county court thereupon dismissed and disallowed the claim for failure of the plaintiff to prosecute the same." Several other special defenses were interposed, to which the appellee demurred, and the demurrer was sustained. Appellant elected to stand by the answer as to the portion demurred to. Trial was had to the court without a jury, resulting in a judgment for appellee for \$2,922.76 against appellant, as administratrix, and, in conclusion, the following

was by the judge made a part of the said judgment: "And it appearing to the court that said estate has been fully administered upon except as to the claim now in suit, it is considered and ordered by the court that said sum of money be paid at once." From such judgment, this appeal was taken.

Steele & Malone, for appellant. *Rockwell & Ellis*, for appellee.

REED, C., (*after stating the facts as above.*) The demurrer was properly sustained. The matters set up in the answer to which the demurrer was directed were extraneous, and could not be legally regarded as capable of barring the suit, or amounting to a defense. Several of the supposed special defenses were allegations of or histories of different suits and proceedings instituted for the collection of the money. A perusal of them shows, perhaps, that appellant and the various parties against whom the suits were brought were unnecessarily harassed and subjected to expense and inconvenience, but fails to show that the claim had in any of them been satisfied and discharged. The issues remaining are amply sufficient for the determination of the case. The claim of appellee had been merged in judgment prior to the death of the intestate, and an appeal was pending in this court at the time of his death. Appellant applied to be and was substituted, the judgment was affirmed, and, by the substitution, became a judgment against her, as administratrix of the estate. Upon its affirmance it became final and conclusive,—an established claim payable out of the estate prior to distribution to heirs. Section 138, (3618,) p. 1055, Gen. St., relied upon by appellant, is as follows: "Upon the recovery of judgment at law in any court other than the county court, against any executor or administrator, for a demand due from his testator or intestate, no execution shall be issued thereon, but the party recovering such judgment shall cause a transcript of the record of the judgment entry to be filed in the county court, and the same shall be classed and paid as other demands are." By it, to prevent unnecessary expense and interruption in the proceedings of settlement, the creditor is precluded from proceeding in the ordinary method by execution to make the money upon the judgment, but "the party recovering such judgment shall cause a transcript of the record of the judgment entry to be filed in the county court." It is contended that this was not done; that "no transcript of the judgment rendered by the district court" was filed; and that only "a transcript of the judgment docket" was filed. An examination will show that, by the statute, it was not required that a transcript of the judgment should be filed. The language is, "shall cause a transcript of the record of the judgment entry" to be filed. Such record of the judgment entry was in the judgment docket, and the filing of a transcript of the docket was sufficient to answer the law; the intention of the law evidently being the proof from the record of the court of the existence of a valid unsatisfied judgment for the sum

named. Such evidence was furnished by the transcript filed. No prosecution of the claim was required; it was an adjudicated claim; the estate was liable for the amount. The duty devolved by the statute upon the administratrix was to pay it, and she could only excuse herself by showing an insufficiency of the assets. In this case the sufficiency of the estate was conceded, and the supposed discharge of the administratrix was invalid.

The judgment of the district court should be sustained. There was no legal discharge or distribution. If it could be held that the act of the county court operated as a discharge, still the judgment should be affirmed, such discharge having been improperly obtained, and the assets to an amount largely exceeding the claim illegally appropriated to her own use while the judgment still remained unpaid. Such assets should be followed and applied as contemplated by the statute. We advise that the judgment be affirmed.

BISSELL and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

McDERMITH *et al.* v. VOORHEES *et al.*

(*Supreme Court of Colorado.* April 17, 1891.)

DEEDS — CONSTRUCTION — TRUSTS — PAROL EVIDENCE.

1. A deed of land, after reciting that it was between the grantor, of the first part, and the grantee, "assignee of" the grantor, of the second part, recited that it was in consideration of "the conditions of the assignment made this day for the benefit of the creditors" of the grantor. *Held*, that the conveyance was in trust for the grantor's creditors, and that it could not be shown by extraneous evidence that it was an absolute conveyance to the grantee in payment of the debts due from the grantor to him and other creditors.

2. Where a deed is made to one as assignee in consideration of an assignment to be made for the benefit of creditors, and the assignment is not made, the grantee holds the legal title in trust for the grantor or his heirs.

Commissioners' decision. Appeal from district court, Arapahoe county; WESTBROOK S. DECKER, Judge.

A. S. Weston, for appellants. A. B. McKinley, for appellees.

REED, C. This was a suit brought by appellees to remove a cloud from the title to quite a large number of lots in an addition to South Denver, and praying that claimants be declared the legal owners. The property originally belonged to one Sullivan D. Breece, who in the year 1876, being insolvent or embarrassed financially, conveyed the property by quitclaim deed to one William J. McDermith. The part of the deed necessary to be considered is as follows: "This deed, made this 19th day of August, in the year of our Lord one thousand eight hundred and seventy-six, between Sullivan D. Breece, of the county of Lake and state of Colorado, of the first part, and William J. McDermith, assignee of said Breece, of the county of Lake and state of Colorado, of

the second part, witnesseth, that the said party of the first part, for and in consideration of the conditions of the assignment made this day for the benefit of the creditors of said Breece, and the further consideration of one dollar to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed, and quitclaimed, and by these presents does remise, sell, convey, and quitclaim, unto the said party of the second part, his heirs and assigns forever, all the right, title, interest, claim, and demand which the said party of the first part has in and to the following described real estate, lying and being in the county of Arapahoe and state of Colorado, to-wit: [Followed by a description of the property.] "It is alleged that Breece died intestate in November, 1877; that Margaret A. Breece, Edward P. Breece, and Jennie V. Zane were his surviving heirs; that McDermith died intestate in 1880, leaving as surviving heirs Anna McDermith, one of appellants, and two children, Oro and William J., infants; also, "that said deed was made by said Breece in trust for the benefit of certain creditors of said Breece, with the intention of providing by a contemporaneous instrument for the payment of their debts out of said property; that no such instrument was executed by McDermith; that said indebtedness was shortly afterwards satisfied by or on behalf of said Breece without resort being had to the property mentioned in said deed; * * * that no reconveyance of said lands was ever made by McDermith to Breece or his heirs; that Margaret A. Breece, Edward P. Breece, and Jennie V. Zane, the surviving heirs of Sullivan D. Breece, conveyed all of their right, etc., in said lands to plaintiff Voorhees on the 30th day of April, 1884, and afterwards said Voorhees conveyed one-half thereof to the plaintiff Samuel W. Shepard." Plaintiffs also claimed title to the property by treasurer's deeds on sales for taxes from the year 1876 to 1883, some of the deeds being for the entire property, others for a part; all of which tax-titles had by various conveyances been conveyed to plaintiffs. The portions of the answers necessary to an understanding of the issues, and for a determination of the case in this court, are as follows: "Admits that said Breece was, at the time of making said deed, the owner of said lands; denies that it was the intention of said Breece to provide by a contemporaneous instrument for the payment of any such creditors out of the proceeds of the sale of said land, but alleges that said deed was an absolute conveyance of said land to said William J. McDermith in consideration of the release executed by him and other creditors releasing said Breece from all claims against him held by said creditors, and that said release was executed at the time of the execution of said deed of conveyance from said Breece to said McDermith; but denies that said indebtedness, or any part thereof, was shortly, or at any time thereafter, settled or satisfied by or on behalf of said Breece without re-

course to said property, or otherwise; admits that said Breece died in 1877; admits that no reconveyance was ever made by said McDermith to said Breece or his heirs; alleges that said McDermith was under no obligation, in law or equity, so to do; and alleges that the pretended conveyance of the supposed heirs of said Breece conveyed no right or title to plaintiffs; alleges, on information and belief, that the pretended title or claim of plaintiffs, by virtue of said tax-deeds and the intermediate conveyance, is wholly void and without effect; and alleges, on information and belief, that said supposed taxes were not assessed and levied in pursuance of the statutes, and that said supposed sales were not made in the manner provided by law." The case was tried to the court, who found generally for the plaintiffs, decreeing the relief asked. The court found specially, with other findings, that the conveyance to McDermith was in trust for the benefit of creditors, and did not vest any title in McDermith save a trust for the benefit of creditors; that, in due course of administration, all the debts of Breece were paid and discharged by the administrator without recourse being had to the property in controversy; that thereupon the title vested in the heirs of Breece, and by their conveyance passed to appellees; that prior to and at the time of the bringing of the suit appellees were in the actual and peaceable possession of the property; and that the appellees had good title also to the property through the sales for taxes and subsequent conveyances to them.

There are several errors assigned upon the action of the court in admitting and rejecting evidence, which we do not find it necessary to determine. The first and fundamental question to be determined was and is the nature and intention of the conveyance of Breece to McDermith,—whether it was a conveyance in trust to McDermith as assignee for the benefit of creditors, or an absolute conveyance of the property in payment of debts due McDermith and other creditors. The latter is contended by appellants. The solution of the question depends upon a construction of the deed itself. The language is plain; the object and intention of the grantor are clearly and definitely expressed. It is said: "Sullivan D. Breece, * * * of the first part, and William J. McDermith, * * * assignee of said Breece." The qualifying phrase relates to the character in which the grantee took,—not as purchaser, but in trust for creditors. The term "assignee" tends to negative any supposition of an intention of vesting the estate in fee in the grantee himself. It was further recited that the conveyance was made "for and in consideration of the conditions of the assignment made this day for the benefit of the creditors of said Breece, and the further consideration of one dollar," etc. These recitals in the grant are conclusive of this branch of the case. It is a principle as old as the law of conveyances that, against a use declared in a deed, no averment to the contrary can be received. The maxim is: "In the absence of ambi-

guilty, no exposition shall be made which is opposed to the express words of the instrument." Broom, Leg. Max. 619. "It is not allowable to interpret what has no need of interpretation." Co. Litt. 147a; Lanyon v. Carne, 2 Saund. 167. The averment in the answer is one defeating the operation and effect of the conveyance itself, which is not permitted, because the effect would be to subvert the entire transaction, as well as to violate established rules of evidence. 1 Greenl. Ev. § 26, and note; Lazell v. Lazell, 12 Vt. 443; Grout v. Townsend, 2 Hill, 554; Byers v. Mullen, 9 Watts, 266. Parol evidence is not admissible when it is offered to contradict the terms of the instrument creating the estate. 2 Washb. Real Prop. 479; 2 Greenl. Cruise, 315; Strimpfer v. Roberts, 18 Pa. St. 283; Livermore v. Aldrich, 5 Cush. 431; White v. Carpenter, 2 Paige, 238. "Where a trust results by force of the written instrument, it cannot be controlled, rebutted, or defeated by parol evidence of any kind." 1 Perry, Trusts, § 150; Langham v. Sanford, 17 Ves. 435; Rachfield v. Careless, 2 P. Wms. 158; White v. Williams, 3 Ves. & B. 72.

The claim or contention that the property was conveyed to McDermith with the intention of vesting him with an absolute title that could descend to his heirs is in express contravention of the recitals of the deed, by which the heirs must take, if they take at all; and under all the authorities, English and American, an allegation or averment in the answer that the conveyance was absolute, and in consideration of the release by McDermith and others of debts, was faulty and vicious; and no oral proof in support of it, and contradicting the recitals in the deed, could legally be admitted. But if this were not so, and parol proof could be admitted, that given fell far short of establishing the averment, and the contention failed for want of proof. There was a great dearth of evidence. Breece and McDermith were both dead long before the trial was had. The heirs had little or no knowledge of the transaction. Judge Weston, counsel for appellants, was at the time of the conveyance, or shortly after, the attorney of Breece. Aside from him, the oral evidence was unimportant. His evidence, so far from establishing appellants' contention, was in support of the recitals in the deed. It shows that he drew up, as attorney of Breece, an assignment which Breece expected all his creditors to accept, but which was not accepted by all, but was signed by a number of them; also, that there was another document drawn by him, which was never executed at all. From this it is apparent that the intended trust was never consummated, nor accepted by McDermith as assignee, or by the creditors. The trust never having been perfected as contemplated in the deed, counsel seems to erroneously suppose that the title vested in McDermith discharged of the trust. When it failed by the acts of the different parties to vest the title as contemplated, the conveyance was void for all intended purposes, and McDermith only held the legal title in trust for Breece and his heirs. "If

the declaration of trust * * * plainly shows that the intention was that the grantee should not take as beneficiary, and that the sole purpose of the grant was to carry out the purpose of the trust, which fails, the grantee will take in trust for the grantor and his heirs." 2 Washb. Real Prop. 473; Perry, Trusts, § 159; Gibbs v. Rumsey, 2 Ves. & B. 294; Hughes v. Evans, 18 Sim. 496; Easterbrooks v. Tillinghast, 5 Gray, 17; Williams v. Coade, 10 Ves. 500; Hawley v. James, 5 Paige, 318.

There was no error in the findings of the trial court on the propositions above discussed, viz., that the conveyance did not vest in McDermith or his heirs any title, interest, or estate whatever, except in trust for the purposes declared in the deed; also, in finding from the evidence that the debts of Breece were paid by his administrator without resort being had to the property in controversy; also, that McDermith held the title to the property in trust for Breece, and after his death in trust for his heirs, from whom claimants took a good title. These findings being correct, it is unnecessary to examine the other branch of the case, and determine the regularity of all the proceedings through which claimants allege their acquired title by sales for taxes and conveyances, etc. We advise that the judgment and decree be affirmed.

RICHMOND and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the decree of the court below is affirmed.

BENNETT *et al.* v. REEF *et al.*

(Supreme Court of Colorado. May 7, 1891.)

CHATTEL MORTGAGES—FORECLOSURE—JURISDICTION—PLEADING.

1. In Colorado, in an action in the county court to foreclose a chattel mortgage, the court has jurisdiction to grant an injunction to restrain defendant from disposing of the mortgaged property.

2. In Colorado, when there has been no default in the payment of a debt secured by a chattel mortgage before the mortgagor's death, and the property has passed to his administrator, suit may be brought against him in the county court to foreclose the mortgage; and such right is not affected by the fact that a power of sale is contained in the mortgage.

3. In a suit to foreclose a chattel mortgage, a plea that the mortgage was obtained by fraud and misrepresentation is too indefinite; it should specify in what the fraud or misrepresentation consisted.

Commissioners' decision. Appeal from district court, Garfield county; THOMAS A. RUCKER, Judge.

This action was first commenced by appellees in the county court, where a trial was had resulting in a judgment in favor of the plaintiffs; appeal was taken to the district court, and trial had, with the same result. It is alleged in the complaint that, on the 8th of December, 1887, one George W. Sagers was indebted to plaintiffs in the sum of \$1,100, for which he made a promissory note payable one year after date, which was secured by chattel mortgage upon a pre-emption

claim of 160 acres of government land, and 94 head of range cattle and other stock; that the mortgagor died in the early part of September, 1899, leaving no property except that covered by the mortgage. Appellant Rachel Sagers is the widow of George W. Appellant Bennett was appointed administrator of the estate, and, on September 27, 1898, filed in the office of the county clerk an inventory of the property, consisting of the pre-emption claim, above mentioned, 7 head of horses, 80 head of range cattle, and some other property. That, on the date of the filing of the inventory, appraisers were appointed, the property subsequently appraised at \$1,695.45, and that such appraisers also appraised the property supposed to be allowed by law to the widow at \$1,985; that the widow, in writing, relinquished all right to the property assigned her, save 2 horses of the value of \$200, and elected to take, instead, the improvements upon the land, 75 head of stock cattle, 2 mares, and 1 colt, being the same property alleged to have been covered by the mortgage. The property elected by her to be taken was of the appraised value of \$1,499.45. That the only remaining property belonging to the estate was 75 or 80 head of calves or young cattle, which were included in the chattel mortgage. The widow and administrator resisted the claim of the mortgagees, contending that the widow was entitled to hold the property relieved of the mortgage executed by the husband. The complaint asked for a foreclosure under the chattel mortgage, and for an injunction to restrain the sale and disposition of any of the mortgaged property by the widow or administrator. An answer was filed traversing each important allegation contained in the complaint. It was also averred that, if any note, as described in the complaint, was made, it was without consideration, and was obtained by fraud and misrepresentation, and was void. An injunction as prayed was granted in the county court.

H. P. Bennet, Jr., and J. E. Havens, for appellants. Jos. W. Taylor and A. M. Stevenson, for appellees.

REED, C., (after stating the facts as above.) There are several errors assigned. The first, which seems to be regarded by appellants as the most important, was want of jurisdiction in the county court. It is not shown nor claimed that the amount involved exceeded the statutory jurisdiction of the court; the jurisdiction is principally attacked by reason of the granting of the injunction in aid of the proceeding. Counsel labor under an apparent misapprehension, and confound the ancillary and assistant writ of injunction with the trial and determination of the suit upon the merits. The granting or refusing to grant or dissolve an injunction could not vitiate nor in any way affect the finding and decree upon the merits of the controversy, if properly tried and otherwise regular, being only an incidental or subsidiary proceeding. If illegally or improvidently granted, and injury resulted, the

remedy may be sought in another direction. It in no way ousted the court of jurisdiction to hear and determine the issues. It is not absolutely necessary to determine for the purposes of this case the question of the power of the county judge to grant an injunction in the premises, nor the regularity of such injunction, nor any other matters pertaining solely to liability upon the injunction bond. There having been no default in payment during the life-time of deceased, and the property having passed to the administrator before the maturity of the debt, had there been an attempt on the part of the mortgagees to reduce the property to possession and dispose of it to discharge the debt, an important legal question would have been presented that we are now relieved from considering. This proceeding in equity in which the administrator was made a party may properly be considered as one to determine the respective rights of the parties, and establish the lien upon the property in the hands of the administrator or the widow, and subject it to the payment of the debt, if the debt and validity of the mortgage were properly established. The power of sale contained in the mortgage would not preclude the mortgagees from proceeding in equity to foreclose, had the mortgagor been living, (*Jones, Mortg.* §§ 776, 777; *Coote, Mortg.* 237; *Slade v. Rigg*, 8 Hare, 35; *Hart v. Ten Eyck*, 2 Johns. Ch. 99; *Charter v. Stevens*, 3 Denio, 35; *Briggs v. Oliver*, 68 N. Y. 339;) and it certainly became a proper proceeding after his death. The complaint appears to contain all the necessary averments for the purposes of the foreclosure, and all necessary parties were brought in. The contention that there was a want of jurisdiction cannot be sustained.

The plea of want of consideration was not sustained by any evidence. The plea of fraud and misrepresentation in obtaining the note was faulty in being too indefinite,—not specifying in what the fraud and misrepresentation consisted; but it was regarded by the court, apparently, as being sufficient to put the plaintiff upon proof of the *bona fides* of the transaction. The correctness and regularity of the debt were sufficiently established, and were not seriously controverted. There was quite an effort made on the part of defendants to obtain, in some manner, evidence to impeach the transaction. Error is assigned upon the failure of the court to compel a production of all of plaintiffs' books of account. We think the court and plaintiffs went fully as far as required to in that direction. There was no demand for any particular book, nor any statement that any book was expected to show anything that would impeach the note; it seemed, rather, on the part of counsel, a praiseworthy desire to discover something that would aid them. If all the books had been presented, and it had been found that the aggregate accounts there entered did not amount to the face of the note it would have been at best but negative testimony to attack or cast doubt upon the consideration. We think counsel do the court injustice

in the ninth assignment, where it is said: "The court refused to allow the defendants to impeach the consideration of the note and mortgage." Considering the pleading, and the manner in which it was sought to impeach the transaction, the court seems to have given fully as great latitude as could have been expected.

We do not think that there were any substantial errors committed in the reception or rejection of the testimony. The court was warranted by the evidence in finding that the deceased was indebted in the amount for which the note was given, and that the property in controversy had been mortgaged to secure the payment. It cannot be successfully contended, if there was an honest indebtedness, and the property claimed by the widow had, in the life-time of the husband, been mortgaged and pledged to its payment, that such disposition of it would not take precedence of the right of the widow. Her right was only to the equity remaining after the payment of the mortgage. Had the property been unincumbered at the time of the decease of the husband, the widow would have been entitled to a certain amount of property regardless of debts, to be selected from that of the estate; but being mortgaged, and to that extent disposed of by the husband, the property did not pass and become a part of the estate, but only the equity remaining passed. This is so well established and elementary that no authorities are needed in its support. We advise that the judgment of the district court be affirmed.

RICHMOND and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

ROLLINS v. MCHATTON.

(Supreme Court of Colorado. July 3, 1891.)

LIFE INSURANCE—CHANGE OF BENEFICIARIES.

Where a mutual benefit insurance policy provides that upon the death of the assured the sum mentioned will be paid to assured's wife, as directed by the application, or to such person "as he may subsequently direct by change of beneficiary entered upon the record of the supreme secretary," a mere delivery of the policy by the assured, after the death of the wife, to a third person, for the benefit of his son, is not a change of beneficiaries.

Appeal from district court, Arapahoe county; GEORGE W. ALLEN, Judge.

Action by R. P. Rollins, guardian of Thomas S. McHatton, against Frances A. McHatton, administratrix of the estate of Charles K. McHatton, deceased, to determine the right to the proceeds of an insurance policy. Judgment equally dividing the fund. Plaintiff appeals. Affirmed.

Charles K. McHatton, during his life-time, held a certificate of membership in the endowment rank of the order of Knights of Pythias. This certificate was also in effect a policy of insurance, the amount of the risk being \$3,000. The following extract therefrom is deemed sufficient for a proper understanding of the

case: "And in consideration of the payment hereafter to the said endowment rank of all monthly payments as required, and the full compliance with all the laws governing this rank now in force or that may hereafter be enacted, and shall be in good standing under said laws, the sum of three thousand dollars (\$3,000.00) will be paid by the Supreme Lodge, Knights of Pythias of the World, to Mattie E. McHatton, wife, as directed by the said brother in his application, or to such other person or persons as he may subsequently direct by change of beneficiary entered upon the record of the supreme secretary of the endowment rank, upon due notice and proof of death and good standing in the rank at the time of death, and surrender of this certificate." Mattie E. McHatton, wife of the said Charles, died before her husband. During her life-time the certificate was kept in her possession. After her death it passed into the custody of her mother, where it remained until the year 1887, when Charles procured it, and delivered it to R. P. Rollins, guardian of Thomas S., the minor son of himself and Mattie E., with instructions to hold it for the benefit of said son. It remained in the possession of Rollins until deposited in the county court after the death of Charles, in obedience to an order of that tribunal. Charles afterwards married appellee, Frances A. McHatton, but died without making any other or further disposition of the certificate. No indorsement showing a change of beneficiary upon the "record of the supreme secretary of the endowment rank" was made or attempted at the time of the delivery of the certificate to Rollins, or at any date subsequent thereto. Charles complied with the requirements of his contract in relation to assessments and dues, and at his death was a member in good standing. The association, being in doubt as to whom the money belonged, deposited it in the county court, where the estate of Charles was being administered upon, with the request that the court make such distribution thereof as the law required under the contract and existing circumstances. From the order of distribution made in the county court an appeal was taken to the district court, where judgment was entered upon an agreed statement of facts, dividing the money equally between the surviving widow and son. To review that judgment the present appeal was taken by the guardian aforesaid.

Edgar Cayless and Keeler & Sales, for appellant. S. T. Horn and I. E. Barnum, for appellee.

HELM, C. J., (after stating the facts as above.) No doubt exists as to the authority of McHatton to change the beneficiary named in the insurance certificate under consideration. Aside from the fact that this power is conferred upon the member by the charters or by-laws of benefit societies, the present contract contains a provision expressly authorizing the same. It declares that upon the death of the assured the sum mentioned will be paid "to Mattie E., wife, as directed by the said brother in his application, or to such person or persons as he may subse-

quently direct by change of beneficiary entered upon the record of the supreme secretary of the endowment rank." Appellant asserts that the entire amount called for by the certificate belongs to the son, and that appellee, the surviving widow, takes nothing. Mattie E., the beneficiary named in the certificate, having died before the assured, no interest in the fund provided for ever vested in her. Thomas S., her surviving son and heir, could therefore have inherited no part thereof by virtue of such relationship. But appellant confidently relies upon the proposition that the delivery of the certificate to him for the use of the son constituted a sufficient change of beneficiary to vest in the son, immediately upon the father's decease, a right to the money. Upon this contention the principal controversy rests. Were the certificate silent as to the manner in which such substitutions are to be made, there might be room for appellant's contention. But, turning to the extract above given, we discover that other persons than the one originally named can receive the bequest only upon direction of the assured "by change of beneficiary entered upon the record of the supreme secretary." This provision thus plainly declares how another person may be substituted in place of the one first designated. The language used is too plain to be misunderstood, and we are not at liberty to supply new words, or to ignore the clear import of those employed by the contracting parties. The intent to permit a change of beneficiary at the will of the assured is no more plainly declared by the preceding clause than is the manner of executing that intent by the expression under consideration. The resolution to substitute can be enforced in but one way, viz., "by change of beneficiary entered upon the record," etc. It will not do to say that the entry upon the record is directory merely, or that it is of no special importance. This entry is an essential part of the substitution, and the change is incomplete until it is made. *Bac. Ben. Soc.* § 307; *Holland v. Taylor*, 111 Ind. 121, 12 N. E. Rep. 116; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. Rep. 166; *Society v. Lupold*, 191 Pa. St. 111; *Stephenson v. Stephenson*, 64 Iowa, 534, 21 N. W. Rep. 19; *Coleman v. Knights of Honor*, 18 Mo. App. 189; *Insurance Co. v. Miller*, 13 Bush. 489; *Eastman v. Association*, 62 N. H. 555; *Hellenberg v. District No. 1, etc.*, (Ct. App.) 94 N. Y. 580. The delivery of the certificate to appellant by McHatton was no compliance with the mode prescribed for effectuating a change of beneficiary. While it may be indicative of the intent of McHatton at the time, it was not the method agreed upon for the declaration of that intent. We cannot accept the view that this provision was inserted in the certificate exclusively for the protection of the association. It is doubtless a matter of importance to such societies that their books show all changes in this respect. But it is more important to the assured that some record of the kind be kept, in order that his wishes in the premises may not, after his death, be defeated. And obviously the beneficiary is profoundly interested in having such defi-

nite and reliable record evidence of his ownership. It would be a dangerous precedent were we to hold that the designation of the change of beneficiary by entry upon the books of the company is not imperative. Disregard of the prescribed mode of substitution would tend to frustrate the wise and benevolent object to which these societies owe their existence. And if such changes could be made simply by delivery of the certificate, accompanied with oral declarations, any relative or dependent who might become possessed of the instrument would have it in his power to nullify the purpose of the deceased donor, and deprive the true donee of the bequest. If McHatton desired to have his son receive all of the insurance fund, notwithstanding his remarriage, it was only necessary for him to comply with the plain language of the certificate. His failure in this regard, coupled with the decease of the beneficiary named, left the fund without any designated owner.

Equity occasionally aids an attempted but uncompleted change of beneficiary. If the assured has done his part towards perfecting the substitution in accordance with the method prescribed, but, owing to circumstances over which he has no control, the change is not entirely consummated at the time of his death, equity will sometimes treat the substitution as complete. *Bac. Ben. Soc.* §§ 309, 310, and cases cited. But it is an essential prerequisite to the interposition of equity that the assured has in good faith attempted to comply with the prescribed mode of substitution. McHatton made no effort to do this. It does not appear that he communicated, orally or in writing, to the secretary, or to any other officer of the association, a desire to have the proceeds from the risk paid to his son, or that he otherwise sought to secure the proper entry in the association's books. We are not called upon to consider what the result would have been had the society, upon McHatton's decease, refused payment, and asserted a right to the reversion. *Id.* § 243. For, while it declined to give either of the claimants preference, it voluntarily deposited the money with the court, to be awarded to them as equity and the law might direct. It is not a party to the present record, and no further notice will be taken of any possible interest it might have possessed.

Did the court below, under all the circumstances above detailed, err in refusing to award appellant for the use of the son the entire proceeds from the certificate? The insured member of such societies has himself no interest in the fund. He possesses simply a power of appointment, which, if not exercised, becomes inoperative. *Hellenberg v. District No. 1, etc.*, supra; *Bac. Ben. Soc.* § 243, supra. It would seem to follow that the insurance money could not in any event become assets of the insured's estate. *Eastman v. Association*, supra; *Worley v. Association*, 3 McCrary, 53, 10 Fed. Rep. 227. That it cannot be used for the payment of his debts is stipulated in the agreed statement of facts, and declared by express legislative enactment. *Mills' Ann. St.* § 3246. The argument of

counsel tends to show that the constitution adopted by the benefit association of which McHatton was a member designates how the fund shall be distributed among the assured's relatives in cases like the present, where upon his death there is no specified beneficiary; but, since this constitutional provision is not a part of the record before us, we cannot be guided by its direction. It is unnecessary, however, to rest our decision upon either the statute of descents and distributions or the constitution of the association. Appellant, as guardian, recovered as much as would have belonged to the son were this constitution or statute applicable; and it is apparent from what we have said that, in the absence of some statute, by-law, or contract touching the subject, he is not entitled to more. The apportionment of the fund in question made by the district court is eminently fair, and cannot be disturbed at the instance of appellant. The judgment is affirmed.

(16 Colo. 381)

COLORADO M. RY. CO. v. CROMAN *et al.*

(Supreme Court of Colorado. April 27, 1891.)

EMINENT DOMAIN—CONDEMNATION—MINING LANDS
—APPEAL.

1. The rights of the owner of a mining claim to the surface ground of his location are dependent on the relation which the vein, in its course and direction, bears to the surface, and where, on appeal by a railroad company from a judgment awarding damages in proceedings to condemn the surface over mining claims, the abstract fails to show the direction and course of the vein, the judgment will not be reversed on the ground that the evidence did not show certain rights of the owners of the mining claims to the surface.

2. A railroad company, in proceedings to condemn land, cannot at the same time, in the same suit and petition, set up a title in fee in itself, and ask an adjudication upon it, since its right to ask condemnation depends on the fact that the property belongs to another.

Commissioners' decision. Appeal from district court, Pitkin county.

This was a proceeding in condemnation, started by the railroad company in July, 1886, against Croman and numerous other parties, to obtain title to certain lands in the vicinity of the city of Aspen, required for trackage and other purposes. The properties across which the company sought to run its lines were sundry mining claims, averred to belong to various defendants, who were made parties to the suit. The petition contained all the averments essential to show interest in the defendants, and right on the part of the petitioners to condemn. In addition to these averments, the company set up that the land they wanted was within the limits of an agricultural entry made by Henry Hopkins, the grantor of one Van Hoesenbergh, who had deeded it to them. The appeal was perfected under the act of 1885, and there is nothing before this court but the abstract. Under the act, it is made incumbent upon the appellant to set forth in his abstract sufficient for a full understanding of the questions presented for decision. This abstract is made up almost wholly of statements which apparently are mere summaries of what the appellant

judges was proven by the respective parties. No pleadings are set out, other than the petition, and a disclaimer filed on behalf of Van Hoesenbergh. The only three claims which were awarded damages were the Home Stake, the Mary B., and the Pride of Aspen. As to the balance the jury found that the owners would sustain no damage by the taking. The owners of the Home Stake introduced a receiver's receipt for their claim, issued in the month of May, 1886. As to the Pride of Aspen and the Mary B., it is recited that the claimants were the owners of the lode claims, and that location certificates thereof were introduced in evidence. Neither the dates of the certificates nor the time of the inception of the title of either of those claims appear. It is recited "that all of the mining claims were located across the strike of the vein, which apparently dipped under the land sought to be condemned." The discovery in each is conceded. No evidence was brought up which shows the direction or the course of the vein within the limits of the respective claims, or which indicates the point at which the lode comes nearest to the strip to be condemned. Neither side introduced evidence on this subject, so far as can be learned from the record. The company introduced evidence showing that in June, 1885, Henry Hopkins made his final proof as an agricultural claimant of all of the land embraced within the strip in controversy, and in June, 1886, upon the payment of the price of agricultural land, received from the proper officers of the government a receiver's receipt therefor. Transfers from him to Van Hoesenbergh, and from Van Hoesenbergh to the company, were introduced without objection. The company proved the *situs* of the discovery shafts of these three claims, but gave no other evidence as to the location of the vein with reference to the strip, or as to its direction within the claims.

Henry T. Rogers, A. E. Pattison, and Wilson & Stimson, for appellant.

BISSELL, C. (after stating the facts as above.) Upon the record it is impossible for this court to do otherwise than affirm the judgment or order of condemnation. The objection that the testimony is insufficient to support it is not well taken. The appellants contend that under one instruction, which the court gave, they were entitled upon the testimony to have the verdict set aside. The court instructed the jury, in substance, that a mining claim must be located along the course of the vein, and that the locators of a claim running across the strike of it could obtain no title to the surface ground within the limits of the location, except for the statutory distance on either side of the middle of the vein, and, should the jury find that the strip in controversy was outside of the limit, then the claimants could not recover damages for the taking of the surface by the company. It is urged that, under this instruction, the case as made does not justify the verdict. Assuming the instruction to be correct, the appellant's claim would be well founded, if it were shown by the record that the testi-

mony introduced established those facts which make the instruction pertinent and applicable. It is well settled that the rights of the miner to the surface ground of his location are dependent upon his discovery, and upon the relation which the vein, in its course and direction, bears to the surface as it has been located. The grant of the vein has always been held to be the principal thing, and the surface but an incident, which, as to its extent, is entirely determined by the course of the principal thing granted, to-wit, the vein. *Patterson v. Hitchcock*, 3 Colo. 533. While this is true, if the petitioner in condemnation desires to avail himself of the force of this principle, and obtain rights by virtue of its application, it is incumbent upon him to establish whatever facts are essential to show its applicability. This he has not done in the present case, and it is impossible for the court upon the record to adjudicate that the order should be reversed for this reason.

The other errors complained of are based on the various instructions given to the jury, and on the refusal of the court to give proper weight to the petitioner's rights in the property, which are said to grow out of the title of the agricultural claimant, *Hopkins*. Some of these instructions, notably the third and fourth, are open to criticism, and might necessitate the reversal of the case, if it appeared that the company were prejudiced by what the court announced as the law. The difficulty is that, if error at all, it was error without prejudice. Appellant cannot be permitted in this proceeding to seek a condemnation of certain lands, and at the same time, and in the same suit, and in the same petition, set up a title in fee in itself, and ask an adjudication upon it. Proceedings in condemnation can only be instituted under the particular statutes which warrant them. The statutes from which the authority to institute them are derived limit the right to certain classes, to-wit, those who seek to take property belonging to others for purposes designated in the enactments upon that subject. If the petitioner is unable to bring himself within the *descriptio personæ* of some act from which he derives his rights, or if he fails to show that he is seeking to take private property, and desires to ascertain its value in that proceeding, his petition must be dismissed. His right to maintain it is as much dependent upon the fact that he desires to take certain property belonging to another person, for a price to be ascertained in the suit, as it is upon his being found to be included in the class to which some statute concerning eminent domain gives the right to proceed in this manner. It has been adjudged that, in the absence of any limitation in the petition, a title in the respondent which justifies the assessment in his favor of full compensation is conceded. *Railway Co. v. Haggart*, 9 Colo. 346, 12 Pac. Rep. 215. If the petitioner himself claims title in fee to the property, the very assumption of that fact in his petition ought to destroy his right to either institute or continue the proceedings, for they are only warranted where he

seeks to obtain the property of another. The two things are wholly inconsistent. The petitioner, having instituted an action under the eminent domain act, cannot be allowed to maintain the same for the mere purpose of quieting title. *Railroad Co. v. Allen*, 13 Colo. 229, 22 Pac. Rep. 605, also 9 Colo. and 12 Pac. Rep. supra; *Railroad Co. v. Strange*, 63 Wis. 178, 23 N. W. Rep. 432. The judgment should be affirmed.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

SIOUX CITY NURSERY & SEED CO. v. MAGNUS.

(Court of Appeals of Colorado. July 7, 1891.)

PRINCIPAL AND AGENT—AUTHORITY OF AGENT.

Where an agent, whose authority was limited to taking orders for future delivery, assumed the right to receive in payment certain chattels, which he appropriated to his own use, without the knowledge of the principal, and there was no evidence that his authority exceeded that usually incident to such agency, the principal was not liable for the chattels, nor was it bound to deliver the goods ordered until it received payment.

Appeal from Arapahoe county court; GEORGE W. MILLER, Judge.

H. B. Johnson, for appellant. Browne, Putnam & Preston, for appellee.

RICHMOND, P. J. The action in this case was originally commenced before a justice of the peace of Arapahoe county, and from the summons issued the character of the suit appears to be in the nature of a money demand for a sum not exceeding \$300. The cause was appealed to the county court. Trial was there had, and judgment rendered against appellant for the sum of \$200. To reverse this judgment this appeal is prosecuted. The facts out of which the action arose, as they appear from the record, are that on the 21st and 28th of January, 1889, at the solicitation of one Wheeler, an agent of the defendant, the Sioux City Nursery & Seed Company, Peter Magnus made two orders on said company for a certain amount of nursery stock. At the time of making the orders, Wheeler received from plaintiff two horses in full payment of \$200 worth of nursery stock mentioned in the order. Thereafter the appellant shipped the stock to Denver, and offered to deliver the same, if paid for, refusing to recognize the action of its agent in taking the horses in payment for the nursery stock. The testimony shows that the agent took the horses, giving a receipt for their value, and thereafter appropriated them to his own use, concealing the transaction from the company. This action is therefore brought by plaintiff, Magnus, against the company to recover for the value of these horses so alleged to have been delivered to the agent in payment for the nursery stock which the company refused to deliver, and for the additional sum of \$100 mentioned in a certain order of Wheeler upon the company to be paid to Magnus on

of his commissions when the nursery stock so ordered should be delivered. The order given by Magnus is in the following words: "I, Peter Magnus, this day bought of E. A. Wheeler, agent, the following bill of trees, vines, plants, etc., to be delivered in good order from the Sioux City Nursery and Seed Company, Sioux City, Iowa: [Here follows the enumerated stock, with prices.] Shipped from Denver. To be delivered at Littleton, Colorado, in the spring of 1889, for which I agree to pay \$150 in cash on the day of delivery. Notice to be sent of the day of delivery. Should I not call for the goods on the day of delivery, I agree to pay expense of delivering stock to my place. No countermand accepted. If not settled for on delivery, payment shall be due at Sioux City, Iowa. [Signed] PETER MAGNUS. Dated January 21st, 1889." The receipt given by Wheeler reads as follows: "Received of Peter Magnus two bay mares, about 3 and 4 years old, branded M on left thigh, in full payment for two bills of nursery stock, one bill for \$150 and the other for \$50, bought of the undersigned. E. A. WHEELER."

The contention of plaintiff is that this agent had authority, express or implied, to make this sale and accept payment. The testimony on the part of the defendant company is to the effect that no such authority existed, and that the agent was not authorized to accept payment, even in cash. A careful review of the transcript and abstract leads us to the conclusion that it is wholly unnecessary for us to determine whether or not the agent was authorized, by implication or otherwise, to collect the money. The fact exists that he did not collect money, but made a bargain to take in exchange for the stock the two horses. This is shown in Wheeler's receipt. The general principle is that payment to the agent must be made in money, in the absence of express authority to him to receive payment in something else than money. *Drain v. Doggett*, 41 Iowa, 682; *Manufacturing Co. v. Givan*, 65 Mo. 89; *Kendall v. Wade*, 5 La. Ann. 157; *Burger v. Limbach*, 42 Mich. 162, 3 N. W. Rep. 942; *Broughton v. Silloway*, 114 Mass. 71; *Lumpkin v. Wilson*, 5 Helsk. 555; *Organ Co. v. Starkey*, 59 N. H. 142. And, even in cases where it has been decided that a general agent to collect and settle debts may receive property in payment, it nevertheless is held that such an agent cannot buy property of the debtor and thereby create a debt against his principal. This transaction, it seems to us, is fully covered by the principles above cited. Here was a general agent, with power to sell, sent out by his principal to take orders for stock to be delivered at a future time. The stock was not intrusted to his care or possession, and at the time of taking the order he assumed the right to exchange it for horses, and thereby bind his principal. He took the horses, executed the receipt above set forth, and reports to his company, transmitting the orders, to the effect that, upon delivery, the stock so ordered will be paid for in cash. The company, wholly ignorant of the transaction, relying implicitly upon the representations

of the agent, prepare the stock, ship it to Colorado, and made offer to deliver upon payment in cash. Magnus declined to pay, and insisted that he was not only entitled to receive the stock mentioned in the orders, but was entitled to credit as payment for the value of the horses, as set forth in the receipt of Wheeler, and for the additional sum of \$100 mentioned in the order. We have examined with considerable care every authority cited in the briefs of appellant and appellee, and can unhesitatingly say that we are unable to find a single authority supporting this contention of appellee. *Greenhood v. Keator*, 9 Ill. App. 183; *Kane v. Barstow*, 42 Kan. 465, 22 Pac. Rep. 588; *Butler v. Dorman*, 68 Mo. 298; *Law v. Stokes*, 32 N. J. Law, 249; *Clark v. Smith*, 88 Ill. 298; *Seiple v. Irwin*, 30 Pa. St. 513. The fact does appear in the record that a former agent of the defendant company named Brownlee introduced Wheeler to plaintiff Magnus, and represented that he had the same authority which the company had conferred upon him a year or more previous, with whom Magnus had dealt, and to whom he had paid money upon delivery. There are other circumstances disclosed in the record which appellee insists tends to establish the authority of this agent to receive payment in full. For the purposes of this case we might readily concede the position taken by appellee, but, under the authorities and the facts disclosed by the record, we are not prepared to announce that the plaintiff has a right of recovery against the defendant company for the value of the horses bartered by the agent in exchange for the company's stock. It certainly seems as though the plaintiff ought to have known that the agent of the company was exceeding his authority when he undertook to make this trade. The judgment of the court must be reversed.

TWIN LAKES HYDRAULIC GOLD MINING SYNDICATE, Limited, *et al.* v. COLORADO M. RY. CO.

(Supreme Court of Colorado. June 5, 1891.)

EMINENT DOMAIN—MINING LANDS—DAMAGES—INSTRUCTIONS.

1. In proceedings by a railroad company to condemn placer mining land, an instruction that "the fact that the land is designated as 'placers,' and that the title thereto was acquired under the mining laws of the United States, constitute no evidence that the ground in question contains valuable deposits of gold or other mineral, or that the same is valuable for placer purposes," is not objectionable, if in the same instruction the jury are told that, if they believe from the evidence the land contains deposits of gold, they may consider the fact as bearing on the question of its value, and that, if the presence of gold enhances either the market or intrinsic value of the land, due weight must be given to that fact.

2. Since, under Code Civil Proc. Colo. § 253, the value of property taken in condemnation proceedings is the actual value thereof at the time of the appraisement, an instruction that the value of the land taken and damages to the residue are to be assessed in accordance with the situation of the property and conditions existing at the date the petition for condemnation is filed, is reversible error.

Commissioners' decision. Error to district court, Chaffee county; WILLIAM HARRISON, Judge.

This was a proceeding in condemnation, instituted by defendant in error to acquire the right of way for a railroad across placer mining property of plaintiffs in error. It having been deemed important that the railroad company should have immediate possession of the right of way for the purposes of construction, without waiting the conclusion of legal proceedings determining the amount of damage, the parties entered into a contract in which, with various other provisions, covenants, and stipulations, occurs the following: "In consideration of the foregoing covenants and agreements to be kept and performed by the party of the first part, said party of the second part hereby agrees that said first party may enter into the immediate possession of said premises for the purposes aforesaid, and may begin at once in the construction of its railway thereon. And it is further agreed by and between the parties hereto that this memorandum of agreement may, upon the hearing before the commissioners or the jury which may be appointed in the proceeding to condemn, to be instituted as aforesaid, be read in evidence, and considered by such board of commissioners or jury in determining the amount of compensation which shall be paid by said second party for the premises hereinbefore described, for the purposes herein mentioned. And it is further agreed, by and between the parties hereto, that this memorandum of agreement shall be a covenant binding upon the parties hereto and their assigns. It is also further agreed and covenanted, as a consideration of this instrument, that proceedings in condemnation shall be commenced by the party of the first part at once, by the filing of its petition in the proper court, and that a hearing, either before commissioners or a jury, shall be had without unnecessary delay, such hearing to extend to all other questions of damage not included or provided for by this agreement." Possession was at once taken, and construction proceeded. The contract bears date November 25, 1886. On December 13th the petition for condemnation was filed. The case was tried to a jury under the provisions of the statute, commencing on May 12th, resulting in a verdict of condemnation, and a finding of \$1,000 as the value of the land taken, and damage to residue of property of \$3,000; judgment in accordance with the verdict, and an appeal taken from such judgment. Various errors are assigned, but those relied upon by counsel for plaintiffs in error are on exceptions taken to the instructions to the jury, given as asked by defendant in error. The fourth, relied upon as erroneous, is as follows: "(4) That in determining the compensation for the land taken, and the resulting damages, if any, to the remaining land, they may consider not only the uses and purposes to which it is now applied, but also any other reasonable use to which it may be adapted or might be appropriated by men of ordinary prudence and judgment. That, if

they believe from the evidence the land contains deposits of gold, they may consider that fact as bearing upon the question of the value of the premises; and that, if the presence of gold enhances either the market value or the intrinsic value thereof, due weight must be given to that fact; but that, if the value is not thereby increased, the mere fact that gold can be found upon the premises should be disregarded. That the fact that the land is designated as 'placers,' and that title thereto was acquired under the mining laws of the United States, constitute no evidence either that the ground in question contains valuable deposits of gold or other mineral, or that the same are valuable for placer purposes."

Patterson & Thomas, for plaintiffs in error. *A. E. Pattison* and *H. F. Rogers*, for defendant in error.

REED, C., (after stating the facts as above.) Counsel contend that the fourth instruction was erroneous, in charging "that the fact that the land is designated as 'placers,' and that the title thereto was acquired under the mining laws of the United States, constitute no evidence either that the ground in question contains valuable deposits of gold or other mineral, or that the same is valuable for placer purposes." This clause of the instruction, above cited, should not be examined alone, but in connection with the balance of the instruction. To do otherwise would be in violation of a well-settled rule. The supposed objectionable clause is preceded in the same instruction by the following: "That in determining the compensation for the land taken, and the resulting damages, if any, to the remaining land, they may consider not only the uses and purposes to which it is now applied, but also any other reasonable use to which it may be adapted or might be appropriated by men of ordinary prudence and judgment. That, if they believe from the evidence the land contains deposits of gold, they may consider that fact as bearing upon the question of the value of the premises; and that, if the presence of gold enhances either the market value or the intrinsic value thereof, due weight must be given to that fact,"—which materially modifies the clause in question. Taken as a whole, we cannot see that it is objectionable. It fairly presents the premises or basis from which a jury could arrive at the value. The clause objected to, in our view of it, only amounts to saying that the estimated value of the property was not to be enhanced and exaggerated by reason of its having been regarded by the land department of the government and purchased from it as mineral or gold-producing land, and held and worked as mines. If this construction is correct, we cannot regard the instruction as erroneous. We are cited to numerous authorities, which we have carefully examined. They are to the effect that the designation of the character of the land granted in the patent, whether as swamp, agricultural, or mineral, is conclusive, and cannot be brought in question in collateral proceedings. Here there was no question in

regard to the character. Its character as mineral land was conceded. It was so regarded in the contract, and recognized as being actually occupied and worked as placer mines. But such conclusivo characterization did not fix its value. It might, as mineral land, be worth no more than five dollars per acre, the price fixed by law; it might be worth thousands. What the value was, was the question to be determined by the jury from the evidence. True, in the statute under which the patent issued, mineral lands are defined to be, in the act of 1872, "as those containing valuable mineral deposits;" and, in the Revised Statutes of the United States, as lands "valuable for minerals;" and it is said that "valuable mineral deposits" in lands belonging to the United States shall be free and open to exploration and purchase. This language being in the statute, it is contended that the last clause of the instruction—"constitutes no evidence either that the ground in question contains valuable deposits of gold or other mineral, or that the same are valuable for placer purposes"—is at variance with the statute, and that sale of the land as mineral was conclusive of the fact that it contained valuable deposits. We do not so regard it. We can only construe it as saying that the land, though containing valuable deposits, was not necessarily of great value, as it might not contain gold in sufficient quantity for profitable working; and that the question of what value must be determined from the evidence, and not from the grant, which, under the law, presumed or imported value. There is an apparent discrepancy in one respect between the different portions of the charge. That part given at the instance of plaintiff in error was fully as favorable as was warranted, and in some parts might be regarded as contemplating prospective and speculative damage; while that given at the instance of the defendant, though apparently somewhat at variance in this particular with that given on the prayer of the plaintiff, appears to be sustained by, and in the language of, the authorities. That, in estimating damages, merely possible or imaginary uses or speculative schemes of its proprietor are to be excluded, see *Pierce*, R. R. 217; *Searle v. Railway*, 33 Pa. St. 57; *Dorlan v. Railway*, 46 Pa. St. 520; *Fleming v. Railroad Co.*, 34 Iowa, 853; *Worcester v. Manufacturing Co.*, 41 Me. 159; *Lake Shore & M. S. R. Co. v. Cincinnati S. & C. R. Co.*, 30 Ohio St. 604. That it is proper to put in evidence the present and any reasonable use in the future to which the property may be adapted, but not the intentions of the owner as to such future use of the land, see *Sherwood v. Railroad Co.*, 21 Minn. 127; *Pinkham v. Chelmsford*, 109 Mass. 225; *Fairbanks v. Fitchburg*, 110 Mass. 224. It is ably urged in argument that the third and fifth instructions were erroneous in the clauses where it was said that the value of the land taken and the damages to the residue should be assessed "in accordance with the situation of the property and conditions existing at that time," viz., at the date of filing the petition. The language in our Code of Civil

Procedure, § 253, is: "In estimating the value of all property actually taken, the true and actual value thereof at the time of the appraisal shall be allowed and awarded," etc. The statute is imperative, and the instruction is in violation of it, and technically incorrect. In view of what, according to the record, "the evidence tended to show," we cannot say the error was harmless. Whether or not there was any change of value between the date of the petition and the time of trial is not shown. As it was erroneous, and counsel for plaintiff in error insist that it was prejudicial, the judgment should be reversed, and the cause remanded.

BISSELL, C. I dissent.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is reversed.

(20 Or. 591)

WEEKLUND v. SOUTHERN OREGON CO.

(Supreme Court of Oregon. July 8, 1891.)

NEGLECT—EVIDENCE—INSTRUCTIONS—ASSUMPTION OF RISK.

1. Facts examined, and held that there was no evidence before the jury upon which the court could properly submit the question of defendant's negligence to the jury; and held, further, that when large timbers were being moved on rollers, and those engaged in the work failed to keep the rollers at right angles with the piece of timber being moved, and by reason thereof it slid around so that the end struck a lumber pile which caused some planks to fall upon the plaintiff's leg, by means of which he was injured, that such negligence was the negligence of the plaintiff's fellow-servants, for which the defendant is not responsible.

2. Where the plaintiff assisted in the construction of the chute for moving large timbers, and had as complete knowledge of its sufficiency for the purpose for which it was constructed as the defendant, and received an injury in the moving of the timbers down said chute, defendant is not responsible on account of its alleged unsuitableness for the purpose for which it was used.

(Syllabus by the Court.)

Appeal from circuit court, Coos county; M. L. PIPES, Judge.

This is an action to recover damages for negligence. The complaint substantially charges that on the 28th of June, 1889, the defendant did saw and deliver from its said mill 12 extraordinary large timbers, of about the size of 20x22 inches, and 83 feet long, under the direction of C. F. Lovelace, its foreman and manager, and William Foley, superintendent; and said defendant did, through its said foreman and manager and its said superintendent, direct the plaintiff to assist in removing said timbers from the mill carriage on the wharf into the waters of Coos bay, in front of said wharf, and plaintiff did so assist, and did while so doing exercise due care and diligence; but that by reason of said defendant being grossly negligent in not supplying proper apparatus to handle and remove said timbers, and by reason of the unskillfulness, carelessness, and incompetency of its said foreman, managers, and superintendents, it did attempt to remove the same from said track to said bay across a certain loose pile of lumber then on said wharf, under the direction of said

William Foley, who was then its foreman, manager, and superintendent, directly in charge of said work, and which said pile of lumber was wholly inadequate to support the weight of said timber; that while so doing, the last handled of said timbers did, by reason of the defendant's gross negligence and the incompetency and unskillful and careless handling of said timber, and the insufficiency of said support, and without any fault or negligence on the part of said plaintiff, fall on said pile of lumber on which plaintiff was working, as directed by the defendant through its said foreman, manager, and superintendent, William Foley, who was at said time directly in charge of said work, causing said lumber pile to fall, and a part of which did fall on and break, fracture, and bruise the right leg of the plaintiff, and by reason thereof the right foot of the plaintiff was necessarily amputated between the ankle and knee, causing plaintiff great anguish, etc. It is then, in substance, alleged, further, that Lovelace and Foley were unacquainted with the handling and removal of such large timbers, and incompetent to superintend said work, and defendant had full knowledge of the same, and it was gross negligence on behalf of said defendant to have said Lovelace and Foley in its employ superintending said work, or to undertake to remove said timbers, or any of them, as aforesaid, across said pile of lumber, or at all, it being unprepared to handle timbers of that size, and unskilled in the handling of the same; that the plaintiff was also unskilled in handling such timber. The amended answer denies every material allegation of the complaint, and then alleges the following facts: That at all times thereafter stated George W. Loggie was, and now is, general manager of the business of the defendant within the state of Oregon, and as such general manager was authorized to employ and did employ such subordinates under him as he deemed right and proper in carrying on the business of the defendant; that said Loggie did, as such general manager of the defendant, employ as a subordinate under him the said C. F. Lovelace, in complaint mentioned, and did constitute him foreman in said saw-mill, and did confer upon him power to take charge of the work in and about said saw-mill, and to hire and discharge men working under him in and about the same, subject to the approval of said general manager; that Lovelace did possess and exercise the authority during all the times in the complaint and answer mentioned, and none other, and that said William Foley was at all times a fellow-servant of the plaintiff, and none other, working in and about said saw-mill, and under the control and subject to the orders of said Lovelace; that at the time of plaintiff's employment he represented himself to be a skillful lumber-piler, and had worked in that capacity about a saw-mill in the state of Michigan for a period of about seven years, and that he was capable of taking care of and piling the lumber and timber sawed at defendant's said mill, and that, in reliance on said representations, defendant employed the plaintiff as

chief lumber-piler, to take charge of the lumber and timbers that were sawed at defendant's said saw-mill when run out on the lumber-car on the car track on its wharf, and pile and dispose of the same as directed by defendant, or by C. F. Lovelace, defendant's foreman; that defendant's mode of handling timber and lumber, and its apparatus for handling the same, were well known to the plaintiff during all the time he was in the employ of the defendant, as aforesaid, and was the same at the time the plaintiff's leg was injured as it was at the time plaintiff commenced work for defendant, and as it was during all the time of said service, and with which plaintiff found no fault; that during said time plaintiff frequently took charge of and assisted in the removal of large timbers, which defendant's mill was adapted to cut, and at no time informed defendant that the apparatus provided for their removal was insufficient for the purpose; that, before proceeding to remove the said 12 large timbers mentioned in complaint, Mill-Foreman Lovelace directed William Foley to assist plaintiff in making such necessary temporary apparatus and appliances as should be sufficient and suitable for removing said large timbers from the lumber-car on the mill track into the waters of Coos bay; that plaintiff and said Foley, without objection from either, undertook said work, and made such temporary apparatus and appliances as they deemed suitable and safe for the removal of said timbers; that the mill car track was elevated above the wharf the distance of 10 feet, and the distance from said car track to the edge of the defendant's wharf, where said timbers were being removed, was 68 feet; that at said time there was a certain pile of lumber on the wharf, placed there by plaintiff, between the car track and the edge of the wharf, which was about 65 feet long, 6 feet high, and about 14 feet wide, and that plaintiff and Foley utilized this pile of lumber in removing said timbers by constructing a chute over and upon said pile of lumber, using heavy timbers for blocking, and planks 4 inches thick, securely fastened together, in such manner as to prevent their spreading apart, whereby a chute having a smooth surface was formed, extending from the said car track to the edge of said pile of lumber, securely fastened to said car track, and having a gradual incline to the end of said pile of lumber, to within 2 or 3 feet of the edge of the wharf. That plaintiff and Foley had full power and authority to make said temporary apparatus and appliance as safe and secure as they deemed necessary, and to obtain any article necessary therefor, and that the mill foreman believed said chute, after inspection, to be safe and secure for the removal of said timbers. The remaining part of this separate answer describes the manner of the removal of the timbers, and the manner in which the plaintiff was injured. The immediate manner of the injury is stated, in effect, that in the removal of said last piece of timber the lumber pile upon which said chute rested was being pressed out by said timber, and said Foley, who as well as the plaintiff was stand-

ing on said lumber pile, called to the plaintiff to jump or get out of the way, and at the same time jumped himself, and other persons present warned plaintiff of the danger; but the plaintiff delayed getting off of said lumber pile until a portion thereof was ready to fall, and then attempted to slide over the side of said lumber pile, or jumped down close to the side thereof, so that some heavy boards or plank fell and struck and broke plaintiff's leg. Another separate answer alleges that whatever danger there was in the removal of said timbers was patent to the plaintiff and other employees of said mill, and that defendant had no reason to believe that there was any danger to plaintiff in removing said timbers. Another defense alleges contributory negligence. Still another defense alleges want of due care in fellow-servants engaged in and about the removal of said timbers with plaintiff. The reply denies the new matter in the answer. The plaintiff recovered judgment, from which defendant appealed.

S. H. Hazard, for appellant. *J. W. Bennett*, for respondent.

STRAHAN, C. J., (after stating the facts as above.) An unusual number of exceptions were taken to the instructions given and refused by the court, but the view we have taken of the case renders it unnecessary to examine each exception. The real facts in this case are covered up in a vast amount of unnecessary verbiage, but, when relieved of it, they are few and plain. In the spring of 1899 the plaintiff entered the service of the defendant to pile lumber at its saw-mill on Coos bay, and the uncontradicted evidence shows that one employed in that capacity, according to the uniform custom of the mills there, also assisted in taking care of all the lumber that came from the mill; and it further appears that the plaintiff, after his employment, and up to the time of the injury complained of, assisted in moving and caring for whatever lumber was turned out by the mill. One Shagreen and Foley were employed by the defendant, who worked with plaintiff about the yard, Foley acting in the capacity of a kind of wharf-boss. The accident complained of occurred in moving timbers from defendant's saw-mill into Coos bay. The timbers to be moved were 12 in number, 20x22 inches, and 88 feet long. The distance from the end of the car track to the bay was 68 feet, which was the distance the timbers had to be moved. A pile of lumber 64 or 65 feet long, from 15 to 20 feet wide, and about 8 feet high, extended from the mill nearly to the edge of the wharf. On the top of this lumber pile a chute was constructed by Foley and the plaintiff, but under Foley's directions. In the first place, a number of pieces of timber 5 inches thick, from 12 to 33 inches wide, were laid across the lumber pile, and on top of these were laid two planks, each 4x12 inches wide, extending to the edge of the wharf on a gradual incline. On the top of the chute thus formed were placed three rollers 10 inches in diameter and 2½ feet long. The planks were securely spiked to their supports, and dogged together so that the

same could not and did not separate. The timbers were pinched from the carriage until they rested upon the rollers. The rollers were kept straight by men with mauls attending them, as the timber was slowly and gradually moved upon them. The incline was so slight and gradual that they had no difficulty in regulating the movement of the timber on the rollers until the middle of the stick passed the edge of the wharf, where it plunged into the waters of the bay. All of the timbers were launched without accident to anyone until it came to the last. After this stick was upon the rollers, they were not kept at right angles with it, and the front end slued round, striking the lumber pile upon which the plaintiff and others engaged in the work were standing. This caused a number of the boards from the top of the pile to fall upon the plaintiff's leg, by means of which it was broken. Neither the chute, nor any of the cribbing supporting it, separated or failed in any way, and the sole cause of the injury was the sluing of the rollers. We think all the evidence on both sides, so far as it relates to, accounts for, or explains the manner of the injury, concurs in this. At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit for the reason that the plaintiff had not proven a case sufficient to be submitted to the jury. This was overruled, and an exception taken; but we do not propose to pass upon this exception, as the case will be disposed of on other grounds. The court charged the jury upon the theory that there was some evidence before them of negligence on the part of the defendant upon which they might find a verdict for the plaintiff. In this we think the learned circuit judge erred. The most that can be said for the plaintiff's evidence is that some of it tended to prove, or at least some of the witnesses gave it as their opinion, that the better way to have launched those timbers was to lower them from the carriage, by means of an apron, down upon the wharf, and then move them into the water; but this is not enough to prove that the defendant was negligent in adopting the means which it did. It does not tend to prove that the plan adopted by the defendant was not reasonably safe or secure. In addition to this, all the evidence tends to prove that, if the piece of timber had been kept upon the chute, there was no possible danger. It was the inattention of the men at the rollers with the mauls that caused the rollers to slue round, which made the end of the stick strike a portion of the lumber, and caused the same to fall, and this was what injured the plaintiff. These men and all engaged in the moving of these timbers were the fellow-servants of the plaintiff, and if they were negligent the master was not liable for it. The negligence of fellow-servants is one of the risks which the plaintiff assumed when he entered the defendant's service. But in addition to this the plaintiff assisted in the construction of the chute. He knew all about its structure and purpose. The defendant had no knowledge on that subject that was not equally possessed by the plaintiff. And

after the chute was completed the plaintiff pronounced it safe and suitable for the purpose for which it was made. If an injury happened to the servant under these circumstances, the master is not responsible. *Kiellay v. Silver Min. Co.*, 3 Sawy. 500; *Bunt v. Gold Mining Co.*, 11 Sawy. 178, 24 Fed. Rep. 847; *Loonam v. Brockway*, 28 How. Pr. 472; *McGlynn v. Brodie*, 31 Cal. 376; *Railroad Co. v. Jewell*, 46 Ill. 99. For the reasons that many of the instructions given by the court were not justified by the evidence, and are at variance with what is here said, the judgment appealed from must be reversed, and remanded for such further proceedings as may be proper, not inconsistent with this opinion. In disposing of this case we have not found it practicable to examine each exception. The defendant asked 54 instructions, many of which were given in a modified form, others were refused, and some of them were given as asked. The court gave 50 instructions, to many of which exceptions were taken. To examine separately each of these rulings would require more time and labor than we can bestow upon a single case. Nothing short of a moderate sized treatise on the law of negligence and its cognate subjects would suffice. Such voluminous instructions must tend to confuse the jury rather than elucidate the questions they are to consider. A few plain and simple propositions of law applicable to the facts will aid them in reaching a correct conclusion much more effectually than some of the complicated statements to be found in this record. Let the judgment be reversed, and the cause remanded to the court below for such further proceedings as may be proper, not inconsistent with this opinion.

BEAN, J., having presided at two former trials of this case, did not sit here.

COOK V. PORT OF PORTLAND.

(Supreme Court of Oregon. July 8, 1891.)

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—TAXATION.

1. Laws Or. 1891, p. 791, incorporates certain cities named therein as the "Port of Portland" for the purpose of improving the navigation of the Willamette and Columbia rivers between those cities and the sea, so as to maintain therein a ship channel of specified width and depth; and confers on it power to borrow money and to levy taxes in furtherance of that purpose. *Held*, that the corporation so created is municipal, within the meaning of Const. Or. art. 11, § 2, prohibiting the creation of corporations by special law "except for municipal purposes."

2. As the proposed improvement will especially benefit the inhabitants of the district so incorporated, the power so granted to levy taxes within that district is not in contravention of the constitutional requirement that taxation shall be equal and uniform.

STRAHAN, C. J., dissenting.

Appeal from circuit court, Multnomah county; LOYAL B. STEARNS, Judge.

Dolph, Bellinger, Mallory & Simon, for appellant. *Ellis G. Hughes*, for respondent.

BEAN, J. This suit involves the constitutionality of an act of the legislative as-

sembly of this state entitled "An act to establish and incorporate the Port of Portland, and to provide for the improvement of the Willamette and Columbia rivers in said port and between said port and the sea." Laws 1891, p. 791. This act, in terms, creates a separate district, with defined boundaries, which embraces substantially what was at the time of the passage the cities of Portland, East Portland, and Albina, and now the city of Portland, to be known as the "Port of Portland," and the inhabitants thereof are constituted and declared to be a corporation by the name and style of the "Port of Portland," and as such to have perpetual succession, and by said name to exercise and carry out all the corporate powers and objects by said act conferred and declared, make all contracts, hold, receive, and dispose of real and personal property, such as may be necessary, requisite, or convenient in carrying out the objects of said corporation, as therein set out and expressed, and sue and be sued, plead and beimpleaded, in all actions, suits, and proceedings brought by or against it. By said act it is declared that the object, purpose, and occupation of such corporation shall be to so improve the Willamette river at the cities of Portland, East Portland, and Albina, and the Willamette and Columbia rivers between said cities and the sea, as that there shall be made and permanently maintained therein a ship channel of good and sufficient width, and having a depth at all points at mean low water, both at said cities and between said cities and the sea, of not less than 25 feet. So far as is necessary, requisite, or convenient to carry out the said object, this corporation is given full control over said rivers at and between said cities and the sea, so far and to the full extent that this state can grant the same, and in carrying on said work is given the same power of eminent domain as exists under the laws of this state in favor of corporations organized for the construction and operation of railroads. For the purpose of providing funds necessary for such improvements said corporation is authorized from time to time to borrow money in such sums as may be found necessary, not exceeding the sum of \$500,000, and to issue its promissory notes or bonds therefor; and is given power to assess, levy, and collect taxes upon all property, real and personal, within its boundaries, and which is by law taxable for state and county purposes, not exceeding the rate therein provided. The power and authority given to the corporation, the Port of Portland, is vested in and to be exercised by a board of commissioners, named therein, and their successors in office, chosen as in said act provided, who shall serve without salary or compensation, except for actual expenses incurred by any commissioners while engaged in the actual work of the corporation.

At the outset it is well to observe that every court approaches with hesitancy the question of declaring a law unconstitutional, and never exerts its power so to do while doubt exists. Every intendment must be given in favor of its validity. As was said by LORD, J., in *Cline v. Green-*

wood, 10 Or. 241: "Before a statute is declared void in whole or in part its repugnancy to the constitution ought to be clear and palpable, and free from doubt. Every intendment must be given in favor of its constitutionality. Able and learned judges have, with great unanimity, laid down and adhered to a rigid rule on this subject. Chief Justice MARSHALL in *U. S. v. Peters*, 5 Cranch, 128; Chief Justice PARSONS in *Kendall v. Kingston*, 5 Mass. 534; Chief Justice TILGHMAN in *Smith v. Insurance Co.*, 3 Serg. & R. 72; Chief Justice SHAW in *Inhabitants of Norwich v. Commissioners*, 13 Pick. 61, and Chief Justice SAVAGE in *Ex parte McCollom*, 1 Cow. 564,—have with one voice declared that it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts be considered void. The opposition between the constitution and the law should be such that the people feel a clear and strong conviction of their incompatibility with each other." Keeping these views in mind, we proceed to the examination of the question before us. It is first contended by plaintiff that the act incorporating the defendant, the Port of Portland, is repugnant to section 2 of article 11 of the constitution, which provides that "corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes." Under this section there can be but one question: What is a corporation created for municipal purposes? No corporation can be created by special act except for municipal purposes, but there is no limitation on the creation of corporations for municipal purposes by special act. Any corporation for municipal purposes may therefore be thus created. If, then, the Port of Portland is a corporation created for municipal purposes, the act creating it is not repugnant to this section of the constitution. The whole question, therefore, turns upon the meaning of the phrase "municipal purposes," as used in the constitution. The word "municipal" is defined by the lexicographers as belonging to a city, town, or place; having the right of local government; belonging to or affecting a particular state or separate community; local; particular; independent. It is usually applied to what belongs to a city, but has a more extensive meaning, and is in legal effect the same as public or governmental, as distinguished from private. Burrill, tit. "Municipal." Thus we call municipal law not the law of a city only, but the law of the state. 1 Bl. Comm. 44. Municipal is used in contradistinction to international. Thus we say an offense against the law of nations is an international offense, but one committed against a particular state or separate community is a municipal offense. And so are municipal affairs public affairs, and municipal purposes are public or governmental purposes, as contradistinguished from private purposes. A corporation, therefore, created for municipal purposes, is a corporation created for public or governmental purposes, with political powers to be exercised for the public good in the adminis-

tration of civil government, whose members are citizens, not stockholders; an instrument of the government, with certain delegated powers, subject to the control of the legislature and its members, officers, or agents of the government for the administration or discharge of public duties. A city, or purely municipal corporation, is perhaps the highest type of a corporation created for municipal purposes, because it is a miniature government, having legislative, executive, and judicial powers; but there is another class of corporations, such as counties, school-districts, road-districts, etc., which, though varying in application and peculiar features, are but so many agencies or instrumentalities of the state to promote the convenience of the public at large, and are, in the broadest use of the term, for municipal purposes. It would be a narrow and unwarranted construction of the language to say that "municipal purposes" means only city, town, or village purposes. The constitution of this state evidently contemplates the creation of counties under the direct supervision of and by special act of the legislature, yet no direct power is given to create them, and the section under consideration contains a direct prohibition against doing so, unless the word "municipal" covers this class of corporations. We thus perceive that the word "municipal" not only applies to cities, towns, and villages, but has a broader and more general signification relating to the state or nation. And therefore the words "municipal corporations," as applied to incorporated cities or towns, and "municipal purposes," are not synonymous. The latter embrace, by the common speech of men before and since the days of Blackstone, state or national purposes. And therefore, while cities, towns, and villages are for municipal purposes, there are also other corporations for municipal purposes that are not of that class. It was in the broader and more general sense of the term that the words "municipal purposes" were used in the constitution of this state. This is evident from section 9 of the same article of the constitution, wherein it is provided that no county, city, town, or other municipal corporation, by a vote of its citizens or otherwise, shall become a stockholder in any joint-stock company, corporation, etc. Here is a direct interpretation from the constitution itself. A municipal corporation is not necessarily a county, city, or town. Were it so, the added words, "or other municipal corporations," would be without meaning. Clearly a corporation for municipal purposes is one composed of citizens, as distinguished from stockholders; a public, as distinguished from a private, corporation. In *Curry v. District Township*, 62 Iowa, 104, 17 N. W. Rep. 191, it is said: "The word 'municipal,' as originally used, in its strictness applied to cities only. But the word now has a much more extended meaning, and, when applied to corporations, the words 'political,' 'municipal,' and 'public' are used interchangeably." In *Horton v. School Com'rs*, 43 Ala. 552, an act had been passed which repealed all

prior laws upon the subject of taxation except those created for municipal purposes, and it was held that these are not words of technical import, and should be construed to apply to a corporation to carry on a public free school, and to raise funds for its support. In *People v. Solomon*, 51 Ill. 37, under an act of the legislature providing for the location and maintenance of a park for the towns of South Chicago, Hyde Park, and Lake, those towns were erected into a park district; and the people of the towns affected by the act having by a vote accepted its provisions, the board of park commissioners thereby created, and appointed by the governor, to whom was committed the entire control of the park, was held to be a municipal corporation. In whom it was competent for the legislature to vest the power to assess and collect taxes within the park district so created for the special corporate purpose of its creation, and this was under a constitutional provision similar to ours. Mr. Chief Justice BRESEE, on page 52, says: "One of the counsel for respondent asks: Of what character is the corporation thus endowed with extraordinary, unheard-of, and unknown powers and privileges? and, after defining the several kinds of corporations, he asks: To which of these divisions of public corporations does the South Park Commissioners belong? The answer is ready and obvious. By the vote of the people within the jurisdiction of their action they became a corporate authority, *quasi* municipal; the object of their creation being of a municipal character, and of that alone. They became a public municipal corporation." So, in *People v. Trustees of Schools*, 78 Ill. 136, Mr. Justice WALKER, in treating of the power and authority of school townships under the constitution of that state to subscribe for the capital stock of railway companies, says: "These school townships were created and are continued for school purposes alone, and not for municipal purposes. They are only intended to establish schools, and loan and manage the school funds of the township, and pay the teachers of schools taught in their jurisdiction. This was the purpose of their organization. They were not created to exercise any of the functions of government, and hence are not municipal in their nature or purpose; nor are they provided with the officers or the power to exercise the functions of government." The test of a corporation for municipal purposes, adopted by the court, seems to have been the right or power to exercise some of the functions of government, and this we apprehend is the true test. In the case of *State v. Leffingwell*, 54 Mo. 458, cited and relied on by counsel for plaintiff, the same principle is clearly recognized, under a constitutional provision similar to ours. In the first opinion there is a tendency to hold that nothing but a city, or some corporation connected therewith, and instituted for the purpose of carrying out some of the known objects of the municipality, is a corporation created for municipal purposes; but in the opinion on a motion for a rehearing, after citing the provisions of the constitution,

this language is used: "From these provisions it is manifest that the legislature is prohibited from creating any sort of corporation by special act except such as are for municipal purposes. A corporation for municipal purposes is either a municipality, such as a city or town, created expressly for local self-government, with delegated legislative powers; or it may be a subdivision of the state for governmental purposes, such as a county, a school or road district, etc. These subdivisions are sometimes called '*quasi* corporations,' but they are nevertheless corporations within the meaning of the constitution. It was therefore eminently proper in framing the constitution that there should be no express or implied prohibition against creating such subdivisions or *quasi* corporations for municipal purposes. The phrase 'municipal purposes' was intended to embrace some of the functions of government, local or general; and no corporation, not exclusively designed for this end, can be properly designated a corporation for municipal purposes." And again: "The aim of the constitution was to prevent the creation of corporations by special legislation, except for a particular purpose. In framing this prohibition it was necessary to exclude the idea that *quasi* corporations or subdivisions of the state for municipal purposes were to be embraced among the inhibited acts of the legislature. No language could have expressed this more clearly than the phrase 'except for municipal purposes,' as used in the constitution." We have not overlooked the cases of *Low v. Mayor*, etc., 5 Cal. 214, and *San Francisco v. Water Co.*, 48 Cal. 493, cited by counsel for plaintiff, but we do not think they conflict with the doctrine we are attempting to announce. In the former the court held that a private corporation, organized to run steam-boats, with one of its termini in the city of Marysville, was not a corporation created for municipal purposes, so that the legislature could authorize the city to subscribe for its stock; and in the latter it was held that the legislature could not confer on a private corporation by special act the right or duty to supply the city of San Francisco with water. The purposes and powers of the Port of Portland are all public, political, or governmental. It possesses none of the features of a private corporation. There is no stock to be subscribed. Its members are citizens, not stockholders. There is no acceptance necessary, and its powers and very existence are at the will of the legislature. The sole object of the corporation is to so improve the Willamette and Columbia rivers at the city of Portland, and between that point and the sea, as to create and maintain a ship channel of a specified depth; and for this purpose it is given full power over these rivers, so far as the state can grant the same. There is no power to take tolls, or make profit of any kind. No private interests of any kind are granted or acquired. The highway to be created or improved belongs to the public, and is open to the whole public, to be used at will, and with such means of navigation as taste, pleas-

ure, or convenience may dictate. No one questions that the establishment and improvement of highways and the opening facilities for access to market are within the governmental powers of every state or nation, and that, among the most important of these highways, are to be classed navigable rivers. These things are necessarily done by law. The state may directly levy taxes to improve such highways, or it may apportion and impose the duty, or confer the power of assuming it, upon the municipal divisions of the state, or create a municipal division locally benefited for that express purpose. These municipal corporations or divisions exist only for the convenient administration of the government. Such organizations are instruments of the state to carry out its will. When they are authorized to levy a tax or appropriate its proceeds, the state is doing through them indirectly what it might do directly. The rivers placed under the control of this corporation are not only navigable, but are the great convenient highway, not only of this state, but largely of the entire north-west. The only powers conferred upon the Port of Portland, except the necessary incidental powers of holding the property and making the contracts necessary to carry out the main purpose, are the control and improvement of this public highway, and the levy and collection of taxes therefor. The Port of Portland, and the commissioners who exercise its powers, are nothing more than the agents of the state, delegated to exercise one of its highest prerogatives—the taxing power—in carrying out one of its best known and recognized objects and most important duties,—the improvement of a great and important public highway.

It is also contended that this act is unconstitutional as being in violation of section 32, art. 1, of the constitution, providing that "all taxation shall be equal and uniform." Counsel for plaintiff admits the general rule that a tax is not unconstitutional for lack of uniformity, when levied for local purposes, if it is equal and uniform throughout the taxing district; but his contention is that, to authorize the legislature to lay a tax upon one district or subdivision of the state alone, the purpose for which it is laid must not only be public, but, as regards the people of such district or subdivision, it must also be local. This is admitted by counsel for respondent to be the correct rule, but he contends—and, we think, correctly—that the power of taxation here under consideration is not subject to objection under this rule. It is a fact of which this court will take judicial knowledge, that the Port of Portland, a district which is now the city of Portland, is the commercial metropolis of the state of Oregon, if not of the whole Pacific north-west. It is the center of trade and commerce for a vast section of country, simply because here the commerce of land and sea meet, and through this city the country trades with the world at large. It holds communication with the sea, the great highway of commerce, by the Willamette and Columbia rivers, and can only retain its commer-

cial supremacy by the maintenance in these rivers of a ship channel of sufficient depth to enable the largest sea-going vessels to find anchorage at its wharves. Its present prosperity is due to the fact that it is a center of trade and commerce, which it would not be were these rivers closed, and which in all probability it will not remain if the improvement contemplated is not made. It is not surrounded by any fertile farming districts, rich mines, or vast forests, to make it a local center, but depends entirely upon its trade and commerce. Counsel has well said: "That the maintenance of this great commercial center at this point is of advantage to the whole state is witnessed by the fact that it does its business here. That anything that will cheapen the handling of what the country exports and imports will be a benefit to all is a self-evident fact, and leaves no doubt of the public interest in this improvement. But the public might find other centers of trade, or channels of export and import, presumably not so advantageous, or it would now use them, but still capable of use at need. But the center of trade and commerce, the Port of Portland, cannot go elsewhere. It must live or die here. In the public the interest is general,—the improvement and maintenance of an advantageous channel of trade. To the metropolitan district, center of trade and commerce, city, cities, or what you will, embraced in the Port of Portland, the interest is one of life and death." The people of the Port of Portland, therefore, will reap the principal benefit from the proposed expenditure, and it is not unconstitutional that they should bear the burden. As was said by Mr. Justice STRONG in *Railroad Co. v. County of Otoe*, 16 Wall. 676: "The legislature has the undoubted power to apportion a public burden among all the tax-payers of the state, or among those of a particular section, if, in its judgment, those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an almshouse, or a hospital." It is not unjust, therefore, that they should alone bear the burden. This subject has so often been discussed, and the principles we have asserted so thoroughly vindicated, that it seems to be needless to say more, or even to refer at large to the decisions. It follows, therefore, that the act incorporating the Port of Portland is constitutional and valid, and the decree of the court below must be affirmed.

STRAHAN, C. J., dissents.

COULTER v. PORTLAND TRUST CO. SAME
v. RASH. SAME v. WARNER.

(Supreme Court of Oregon. July 8, 1891.)

APPEAL—REVERSAL—NEW TRIAL—JUDGMENT.

After a judgment has been reversed, and a new trial awarded, it is too late for appellant to claim that judgment should have been directed for him by the supreme court on the findings of fact in the record, and a rehearing for that purpose will be denied.

On rehearing. For former report, see 26 Pac. Rep. 563.

STRAHAN, C. J. Counsel for appellant have filed application in the nature of a petition for rehearing as to that part of the judgment directing a new trial, on the ground that the findings of fact in the record entitle them to a direction from this court that final judgment be entered in favor of the appellant on the finding of fact. That question is an important one in practice, but it was not made by the appellant upon the argument, nor suggested until after the entry of judgment here. The respondent, therefore, had no convenient opportunity to consider or answer it. No doubt, in most cases tried by the court without a jury, when the court errs in its conclusions of law, and the judgment is reversed for that reason, the better practice is for this court to correct the findings of law and direct what judgment shall be entered; but in such case the appellant ought to insist upon that mode of procedure at the argument, when the whole question can be considered, and not wait until a new trial is awarded, and then suggest the question for the first time. A new trial can result in no injury to either party, and under the circumstances of this case the application for rehearing will be denied. In the cases of *Coulter v. Rash* and *Coulter v. Warner* the same question is presented, and the like order will be entered.

FIELDS *et al.* v. FIELDS.

(Supreme Court of Washington. June 15, 1891.)

DIVORCE—DIVISION OF PROPERTY—FRAUDULENT CONVEYANCE.

1. Under Code Wash. § 2007, giving the court decreeing a divorce power to divide all the property of the parties between them, it is immaterial whether the property divided be the separate property of one of the parties or the community property of both, as the court may divide it whether it is the one or the other.

2. Where the husband, just prior to commencing suit for divorce, conveys all of his property to his brother, without receiving any cash payment or taking any notes for the price, nor even agreeing on the price of the land, the conveyance will be held fraudulent as against the wife.

Appeal from superior court, Walla Walla county.

D. J. Crowley and *Geo. T. Thompson*, for appellants, *Fletcher R. Fields*, *Simon G. Fields*, and *Nancy E. Fields*. *Brents & Clark*, for appellee, *Sarah J. Fields*.

DUNBAR, J. This action is brought by the plaintiff against the defendant for a decree of divorce, the division of the property, and the custody of the minor children. It seems from the testimony that the plaintiff and defendant commenced living together in 1873; that a marriage license was obtained; that they went to a neighboring town for the purpose of getting married, but returned without having the marriage ceremony performed; that they represented themselves as husband and wife; that they lived and cohabited together as husband and wife; that several children were born to them; that they conveyed and incumbered land as husband and wife; and that in the community in which they lived they were generally thought to be husband and wife;

that this state of affairs existed until about three years before the commencement of this action, when they had the marriage ceremony performed in the statutory form. At the time they commenced living together in 1873 the defendant had no property, and the plaintiff had property variously estimated at from two to eight thousand dollars. The court below found it was worth \$3,000, which was probably a reasonable valuation. There are now living two minor children the fruits of their union, to-wit, *Maud May Fields*, aged 12 years; and *Fletcher R. Fields, Jr.*, aged 5 years. The complaint alleges that the parties plaintiff and defendant were intermarried on February 6, 1888; alleges cruel and inhuman treatment on the part of the defendant towards plaintiff; and charges defendant with adultery with divers persons, some named and others unnamed. The answer of the defendant is a denial of the adultery and of the cruel and inhuman treatment charged, and alleges various acts of cruelty on the part of the plaintiff, such as frequently and falsely accusing her of adultery with divers and sundry people, applying to her insulting, degrading, and opprobrious epithets, and vulgar and indecent names, in the hearing of others, and that he had cursed and applied vile epithets to his little daughter; that he had struck defendant, and threatened to kill her, and drove her away from their house; that for the last two years he was in the habit of being frequently drunk; and many other damaging allegations. Defendant alleges their intermarriage in October, 1873. The reply of plaintiff denies all affirmative allegations in the answer, excepting that he admits that on the 23d day of April, 1890, he struck plaintiff; and admits that during the last two years he has been occasionally drunk. Afterwards, on the petition of defendant, alleging the conveyance by *Fletcher R. Fields* to *Simon G. Fields* of certain lands claimed to belong jointly to the plaintiff and defendant, the said *Simon G. Fields* and his wife, *Nancy Fields*, were made parties to this action, and filed an answer denying the fraudulency of the conveyance, and alleging that said conveyance was made in good faith.

The principal legal discussion in this case was as to the status of the property with relation to the community property laws. Appellants contended that a great portion, if not all, the property involved, was the separate property of the husband; and appellee contended that it was community property. The decision of this court in *Webster v. Webster*, 26 Pac. Rep. 864, (at this term,) eliminates that question from this case, as it was there held that under the provisions of section 2007 of the Code the court decreeing a divorce has power to make division of all the property of the parties, whether it was community or separate property, and the court would only consider through whom the property was acquired as a circumstance to aid it in making an equitable division; and, while it is a circumstance to be considered, it is not a controlling fact, but will be considered by the court as any other important fact in the case.

Some discussion was had as to the extent of the authority conferred by a power of attorney given by the defendant to the plaintiff, under authority of which plaintiff conveyed the land to Simon G. Fields. Without discussing the legality or potency of the instrument, it seems to me that the unusual character of this transaction and all the circumstances surrounding it conclusively point to fraud on the part of the plaintiff, if not also on the part of Simon G. Fields. Here was an \$18,000 transaction, involving all the property, according to the testimony of the plaintiff, that he had; involving the home of himself and family, sold to his own brother, just prior to the time he commenced suit against his wife for divorce, and when he evidently had the suit in contemplation, (the deed being executed May 11, 1890, and the complaint filed in the clerk's office the 14th of May succeeding;) a wife, who had a short time before brought two suits for divorce; a wife whom he testified was "trying to break him up;" a sale made and deed executed on the strength of a power of attorney the legality of which he was doubtful of himself, and made after he had tried and failed to get a good power of attorney from the defendant, and after her refusal to give a better power of attorney had been made known to the purchaser. It is not thus that business is transacted that is open and above-board. If the defendant refused to execute the power of attorney, and both of the parties to the sale knew this, it was notice to them that she did not wish to convey any property under the power of attorney already given, and was undoubtedly intended by her, and understood by them, as a revocation of the power of attorney, and from that they understood her unwillingness to sell; but, notwithstanding this fact, on failing to obtain a better power of attorney, they concluded to chance the one they had. We quote from the testimony of Simon G. Fields on cross-examination: "Question. You knew at the time you bought this place, did you not, that his wife had some trouble, and he intended to bring this suit? Answer. I didn't know he was going to bring it so soon. I knew he had started to do it once or twice before that. I expected suit would be brought. Q. You were expected to obtain this property, and hold it during the suit, were you not? A. I don't know as I was. Q. Wasn't that the object in the transfer of this property? A. No, sir. Q. How did you pay him for it? A. I haven't paid him yet. Q. How did you secure him? Did you give him a mortgage? A. No, sir. Q. And you gave no security at all then? A. None only my word. He owed me a little, and he was to have the crop. Q. Has he not asked you for any notes or mortgages or anything? A. No, sir. Q. The Court: Did he take your word for the whole price of eighteen thousand dollars? A. Yes, sir. Q. The deed was the only writing that passed between you? You were to deed

this place back to him after suit, were you not? A. I was to deed it back if I wanted to." Witness also testified that he was to pay no interest on the purchase price, and that there was no definite time at which the payment was to be made; or, to use his own words: "Well, he said he would give me time. He said he would want some money off and on. I said I would give him some money at times. There was no fixed time." There was really no agreed valuation of the land, according to their own statement, for there was no interest to be paid, and the real price to be paid would depend upon the time of the payment of the principal, and, as this time was not agreed upon, the actual agreed price of the land could not have been determined. In my judgment the whole transaction is inconsistent with the theory of good faith. Men of good business capacity, as the plaintiff is conceded to be, do not transact important business in this way. There seems to be no doubt that the parties commenced living together as husband and wife in the fall of 1873; and, while neither party in this case is probably entirely lameless, the testimony of the plaintiff, in his attempt to evade the fact that he had held defendant out to the world as his wife, has a tendency to weaken the effect of his testimony on other points; and the entire failure of plaintiff to prove the charges of adultery against his wife is to be taken against him. These are charges which a man with a proper appreciation of the domestic relation would hesitate to make against the mother of his children under any circumstances, and where the proof utterly fails, as in this case, shows a very debased condition of mind. Outside of the testimony of defendant as to harsh and cruel treatment, plaintiff himself admits of having struck her on one occasion. A distinguished writer has said:

The man that lays his hand upon a woman,

Save in the way of kindness, is a wretch

Whom 'twere base flattery to name a coward.

This sentiment, while poetically expressed, is literally true; for, no matter what the provocation may be, there is no palliation or excuse for this brutal offense. Plaintiff also admits having been drunk several times during the last two years, and the testimony outside of his own admission shows that he has been under the influence of liquor a considerable portion of the time; to such an extent, at least, that he is evidently not a proper person to be intrusted with the care and guardianship of the children. Taking all the circumstances of the case into consideration, without further particularizing, we think there was no abuse of discretion by the judge who tried the case, and that the judgment should therefore be affirmed, including the allowance of \$150 for services of defendant's attorneys in this court, and it is so ordered.

HOYT, SCOTT, and STILES, JJ., concur.
ANDERS, C. J., not sitting.

SANDER-BOMAN REAL-ESTATE CO. v. YESLER'S ESTATE *et al.*

(Supreme Court of Washington. June 15, 1891.)

DECREE FOR SPECIFIC PERFORMANCE—DECEDENT'S CONTRACT TO CONVEY—APPEALABLE ORDER.

1. Act Wash. March 22, 1890, § 1, (Sess. Laws, p. 383,) providing, among other things, for appeals to the supreme from the superior court from a final order in special proceedings affecting a substantial right, or made on summary application after judgment, or from an order granting a new trial, was repealed by Act March 27, 1890, § 1, (Sess. Laws, p. 386,) providing that an appeal may be taken to the supreme from the superior court in all actions and proceedings; and an order, in the nature of one granting a new trial, which vacates a judgment, and permits one not before made a party to appear and defend the action, is not appealable.

2. Code Wash. (1881.) c. 52, § 627, provides that no decree for specific performance of a decedent's contract to convey real estate shall be made, unless the executor or administrator has been personally served with a copy of the petition and notice of the proceedings. Section 625 provides that the court shall hear the application at such time as has been fixed therefor, or at such other time as the hearing may be adjourned to. Section 630 provides that, if no appeal be taken within six months from rendition of decree, the executor or administrator, or a commissioner appointed for the purpose, shall execute a conveyance as decreed. *Held*, that a decree ordering a conveyance is erroneous, where no copy of the petition or notice was served on the administrator, and the hearing was had at a time later than that fixed in the notice, and to which no adjournment had been taken, and the conveyance was ordered to be made prior to the expiration of the time allowed for appeal.

3. A published notice of such proceedings, directed to "the personal representatives and all persons interested in the estate," is not insufficient because not directed to the "creditors, heirs, devisees, or personal representatives" of the decedent.

Appeal from superior court, King county.

Action by Sander-Boman Real-Estate Company against the estate of Sarah B. Yesler and others for specific performance of a contract by decedent to convey real estate. There was a decree directing conveyance as prayed. Subsequently the decree was set aside on application of Lucinda Hochstetler, one of the heirs of Sarah B. Yesler, and permission granted her to appear and defend. The plaintiff appeals from this order. Appeal dismissed. Code Wash. (1881.) c. 52, provides, among other things, as follows: "Sec. 623. If any person bound by written contract to convey real estate die before making conveyance, the district court of the county where the land is situated may by decree compel such conveyance in all cases where deceased might have been so compelled. Sec. 624. On presentation of the petition of the party claiming the right to such conveyance, the court shall appoint a place and time for the hearing at some day of a regular term, and order four weeks' notice thereof to be given by publication. Sec. 625. At the time and place of hearing, or at such other time as the same may be adjourned to, the court, on the filing of proof of publication, shall proceed to the hearing, and all persons interested as creditors, heirs, devisees, or personal representatives may appear and resist the petition." "Sec. 627. No decree

for conveyance shall be made unless the executor or administrator has been personally served with a copy of the petition, and the notice provided in section 624, at least two weeks before the hearing."

"Sec. 630. Any party interested may appeal within six months from rendition of decree, but, if no appeal is taken within that time, the executor or administrator, or a commissioner appointed therefor, shall make the conveyance as decreed. Section 631. A certified copy of the decree, duly recorded, shall give the party entitled thereto a right to immediate possession of the land in like manner as if it has been actually conveyed in pursuance of the decree." Chapter 4, § 67, provides, among other things, that a defendant against whom publication of notice is made, or his personal representatives, on application and sufficient cause shown, may be allowed to defend an action after judgment, and within one year from its entry, on such terms as may be just.

Junius Rochester, for appellant. *Greene & Turner*, for appellee.

STILES, J. The appellant in this case filed its petition in the district court of King county in 1889, under chapter 52 of the Code, claiming that its assignor had received from Sarah B. Yesler, deceased, a contract for the conveyance of certain lands in the city of Seattle. The petition was filed on the 2d day of May, and on the same day the judge of the district court made an order setting June 24th as the time for hearing, and directing notice of the pendency of the proceeding to be published in a weekly newspaper. No copy of the petition or notice appears to have been served upon the administrator, but upon the 31st day of May a summons was issued by the clerk of the court in the ordinary form of summons in actions at law or in equity, a copy of which was served upon the administrator by the sheriff of King county on the 3d day of June. On the 24th day of June the administrator appeared by his attorney, and filed his demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of action. No further proceedings were taken in the matter at that time, nor does there appear to have been any adjournment of the hearing on the petition. On the 25th day of January, 1890, however, the superior court overruled the demurrer, and allowed the respondent five days in which to answer; and on February 14th the administrator by his counsel consented that his default might be entered, and that judgment be taken in accordance with the prayer of the petition. On the 3d day of March thereafter proof of publication of the notice ordered to be published was filed, the substance of which is as follows: "Notice. In the district court of the third judicial district holding terms at Seattle, in and for King county. [Title of cause.] To J. D. Lowman, administrator of the estate of Sarah B. Yesler, deceased, and all parties having an interest in said estate: You, and each of you, will please take notice that whereas, the Sander-Boman Real-Estate Company, petitioner and

plaintiff herein, heretofore filed and presented its certain petition, praying, among other things, for an order of the court for the conveyance to it of the following described real estate in King county, to-wit: [Description:] Now, therefore, you are notified, pursuant to an order of court heretofore entered herein on the 2d day of May, 1889, that Monday, the 24th day of June, 1889, being a day of the regular term of said district court, at 11 o'clock A. M., at the court-room in the court-house in the city of Seattle, said petition will be heard, when and where all parties, interested as creditors, devisees, or personal representatives of Sarah B. Yesler may appear and show cause if any they have or can show, why the prayer of said petitioner shall not be granted. [Attested by the clerk.]” On the same day a decree was entered directing the administrator to forthwith execute a deed to the petitioner for the real estate described, and it was further ordered that, if the administrator should fail to execute such deed within 10 days after the date of the judgment, a commissioner, who was named, should execute such deed in his place. Subsequently, and on the 26th day of August, 1890, Lucinda Hochstettler, the appellee in this court, who was one of the heirs at law of the deceased, Mrs. Yesler, filed in the superior court of King county a petition showing that she had not been served with process in said proceeding in any other way than by publication; and upon a proposed answer, filed at the same time, asked to be allowed to appear in said action, and defend the same upon terms. The court thereupon granted the petition, set aside the judgment, and allowed the petitioner to appear and defend the action. This appeal was taken from the order last mentioned, and although the point was not raised by the appellee on the hearing in this court, the question whether or not this was an order such as was appealable goes directly to our jurisdiction, and we must notice it as a preliminary to the further consideration of the case.

The appellant seems to have proceeded upon the assumption that such an appeal was justified by section 1 of the act of 1890, (page 333.) wherein it is provided that an appeal can be taken to this court “from a final order made in special proceedings, affecting a substantial right therein, or made on a summary application in an action after judgment, or from an order granting a new trial.” Probably, had section 1 been permitted to stand as the law of the state beyond the end of the session of the legislature which passed it, the proposition that this case is covered by it, and that the order was therefore appealable, would be well taken, inasmuch as the order setting aside this judgment was in the nature, at least, of one granting a new trial. Unfortunately, on the 27th day of March, 1890, the same legislature passed another act, which is found upon page 336 of the Session Laws, in which section 1 of the act of March 22d was entirely repealed. The views of this court upon the subject of appeals, in this respect, are set forth in the case of *Windt v. Banniza*, 26 Pac. Rep.

189. We are constrained to hold, therefore, that this court has no jurisdiction to hear this cause in its present condition.

However, as both parties appear to have submitted their controversy, it will, perhaps, save further expense and loss of time in this matter if we indicate in this opinion the position in which the facts shown seem to place the case. The principal contention of the appellant is that the order of the court setting aside the former judgment, and allowing one of the heirs of Mrs. Yesler to appear and defend, was erroneous in that section 67 of the Code, under which the petition was filed, had no reference to such proceedings as were taken by the original petitioner, but claims that the provisions of section 67 apply only to ordinary actions at law or equity. With this view we are inclined to agree, inasmuch as chapter 52 is really a species of proceedings ancillary to the administration of estates in the probate court. In fact, the action therein provided to be taken in the district court is almost universally, in other states, confided to the court having general probate jurisdiction. Pom. Spec. Perf. § 497, and note. For some reason or other, the cogency of which is not entirely apparent, our legislature saw fit to impose the duty of passing upon questions of this kind, in the first instance, upon the district court instead of the probate court, but, although it changed the forum in which the cause was to be heard, we see no indication that there was any intention to change the usual mode of procedure in the probate court, and we should therefore be inclined to hold that the action of the court in setting aside the judgment, and allowing the petitioner to defend, was unwarranted by statute. On the other hand, however, this proceeding being in the nature of a special probate proceeding, was hedged about with all the rules applying to analogous proceedings in a probate court. It was necessary, therefore, for the district court, both in acquiring jurisdiction and in any final judgment, to follow the statute strictly.

The appellee contends that the notice as published was not sufficient, in that it was not directed to the creditors, heirs, devisees, or personal representatives of Mrs. Yesler, who are authorized by section 625 to appear and resist the petition, but only to the personal representatives, “and all persons having an interest in said estate.” This point seems hardly to be well taken. The notice contended for would not be required in usual probate proceedings, and we think it was unnecessary here.

The next point appellee makes, however, as well as the one which follows it, seem to us to have been defects fatal to the jurisdiction of the court. In the *first* place, no copy of the petition or notice appears to have been served upon the administrator at any time. True, a summons was served upon him, but that did not take the place of the service required by the statute. *Secondly*, the hearing was set for June 24th, and the statute requires that such hearing shall be had upon the day fixed by the court, or at such other time as the same may be adjourned

to. No adjournment was made, and no further proceedings were taken for more than six months thereafter, and when the judgment was rendered the court therefore had lost all jurisdiction of the matter. This position of the case would seem to have left the court without power either to enter the judgment on the 5th day of March, 1890, or later to entertain a petition on the part of Mrs. Hochstetler to be allowed to appear and defend; for certainly, if the court could not enter a judgment, then neither could it subsequently reopen the case, hear it again, and enter another judgment.

The judgment seems to be erroneous, in this: The statute provides that the court may decree a conveyance, but the plain intention of it is that the conveyance is not to be made until after the time for an appeal (six months) shall have elapsed. In the mean time the party entitled to the decree is to be permitted to have possession of the real estate, but the deed is not due until the time for appeal has expired. In this case the deed was ordered forthwith, and, in default of its execution within 10 days by the administrator, the commissioner was required to execute it at once. No practice of this kind is provided for. The appeal must be dismissed, and it is so ordered.

ANDERS, C. J., and DUNBAR, and HOYT, JJ., concur.

SCOTT, J. I concur in the result.

EDISON ELECTRIC ILLUMINATING CO. v.
NEEDHAM *et al.*

(*Supreme Court of Washington.* June 15, 1891.)

APPEAL—FAILURE TO FILE BRIEF AND TRANSCRIPT.

Where appellant fails both to file a transcript and to serve and file his brief within the time prescribed by the statute and the rules of the supreme court, and gives no excuse for such failure, the appeal will be dismissed.

Appeal from superior court, Spokane county.

Arthur & Regan, for appellees.

PER CURIAM. On the 15th day of August, 1890, judgment was rendered in this cause, in the court below, in favor of defendants, appellees here, for costs, and dismissing plaintiff's complaint. On the same day the plaintiff, in open court, gave notice of appeal from said judgment to the supreme court of the state of Washington, and thereupon filed a *supersedeas* bond, by order of the court, in the sum of \$5,000. Appellees having filed in this court a certified copy of the judgment appealed from, and of the notice of appeal, move to dismiss this appeal because appellant has failed to cause a transcript to be prepared, and has failed to serve and file a brief as provided by law, and the rules of this court. Due notice of the motion was served upon appellant more than 10 days previous to the date fixed for the hearing, and it appearing that the time prescribed for preparing and filing the transcript, and for serving and filing a brief, has long since expired, and that no

transcript or brief has been filed, and that no reason or excuse has been given or made for failing so to do, the appeal must be dismissed at the cost of appellant, and it is so ordered.

DEXTER, HORTON & CO. v. LONG.

(*Supreme Court of Washington.* June 15, 1891.)

MORTGAGE OF CORPORATION—FORECLOSURE—
PLEADING—ULTRA VIRES.

1. Plaintiff in foreclosure need not allege the specific interest of one made a party defendant, but it is sufficient to allege generally: "The defendant has or claims some interest in or lien upon said real property; but the same, whatever it may be, is subject to the lien of said mortgage."

2. A mortgage executed by the president and secretary of a corporation, instead of by its trustees, and without any formal authorization, is valid where there were only three trustees, and two of them were the president and secretary, and the money secured by the mortgage was received by the corporation and used for its benefit.

3. Where the complaint in foreclosure alleges a reasonable attorney's fee to be \$250, but the answer denies that any greater sum than \$100 is a reasonable fee, and no testimony is offered on the point, the court should find \$100 to be such a fee.

Appeal from superior court, King county.

Cole, Blaine & De Vries, for appellant.
J. H. Allen, for appellee.

DUNBAR, J. We are of the opinion that, construing the complaint together, and considering the relief prayed for, the complaint is simply for a foreclosure of a mortgage, and that the question of whether or not the vendor's lien exists in this state is not in issue in this case. There were some allegations in the complaint which were not necessary to a complaint in foreclosure, but they were subject to a motion to strike, and were not grounds of demurrer. The demurrer, we think, was properly overruled. It is contended by the appellant that the complaint should have alleged what interest the appellee had in the lands which plaintiff sought to foreclose. The sufficiency of the complaint in this respect, it seems to us, is established by almost universal usage. The form prescribed by Estey is: "The defendant has or claims some interest in or lien upon the said real property; but the same, whatever it may be, is subject to the lien of the said mortgage." This is substantially the same as the tenth allegation in the complaint in this cause, and is all the allegation that is necessary. The defendant's answer was a general denial, and his claim, if he had any, was not disclosed. It is claimed by the appellant that this was not a disclaimer of interest, and that it put in issue the fact that it was subject to plaintiff's lien, and cites *Elder v. Spinks*, 53 Cal. 293, in support of its contention. This case evidently sustains appellant's theory, but is in conflict with the earlier California authorities, and, we believe, with the well-established and generally recognized practice. In *Anthony v. Nye*, 30 Cal. 402, it was held that in an action to foreclose a mortgage the allegation that a party who is made co-defendant with the mortgagor

has, or claims to have, some interest or claim upon the mortgaged premises, is sufficient without averring the character of the interest; and Judge SAWYER, who rendered the opinion, says: "The allegation of her claim and interest is in the form universally adopted and long established. The plaintiff is not supposed to know the nature of every person's claim. It is enough that the claim is set up. It is the defendant's business, when this claim is set up, to disclose its nature. There is no personal judgment against the wife. If she has no claim, she is in no way injured. If she has any, she has had opportunity to present it. There is neither merit nor plausibility in the objection." — the objection being that the complaint did not disclose the defendant's interest. To the same effect, see *Mitchell v. Steelman*, 8 Cal. 363; Pom. Rem. (2d Ed.) § 341. We think the doctrine laid down by the earlier California court: much more in harmony with the general rules governing pleadings than the doctrine promulgated by the later case, and therefore feel bound to follow it. The only object in making Dexter, Horton & Co. parties to the suit was to settle any claim that they might set up to the mortgaged premises. The object of the law in permitting this is to avoid a multiplicity of suits, so that all claimants may have their rights adjusted in one action.

Another objection raised by the appellant is that the mortgage was not executed by the trustees of the defendant corporation, but that the president and secretary, by whom the mortgage was executed, had no authority to enter into such a contract, and that it was therefore *ultra vires*. Even conceding that the contract was *ultra vires*, and that the plaintiff has placed himself in a position in this case to legally allege it, under the testimony in this case it will not avail against the plaintiff. The corporation was attempting to execute a *bona fide* mortgage. It was within the power of the corporation to execute it, and its officers and agents were trying to carry out the will of the corporation. There were but three trustees, and two of them signed the mortgage, but not as trustees. They did not go through the form of an authorization by resolution, but a majority of those who had power to pass the resolution, by a short cut, brought about the result which the resolution would have authorized. The formality of the resolu-

tion, it is true, was omitted, but the corporation, taking possession of the property by virtue of the mortgage, indorsed its execution, and if there were any technical defect in its original execution it has been cured by acquiescence and ratification. Where money has been obtained by a corporation upon its securities, which are irregular and *ultra vires*, but the money was applied for the benefit of the company with the knowledge and acquiescence of the stockholders, the company and the shareholders were estopped from denying the liability of the company to repay it. (In re Cork & Youghal R. Co., L. R. 4 Ch. App. 748;) and a court of equity abhors forfeitures, and will not lend its aid to enforce them, (*Marshal v. Vicksburg*, 15 Wall. 146.) Neither will it give its aid to the assurance of a mere legal right contrary to the equity and justice of the case. *Lewis v. Lyons*, 13 Ill. 117. In this case the contract is not executory, but is executed, and a stronger rule obtains in favor of the validity of the contract. Says the supreme court in *Bradley v. Ballard*, 55 Ill. 413: "But if any one of the parties proceeds in the performance of the contract, and expends his money and labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power." Such we believe to be the doctrine of the authorities generally.

We have examined the other points raised by appellant, and are unable to find any error. All the facts found by the court are, in our opinion, justified by the testimony, with the exception of the fact that \$150 is a reasonable attorney's fee. The complaint alleged \$250 as a reasonable attorney's fee. The answer denied that any greater sum than \$100 is a reasonable attorney's fee in this case. There being no testimony offered on this point, and as the reasonableness of an attorney's fee when denied must be proven as any other fact, the court should have found that \$100 was a reasonable attorney's fee, and rendered judgment accordingly. The case will be remitted to the lower court with instructions to modify the judgment in accordance with this opinion.

ANDERS, C. J., and SCOTT and STILES, JJ., concur.

HOYT, J., did not sit at the hearing.

JANSON v. PETERSON *et al.*

(Supreme Court of Washington. June 15, 1891.)

SPECIFIC PERFORMANCE.

In an action for specific performance, the court found that plaintiff entered into possession of and improved land under a contract to purchase the land from defendant for \$350 if plaintiff C. should nurse defendant during a certain sickness, but, if C. should not so nurse defendant, then the price of the land should be \$400. After making certain payments, plaintiffs tendered the balance of the sum of \$350, which defendant refused on the ground that it was not paid as "agreed to a year before," and no objection was made as to the amount. *Held*, that specific performance of the contract to convey was properly decreed.

Appeal from superior court, King county.

Action for specific performance of a sale of land by Andrew Gustave Peterson and Christina L. Peterson against Mary Janson. Judgment for plaintiffs. Defendant appeals. Affirmed.

Thompson, Edsen & Humphries, for appellant. *Greene & Turner*, for appellees.

DUNBAR, J. We have looked into this case, and find no error substantially affecting the rights of appellant. One of the findings of the court was that the purchase price agreed upon in said oral agreement was to be the sum of \$350 if the plaintiff Christina L. Peterson should care for and nurse defendant during a certain sickness, but, if said plaintiff Christina L. Peterson should not so care for and nurse said defendant, then the purchase price was to be the sum of \$400. We think the court, from all the testimony, should have found that the agreed price of the lot was \$350, one-third to be paid at the time the deed passed, and the balance in a reasonable time. However, we are satisfied from the testimony of appellant, especially as shown on page 42 of the record, that it was not the difference between \$350 and \$400 that caused her to refuse the tender, but because she had concluded not to deed appellees the land at all, for the reason alleged by her that "he did not pay it when he agreed to a year before." There is no dispute about the fact that under the contract the appellees went into immediate possession; that they commenced building a house immediately, and that they moved into the house; and that they have lived there ever since; and that appellant knew this, and never raised any objection to it. We cannot agree with the appellant that the proof shows that the improvements did not exceed \$150. The appellant testified that the improvements could not be sold for more than \$150; but the appellees, who put the improvements there, testified that the first improvements made were a house worth \$300, and other improvements of the value of \$100. The house was a basement and three rooms, in which appellees and their four children lived until about the commencement of this action, when some further additions were made. We think the whole testimony fairly justifies the conclusion that the \$10 and \$20 payments were intended by the appellees as payments on the lot, and were received as such by appellant, and that the order given Wood on appellee

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Peterson by Mrs. Janson of \$50 was intended by appellant to be placed to the Petersons' credit on the lot transaction, and was so understood by Peterson when he honored and paid the order. While there is undoubtedly conflict of testimony on nearly all the questions of fact raised by the pleading, in the judgment of this court the material allegations of the complaint are sustained by the testimony. The judgment will be affirmed.

ANDERS, C. J., and SCOTT, STILES, and HOYT, JJ., concur.

BARD *et al.* v. KLEEB.

(Supreme Court of Washington. Nov. 18, 1890.)

FINDINGS OF FACT—WAIVER.

1. Under the provisions of Code Wash. T. § 246, that, on the trial of an issue of fact by the court, its decision shall be given in writing, and filed with the clerk, and that the facts found and the conclusions of law shall be separately stated, and judgment shall be entered accordingly, the recital in the judgment that "the court finds the matters and things set forth in the complaint are true," etc., cannot take the place of findings; especially where one of the allegations of the complaint is admitted to be untrue by the reply.

2. In the absence of an affirmative showing by the record that findings of fact were not waived, there is no presumption of waiver.

On rehearing. For prior report, see 25 Pac. Rep. 467.

STILES, J. In this case, a petition for rehearing having been filed, in denying the petition we deem it proper to add to the opinion on file something by way of enlargement and explanation, as it appears the opinion may be misunderstood. In the first place, the statement in the opinion that this was a case in equity goes no further than that the form of the complaint made it appear so. The cause, for the reason that the sums alleged to be due had become due before the trial, was treated by the court and parties as an action at law for money due, and the judgment was for money. Under this view of it, the right to a trial by a jury existed, and when the court tried the case without, its proceeding was controlled by section 246, requiring the findings of facts and conclusions of law. Whether, in a purely equitable action, findings are necessary, it is not necessary to hold; but it would seem not, as such cases come up on appeal from final judgment upon the entire record and testimony for a new trial in this court. It is urged that section 451 of the Code practically does away with section 246; but we view the former section as only applying to equity causes, and as to be read in connection with that part of section 464 which refers to actions by equitable proceedings. Moreover, were the appellee's position as to section 451 admitted, its terms were not complied with. The evidence was not certified as required in that section, but in the form of a statement under the act of 1883; and, not being so certified, the plain inference would be that this obstacle to the objec-

tion that there were findings had no existence.

ANDERS, C. J., and SCOTT, HOYT, and DUNBAR, JJ., concur.

(2 Wash. St. 525)

FAULCONER *et al.* v. WARNER *et al.*

(*Supreme Court of Washington.* July 7, 1891.)

STATEMENT ON APPEAL—BY WHOM SETTLED.

A statement of facts settled by a judge who tried a cause, but after he had ceased to be a judicial officer, is not a settlement, within the meaning of Acts Wash. 1890, p. 334, which provides that such statement shall be settled by the "court or judge who tried the cause." ANDERS, C. J., dissenting.

Appeal from superior court, Spokane county.

Quinn, Fenton & Fenton, for appellants, citing, in support of the proposition that a judge may settle a statement of facts after the expiration of his term of office, the following cases: *Fellows v. Tait*, 14 Wis. 169; *Davis v. Village of Menasha*, 20 Wis. 205; *Hale v. Haselton*, 21 Wis. 325; *Johnson v. Higgins*, 53 Conn. 236, 1 Atl. Rep. 616; *State v. Barnes*, (Neb.) 19 N. W. Rep. 701.

Turner & Graves, for respondents.

HOYT, J. The statement of facts to support the appeal in this case was settled by the judge who tried the same after he had gone out of office, and his successor had assumed the duties thereof. For this, among other reasons, respondents move the court to strike such statement, and affirm the judgment of the court below. Our statute in relation to this matter provides that such statement shall be settled by the court or judge who tried the cause. Does this provision authorize the settlement of such statement by a private individual simply because at one time he was the court or judge who tried the cause? I think not. That the settlement of such statement is the exercise of a purely judicial function is conceded, but it is contended on the part of appellants that the language of the statute is broad enough to confer upon such private person such powers, their theory being that, by virtue of such statute, it must be held that the legislature intended that so much of the judicial power of the judge as was necessary for such purpose should be retained by him after he went out of office. I can see nothing in the language used by the legislature to warrant such a contention. The words "court or judge" cannot be held without too strained an effort to mean not only what they say, "the court or judge," but also the person who was the court or judge on a certain day long past. In the absence of a statute expressly or by necessary intendment providing for the exercise of such powers by a judge after he had gone out of office, I am of the opinion that it would be judicial legislation to hold that he had any such power. Appellants urge the hardship that must ensue from such a construction of our statute. I do not now decide that, under the circumstances of this case, there was no method provided by which such statement could have been properly settled;

but even if this were so, and I should be of the opinion that there had been a failure of proper legislation upon that subject, that fact would not warrant this court in making a legislature of itself, and supplying the deficiency. It is true that, in the cases cited by appellants from the states of Wisconsin, Connecticut, and Nebraska, the courts seem to have made such decisions as would warrant the contention in this case; but I am not satisfied with the reasoning of such cases. Besides, most of those decisions were put upon the express ground of long-continued usage in the states where the decisions were rendered. The courts of Indiana, and other states not necessary to mention, have taken the other position, and the reasoning therein contained seems to me incontrovertible. See *Smith v. Baugh*, 32 Ind. 163; *Ketcham v. Hill*, 42 Ind. 64. When a judge goes out of office, he can retain no judicial functions, excepting such as it is specially provided by statute that he shall retain, and, under our statute, his power to settle a statement of facts or bill of exceptions is not so retained. Several other reasons were assigned by respondents why this statement should be stricken, but the conclusion to which we have come as to this principal one makes a decision thereon unnecessary. The motion to strike must be granted, and, as that leaves nothing upon which the appeal can stand, the judgment of the court below will be affirmed.

DUNBAR, STILES, and SCOTT, JJ., concur.

ANDERS, C. J., (*dissenting.*) I respectfully dissent from the conclusion reached by the majority of the court. The duty of settling a statement of facts, which is to be made a part of the record on appeal to the supreme court, is strictly statutory; and the law governing this case provides, among other things, that the party appealing may give notice to the opposite party or his attorney that, upon a day to be named in said notice, he will apply to the court or judge who tried the cause or made the decision, order, or judgment complained of, at a place to be named in said notice, to settle and certify said statement of facts. It is further provided that, upon the day named in said notice, the said parties, or their attorneys, may appear before the said "court or judge;" and it shall be the duty of said court or judge to settle what is the proper statement, and to certify the same. See Laws 1889-90, p. 334, § 4. It seems to me that, when the statute expressly declares that this duty shall be performed by the court or judge who tried the cause or made the decision, order, or judgment complained of, this court ought not to say that, notwithstanding the plain and unambiguous language used by the legislature, the judge who actually tried the cause and rendered the judgment appealed from, and who is the only person who is presumed to know the very facts to be settled and certified, cannot perform that most important duty, simply because he has ceased, since the trial, to hold the

office with which he was clothed at the time he became possessed of the facts. I cannot conceive how the individual who signed and certified the statement of facts in question is any less the judge who tried the cause since his retirement from the bench than he would be if he had retained all of his judicial functions. Certainly there is no other judge who tried the cause, and no other judge or "court" cognizant of the facts which occurred on the trial; and, if the judge who presided at the trial cannot certify to what took place before him, the right of appeal, in such cases as this, will be greatly clogged with difficulties, if not altogether destroyed. There seems to be no method pointed out by statute whereby the successor of the judge who tries a cause may be made to know the facts to be settled and certified by the "court or judge," and this fact alone is a cogent reason for concluding that the legislature did not intend to cast that duty upon him. Whether the settlement of such statement is the exercise of a judicial function or not, it is nevertheless competent for the legislature to authorize the doing of it by a judge after he has gone out of office. This was so held in *Johnson v. Higgins*, 53 Conn. 236, 1 Atl. Rep. 616. It was contended in that case that such an act of the legislature was unconstitutional, and that the act of signing the finding and statement upon appeal was a judicial act, and must have been done by the judge while in office. And STODDARD, J., in delivering the opinion of the court, said: "Even if it be admitted that the act of the judge in signing the finding on appeal is a judicial act in the sense claimed by the plaintiff, and that the act was done after he had ceased to be such judge, no authority has been brought to our attention denying the legislature the power implied in the law in question. No substantial reason is given why the legislative power is incompetent to authorize judicial officers, after their term of office, to complete the history of trials had, and to give permanent and official form to facts found during their term of office. Such acts are rather clerical than judicial." In Wisconsin it has been the uniform practice for judges, after their term of office, to settle bills of exceptions, on the ground that, if not permitted so to do, a party would be deprived of the benefit of an appeal. *Fellows v. Tait*, 14 Wis. 169; *Davis v. Village of Menasha*, 20 Wis. 205; *Hale v. Haselton*, 21 Wis. 325. The courts of Indiana take the opposite view of the question, and hold that such acts are judicial, and can only be done by a judge while in office; but as to what the statutes of that state are upon the subject I am not informed. In *State v. Barnes*, 16 Neb. 37, 19 N. W. Rep. 701, under a statute providing for the settlement of bills of exceptions by "the judge who heard or tried the case," or, in case of his death, absence, or physical disability to act, then by the clerk, it was held that the judge who tried the case not only had the power, but it was his duty, after his term of office had expired, to settle and allow a bill of exceptions, and that, in a proper case, *mandamus* would lie to compel

him to do so. And in the course of the opinion by REESE, J., at page 40, 16 Neb. and page 703, 19 N. W. Rep., it is said: "The duty of settling the bill now being imposed upon the person 'who heard or tried the case,' it seems clear to us that the duty attaches to the incumbent at the time of the trial, and continues until it is performed, subject to the exceptions contained in the statute." To my mind, our statute is equally as clear as the one under consideration in that case, and all the reasons there given by the court are applicable to the case at bar. For the foregoing reasons I am of the opinion that the motion to strike the statement of facts from the files should be denied.

MURDOCK v. CLARKE et al. (No. 13,472.)

(Supreme Court of California. Aug. 7, 1891.)

MORTGAGEE IN POSSESSION—ACCOUNTING.

1. A mortgagor, all of whose property was attached by creditors, agreed with the mortgagee, in consideration of his procuring a release of the attachments and of other advances, to place his business and property in the hands of an agent, who should manage it, and apply the proceeds to the payment of the mortgage debt and advances. It was agreed that the agent should be a person satisfactory to the mortgagor, and he was jointly selected by the parties. The mortgagor was to assist in the conduct of the business, which was to be carried on in the same manner as before. *Held*, that the agent was the representative of both parties, and that the mortgagees were not liable to the mortgagor for his mismanagement.

2. In such case, the mortgagees are held to the exercise of reasonable diligence in the management of the property mortgaged, and are not liable as trustees.

3. Where both the agent and the mortgagees kept their own cattle on the mortgaged land, along with the cattle of the mortgagor, the mortgagees were properly charged with a proportion of the running expenses, and with the value of the use of the land.

4. It being the duty of the mortgagor, under the agreement, to deliver all of the property, the mortgagees are not liable for failing to take possession of a saw-mill, in which the mortgagor had an interest.

5. In apportioning the expenses between the mortgagor and mortgagee, it was error to exclude taxes on the personal property from the deductions from the charges made against the mortgagor.

6. It not being necessary, under Code Civil Proc. Cal. § 454, to give an itemized account in the pleadings the findings, need not give the items of the account.

7. One who accepts a bill of sale purporting to transfer a certain number of cattle is not estopped thereby from denying that he actually received that number.

8. A conveyance of land to secure the payment of money, though the grantee is put in possession under an agreement for an accounting for the rents and profits, is only a mortgage, and does not pass the legal title.

9. Where the conclusions of the trial court as to the amount, necessity, or reasonableness of the expenditures rest on the weight of evidence, they are not reviewable on appeal, unless based upon some erroneous rule of law apparent on the record.

In bank. On rehearing. For former opinion, see 26 Pac. Rep. 601.

HARRISON, J. February 4, 1875, Adam Murdock borrowed from the defendant Clarke \$8,500, for which he gave him his note, payable in one year after date, with interest at 1½ per cent. per month, and as

security for its payment made a deed to him of a tract of 330 acres of land, known as the "Beaver Creek Ranch," and assigned to him a swamp-land certificate of purchase of certain other lands known as the "Big Valley Ranch." These transfers were by instruments absolute in form, but Murdock continued to remain in possession of the property. Soon after this date, Clarke sold and assigned to his co-defendant, Cox, one-half of said note and security. Thereafter, viz., March 22, 1875, Murdock borrowed from Clarke and Cox the further sum of \$5,000, and gave them his promissory note therefor. At this time Murdock's property, including the lands aforesaid, and his cattle and other personal property, were under attachment, and he was anxious to obtain the loan in order to free his property therefrom. The defendants agreed to loan him the money, and make such advancements as might be needed to free the property, provided such arrangement could be made that they would be secure; and it was thereupon mutually agreed that the property should be placed in the possession of one J. B. Stanton, who should have the care and management of it, and should account therefor to the defendants, and that, when the defendants had been paid the amount of their loans and advances, it should be restored to Murdock. It was also a part of the arrangement that Murdock should remain upon the property, and assist Stanton in its management. Under this arrangement, Murdock, on the 10th of April, 1875, executed to the defendants a bill of sale of the property, and also of his interest in a saw-mill and other property connected therewith which he owned jointly with one Quinn. Thereafter the defendants advanced for his use the further sum of \$3,176.45, for which he gave them his promissory note, bearing date April 11, 1875, and Stanton was placed in possession of the property, and continued to manage it until his death, in 1886, after which one Snell was placed in charge thereof. Murdock died in December, 1875, and the plaintiff, having been appointed administratrix of his estate in 1876, qualified as such in October, 1878, and soon after brought the present action against the defendants for an accounting. The cause was tried by the court; findings were filed February 18, 1889, upon which a decree was entered July 3, 1889, wherein it found an indebtedness to the defendants of \$31,926.37, for which they held the property as security, and adjudged that the plaintiff should pay that sum within 30 days; otherwise that the said property should vest absolutely in the defendants. From this judgment, and an order denying a new trial, the plaintiff has appealed.

1. The court found, in substance, that Stanton was selected and mutually agreed upon by Murdock and the defendants to be the agent of both parties, to take the possession and management of the property assigned to the defendants, and that his subsequent holding and management thereof was in the capacity of such agent for both parties. This question of Stanton's agency was treated by both parties at the trial as an issue in the case, and

considerable evidence in reference thereto was offered by each party without objection from the other. Under these circumstances, the plaintiff is not at liberty to urge here that by the answer of the defendants no such issue was before the court below. *King v. Davis*, 34 Cal. 100. The appellant, however, contends that this finding is not sustained by the evidence, and a very considerable portion of the briefs on behalf of each party is devoted to a discussion of this question. Its importance is recognized, since the determination of the relation which Stanton bore to the respective parties to the transaction very materially determines the principles upon which the account should be taken. If Stanton was the representative of only the defendants, his acts in the management of the property became their acts, and they are accountable for any mismanagement or waste committed by him, as well as for the use which he made of the property for his individual account; whereas, if he was the agent of Murdock as well as of the defendants, the defendants would not be accountable to Murdock or to the plaintiff for any of his acts or conduct.

In view of the importance and bearing which this relation has to the correct decision of the case, we have given to the evidence upon this point very careful consideration, and are satisfied that it fully supports the conclusion reached by the court below. It is very likely that the importance of distinctly defining this relation, as shown by subsequent events, was not appreciated by either of the parties at the time that they were about to agree upon the person who should be selected to take possession of the property, and for that reason the testimony in reference thereto is somewhat meager; but a consideration of the relative situation of the parties, and the object which each had in view, as well as the evidence of their negotiations in reference to such selection, warrants the conclusion that it was their intention that the person to be selected was to be the mutual representative of them all. Murdock was greatly embarrassed with debt. His property was all under attachment, at the instance of some of his other creditors. The defendants held his real estate as security for his indebtedness to them. Unless Murdock could get additional money with which to remove the attachments, he felt that his property would be sacrificed. If he could obtain this money, he thought that in a few months he would be able to settle his whole difficulty. The defendants were willing to accommodate him, if they could besecure, but they knew that the personal property would be no security to them if Murdock was left in possession thereof. A plan was finally agreed upon by which the property should be put in the possession of Stanton, who was to carry on the business in the same way that Murdock had done, and account for its profits to the defendants until their indebtedness was paid. Murdock was to remain on the place, and assist Stanton in the conduct of the business as much as he could in every way. It is a significant circum-

stance that, when they came to the selection of the person who was to take this possession, it was to be some one who was to be satisfactory to Murdock, and that Stanton was jointly selected as the person who was to manage and control the property. If it had been the intention of the parties that the defendants were to take possession and manage and control the property, there would have been no occasion for them to consult Murdock about the person who should have been put in charge, or to agree that Murdock should remain on the place and assist him. The defendants would in that case have selected their own agent, and the relation of the parties would have been that of pledgee and pledgor, with the strict responsibility and rights of each. We think that it fully appears from the record that the only purpose in the mind of either Murdock or the defendants was that, while accommodating him with the loan, they should be secured against any loss of the security at the instance of his other creditors, and that it was not the intention of either party that Murdock should lose the control of his business, or that the defendants should assume the responsibility of its management. Murdock himself was anxious to keep the business alive, and it would have been inconsistent with the purpose of both parties to hold that it was either the intention of Murdock to give to the defendants the possession and management of the stock-raising, or of them to assume it. Hence the selection of Stanton was made by their mutual consent, and the duties assumed by him were for the benefit of both. He was to manage the property for the benefit of Murdock, and in the manner in which Murdock had previously carried on the business, so that from the proceeds thereof Murdock's indebtedness to the defendants could be paid; and he was to hold the property, in order that in their security for this indebtedness the defendants might not be prejudiced. His relation to the property, and to the parties, resembled that of a trustee in a deed of trust, where the debtor transfers his property to a third person mutually agreed upon between them, to hold and pay the income thereof to his creditor. In such case the person agreed upon is regarded as a trustee for both parties.

These are some of the considerations which could have been addressed to the court below upon the evidence before it, and which we may assume influenced it in making the finding referred to. It is needless to mention the established rule that the sufficiency of the considerations, as well as the evidence upon which they are based, is addressed entirely to that court. It was proper for the plaintiff to call upon that court to re-examine their sufficiency in her application for a new trial, but, after the court had upon such examination declined to set aside its action, this court will not review its determination. The relation which Stanton bore to the property, so far as the liability of the defendants for his acts is concerned, was fixed at the time of his selection, and as between them nothing was

afterwards done which changed this relation. The death of Murdock within the year doubtless materially affected the early closing of the trust, but it did not change the position which Stanton bore to the property, or his relation to the defendants. The court having determined that Stanton was the representative of Murdock, as well as of the defendants, in the management of the property, it follows that the respondents are not accountable for any of the acts of Stanton, or for any of the waste or mismanagement which is charged upon him by the plaintiff.

2. The appellant has also excepted to the sufficiency of the evidence to sustain the findings of the court in regard to their expenditures in the management of the property since its assignment to the defendants, and has also objected to the findings themselves upon this point as not being sufficiently explicit, contending that the findings should be in reality an itemized statement of the account, rather than a summary of the transactions. It was not necessary for the findings to give the items of the account. It is not necessary in pleadings to give an itemized account, (Code Civil Proc. § 454,) and a finding which follows the pleading is sufficient. In this, as in other cases, it is sufficient to find the ultimate facts, or secondary facts, from which the ultimate fact necessarily follows.

The objections made by the appellant to the character amount, and necessity of the various expenditures incurred in the care and management of the property are matters that were properly presented to the court below, as well upon the motion for a new trial as upon the original trial of the case. Unless that court has made its determination upon some erroneous rule, or in violation of some established principle of law which is apparent from the record, we cannot review its action in these respects. In all matters in which its conclusion rests upon the weight of evidence, the necessity or amount or reasonableness of the expenditure, such conclusion is not reviewable by this court. If the court had found that a certain amount of expenditure had been made for any specific purpose, and the evidence fails to show that that amount of money has been expended for any purpose, it would be a sufficient reason for us to set aside the finding; but when, as in the present case, the finding is challenged only in general terms, and not specifically, and the objections are addressed to the necessity or reasonableness of the expenditure, rather than to its amount, we must accept the finding as correct. The action of the court below is presumed to be correct, and upon an appeal therefrom it is incumbent upon counsel to point out the error. This, in a case like the present, where an account has extended over many years, can be done only by taking the account as a whole, rather than selecting individual items, and expecting this court to examine the entire record for the purpose of determining whether, in connection with the result as finally ascertained, those items have been properly allowed.

3. In apportioning between the defendants and the plaintiff the expenses of keeping the cattle, the court adopted as a rule that "one-third of said expenses, including the wages of Stanton and Snell, but excluding the expenses of marketing said cattle, and taxes, should be deducted from the charge made against the Murdock estate." The court erred in not holding that one-third of the taxes upon the cattle should be deducted from the charge made against the Murdock estate. This error is so manifest that it is practically conceded by counsel for the respondents in saying that the insertion of the words "and taxes" in the finding was inadvertent. They also state in their brief that in fact the court did, in stating the account, deduct these taxes from the charge against the Murdock estate. We cannot, however, assume that such deduction was made, since in the same finding the amounts found to have been expended by the defendants upon said property are declared to be found "upon the principle of this finding." It is not necessary, however, to reverse the entire case for this error. The court below can take the proofs, upon this point, and, having ascertained the amount of taxes thus chargeable to the defendants, make the appropriate correction in the amount found due to them. If, upon taking such proofs, it shall appear to the court that the deduction has been made in the account already taken and stated, no change will be needed.

4. In finding 14 the court finds that between April, 1875, and January, 1876, the defendants advanced to Murdock the sum of \$1,268.80, in addition to the amounts embraced in the three notes. The amount thus found to have been advanced is distinct from the amount found to have been expended in the care and management of the property, and cannot be upheld by an attempt to consolidate the whole amount of the moneys paid by the defendants, but must find support in the evidence pointed directly at the objects for which the court finds that the advances were made. We have examined the record with reference to this finding, and have not been able to find therein, nor have counsel pointed out to us, evidence in support of this finding of payments beyond the sum of \$353.10, that are not included in the other findings. The finding is based upon the averment in the answer that the defendants expended the sum of \$1,021 "in purchasing cattle belonging to said Adam Murdock at execution sales against him, and in releasing property of the same kind from attachments." There is no evidence in the record showing that any portion of this amount was paid by the defendants; and Cox, in his testimony, states that of this amount the sum of \$600 was sent to Stanton for the purpose of releasing the attachments, and should not have been included therein, as it was covered by one of the notes. It was shown that Stanton paid the sum of \$872.30 for releasing the attachments, of which he had received the aforesaid sum of \$600, leaving the amount of \$272.30, for which the defendants are entitled to be reimbursed. It also appears

that Stanton paid for the defendants \$80.80, for the expenses of organizing a swamp land district. This finding should therefore be corrected by substituting \$353.10 for the sum of \$1,268.80, named therein.

5. Upon many of the points presented by the appellant, the opinion of Mr. Commissioner HAYNE, rendered upon the former hearing of this appeal, (24 Pac. Rep. 272,) so correctly expresses the law applicable thereto that we incorporate into our opinion, and adopt his views thereon, as follows, viz.:

"(1) It is contended for the appellant that the defendants were trustees, and were therefore bound to account as such, and are held to the same strict responsibility in the management of the property committed to their care. It is true that mortgagees in possession are often spoken of as 'trustees.' But they are only so in a limited sense. *Ten Eyck v. Craig*, 62 N. Y. 422; *Clark v. Sibley*, 13 Metc. (Mass.) 213; *Cholmondeley v. Clinton*, 2 Jac. & W. 184; 1 Hil. Mortg. 391. As remarked by SHAW, C. J., in reasoning to a somewhat different point: 'In some very limited respects, a mortgagee is a trustee; as when he has entered and is in the receipt of the rents and profits, he is liable to account therefor, and in that respect may be denominated a trustee.' *King v. Insurance Co.*, 7 Cush. 7. That they are bound to account for the rents and profits is a matter of course. 2 Story, Eq. Jur. (13th Ed.) § 1016a; *Raun v. Reynolds*, 15 Cal. 471. And we think that the rule as to trustees in general, viz., that their accounts should be clear and accurate, and that all obscurities and doubts should be resolved against them, (2 Perry, Trusts, 4th Ed. § 821,) applies here. But the accounting is not to be extended to imaginary profits. Where no negligence or improper conduct is alleged, a mortgagee in possession is chargeable with what he has actually received, and no more. *Benham v. Rowe*, 2 Cal. 407. In this case negligence and improper conduct are charged, and various claims are based thereon. It is therefore necessary to consider what was the degree of care required of the defendants. Chancellor Kent, in his Commentaries, stated the rule as follows: 'If the mortgagee obtains possession of the mortgaged premises before foreclosure, he will be accountable for the actual receipts of the net rents and profits, and nothing more, unless they were reduced or lost by his willful default or gross negligence. By taking possession, he imposes upon himself the duty of a provident owner; and he is bound to recover what such an owner would, with reasonable diligence, have received.' 4 Kent, Comm. 166. This statement of the rule has found its way into the decisions of the courts and the treatises of text-writers, (see *Hidden v. Jordan*, 28 Cal. 309; *Moshier v. Norton*, 100 Ill. 68,) and a similar passage was quoted from a modern text-writer on the former appeal of this case, (59 Cal. 694;) but it cannot be determined from the opinion whether the court meant to establish a rule or not. But, if the term 'gross negligence' is to be taken in its ordinary sense, viz., as denoting the absence of slight care, (see *Shear*,

& R. Neg., 4th Ed., § 49,) It is manifest that the passage quoted is somewhat inconsistent; for if the mortgagee, by taking possession, 'imposes upon himself the duty of a provident owner, and is bound to recover what such an owner would, with reasonable diligence, have received,' it is evident that he is bound to something more than slight care, and is responsible for something less than gross negligence. What we think the passage means, when taken as a whole, is that the mortgagee in possession is bound to exercise reasonable care, and is responsible for the want thereof. This was the construction given to similar language by a comparatively recent case in Alabama. The court said: 'On a bill to redeem, a mortgagee in possession will not be held accountable for anything more than the rents actually received, unless there has been willful default or gross negligence, which, in such case, is the measure of reasonable diligence.' *Gresham v. Ware*, 79 Ala. 199. That reasonable diligence is required is laid down in several cases. *Shaffer v. Chambers*, 6 N. J. Eq. 548; *Strong v. Blanchard*, 4 Allen, 543, 544; *Scruggs v. Railroad Co.*, 108 U. S. 375, 2 Sup. Ct. Rep. 780. It seems plain, upon principle, that the mortgagee in possession is bound to something more than slight care. And we think that Chancellor Kent, and the courts and writers who adopted his language, meant to say that reasonable care was required. Applying this rule to the case before us, we think that the evidence shows, without material contradiction, that, while there were some errors of judgment, the general management of the property was what was required. Especially does this appear when it is considered that it was agreed that the ranches were to be run as they had been by the mortgagor. This does not mean that, if the mortgagor was negligent as to any matter, the mortgagees should be so too, but that the management of the mortgagees should be on the same general lines as that of the mortgagor; and, as above stated, we think it was.

"(2) Much argument is based upon the undoubted fact that both Stanton and the defendants kept their own cattle upon the ranches, not separate from the Murdock cattle, but together with them. This was certainly wrong. But it was settled on the former appeal that it made them liable for a proportion of the running expenses, (59 Cal. 695, 696;) and, in addition to this, the court below allowed the value of the use of the land. This, we think, was all that could properly be charged against the defendants on this account. In addition to the cattle, the defendants sent some horses to the property. This was because the horses were needed for ranch work, and they were used for that purpose. This was for the benefit of the property, and nothing can be charged against the defendants by reason thereof. Similar remarks apply to the stallion. He was useful as a work-horse and for breeding the ranch mares. The money made from outside parties during the breeding season belonged to the defendants.

"(3) Part of the property mentioned in

the bill of sale was a half interest in a portable saw-mill located upon public land, and owned by Murdock in partnership with one Quinn. No profits were ever made from this mill, and it does not clearly appear what finally became of it. It was moved once while Quinn was in control. Afterwards it was moved again, and it seems that one Harris 'took it.' The court below found that the defendants never had possession, and the evidence leads us to the same conclusion. The defendants incurred no liability to Murdock or his estate, by not taking possession; for it was as much his duty to deliver it to them as theirs to receive it, and there is nothing to show that he tendered it. Even if the defendants be considered as having been in possession, we cannot say that there was a want of reasonable care on their part. Quinn was allowed, with the acquiescence of Murdock, to run it, as he had been previous to the bill of sale. After Murdock's death Quinn was the surviving partner, with authority to settle up the affairs and dispose of the property. He is the person who is accountable to the plaintiff in relation to the matter. The defendants are not bound to litigate with him for the benefit of the estate.

"(4) A point is made in relation to the number of cattle received by the defendants with the ranches. The bill of sale purports to transfer 1,322 head, and it is argued that its acceptance estopped the defendants from denying that they received that number. There is no force in this suggestion. After the bill of sale was signed, it was Murdock's duty to deliver the cattle in accordance therewith. If he did not perform this duty to its full extent, the defendants were certainly at liberty to prove the fact."

We have also reached the same conclusion that was reached by the commissioner regarding the error in the decree, as well as his reasons therefor, viz.:

"There is also a radical error in the decree. The court adjudged, in effect, that the legal title passed to the defendants, and it gave to the plaintiff a certain time in which to redeem, failing which, the property was to vest absolutely in the defendants. But, as it is admitted that the conveyances were intended only to secure the payment of money, they were mere mortgages, and did not pass the legal title. 'It is the settled rule in this state that, if a deed absolute in form was made merely to secure an indebtedness (to the grantee,) it is a mere mortgage, and does not pass the title.' *Smith v. Smith*, 80 Cal. 325, 21 Pac. Rep. 4, and 22 Pac. Rep. 186, 549. See, also, *Hall v. Arnott*, 80 Cal. 352, 22 Pac. Rep. 200; *Booth v. Hoskins*, 75 Cal. 275, 17 Pac. Rep. 225; *Raynor v. Drew*, 72 Cal. 309, 13 Pac. Rep. 866; *Healy v. O'Brien*, 66 Cal. 519, 6 Pac. Rep. 386; *Taylor v. McLain*, 64 Cal. 514, 2 Pac. Rep. 399. And the fact that the mortgagees were put in possession does not change the rule. As was said in *Smith v. Smith*, above cited, 'such a deed gives a mere lien upon the property, just as if the parties had put their agreement in the form of a mortgage;' and it has been decided that,

In this state, the interest of the mortgagee is not enlarged or affected by the fact that he is in possession under the mortgage. *Dutton v. Warschauer*, 21 Cal. 609. The legal title, therefore, remained in Murdock, and vested in his heirs, and is not in the defendants; and the court below was not authorized to decree that it should vest absolutely in the defendants upon the failure of the plaintiff to pay what was due within a certain time. The defendants, however, have a right to retain possession until the sums due to them have been paid; and, even if they have not, the court has power to impose proper conditions upon the plaintiff. *Raynor v. Drew*, 72 Cal. 311, 13 Pac. Rep. 866; *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. Rep. 225; *De Cazara v. Orena*, 80 Cal. 134, 22 Pac. Rep. 74. And the answer prays that the property be sold and the proceeds applied to the payment of the debt. The decree, therefore, ought to have provided that, in case of the failure of the plaintiff to pay what was due within the specified time, the property should be sold, and the proceeds applied to the payment of whatever is due to the defendants."

The order denying a new trial is affirmed; but the court below is directed to modify the judgment, in conformity with the foregoing opinion, by deducting therefrom the sum of \$915.70, with proper allowance for interest, the same being the difference between \$353.10 and the sum of \$1,268.80, found to have been advanced by the defendants between April 14, 1875, and January 1, 1876, in addition to the amount of the three promissory notes; and to further modify the judgment to such extent that one-third of the amount of taxes paid by the defendants upon the personal property after November 1, 1877, shall be deducted from the expenses incurred in the management of the estate; and, for the purpose of ascertaining this fact, the court is directed to take such testimony relative thereto as may be offered by the respective parties. The judgment is further modified by striking therefrom the following clause, viz.: "And it is further ordered, adjudged, and decreed that, if the plaintiff fails, neglects, or refuses to pay said sum found due the defendants, as aforesaid, on or before the expiration of said 30 days, then, and in that event, said property, real and personal, and all the right, title, and interest of the plaintiff as administratrix of the estate of Adam Murdock, deceased, and all the right, title, and interest which the estate of Adam Clarke, deceased, has or had in or to said property and every part thereof, shall vest absolutely in the defendants, and shall forever thereafter be the property of the defendants, discharged and released from all claims or demands on the part of the plaintiff, or on the part of the estate of said Adam Murdock, deceased." And the court is directed to insert in the judgment, in lieu of the clause so stricken out, a direction to the effect that in case the plaintiff shall fail to make the redemption provided for in said judgment, the said property, held by the defendants as security, shall be sold for the purpose of satisfying the amount of said judgment, with such terms

and provisions included in said judgment as are proper for a sale under a decree for the foreclosure of a mortgage; and, as thus modified, the judgment shall stand affirmed.

We concur: MCFARLAND, J.; GAROETTE, J.; PATERSON, J.; SHARPSTEIN, J.

(90 Cal. 307)

EASTON V. MONTGOMERY *et al.* (No. 13,-258.)¹

(Supreme Court of California. July 21, 1891.)

VENDOR AND VENDEE—CONTRACT OF SALE—ABSTRACT OF TITLE—WHEN DEED TO BE DELIVERED—DEFECTIVE TITLE—FRAUD.

1. A contract for the sale of land which provides "title to prove good or no sale," without specifying the time within which the examination is to be made, implies a reasonable time.

2. Where the agreement does not provide that the vendor shall furnish the abstract, it is incumbent upon the vendee to provide it, to ascertain the condition of the title.

3. Where a title is defective, the vendee is obliged to point out the defect to the vendor, and give a reasonable time to perfect the same, before bringing an action to recover a deposit.

4. In an action by the vendee to recover a deposit upon the ground that the title is defective, he is limited to the defects pointed out.

5. A contract for the sale of land provided that the agents of the vendor "are authorized to return the deposit if the title is defective." *Held*, the fact that the vendor's title was defective at the date of the contract does not give a right of action to recover the deposit without notice of the defect to the vendor.

6. Where one holds a contract for a deed, and pays a part of the purchase price, he may make a valid agreement for the sale of the land, the deed to be delivered by him thereafter.

7. Where the agent acting for the vendee had full knowledge of the condition of the vendor's title before making the contract, the fact that he failed to inform the vendee does not constitute fraud on the part of the vendor.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Action by George Easton against Montgomery and others to rescind a contract and recover a deposit. Judgment for plaintiff. Defendants appeal. Reversed.

Olney, Chickering & Thomas, for appellants. *Van Ness & Roche*, for respondent.

HARRISON, J. During the month of August, 1887, there was great excitement in the real-estate market in the county of Santa Clara, popularly known as a "boom." This excitement subsided at about the end of that month, and thereafter it became much more difficult to sell real estate in that county. During this period, viz., August 15, 1887, one A. H. Albers, who was the owner of the tract of land described in the instrument hereinafter set forth, made a contract with the defendants, Montgomery and Rea, for the sale of the tract to them for the sum of \$29,000, of which they paid him \$1,000 as a part payment, and were to pay the remainder on or before January 1, 1888. Montgomery and Rea were real-estate brokers, and were acting in this matter as the agents of the defendant, Chase, and the money which they then paid to Albers as part payment upon said purchase had been previously placed in their hands by

¹ Rehearing denied.

Chase for the purpose of investing in real estate as a speculation. They took the contract in their own names for the reason that it was uncertain whether Chase would approve the purchase. Chase, however, did approve the purchase as soon as informed thereof, and prior to the 20th day of August. On the 20th day of August, 1887, one Lawrence, as the agent of the plaintiff, and acting in his behalf, entered into negotiations with Montgomery and Rea for the purchase of this tract of land, and, after being informed of the nature of the interest therein held by Chase, agreed with them upon the terms of purchase, and thereafter, upon the same day, in pursuance of said agreement, the plaintiff paid to Montgomery and Rea the sum of \$500, and received from them the following instrument: "Received, San Jose, August 20, 1887, from Geo. Easton, by Lawrence, the sum of (\$500) five hundred dollars, in gold coin, being a deposit and part payment on account of bargain and sale made to him this day, to a certain lot, tract, or parcel of land, lying, situate, and being in the county of Santa Clara, state of California, and bounded and described as follows: Being 187 acres, known as 'Albers' Place,' situate on Albers' road, bounded on the east by Albers' road, and on the south by Storey road; said farm having been sold to said Easton this day for the sum of (\$46,750) forty-six thousand seven hundred and fifty dollars, in gold coin, the balance to be paid as follows: Forty-five hundred dollars on or before Monday, August 22d, at one o'clock P.M.; one-third of purchase price within thirty days; and balance on or before two years, at 7 per cent. from date, or this deposit to be forfeited without recourse. Title to prove good or no sale, and this deposit to be returned. The said deposit is to remain in the hands of Montgomery and Rea, the agents making this sale, until the title passes. And they are authorized to return the same to the buyer if the title is defective. C. M. CHASE, by MONTGOMERY & REA, Real-Estate Agents." August 22, 1887, the plaintiff paid the sum of \$4,500, named in the instrument to be paid on that day; and on September 19, 1887, he paid the further sum of \$666.67, and delivered to Montgomery and Rea a note of Lawrence for \$333.33, for which he received from them the following instrument: "San Jose, Sept. 19, 1887. \$1,000. Received from Geo. Easton, by Lawrence and Lyons, one thousand dollars, in consideration of which the time for payment on the Rancho Coronado is extended thirty days. The above payment is on account of the purchase price. C. M. CHASE, by MONTGOMERY & REA." Thereafter the plaintiff commenced this action to recover from the defendants the amount of money so paid by him, and for a cancellation of the note of Lawrence. The transcript does not show the date at which action was commenced, but alleges that prior thereto, viz., September 23, 1887, he demanded from the defendants a return of the money and of the note, which was refused.

The instrument above set forth is not an agreement for the purchase of an option, but is a contract for the sale of lands.

Benson v. Shotwell, 87 Cal. 49, 25 Pac. Rep. 249. It is more in the nature of a memorandum to satisfy the statute of frauds than a contract embracing all the terms of the agreement between the parties. Being signed by Chase, it satisfies the statute of frauds so far as to be capable of enforcement against him, and its execution by him and delivery to the plaintiff is a sufficient consideration for the support of a promise on the part of the plaintiff to pay the money therein named as the price of the land. *Cavanaugh v. Casselman*, 26 Pac. Rep. 515. There is no mention in it of the time at which a conveyance of the land is to be made, or within which an examination of the title is to be had. Ordinarily, parties entering into an executory agreement for the purchase and sale of real estate make provision therein in these respects, specifying the time allowed for examination of the title; for furnishing abstract; making report of defects and objections, specifying the time within which the vendor may thereafter make his title good, and the character of the conveyance to be executed by him; but, in the haste attendant upon the excitement of a "boom," these formal provisions are frequently omitted, and the construction of the contract is left to implication or established rules.

It is evident from the provision inserted in the memorandum, "title to prove good or no sale, and this deposit to be returned," that it was contemplated by the parties that an examination of the title was to be made on behalf of the plaintiff, and that upon such examination it might be found defective. As no time was specified within which such examination should be made, a reasonable time therefor was implied. *Allen v. Atkinson*, 21 Mich. 351. The parties did not agree that the condition of the title should be ascertained from any particular abstract, or from an abstract to be furnished by Chase; and in this respect the case is distinguishable from *Smith v. Taylor*, 82 Cal. 533, 23 Pac. Rep. 217, and from *Boas v. Farrington*, 85 Cal. 535, 24 Pac. Rep. 787. The agreement being silent upon this point, it was incumbent upon the plaintiff to provide the abstract, and to satisfy himself as to the condition of the title. *Carr v. Roach*, 2 Duer, 20; *Espy v. Anderson*, 14 Pa. St. 312. He was not at liberty, however, to pronounce the title defective without any examination or upon a partial examination. Having assumed to examine the title for the purpose of determining whether it was good, it was incumbent upon him to make a complete examination thereof. He could call upon the defendants for any information with reference thereto, and it then became their duty to furnish such information as they possessed. *Benson v. Shotwell*, supra. If, upon such examination, it appeared to him that the title was defective, it then became his duty to report to the vendor the particulars wherein such defects were claimed to exist, and in the absence of any time fixed by the agreement within which the vendor should remove these defects, or satisfy his objections, a reasonable time would be allowed therefor. *More v. Smedburgh*, 8 Paige, 600.

The burden is on the vendee to point out the defects in the title. *Dwight v. Cutler*, 8 Mich. 566. If the vendor fails within such time to remedy the defects thus pointed out, the purchaser, in any action to recover the purchase money or deposit paid by him, upon the ground that the title is defective, is limited to such defects as were then pointed out. 1 Chit. Cont. 434; *Todd v. Hoggart*, *Moody & M.* 128.

It does not appear whether the plaintiff caused any examination of the title to be made, except that Montgomery in his testimony says that in October, long after the demand for the return of the deposit, "we received a letter from Mr. Easton, and another one from his attorney, saying that the title was imperfect." There is no evidence in the record that the particulars in which the title was imperfect were called to the attention of the defendants, or that any demand was ever made upon Chase to remedy these defects prior to making the demand for the return of the deposit, or prior to the commencement of the action.

The plaintiff contends, however, that, inasmuch as at the date of the instrument Chase's title to the land was defective, the clause in the instrument, "and they are authorized to return the same to the buyer if the title is defective," gave him an immediate right of action to recover the deposit, which he can enforce at any time thereafter. This principle contended for by the plaintiff would be equally applicable to a title with any incumbrance or any defect, however slight, or however easily removed. We do not, however, construe this clause as conferring such right. In every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee by his deed of conveyance a title unincumbered and without defect. *Burwell v. Jackson*, 9 N. Y. 535; *Pomeroy v. Drury*, 14 Barb. 418; *Inness v. Willis*, 48 N. Y. Super. Ct. 192; *Dwight v. Cutler*, 3 Mich. 566; *Warr. Abst.* 293. The money left with Montgomery & Rea, by the plaintiff, as a deposit, was a part payment on account of the purchase by him of the land, and was not given upon the consideration that Chase then had a good title to the land purchased, but upon the consideration that the plaintiff would receive from him a good title thereto at the time when, by the terms of the agreement, he should be called upon to make a conveyance. The "defective" condition of the title referred to in the last clause of the instrument is "pointed out at incurable defects in the title, and not to such imperfections as are capable of being removed after the agreement is made, and while the title is under investigation." *Stowell v. Robinson*, 5 Scott, 211. "The object of this clause evidently is to avoid disputes about the title; and while it is being adjusted the purchaser keeps his money for other operations. The same with the vendor; he is enabled to find another purchaser if his first vendee is dissatisfied with the title." *Brizzolara v. Mosher*, 71 Ill. 41.

It is not necessary, however, that the

vendor should be the absolute owner of the property at the time he enters into the agreement of sale. An equitable estate in land, or a right to become the owner of the land, is as much the subject of sale as is the land itself; and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof. As was said by Mr. Justice PATERSON in *Burks v. Davies*, 85 Cal. 114, 24 Pac. Rep. 613 "If, though he be not the absolute owner, it is in his power, by the ordinary course of law or equity, to make himself such owner, he will be permitted within a reasonable time to do so." If the agreement is made by him in good faith, and he has at the time such an interest in the land, or is so situated with reference thereto, that he can carry into effect the agreement on his part at the time when he has agreed so to do, it will be upheld. 1 Chit. Cont. (11th Amer. Ed.) 431; *Dresel v. Jordan*, 104 Mass. 407; *Townshend v. Goodfellow*, 40 Minn. 312, 41 N. W. Rep. 1056; *Smith v. Cansler*, 83 Ky. 371; *Gaither v. O'Doherty*, (Ky.) 12 S. W. Rep. 306; *Tapp v. Nock*, Id. 713; *Ley v. Huber*, 3 Watts, 367; *Tiernan v. Roland*, 15 Pa. St. 429. We cannot lose sight of the proposition that in this country, where values of land fluctuate rapidly, and where transfers are so frequent, it is very common for the purchaser of land to make a transfer before he has acquired the title. It would work great injustice to hold that no one could make a valid contract for the sale of land until he has himself become clothed with the absolute title. Even in the present case it appears that the plaintiff, after the agreement for the purchase was made, placed the property on the market immediately after the first payment was made, and endeavored to sell the same prior to his obtaining the title thereto. He himself testifies: "I was trying all the time to make a trade of the property pending our getting a title to the property."

It has been held that when the vendor has no interest whatever in the lands which he agrees to convey, and his contract of sale is the mere speculation of a volunteer, courts will refuse to enforce the contract at his instance, and will rescind the agreement at the instance of the vendee, upon the ground that the contract was not made in good faith. The correctness of this rule in its application to a case wherein there is no charge of bad faith has, however, been seriously questioned, and was distinctly repudiated in *Dresel v. Jordan*, *supra*. It is held, also, that the vendee may maintain an action to rescind the agreement upon the ground that the vendor, at the time of entering into the agreement, knew that he could not make the conveyance, or fraudulently represented himself as the owner of the premises, (*Inness v. Willis*, *supra*;) and that if, subsequent to entering into the agreement, the vendor voluntarily puts it out of his power to complete the contract,—as if he should sell the land to another pending the existence of the

agreement,—the vendee may treat the contract as rescinded, and bring his action for the deposit, (*Burwell v. Jackson*, supra.) In either of these cases the ground for the rescission is the fraud of the vendor, either at the time of entering into the contract, or by his subsequent acts.

There is no question, however, in the present case of fraud or misrepresentation on the part of the defendants. Montgomery informed Lawrence, who in making the purchase was acting for the plaintiff, of the exact condition of the title, and the relation which Chase bore to it. Whether Lawrence informed the plaintiff thereof is immaterial. The fact that Lawrence knew all about it before making the agreement removes all charge of fraud or concealment on the part of the defendants. The plaintiff, moreover, does not place his right of recovery upon the ground of fraud, but solely upon the fact that Chase did not have the title to the land at the date of the agreement. Chase, however, although not then holding the absolute title, did have an interest in the land sufficient to sustain an agreement on his part to sell the same. The plaintiff in an action therefor, with proper parties, could at any time have enforced a specific performance in his behalf of the contract with Chase. Chase had furnished the money with which Montgomery and Rea had paid Albers the deposit on the contract of sale. The purchase had been made in pursuance of previous directions from Chase to Montgomery and Rea, and, after the contract had been entered into, had been ratified by Chase. As between Chase on the one part, and Montgomery and Rea on the other, the interest acquired by that contract belonged to Chase, and in a proper action Albers could have been compelled to convey to Chase, as he afterwards did voluntarily so convey. Prior to making the contract with the plaintiff, Chase had authorized Montgomery and Rea, who were his agents, to sell the land; and in pursuance of such order, which was in writing and exhibited to Lawrence, they made the agreement with the plaintiff in the name of Chase. This was such an additional recognition by them of the interest of Chase in the land that Chase would be able to enforce any *bona fide* contract made by them in his behalf.

It is not necessary for us to decide whether by the terms of this agreement the title was to pass to the plaintiff prior to the payment of the last installment. The general rule, in the absence of special provisions in reference thereto, is that the vendee is not entitled to a conveyance until the full payment of the purchase money, and that, the acts of payment and conveyance being mutual and dependent, neither party is in default until after tender and demand by the other. In the present case we have seen that the right of rescission did not exist, and in any action upon the contract, either to enforce it, or to recover damages for its breach, it was incumbent upon the plaintiff to show a performance on his part of all the acts required to be performed by him before he could call upon Chase, and a subsequent

failure on the part of Chase to comply with his part of the agreement. The plaintiff, not having alleged or proved such performance, is not in a position to maintain an action for the recovery of the money paid by him in part performance of his obligations, while the contract is still in existence and uncompleted. The judgment and order of the court below are reversed, and the cause remanded for a new trial.

WE CONCUR: PATERSON, J.; GAROUTTE, J.

(90 Cal. 297)

CASHMAN v. HARRISON. (No. 13,289.)¹

(Supreme Court of California. July 20, 1891.)

BILL OF EXCHANGE — EQUITABLE ASSIGNMENT OF FUND—PRESENTMENT—EVIDENCE.

1. An instrument in the form of a bill of exchange was given by the drawer in settlement of his liability to the payee, and the drawer delivered certain property to the drawee for sale, with the understanding that the proceeds were to be applied on the bill. There was no agreement that the drawee should accept or pay the bill before sale, or that it should be wholly satisfied therefrom, or by payment of less than its face value. *Held*, that the instrument was a bill of exchange, and not an equitable assignment of the fund arising from the sale.

2. The fact that the drawer had no reason to believe the drawee would accept or pay the bill before the sale of the property excuses, as to the drawer, non-presentment for acceptance or payment and notice of dishonor, under Civil Code Cal. § 3220.

3. Where the consideration of a bill of exchange is in issue, evidence thereof is competent in rebuttal, and error in receiving it in chief, over the objection of incompetency, is harmless.

Commissioners' decision. Department

2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action by James Cashman against C. H. Harrison on a bill of exchange. Trial to the court. Judgment for plaintiff, and defendant appeals. Affirmed.

E. F. Preston, for appellant *H. McCrea* and *J. D. Sullivan*, (*Hepburn Wilkins*, of counsel,) for respondent.

VANCLIEF, C. This action is by the payee against the drawer of a bill of exchange, of which the following is a copy: "\$2,019.70. San Francisco, December 29, 1881. Pay to the order of James Cashman \$2,019.70, gold coin of the United States, value received, and charge the same to account of C. H. HARRISON. To R. S. Howland, San Francisco. No." Of the defenses pleaded, two are alternately insisted upon here, viz.: (1) That the instrument was intended to effect merely an equitable assignment of a portion of a fund, and therefore is not what it purports to be; or (2) that, if it be considered and treated as a bill of exchange, there was no presentment of it to the drawee for payment, and no notice to the drawer of its dishonor. To excuse the non-presentment for payment, it was alleged in the complaint, and found by the court, "that the defendant at the time of drawing said bill as aforesaid, had no reason to believe that R. S. Howland, the drawee therein named, would accept or pay the same, and defendant at said time well

¹ Rehearing denied.

knew that said crew had no funds in his hands due or owing to defendant." The court also found that "the said bill was not intended as an assignment of a portion of any fund whatsoever," but that "said bill was executed by defendant in settlement of a liability to plaintiff theretofore incurred by defendant under a certain bond, and said liability existed in full force as a cause of action in plaintiff's behalf at the time of the execution of said bill by defendant as aforesaid." The judgment was for plaintiff, from which, and from an order denying his motion for a new trial, the defendant appeals.

The facts and circumstances pertinent to the questions to be decided are substantially as follows: In February, 1881, one Tibbey chartered the plaintiff's schooner for a sealing voyage in the Northern Pacific. To secure the performance of the charter-party on the part of Tibbey, and for his accommodation, the defendant executed a bond to plaintiff in the penal sum of \$6,250, but the defendant was not interested in the charter-party, nor in the sealing voyage. The schooner, after fishing for a season, sailed to Yokohama, Japan, with such cargo of skins as had been taken on the voyage, and there got into trouble and litigation. When news of her arrival in Yokohama, and of her trouble there, was received in San Francisco, Tibbey, to secure indemnity to the defendant for his liability on the bond to plaintiff, assigned to him the cargo of skins. While matters were in this condition, the plaintiff was demanding of defendant payment of about \$3,100, which he claimed to be due him on the charter-party, and which Tibbey was unable to pay. Through the intervention and assistance of R. S. Howland, acting as the agent and adviser of plaintiff, a settlement was effected between plaintiff and defendant, the terms of which, as then executed, were (1) that plaintiff's demand was reduced to the sum of \$2,019.70; (2) that defendant turned over to Howland his security for indemnity (the cargo of skins) to be disposed of and converted into money by the latter; and (3) that defendant drew on Howland the bill of exchange in suit for the sum of plaintiff's reduced demand, (\$2,019.70.) This settlement was made with the consent of Tibbey. At the time of this settlement it was believed by all the parties concerned that the money product of the cargo would be even more than sufficient to pay the bill; but it was well known by plaintiff and defendant, at the time the bill was drawn, that defendant had no funds in the hands of Howland, and it was quite as well understood that Howland was not expected to accept or pay the bill until he should receive money for that purpose from the sale of the cargo, nor to pay a greater sum than he should thus receive. There appears to have been no agreement or understanding, however, that the bill should be wholly satisfied from the fund to be realized from the sale of the cargo, nor, in any event, by payment of less than the sum it called for. Howland, in his deposition, says: "It was understood that if sufficient funds came to me from the sale

of that cargo it was to be paid to Cashman upon this instrument, (the bill,) to the amount named therein. * * * Harrison had no reason to believe that I would accept or pay said bill before the money came." Again he says: "I don't remember any other instrument executed at that time for the purpose of portioning the fund that was expected to be realized from the sale of the cargo of said schooner, nor did I understand that this instrument was for such purpose. I understood that the legal title to said cargo of said schooner, immediately prior to the execution of the bill of exchange, was in Harrison. The legal title to the cargo was vested in Harrison by the Tibbeys by their assignment of the same to him, to secure him for the liability he had incurred in their behalf by his bond given to Cashman. Harrison gave Cashman this paper or instrument to settle his liability to Cashman on account of this very bond for the payment of the charter money." The cargo of skins was finally sold in London, but after paying expenses, including expenses of litigation in Japan, Howland realized therefrom only \$600, which was not received by him until some time after May, 1883; and when it was received the defendant took it out of his hands, so that no part of it was paid on the bill of exchange.

I. I think the bill was intended to be what it plainly purports to be, an inland bill of exchange, and that the finding that it "was not intended as an assignment of a portion of any fund whatsoever" is justified by the evidence. By turning over his indemnity security to Howland, Harrison intended merely to provide funds, then supposed to be sufficient, for the payment of the bill at such future time as those funds were expected to come into Howland's hands; thereby gaining time to realize upon his own security for indemnity. But the evidence fails to show that plaintiff agreed to rely solely upon that security, or that the bill of exchange should not have the legal effect of a bill of exchange. The substance of the transaction was—*First*, to settle and liquidate the amount of defendant's liability on his bond; and, *second*, to exchange securities for the payment thereof. The bill of exchange was given to secure the payment of the sum for which defendant was liable on his bond thus liquidated by the settlement. Had it been the intention of the parties that the bill was to operate only as an assignment of the fund to be realized from the cargo, and that it was to be wholly satisfied from that fund alone, it is difficult to conceive why, when the fund was received by Howland, the defendant should have thought himself entitled to demand and receive the whole of it, or why Howland should have complied with the demand. The taking of the money proceeds of the cargo out of the hands of Howland seems utterly inconsistent with the assignment theory, and can be rationally accounted for only upon the supposition that the defendant regarded the instrument as being what it purported to be; and, so regarding it, concluded as matter of law that his liability upon it

had been discharged by want of timely presentment of it to the drawee, or notice of dishonor; and consequently that he was entitled to withdraw his funds from Howland.

The bill itself, before acceptance, has no tendency to prove the assignment, but the contrary. In *Harris v. Clark*, 3 N. Y. 118, the court, by RUGGLES, J., after reviewing the cases, said: "The principle appears to be firmly established that a bill of exchange does not of itself give to the holder, either at law or in equity, a lien upon the funds of the creditor in the hands of the debtor until after acceptance by the latter." To the same effect are *Mandeville v. Welch*, 5 Wheat. 286, and *Tiernan v. Jackson*, 5 Pet. 580. In the well-considered case of *Attorney General v. Insurance Co.*, 71 N. Y. 325, it was held that even a check upon a bank, which has funds of the drawer, does not operate as an assignment of the fund, unless the check specify the particular fund upon which it is drawn; and a like decision was rendered in *Lunt v. Bank*, 49 Barb. 221. In *Bank v. Jauncey*, 3 Sandf. 257, it was insisted by counsel that a bill of exchange drawn against a consignment of cotton, but without specifying the fund, was itself an equitable assignment by the drawer of the cotton or its proceeds. To this the court answered: "This is certainly carrying the doctrine of equitable assignment very far, and is, in our judgment, entirely unsupported by authority. In the cases cited by counsel, and in all the other cases where an order has been held to be an equitable assignment of a particular fund, the fund has been specified in the order, and the party giving the order has thereby divested himself of all right to control the fund purporting to be assigned. The form of the assignment is immaterial, but these two ingredients first named are essential. * * * A bill of exchange, however,—and the instrument in question is nothing more nor less,—differs from such an order. It must be payable at all events, and not out of a particular fund. If its payment is contingent, either with regard to the event or the fund out of which it is to be made, it is not a bill of exchange, but an order or assignment of a fund. The converse of this is also true, that, if the instrument be a bill of exchange, it is not an assignment of a fund."

2. Assuming, as we must, that the instrument is a bill of exchange payable immediately, as it purports to be, I think presentment thereof for acceptance or payment, and notice of dishonor, according to the general rule, were excused as to the defendant. Section 3220, Civil Code, provides: "Presentment of a bill of exchange for acceptance or payment and notice of dishonor are excused as to the drawer, * * * if, at the time of drawing, he had no reason to believe the drawee would accept or pay the same." See, also, *Daniel, Neg. Inst.* §§ 1073-1081 inclusive; *Terry v. Parker*, 1 Nev. & P. 752; *Bank v. Hughes*, 17 Wend. 94. The finding of the trial court that, at the time of drawing the bill, the defendant had no reason to believe that the drawee would accept or pay

the same, is well supported by the evidence, and brings the case fairly within the Code exception to the general rule requiring presentment for acceptance or payment according to the tenor of the bill and notice of dishonor. To bring a case within this Code exception, it is not necessary, as contended by counsel for appellant, to prove fraud on the part of the drawer of the bill. The exception is based on the mere fact that the drawer, at the time of drawing the bill, "had no reason to believe the drawee would accept or pay the same;" and it is certainly possible that this fact may exist without fraud. It may be attributable to folly, or to a degree of negligence not at all evincive of fraud. Indeed, it is consistent with an ill-founded belief that the drawee would accept and pay the bill. *Daniel, Neg. Inst.* § 1073. Except for the purpose of proving want of consideration, fraud, accident, or mistake, which might nullify the instrument, parol evidence is inadmissible to vary or contradict a bill of exchange. "Therefore, if a bill or note be absolute upon its face, no evidence of a verbal agreement made at the same time, qualifying its terms, can be admitted." If the bill is payable on demand, "it cannot be shown by verbal testimony that it was agreed that it should not be paid * * * until the amount was collected from certain sources; nor until a certain draft was received; * * * nor that a note [or bill] in which no time for payment is expressed, and is therefore constructively payable on demand, was to be paid at a specified time; * * * nor that the liability of the drawer, maker, or other party was not to be enforced; * * * nor that it was to be paid out of a particular estate." *Id.* §§ 80, 81, and cases there cited. In this case there is no pretense of fraud on the part of the plaintiff or drawee, or that there was any accident or mistake affecting the express obligation of the drawee. The parol evidence introduced was admissible only for the purpose of proving the consideration or want of consideration for the bill, the timely presentment, demand, etc., or the excuse for not having made them. *Id.* § 81a.

But conceding, for the sake of the argument merely, that the parol evidence was competent to prove, and that it did prove, that the bill was payable only when Howland, at some future time, should receive from Japan or England the cash proceeds of the cargo of skins, yet, by withdrawing from Howland the whole cash proceeds of the cargo after they were received by him, the defendant committed a fraud by which he forfeited the right to require demand and notice. *Id.* § 1081. Besides, he thereby precluded any possible prejudice to himself by want of demand and notice. Said Lord DENMAN, in *Terry v. Parker*, supra: "The question is whether want of effects in the hands of the drawee excuses the holder of a bill of exchange from the necessity of presenting the bill for payment, as well as of giving notice of dishonor to the drawer. Many cases establish that notice of dishonor need not be given to the drawer in such a case, and the reason assigned is because

he is in no respect prejudiced by want of such notice, having no remedy against any other party on the bill. This reason equally applies to want of presentment for payment, since, if the bill was presented and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill, and would be in no way benefited by such presentment and payment." In *Bank v. Hughes*, supra, COWEN, J., said: "When the drawer has plainly suffered nothing, and can sustain no mischief for want of demand and notice, none need be made or given." Had the plaintiff demanded and received from Howland the full proceeds of the cargo, \$600, that sum would have been credited on the bill. Had defendant, after withdrawing the \$600 from Howland, paid it to plaintiff, the result would have been the same. Is defendant prejudiced by his withdrawal and retention of the \$600, which should, and, according to his theory, would, have been paid to plaintiff if demanded? The principle upon which the exception to the general rule solely rests, is that, in the cases to which it applies, the drawer is in no degree prejudiced by the failure of the holder to protest the bill, and would not be benefited by demand and notice of dishonor. It thus appears that in no aspect of the case was the defendant prejudiced by want of presentment of the bill or notice of dishonor.

8. It is contended that the court erred in permitting plaintiff to introduce the bond of defendant to plaintiff as evidence in chief, against defendant's objection on the grounds that it was "immaterial, irrelevant, and incompetent." The bond was certainly competent, relevant, and material on the issue as to the consideration for the bill, raised by the answer, and insisted upon here. But it was at least irregular to introduce it in chief, since the bill was *prima facie* evidence of a sufficient consideration; but it was not objected to on the ground that it was offered out of the proper order, or that it could properly be offered only in rebuttal. That it became relevant in rebuttal there is no question; so that the error, if it was such, of admitting it out of the proper order, was harmless. I think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 418)

BERRY *et al.* v. KOWALSKY, (two cases.
Nos. 13,116, 13,309.)¹

(Supreme Court of California. July 22, 1891.)

BREACH OF OPTION CONTRACT — SUFFICIENCY OF COMPLAINT—EVIDENCE—EXCHANGE RULES.

1. A complaint for the breach of the following contract, "Received of A. Gerberding one hundred dollars, for which I allow him the privilege of delivering me, at any time within thirty days from date, five hundred tons S/87 wheat, at one dollar and eighty cents per cental," signed, "E. H. K.," which is set out *in hac verba*, is sufficient on demurrer, although it does not allege that defendant executed the same.

2. The fact that the abbreviation "S/87" is used as descriptive of the wheat to be delivered under the contract does not make the complaint unintelligible and uncertain, as oral evidence may be introduced to explain the customary meaning, and need not be pleaded.

3. Where the contract sued upon was written on a sheet, with rules of the produce exchange printed at the head, and plaintiff testified that it was no part of the contract, and that the contract had no connection with the exchange, it was error to exclude evidence tending to show that it was an exchange contract, as well as the exchange rules governing such contracts.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by F. G. Berry and John F. English against E. H. Kowalsky for breach of contract. Judgment for plaintiffs. Defendant appeals. Reversed.

Thornton & Merrybach, for appellant. Whittemore & Sears, for respondents.

VANCLIEF, C. There are two appeals in this case, upon distinct records. No. 13,116 is from the final judgment, and upon the judgment roll. No. 13,309 is from an order denying defendant's motion for a new trial, upon a record consisting of a statement of the case in addition to the judgment-roll. On the appeal from the judgment it is contended that the court erred in overruling the defendant's demurrer to the complaint, and that the findings do not support the judgment. On the appeal from the order the errors assigned are errors in law occurring at the trial. The following is a copy of the verified complaint: "The said plaintiffs complain of the said defendant, and for cause of action herein allege: That on the 15th day of July, 1887, the plaintiffs paid to defendant the sum of one hundred dollars for the right and privilege of delivering to defendant five hundred tons of wheat at any time within thirty days from said 15th day of July, at the rate of one dollar and eighty cents per cental. Said contract is in the following words and figures, to-wit: 'San Francisco, July 15, 1887. Received of A. Gerberding one hundred dollars, for which I allow him the privilege of delivering me at any time, within thirty days from date, five hundred tons S/87 wheat, at one dollar and eighty cents per cental. E. H. KOWALSKY.' That said contract was made in the name of A. Gerberding, as the agent of plaintiffs, but the plaintiffs were and still are the real parties in interest; that said plaintiffs, on the 13th day of August, 1887, in the said city and county of San Francisco, at the office of said defendant, tendered the delivery of said five hundred tons of wheat to said defendant, and performed all the conditions on their part undersaid contract. Said plaintiffs then and there demanded from said defendant the sum of eighteen thousand dollars, payment as the price of said wheat according to said contract; that said defendant denied having purchased said wheat, and refused to pay for said wheat, to the damage of plaintiffs in the sum of eighteen thousand dollars; that said plaintiffs made said contract with said defendant in good faith, for the purpose

¹ Reversed in banc. See 30 P. 202, 95 Cal. 124.

of delivering said wheat to said defendant, and had said wheat in warehouse in San Francisco for the purpose of delivering the same on said contract to said defendant. Wherefore plaintiffs pray for judgment against said defendant in the sum of eighteen thousand dollars, interest and costs of suit, and for such other and further relief as justice may require. WHITTEMORE & SEARS, Att'ys for Plaintiff." This complaint was demurred to on the ground (1) that it is ambiguous, unintelligible, and uncertain, in that "no meaning is alleged of the words 'S/78' in the contract;" and (2) that the complaint does not state facts sufficient to constitute a cause of action. The alleged contract is not, does not purport to be, and is not alleged to be, an agreement "to sell and buy," nor an agreement on the part of the plaintiffs to sell wheat at any time. It imposes upon the plaintiffs no obligation to be performed by them. If it be a valid contract, it is an agreement by the defendant, for an executed consideration, to buy and accept delivery of, from the plaintiffs, a certain quantity of wheat, within a certain period of time, for a certain price, at the option of the plaintiffs, and to pay plaintiffs the price therefor. Civil Code, §§ 1726-1730; Whart. Cont. § 453a. Nor is the action brought to recover the price or value of wheat "sold and delivered," or "bargained and sold," but to recover damages for defendant's breach of his alleged conditional agreement to buy the wheat at plaintiffs' option.

1. As against a general demurrer, I think the facts expressed and implied in the complaint barely constitute a cause of action. The written instrument set out purports to have been signed by the defendant, and it is designated as the contract for the breach of which (afterwards alleged) the action is brought. This implies that it was executed by the defendant. The instrument admits the receipt of a consideration of \$100, for which defendant "allows" (gives) plaintiffs the "privilege" (option) to deliver (or not) to defendant, within thirty days, 500 tons of wheat, "at [the price of] one dollar and eighty cents per cental." The giving of the privilege to deliver the wheat to defendant at a certain price implies that he will receive it and pay for it the price specified. The foregoing, I think, is the only admissible construction of the instrument as pleaded. If it will not bear this construction, it can have no effect as an agreement. As a breach of this agreement, it is alleged that, within 30 days, the plaintiffs tendered a delivery of the wheat, and demanded payment of the price, thus creating the condition upon which defendant's liability depended; and that defendant refused to pay the price. This shows a breach of the agreement, for which the plaintiffs were entitled to such damages as proximately resulted therefrom.

2. The grounds of the special demurrer, that the "complaint is ambiguous, unintelligible, and uncertain," do not appear on the face of the complaint. The words or abbreviations "S/87" appear to have been used as descriptive of the wheat, and to require oral evidence of their custom-

ary meaning in the business of dealing in wheat; but such oral evidence need not be stated in a pleading in which the written agreement is set out *in hæc verba*. The meaning may be proved on the trial for the purpose of enabling the court to interpret the words. Civil Code, §§ 1636, 1644-1646; Callahan v. Stanley, 57 Cal. 476. Had it appeared on the face of the complaint that, even with the aid of parol evidence, the words "S/87" as used were meaningless, and that a complete contract was expressed without them, they might have been disregarded as surplusage, (Harrison v. McCormick, (Cal.) 26 Pac. Rep. 830;) and certainly a complete contract is expressed without them. But it does not appear that, read in the light of admissible oral evidence, they are meaningless or unintelligible. So read, they may have a certain unambiguous meaning descriptive of the subject of the contract. Therefore the court could not see, on the trial of the demurrer, that those words were unintelligible, or that their use rendered the complaint ambiguous or uncertain.

3. The execution of the contract, and the breach thereof, as alleged, are found as facts. Therefore, the findings support the judgment.

4. The contract, as set out in the complaint, being denied, it appears by the statement on motion for new trial that, to prove the contract, plaintiffs offered in evidence a paper on which was written the alleged contract as pleaded. Above the manuscript, and on the same paper, was printed matter composed of what was admitted to be extracts from the rules of the Produce Exchange and Call Board of San Francisco. The paper was objected to by counsel for defendant on the ground that it varied from the contract as pleaded, the printed matter not being set out in the complaint. Thereupon, for the apparent purpose of proving that the printed matter was no part of the contract, and that the contract was entirely independent of the printed heading, the plaintiff Berry, on behalf of plaintiffs, testified to the circumstances under which the contract was made, and to what he claimed to have been all the verbal negotiations—all that was said by each party—preceding and leading up to the signing of the written contract, which, he said, was drawn by him according to the verbal understanding. He was further permitted to testify, against the objection of defendant's counsel, that the "contract was drawn independent of any connection with what is known as the 'Produce Exchange.' * * * I was not figuring on the contract on the board. It was business outside. * * * I never read the printed matter on the top of the contract. It had nothing whatever to do with the contract. It is the written portion of this piece of paper that constitutes the entire contract between myself and the defendant." F. J. Bonney, a witness for the defendant, testified that he was a farmer, and was a member of the Produce Exchange and Call Board on or about July 15, 1887, and was somewhat familiar with the rules thereof, and that he was present when the contract in suit

was made, and heard the preliminary talk between the parties, but was not present when defendant signed the contract. Thereupon defendant's counsel asked the witness the following questions, each of which was objected to on the ground that the effect of the answer thereto would be to vary the written contract; and the objection to each question was sustained by the court, defendant duly excepting: "Question. Was there any reference had in the conversation between these parties to what was known as the 'Call Board Contract?' Q. Was anything said about the contract which was to be entered into between the parties being governed or to be complied with or performed under the rules of the San Francisco Produce Exchange and Call Board? Q. Was the term 'board contract' used in reference to the contract proposed to be executed by them in regard to the dealing in wheat upon which they were entering?" The defendant's counsel also offered in evidence all the rules and regulations of the Produce and Exchange Call Board; but, upon objection by plaintiffs' counsel, they were excluded by the court. It appeared that the plaintiff English, and Gerberding, (in whose name the contract was made,) were members of the exchange board at the date of the contract. The defendant, at the same time, owned a seat in the board, but was not then occupying it, having leased it temporarily to another person. The plaintiff Berry had formerly been a member of the board. As to whether, under the facts and circumstances disclosed by the evidence, the contract could properly be considered a "board contract," and as to what extent, if at all, it was governed or affected by the rules and customs of the board, the testimony was conflicting. Without deciding whether the testimony of Berry on the part of the plaintiffs was properly admitted or not, I think after it was admitted the proffered testimony of Bonney, and the rules of the exchange board on the part of defendant, should also have been admitted. The testimony of Berry may have influenced the decision of the court to the prejudice of the defendant, and it does not appear that it did not. Had the testimony of Bonney and the rules of the board been admitted, they might have even more than neutralized the effect of Berry's testimony. It was not questioned by either party that the words "S/87" in the contract were to be interpreted by reference to the rules and customs of the produce exchange board. Each party, without objection, introduced expert testimony as to the effect of the rules on the meaning of those words; and it is, at least, possible that the contract may have been otherwise qualified by them. Whether it was so or not could not have been determined without a knowledge of those rules and customs, together with a knowledge of the circumstances under which the contract was made. After the plaintiffs had been permitted to testify as to those circumstances, and that the contract was independent of the rules of the board, the proffered evi-

dence on the part of the defendant as to the same matters should have been admitted. I think the judgment and order should be reversed, and a new trial granted.

We concur: BELCHER, C. C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted.

DE HAVEN, J. I concur in the judgment upon the ground last discussed in the opinion of Commissioner VANCELIFF. Upon the other points I express no opinion.

90 Cal. 330

HOYT v. SELBY SMELTING & LEAD CO. et al. (No. 13,072.)

(Supreme Court of California. July 24, 1891.)

REPLEVIN—FINDINGS OF FACT—CONFLICTING EVIDENCE—TAXATION OF COSTS.

1. A judgment in favor of the pledgee in an action of replevin for the pledge against him and his bailee, by one to whom the latter had sold it, will not be disturbed where the court finds that the property was pledged by a duly-authorized agent of the pledgor, and the evidence of the agent's authority is conflicting.

2. The decision of a motion to relax costs will not be disturbed where the items appear proper on their face, and the objections thereto were heard and determined upon conflicting evidence.

Commissioners' decision. Department

1. Appeal from superior court, city and county of San Francisco. JAMES G. MAGUIRE, Judge.

Action by A. A. Hoyt against Harris & Rhine and Selby Smelting & Lead Company for the possession of certain bullion. Trial to the court. Judgment for defendants, and plaintiff appeals. Affirmed.

A. B. Hunt, and W. W. Davidson, for appellant. P. Reddy and F. R. Whitcomb, for respondents.

FITZGERALD, C. This is an action of claim and delivery, brought by plaintiff against the defendants, for the possession of 230 bars of base bullion, or its alleged value, and damages for its detention. The allegations of the complaint, and the averment of value, are specifically denied by the answer, and for a further separate defense defendants justify under a pledge. The case was tried by the court without a jury, and judgment rendered in the alternative in favor of defendants. The appeal is taken from the judgment and the order denying plaintiff's motion for a new trial.

The facts necessary to be stated, in connection with the points upon which we have rested our decision, are as follows: On the 30th and 31st days of October, 1884, the defendants Harris & Rhine, partners doing business as merchants at Independence, in the county of Inyo, Cal., commenced two actions, one for \$386.64, and another for \$589.11, against the Owens River Mining & Smelting Company, a corporation of this state, having its principal place of business in San Francisco, and its smelting works and mining property in Inyo county. That thereafter

writs of attachment were issued at the instance of Harris & Rhine, and placed in the hands of the sheriff of Inyo county, who executed the same by levying upon and taking into his possession, with other property, the bullion in question as the property of the said corporation. Afterwards, on the 5th day of November, 1884, one A. P. Minear, the superintendent of the company, and in charge of its smelting works, mining property, and business in Inyo county, for the purpose of releasing the bullion and all the property of the company in said county from these attachments, thereby enabling it to continue the operation of its smelting works, and the working of its mines, agreed to deliver, and subsequently upon the release thereof did deliver, the bullion in question to Harris & Rhine, in pledge to secure to them the payment of a valid and undisputed debt of the corporation, with the undertaking and agreement, on the part of Harris & Rhine, that they should ship the bullion to the Selby Smelting & Lead Company, of San Francisco, to be reduced and refined by it, and that they should cause it to be sold, and out of the proceeds retain the amount of their claim, costs of transportation, reducing and refining, and pay over the balance to the corporation on its order. On the same day, in pursuance of this agreement, they shipped the bullion to San Francisco, to the Selby Smelting & Lead Company, in whose possession it was at the time this action was brought. The plaintiff herein, who is an alleged creditor of the corporation, claims to be the owner and entitled to the possession thereof under and by virtue of a bill of sale, executed to him by the secretary of the corporation in pursuance of a resolution adopted at a meeting of the board of directors held on the 13th day of November, 1884, authorizing and directing him to sell the bullion to plaintiff for \$2,000. It further appears that the meeting was called specially for this purpose, the object being, as was testified to by the secretary of the corporation, "to protect Mr. Hoyt against certain creditors," and "to turn the bullion over to Mr. Hoyt so as to prevent creditors from getting it, and that he subsequently understood that Harris & Rhine were the creditors referred to." The corporation was organized under the laws of this state for the purpose of carrying on a mining and smelting business in Inyo county. A. P. Minear was the superintendent of the company, and intrusted with the management of its business in that county, which is distant about 500 miles from San Francisco. It is contended that Minear, as superintendent of the company, had no power or authority to pledge the property in question, and that the agreement in relation thereto between Minear and Harris & Rhine was not binding on the corporation. The court in its decision found that the Owens River Mining & Smelting Company, acting by and through its duly-authorized agent, A. P. Minear, entered into the agreement referred to with Harris & Rhine, and in pursuance thereof, acting by and through said agent, delivered said property to them, in pledge

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for the purposes stated in the agreement. As the evidence upon this point is substantially conflicting, the finding, under the well-established rule of this court as to conflict, will not be disturbed on the ground of the insufficiency of the evidence to justify it. The conclusion here reached renders it unnecessary to notice the question involving the validity of the sale of the bullion to plaintiff, further than to say that the court below found adversely to plaintiff, and that there was evidence to support the finding.

In relation to the motion of plaintiff to re-tax the bill of costs filed by the defendants herein, and which was denied by the court, it is sufficient to say that upon its face the items of costs and disbursements charged appear to be proper, and, as the objections thereto were heard and decided by the court in favor of respondents, upon evidence which was substantially conflicting, we are of the opinion that the court properly exercised its judicial discretion in denying the motion. We therefore recommend that the judgment and order appealed from be affirmed.

WE CONCUR: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

90 Cal. 340
GORHAM *et al.* v. HEIMAN *et al.*, (SNELL *et al.* Interveners. Two cases. Nos. 12,958, 13,333.)¹

(Supreme Court of California. July 24, 1891.)

MINING BROKERS — COMMISSIONS — STATUTE OF FRAUDS — AGREEMENTS RELATING TO SALE OF LAND.

1. An agreement was made between two brokers and the owner for an equal division of the commissions received upon the sale of a mine. Afterwards one of them secretly made an agreement with a third broker, by which the latter was to receive all of a 10 per cent. commission on the purchase price fixed by the owner, and the former to have all the mine sold for above that price. *Held*, that the first broker was entitled to one-half of the entire amount realized above the price fixed by the owner.

2. Where the purchase money of a mine was payable in installments, and broker's commissions were to be deducted from each installment as paid, it is error to render judgment for the full amount of commissions before all of the installments have been paid.

3. Where the court finds that the owner of a mine agreed with two brokers to sell it on commissions to be shared between them, and that a direction by the owner to the buyer to pay all the commissions to one of them was for the benefit of the other, it is immaterial that the court made no finding upon allegations of a partnership between the brokers, and of fraudulent collusion between the owner and the broker in so directing the payment of commissions.

4. Civil Code Cal. § 1034, subd. 6, requiring agreements employing an agent or broker to buy or sell real estate for compensation or commission to be in writing, does not apply to contracts between brokers to co-operate in making sales for a share of the commissions.

Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action in chancery by Gorham & Rank against Heiman & Hamilton. Snell and others intervened. Trial to the court.

¹ Rehearing denied.

Decrees for plaintiffs and interveners. Plaintiffs appeal from the decree in favor of interveners, and defendants appeal from both decrees. Reversed.

Cyril V. Grey, W. S. Goodfellow, L. F. Dunand, and Cabaniss, Winans & Belknap, for appellants. Royce & Cummings, for respondents. Bishop & Watt, for interveners.

BEATTY, C. J. This is a suit in equity arising out of a controversy between several opposing claimants to a sum of money in the hands of the London & San Francisco Bank. There are two appeals in the case,—the first, No. 12,955, being an appeal by plaintiffs from a part of the judgment in favor of the interveners; and the second, No. 13,333, being an appeal by the defendants Helman & Hamilton from the whole judgment, which was in favor of the plaintiffs and the interveners. The two appeals have been argued and submitted, and may be conveniently considered together.

The controversy arose upon the following state of facts: In January, 1886, and prior thereto, John Rathgeb and brother were owners of a valuable mine in Calaveras county, known as the "Cordova Mine," which they were willing to sell for \$150,000, less 10 per cent. commission, to any broker who might effect a sale for them at that figure. The plaintiffs, Gorham & Rank, were partners in the business of selling mines and other real estate on commission, and had been in communication with the Rathgebbs, endeavoring to secure written authority to make sale of their mine. The interveners, Snell and others, partners in the same business, had likewise been endeavoring to secure such authority from the Rathgebbs, but neither had succeeded. The matter being in this situation, plaintiffs and interveners, each without the knowledge of the other, brought the Cordova mine to the attention of the defendants, Helman & Hamilton, who also were engaged as partners in selling mines on commission, and who, by reason of certain business connections, had unusual facilities for disposing of such properties in the London market. The result was that defendants Helman & Hamilton, without the knowledge of the interveners, entered into an oral agreement with the plaintiffs, to the effect that they would unite with them in obtaining written authority from the Rathgebbs to make the sale, that they would co-operate in effecting it, and divide the commissions equally. At the same time, without the knowledge of the plaintiffs, the defendants entered into another oral agreement, with the interveners, that they would unite with them in obtaining written authority from the Rathgebbs, and, in making the sale, the interveners to take the whole of the 10 per cent. commissions, and the defendants to have what they could get over and above \$150,000, the price asked for the mine by the owner. In pursuance of these agreements, the interveners furnished the defendants with the written report of an expert, and other valuable information they had concerning the mine, and gave the defendant Hamilton a letter

of introduction to the owners, upon the understanding that he should visit them at the mine, for the purpose of procuring their written authority to sell. Shortly thereafter Hamilton did visit the mine, but he went in company with the plaintiff Rank, by whom he was introduced to the owners, and assisted in making measurements of the workings, taking photographs, etc. He did not inform the Rathgebbs of his connection with the interveners, nor, it would seem, did he make any use of their letter of introduction. The result of his and Rank's visit to the mine was that the owners concluded to confide the business of making the sale to the plaintiffs and defendants Helman & Hamilton, and to give them exclusive control of the property for a limited time. It seems to have been understood that Hamilton was to proceed to London for the purpose of effecting the sale there; and for the purpose of facilitating his operations, and at the same time protecting the owners, it was decided to put the transaction in the form of a grant of the mine to Hamilton, the deed to be deposited in escrow with a San Francisco bank, under instructions to deliver it to him upon payment of £30,000, less 10 per cent. A written memorandum to this effect was made at the mine in January, 1886, and afterwards, in March, 1886, a deed, granting the mine to Hamilton, was deposited, with instructions for its delivery, in a bank at San Francisco. Meantime Hamilton had proceeded to London, where he effected a sale of the property for £40,000, to be paid in installments extending over a period of 18 months. For the purpose, apparently, of conforming to the terms of this sale, the Rathgebbs executed another conveyance of the mine directly to the English purchaser, and deposited it with the London & San Francisco Bank, under written instructions for its delivery to the grantee, upon the payment of £30,000 in certain installments, 10 per cent. of each installment, as paid, to be placed to the credit of the defendant Helman. But, although this was the form by which written authority to make the sale was given, it was understood and intended by the Rathgebbs, and by Hamilton and Rank,—the four parties who participated in the negotiations preceding the agreement,—that the direction to the bank to pay the 10 per cent. of the £30,000 to Helman was for the equal benefit of the plaintiffs and defendants; that is to say, Gorham & Rank, as copartners, were to have one-half, and Helman & Hamilton the other half, of said commissions. The defendants Helman & Hamilton, however, seem to have determined at this stage of the proceeding to repudiate the claim of the plaintiffs to any share in the commissions, as well as their agreement with the interveners that they should have the whole thereof; for they concealed the fact that a sale had been made, and, even after Helman had drawn and appropriated 10 per cent. of the first £5,000, he responded to the inquiries of plaintiffs and interveners by a denial of the sale. Before the second installment of £5,000 was paid, the plaintiffs, having discovered the truth, commenced this action,

making Heiman & Hamilton and the Rathgebs defendants. Afterwards, by order of the court, the bank was made a defendant; but, having no interest in the controversy beyond that of a mere stakeholder, its pleadings need not be considered. The Rathgebs also are practically out of the case. The plaintiffs allege against them certain acts of collusion with Heiman & Hamilton, which they deny, and their denial is sustained by the findings of the court. For the rest, it is sufficient to say that in their answers to the complaints of plaintiffs and of the interveners the Rathgebs sustain the allegations of the plaintiffs, and deny those of the interveners, so far as they are brought in relation to the controversy. It will be understood, therefore, that, in speaking of the defendants hereafter in this opinion, Heiman & Hamilton alone are intended.

The plaintiffs in their amended complaint allege that on or about the 18th of January, 1886, they and the defendants associated themselves together as copartners, under an oral agreement to deal in mining properties, and divide the profits equally. That in pursuance of said agreement they informed defendants about the Cordova mine, and that the owners had orally agreed to give them, and such others as they chose to associate with them, a written contract to pay a commission, provided they procured a purchaser for said mine at \$150,000 or more. That it was then and there agreed that Hamilton and Rank should examine the mine and if Hamilton was satisfied therewith, and satisfactory terms could be made with the owners, Heiman should advance the money to defray Hamilton's expenses in going to London and making the sale. That Rank and Hamilton went to Calaveras county, examined, mapped, and photographed the mine. That the owners then and there orally agreed to pay them and their associates 10 per cent. commissions, provided they made a sale in three months at \$150,000 or over, and that said agreement should be reduced to writing in San Francisco, and executed in the presence of Gorham and Heiman. That afterwards John Rathgeb came to San Francisco, and, conniving with defendants to deceive and defraud plaintiffs, executed writings empowering defendants to sell the mine and receive the proceeds. That Hamilton sold the mine to an English corporation for £40,000, to be paid as follows:

£ 5,000.....	August 31, 1886	
5,000.....	5 months thereafter,	
5,000.....	6 " "	
5,000.....	9 " "	
5,000.....	12 " "	
5,000.....	15 " "	and
10,000.....	18 " "	

—Each of the deferred payments to bear interest at the rate of 7 per cent. per annum. That on August 31st the Rathgebs executed deeds of the mine, and deposited them in the London & San Francisco Bank, with instructions to deliver them to the purchaser upon payment of the purchase price; and, for the purpose of defrauding plaintiffs out of their share of the commissions, instructed the bank to pay the commissions to Heiman. That the

first payment was made August 31, 1886, and 10 per cent. thereof, amounting to \$2,418.12, paid to and appropriated by Heiman, to the exclusion of plaintiffs. Upon these allegations, in substance, the plaintiffs prayed—*First*, that the defendants be required to bring in the papers deposited in the bank, to the end that they might be properly reformed so as to preserve the rights of the plaintiffs; *second*, that Heiman & Hamilton be required to account for and pay to them one-half of the commissions received; *third*, that the bank be made a party; *fifth*, for an injunction against payment by the bank to Heiman & Hamilton *pendente lite*; *sixth*, for costs and general relief. To this complaint Heiman & Hamilton each interposed a general demurrer for want of facts, which being overruled, they answered separately, denying all the material allegations of the complaint, except the sale of the mine and its terms, and alleging an exclusive contract between themselves and the Rathgebs for its sale and the payment of the commissions. Afterwards a supplemental complaint was filed, alleging the payment to the bank of two additional installments of the purchase price of the mine, and the receipt and appropriation by Heiman of 10 per cent. of the second installment, all of which was admitted by the several defendants to be true. Afterwards the interveners were permitted to file their complaint in intervention, wherein they alleged that in November, 1885, they associated themselves as copartners, under an oral agreement to deal in mining properties, and divide the profits. That thereafter they were engaged in negotiating a sale of the Rathgebs' mines, and while so engaged were informed by Heiman & Hamilton of the facilities they claimed to have for selling mines in London. That they thereupon informed defendants of their attempts to sell the Rathgebs' mine, and that they were to receive 10 per cent. of the selling price, which must not be less than \$150,000. That defendants offered to aid them in negotiating a sale, and they "then and there agreed that said Snell and his associates would place said property in the hands of said Hamilton & Heiman for sale;" defendants to receive for their compensation in making the sale the excess which might be obtained over \$150,000, and the interveners to receive the 10 per cent. That in pursuance of this agreement the interveners delivered to the defendants a written report and diagram of the property, supplied other information, and thereafter continued to render all possible aid to defendants in making a sale. That afterwards a sale was made as alleged in the complaint. That John Rathgeb was well informed of all the facts, and well understood that interveners were to receive the commissions on the sale. That after the sale said Hamilton induced John Rathgeb to order the commissions to be paid to him. That they refuse to pay any part thereof to the interveners, though demanded, etc. Wherefore interveners pray—*First*, that the bank be directed to pay them such sums as may be found to be due, etc.; *second*, that Hamilton &

Helman be ordered to pay them the sums they have received; and, *third*, for general relief. To this complaint in intervention the plaintiffs and the Rathgebs interposed demurrers, which were overruled; whereupon they answered, denying all the material allegations contained therein. The defendants Helman & Hamilton answered by similar denials without having demurred.

Upon these pleadings the cause was tried by the superior court without a jury, and the facts found substantially as set out in the beginning of this opinion, from which it was concluded as follows: "As against the defendants, the plaintiffs are entitled to one-half of the sum on deposit in the London & San Francisco Bank, Limited, as the commissions; as against the defendants, the interveners are entitled to the whole of said commissions; as between the plaintiffs, the interveners, and the defendant London & San Francisco Bank, Limited, the plaintiffs are entitled to one-third, and the interveners to two-thirds, of the sum on deposit in said bank. Defendants Hamilton & Helman to pay the costs." The following judgment, omitting formal recitals, was at the same date signed and filed by the judge, together with the findings, and was afterwards duly entered: "Now, therefore, in accordance with law and decisions and findings aforesaid, it is ordered, adjudged, and decreed that the plaintiffs, C. L. Gorham and J. B. Rank, do have and recover of and from the defendants C. A. Hamilton and Joseph Helman the sum of seven thousand two hundred and seventy-five dollars, with interest at seven per cent. per annum from the 31st day of August, A. D. 1886, and for their costs, taxed at the sum of ——. And it is further ordered, adjudged, and decreed that the interveners, Henry Snell, W. E. Griswold, James McMeahan, and S. W. Howland, do have and recover of and from the defendants C. A. Hamilton and Joseph Helman the sum of fourteen thousand five hundred and fifty dollars, (\$14,550,) with interest thereon from the 31st day of August, A. D. 1886, and their costs of this action, taxed at the sum of ——. And it is further ordered, adjudged, and decreed that the defendant London & San Francisco Bank, Limited, do pay over and deliver to the plaintiffs and interveners, above named, all funds received and held by it as commissions on the sale of the so-called Rathgeb or Cordova mine, or held by it to the credit or order of the defendants C. A. Hamilton and Joseph Helman, or either of them, and all moneys received by it from the Union Gold Company, Limited, or from John Rathgeb, Sr., and Hans Rathgeb, or either of them, to the credit of said defendants C. A. Hamilton and Joseph Helman, or either of them, to the extent of the judgments in favor of the plaintiffs and interveners herein ordered, in the proportions following, viz., one-third of such funds to the plaintiffs, and two-thirds thereof to the interveners. Done in open court this 25th day of May, A. D. 1888."

We will first consider the appeal of the defendants from this judgment.

1. They contend that the superior court erred in overruling their demurrers to the complaint of the plaintiffs, because the oral agreement to form a copartnership to deal in mining properties therein alleged was void. But, reading the whole complaint together, it is apparent that the contract alleged was merely to buy and sell as brokers, and there is no statute of frauds requiring such contracts to be in writing. Besides, there is enough in the complaint to show a cause of action against the appellants, independent of the contract of partnership. It shows an agreement to co-operate in obtaining authority to sell, and in selling, a mine for an equal share of the commissions. It shows that the agreement was acted upon. It shows performance on the part of plaintiffs, collection of the commissions by appellants, and refusal to divide. Certainly this establishes a cause of action if the agreement was valid, and we know of no ground upon which it can be held invalid. Counsel seem to rely on section 1624, Civil Code, subd. 6. But, clearly, that provision was only designed to protect owners of real estate against unfounded claims of brokers. It does not extend to agreements between brokers to co-operate in making sales for a share of the commissions. It may be, as counsel argue, that the allowance of such claims as plaintiffs and interveners make in this action, unsupported as they are by any written evidence of the contract, opens the doors to frauds of as gross a nature as were ever perpetrated by real-estate brokers, under pretense of oral employment by the owners to make sales; but, if so, the evil is one which the legislature alone can remedy. It might be as plausibly argued that contracts should generally be held void if not in writing, but the law is otherwise. *Id.* § 1622. The court did not err in overruling the demurrers.

2. The objections to the sufficiency of the complaint in intervention urged in the argument are better founded, and will be referred to hereafter, but for the present it is sufficient to say that defendants did not demur to the complaint in intervention.

3. It is no objection to the sufficiency of the findings that they do not respond to the allegation of a partnership between plaintiff and defendants. As we have seen, that allegation is wholly immaterial. We think the findings do clearly and sufficiently show that it was understood and intended by the Rathgebs that plaintiffs were to have a share in the business of selling the mine, and an equal share of the commissions; that the direction to pay the commissions to Helman was for the benefit of all these parties; and that Helman was thereby constituted the agent and trustee of plaintiffs in the collection of their share of the commissions.

4. Such being the case, the allegation that the Rathgebs colluded with defendants to defraud the plaintiffs becomes immaterial, and the failure to find this allegation true does not affect their right to recover.

5. The findings in favor of the interveners are certainly rather meager, but they come

fully up to the allegations of their complaint, so that the particular objection made to them goes rather to the complaint than to the findings themselves. In setting out their agreement with defendants, interveners allege that they agreed "to place said property in the hands of Heiman and Hamilton for sale," but they nowhere allege compliance with this stipulation, or anything equivalent to it, or excuse for non-compliance. Their complaint was, in this respect, extremely faulty; but the court, in the absence of a demurrer, seems to have treated the allegation quoted as the equivalent of an allegation that interveners agreed to furnish Heiman & Hamilton with such information as they possessed concerning the mine, introduce them to the owners, and, when the mine should be placed in their hands, to assist in making a sale. This, in substance, is all they are found to have done, and this, no doubt, if such was the agreement, was a sufficient consideration for an agreement by defendants to allow them all the commissions on the price demanded by the owners. But the allegations of the complaint in intervention as to these matters are too loose and vague to deserve commendation, and the findings are necessarily like the pleadings. It is not necessary, however, to decide whether these deficiencies would necessitate a reversal of the judgment, since there is another ground upon which we are convinced it must be reversed; and, when the cause is remanded, the interveners will have an opportunity of amending their complaint so as to show precisely what they stipulated to do, and their compliance with their stipulations, or their excuse for any failure to comply.

6. The defendants make the point that the findings do not support the judgment, and in this respect we think their contention must be sustained. There is nothing in the pleadings or the findings to show that anything more than the three first instalments of the price of the mine, amounting to £15,000, has been paid by the English purchaser, and it clearly appears that, under the contract with the Rathgebbs, Heiman & Hamilton were only to receive for commissions 10 per cent. of the amount actually paid into the bank. But the judgment against them in favor of the interveners is for 10 per cent. of £30,000, and in favor of plaintiffs for half that sum; in other words, there are judgments against them for commissions which, so far as the record shows, they have never received, and may never become entitled to. For this error the judgment must be reversed, and the cause remanded for further proceedings.

For the purpose of such further proceedings, it is necessary that the superior court should be advised of our views respecting the controversy between plaintiffs and interveners as to the proportion of the fund in the hands of the bank to which they are respectively entitled. The plaintiffs contend, in support of their appeal, that the superior court erred in directing payment to them of only one-third of said fund, and we think they are right in this contention. It may be that defend-

ants have become personally liable to the interveners for an amount equal to the whole of the 10 per cent. commissions on £30,000, and that, as against the defendants, the interveners would be entitled to the entire fund. But if one-half of the fund has always belonged to the plaintiffs, it cannot be taken away from them, and given to a party to whom the defendants, without right or authority, agreed to give it. According to the findings, the defendants, before obtaining any authority from the mine-owners, agreed to give the interveners the entire amount of the commissions. This, as we say, may have resulted in a personal liability to that amount, but the right of the interveners to share in the specific fund is dependent upon the right of the defendants, and can by no possibility exceed it. Now, this fund was created by the act of the mine-owners, and belongs to those for whose benefit they designed it. They had a right to select their agents for the sale of the mine, and they selected, not the defendants only, but the plaintiffs and the defendants, and they agreed with the plaintiffs that they should have one-half of the commissions. By virtue of this agreement, one-half of the commissions became the property of the plaintiffs, and the defendants had no power to dispose of it. The mere fact that Heiman was empowered to draw the whole of the commissions conferred upon defendants no property in the share of the plaintiffs. It simply constituted Heiman their trustee to receive and pay over the money to them. For these reasons the part of the decree appealed from by the plaintiffs must be reversed.

It remains to be decided what further proceedings in the superior court are necessary for determining and enforcing the rights of the parties. As to the plaintiffs, there seems to be no necessity for a new trial of the issues upon which their right to recover from defendants one-half of the commissions depends, but, for the purpose of determining the amount to which they are entitled, it will be necessary, by supplemental complaint and additional findings, to ascertain the amount paid by the purchaser of the mine, for upon that depends the amount of commissions earned. As to the interveners, they should be allowed to amend their complaint, and as between them and plaintiffs and defendants there should be a new trial. If they again recover, the funds in the hands of the bank should be equally divided and applied in satisfaction of the respective judgments in favor of plaintiffs and interveners. If the interveners fail to recover, the fund in the bank should be applied, as far as necessary, in satisfaction of the judgment in favor of the plaintiffs. The judgment is reversed, and the cause remanded, with directions to the superior court to proceed in accordance with the views herein expressed.

WE CONCUR: PATERSON, J.; DE HAVEN, J.; GAROUTTE, J.; SHARPSTEIN, J.

HARRISON, J., deeming himself disqualified, did not participate in the above decision.

90 Cal. 373

LA GRILLE *et al.* v. MALLARD. (No. 14,189.)

(Supreme Court of California. July 26, 1891.)

MECHANIC'S LIEN—COMPLAINT—REVIEW ON APPEAL.

1. A complaint alleging that plaintiffs, in accordance with a contract made by them as original contractors with defendant, papered and decorated several rooms in a dwelling-house of the latter, and furnished the labor and material therefor, sufficiently shows that plaintiffs were "original contractors," within Code Civil Proc. Cal. § 1187, which provides that every "original contractor," claiming the benefit of a mechanic's lien, must file his claim within 60 days after the completion of any building, improvement, etc.

2. Section 1187 further provides that such claim must state the terms, conditions, etc., of the contract; and Civil Code, §§ 1609, 1610, provide that a consideration may be executed or executory, and, where executory, it is not indispensable that the contract should specify its amount, or the means of ascertaining it. *Held*, that an allegation that defendant promised to pay "the reasonable value" of said labor and material indicated a sufficient consideration to render the contract valid.

3. Where, on appeal by defendant from a default judgment, on the ground that the complaint fails to state a cause of action, the evidence is not before the court, the question will be determined by the allegations of the complaint.

4. Papering or decorating a house with paper decorations is a proper subject-matter of a mechanic's lien.

Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by La Grille & Kraft against Walter Mallard to enforce a mechanic's lien. Judgment for plaintiffs. Defendant appeals. Affirmed.

Thomas Mitchell, for appellant. E. C. ROVER, for respondents.

GAROUTTE, J. This is an action to foreclose a mechanic's lien, in which plaintiffs obtained a decree, the defendant having filed an answer, and then failed to appear at the trial. He now appeals from the judgment, and insists that the complaint does not state facts sufficient to constitute a cause of action. The notice of lien was filed 34 days after the completion of the work. If the plaintiffs were not original contractors, the complaint is fatally defective, and will not support the judgment, for the notice of lien was not filed within 30 days. The evidence not being before us, this question must be weighed and determined by the allegation of the pleading.

The plaintiffs allege "that on or about the 10th day of June, 1886, plaintiffs made and entered into a contract, as original contractors, with the defendant herein, whereby the plaintiffs were to paper and decorate, with paper decorations, the walls and ceilings of four rooms and the hall in the building, the same being a dwelling-house of the defendant; and afterwards, about the 10th day of July, 1888, by the direction and request of the defendant, plaintiffs papered with plain paper the walls and ceiling of one other room and two closets in said building; the said plaintiffs were to furnish, and did actually furnish, the labor and material used in doing said papering and decorating in said building, and the defendant promised

and agreed with plaintiffs that he would pay for said labor and material the reasonable value thereof, to be so paid when said work should be completed." Under this allegation the plaintiffs furnished the material and performed the labor in decorating these rooms, under a contract made directly with the owner, and were to receive from him what the services and material were reasonably worth, when said work was completed. If it had been agreed between the parties as to the exact amount to be paid by defendant, then certainly there would have been a complete and perfect contract, and the plaintiffs would have been original contractors, within the meaning of the statute; or if it had been stipulated that the compensation should be determined by arbitration, that would not have detracted from the completeness of the contract, or defeated the claims of plaintiffs that they were original contractors. Section 1609 of the Civil Code provides: "A consideration may be executed or executory, in whole or in part." Section 1610: "When a consideration is executory, it is not indispensable that the contract should specify its amount or the means of ascertaining it; it may be left to the decision of a third person, or regulated by any special standard." Section 1611: "When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the consideration is reasonably worth." It is a common practice for a party desirous of erecting a building to let different contracts to various parties for the building of certain portions of it. These parties would all be original contractors, and men employed by them would be entitled to file liens as laborers. Under this contract, men working for plaintiffs in the decoration of this house would have been entitled to their laborers' liens; and that, too, under section 1194 of the Code of Civil Procedure, prior to the satisfaction of any lien filed by plaintiffs. Plaintiffs and their employes both being entitled to liens, in order to distinguish their status, the former must unquestionably be designated as original contractors. These views are not in hostility to the case of Sparks v. Mining Co., 55 Cal. 389, or Schwartz v. Knight, 74 Cal. 432, 16 Pac. Rep. 235. Indeed, the case of Sparks v. Mining Co., supra, is in line with the foregoing views, for the test as there defined is: If there could be intermediate lienholders for work done or materials furnished, then the plaintiffs here would be contractors. We have already seen that such a result might follow in this case, and, measured by the foregoing test, the plaintiffs are original contractors, and filed their notice of lien within the statutory time. Papering or decorating a house with paper decorations is as much the subject-matter of lien as painting or putting on a hard finish of plaster. The paper loses its character of personalty, becomes affixed to the building, and its removal therefrom results in a destruction of its value. For

the foregoing reasons let the judgment be affirmed.

We concur: HARRISON, J.; PATERSON, J.

90 Cal. 263

MERITHEW v. ORR. (No. 14,241.)

(Supreme Court of California. July 25, 1891.)

REVIEW ON APPEAL—EVIDENCE NOT OF RECORD.

Where, in an action for the balance due on a mutual account, the items of which are set forth in the complaint, the court has found for plaintiff in a less sum than that demanded, and defendant, appealing from the judgment, brings only the judgment roll before the supreme court, the finding is conclusive, and the judgment will be affirmed.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action on a mutual account by one Merithew against one Orr. Judgment for plaintiff. Defendant appeals. Affirmed.

L. F. Fisher, for appellant. Brousseau & Hatch, for respondent.

PATERSON, J. It is alleged in the complaint that on November 4, 1888, the defendant's testator was indebted to plaintiff in the sum of \$761.32, the balance of a mutual account; that, after the death of the said testator, and the probate of his will, plaintiff's claim was duly presented to defendant, the executor, for allowance, and was rejected. The answer denied that the defendant's testator was indebted to plaintiff, as alleged, or at all. The court found that on April 15, 1888, plaintiff and the testator, Matthew W. Orr, had a settlement of their accounts with each other, and agreed that there was due at that time from plaintiff to Orr the sum of \$115; that said Matthew W. Orr thereafter became indebted to plaintiff for hay sold to him in his life-time in the sum of \$515; for one mare, \$75; for the use of a team and mowing-machine 10 days, \$15; and for hauling hay, \$30; amounting to \$635; leaving a balance due plaintiff at the time of the death of said testator in the sum of \$520. Judgment was entered in favor of plaintiff for the last-named sum, with interest, and defendant has appealed. The appeal is from the judgment, the judgment roll only having been brought before us. It cannot be said that the findings go beyond the issues. The action is to recover the balance due on the mutual account; and the items were duly set forth in the claim presented, and in the complaint. The court found as an ultimate fact that the estate was indebted to plaintiff in the sum of \$520, which was less than the amount claimed. The evidence is not before us, and the finding is therefore conclusive. The judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

90 Cal. 377

PEOPLE v. LOUI TUNG. (No. 20,784.)

(Supreme Court of California. July 26, 1891.)

ROBBERY—EVIDENCE—NEW TRIAL.

1. Where, on a trial for robbery, it is conceded that there was blood upon defendant's coat, a witness who saw him shortly after the

alleged robbery is competent to testify that such blood was fresh, although he is not an expert.

2. The denial by the trial court of a motion for new trial, on the ground of newly-discovered evidence, tending to show statements of the prosecuting witness inconsistent with his testimony, will be affirmed, where two eye-witnesses gave testimony directly contrary to that of such prosecuting witness, since such new evidence is merely cumulative.

3. Newly-discovered evidence, the only office of which is to impeach an adverse witness, is insufficient to justify a new trial.

In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Appeal of Loui Tung from a conviction of robbery. Affirmed.

C. C. Stevens and J. A. Donnell, for appellant. Frank P. Kelly, Dist. Atty., W. H. H. Hart, Atty. Gen., and Oregon Sanders, Dep. Atty. Gen., for the People.

GAROUTTE, J. The defendant was convicted of robbery, and appeals from the judgment and order denying his motion for a new trial. It insisted that the court erred in its decision of questions of law. Many of the exceptions to the court's rulings are technical in the extreme, and others have not even a technicality upon which to lean for support. As an example, at the trial it was conceded that there was blood upon defendant's coat. A witness testified that shortly after the alleged robbery he saw the defendant, and there was fresh blood upon his coat. Counsel for defendant moved to strike out the statement as to its being fresh blood, upon the ground that the witness had not shown himself to be an expert. We fail to see that the question involved was such as to prevent any witness of ordinary understanding from testifying regarding it. The remaining exceptions were based upon rulings made upon matters largely in the discretion of the court, and we discover no abuse of that discretion. The offense was proven to have been committed in the city of Los Angeles, which constitutes sufficient proof of the venue. People v. McGregor, (Cal.) 26 Pac. Rep. 97, and cases there cited. The evidence is contradictory, and we will not disturb the verdict of the jury upon the ground of its insufficiency. The motion for a new trial, upon the ground of newly-discovered evidence, is addressed to the sound discretion of the trial court. The affidavits relied upon tend to show statements of the prosecuting witness inconsistent with the testimony he gave in the case, thereby impeaching him. Two eye-witnesses gave testimony at the trial directly contradicting his testimony in all material points, and in that respect the facts set out in the affidavits would be simply cumulative. Where the only office of newly-discovered evidence is to impeach an adverse witness, it is insufficient for the purposes of a new trial. Stokes v. Monroe, 36 Cal. 388; People v. Anthony, 56 Cal. 399. Considering the character of these affidavits proffered, we cannot say that the court might not have reasonably inferred that the verdict would have been the same had the evidence set out in the affidavits been before the jury. Let the judgment and order be affirmed.

WE CONCUR: MCFARLAND, J.; SHARPSTEIN, J.; DE HAVEN, J.; HARRISON, J.; PATERSON, J.

(39 Cal. 552)

BAIRD V. MILFORD LAND & LUMBER CO.
(No. 13,143.)

(*Supreme Court of California*. July 23, 1891.)

LEASE OF TIMBER-LAND—CONSTRUCTION.

A contract leasing certain land, with the privilege of removing timber therefrom, provided that the lessee should remove at least 1,500,000 feet the first year, and 2,000,000 each succeeding year, and pay one dollar per thousand feet therefor, in quarterly installments; provided that, if he should not remove such amount in any one year, he should pay therefor and remove the same in any subsequent year without further charge; the lease to continue 20 years, renewable at the option of the lessee, on certain stated terms. *Held*, that such contract provided only for the sale of the timber, and not for a continuous rent, and, where the timber is all removed before the end of the lease, the lessor cannot recover rent for the remainder of the term. Modifying 26 Pac. Rep. 1084.

On rehearing.

PER CURIAM. The petition for a rehearing is denied, but the following portion of the opinion, being unnecessary to a decision herein, is eliminated therefrom: "It is certain that defendant cannot be deprived of the use of the land for general lumbering purposes until the end of the twenty years named, whether the timber is removed or not, and we do not think that the parties intended that any consideration should be paid to plaintiff during that term other than the value of the merchantable timber at the price fixed."

(90 Cal. 10)

NILES V. EDWARDS. (No. 13,050.)

(*Supreme Court of California*. July 30, 1891.)

CONVERSION—MEASURE OF DAMAGES.

Under Civil Code Cal. § 3336, which provides that, where an action for the conversion of personal property has been prosecuted with reasonable diligence, the measure of damages shall be the highest market value of the property at any time between the conversion and the verdict, a finding of the highest market value of the property, between the conversion and the trial, will not sustain a verdict for that amount, in a case which was pending for one year, unless there is a finding that the suit was prosecuted with reasonable diligence.

In bank. Motion for rehearing. For former report, see 27 Pac. Rep. 159.

PER CURIAM. A rehearing of this cause is denied, but the judgment heretofore pronounced by the department is modified so as to read as follows: For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for a new trial. This modification of our previous order is made because our attention is called to the fact that there is nothing in the findings to fix the amount of the damages to which the plaintiff is entitled. The rule of damages for conversion of personal property is prescribed by section 3336 of the Civil Code, as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion with

the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and (2) a fair compensation for the time and money properly expended in pursuit of the property." In this case the date of the conversion was November 17, 1886; action commenced, November 29, 1886; trial, December 13, 1887. The complaint alleges damages in the sum of \$1,000, and prays judgment for \$1,000, or for the highest market value of the stock before verdict. Waiving all questions as to the time when the plaintiff must make his election as to which method of computing damages he will ask the court to apply, and assuming that in this case he had a right to claim the highest market value, the findings are clearly insufficient to support a judgment on that basis. There is, it is true, a finding that the highest market value of the stock between the conversion and the trial was \$3,300, but there is no finding, express or implied, that the action had been prosecuted with reasonable diligence. We could, perhaps, say as matter of law that the action was commenced in time to entitle the plaintiff to the benefit of the rule allowing the highest market value, but, a whole year having elapsed between the commencement of the action and the trial, it cannot be concluded as matter of law that it was prosecuted with due diligence. It may have been or it may not have been so prosecuted, and, without an express finding in his favor on this point, the plaintiff is not entitled to a judgment based on the highest market value, and, as there is no finding of the value of the stock at the date of conversion, there is nothing to sustain a judgment based on the other branch of the rule. A retrial of the cause is therefore necessary.

(90 Cal. 368)

MOFFAT V. GREENAWALT et al. (No. 14,310.)

(*Supreme Court of California*. July 26, 1891.)

APPEAL—BONDS—FAILURE OF SURETIES TO JUSTIFY.

1. A complaint in an action on an appeal bond which alleges that defendant, in an action in the justice court, "appealed to the superior court of said county from said judgment," is a sufficient averment that an appeal was taken, and it is unnecessary to set out the several acts performed in taking it.

2. Where the condition of a bond is that, "if the appeal be withdrawn or dismissed," the obligors will pay the amount of the judgment, the fact that the sufficiency of the bond was excepted to, and the sureties failed to justify, does not relieve them from liability, where execution was stayed on the filing of the bond, though the appeal was dismissed for failure to give a sufficient bond.

3. Under Code Civil Proc. Cal. § 978, which provides that when exceptions have been taken to the sufficiency of sureties, unless they justify within five days, "the appeal must be regarded as if no undertaking had been given," the sureties, on failure to justify, are not released from the obligation of an appeal bond given, on the ground that no appeal was taken, but the appeal may be dismissed.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADSWORTH, Judge.

Action by Moffat against Greenawalt and others, on an appeal-bond from a justice court. Judgment for plaintiff. Defendants appeal. Affirmed.

Dupy & Bently and *R. Dunnigan*, for appellants. *Adams & Mitchell*, for respondent.

HARRISON, J. This was an action against the defendants as sureties upon an undertaking, given on an appeal from a judgment rendered in favor of the plaintiff in the justice's court of Los Angeles city township. The judgment was rendered in the justice's court, June 3, 1889. On the 18th of June the defendant in that case served and filed a notice of appeal therefrom, and on the 21st of June an undertaking on appeal executed by the defendants herein was filed in the justice's court. June 22d the plaintiff excepted to the sufficiency of the sureties, and they failed to justify; and, no other undertaking being filed, the papers in the case were not transmitted to the superior court by the justice; and on the 7th of November, 1889, the superior court, upon the motion of the plaintiff, dismissed the appeal.

1. The allegation in the complaint that the defendant in the action in the justice's court "appealed to the superior court of said county and state from said judgment" is a sufficient averment of that fact. The "appeal" is the ultimate fact to be alleged. The several acts performed in taking it are but probative facts, and their allegation in the complaint would be obnoxious to the charge of alleging evidence instead of facts. The provisions of section 456, Code Civil Proc., have no application to an averment of this nature. An appeal is not in any sense a "judgment or other determination." The objection urged in support of the demurrer, that the averment in the complaint that the "appeal was dismissed by the superior court" does not sufficiently comply with the requirements of section 456, *Id.*, if it had any merit, was cured by the allegation in the answer that the court made an order that the appeal be dismissed, "which said judgment was duly made, duly rendered, and duly given."

2. It is contended by the appellants that, upon their failure to appear and justify after the plaintiff had excepted to their sufficiency under the provisions of section 978, Code Civil Proc., "the appeal must be regarded as if no such undertaking had been given;" and they further contend that, inasmuch as if no undertaking had been given, the appeal was "not effectual for any purpose," there was no appeal which could be dismissed; consequently their liability on the undertaking never attached. At the common law, when special bail were excepted to, they were considered as no bail, unless they justified, and, if they did not justify, the court would, upon their application, order an *exoneretur* to be entered upon the bail-piece, but until this was done they were held liable. 1 Tidd, Pr. 258. In *Bramwell v. Farmer*, 1 Taunt. 427, the court affirmed a judgment against the bail under these circumstances, saying: "The bail had nothing to do with the exception

or the waiver of it. They entered into a recognizance, and thereby incurred the obligation to perform it." In New York, under a provision similar to that in our Code, it is held that the sureties upon an undertaking on appeal are liable thereon, although they have failed to justify after an exception has been taken to their sufficiency. *Manning v. Gould*, 47 N. Y. Super. Ct. 387; *McSpedon v. Bouton*, 5 Daly, 30. By their undertaking, the defendants promised and agreed that, "if the appeal be withdrawn or dismissed," the appellant would pay the amount of the judgment so appealed from. This was an original and independent agreement on their part. (*Tissot v. Darling*, 9 Cal. 278;) and, in legal effect, was entered into by them with the plaintiff. By virtue of the provisions of section 979, Code Civil Proc., upon the filing of the undertaking staying proceedings, all proceedings under the execution are to be stayed; and it was shown at the trial that, upon the making and filing of said undertaking, the property levied upon under an execution upon the judgment was released. The consideration recited in the undertaking was the "staying of the execution of the judgment appealed from." As soon as this undertaking was filed, it became an executed obligation on their part, and, whenever the contingency upon which the obligation was to depend arose, their liability became fixed. This liability could not thereafter be defeated by any act or omission on their part, or on the part of their principal. Their agreement to be bound, in case the appeal should be dismissed, extended as well to a dismissal resulting from their failure to justify as to a dismissal resulting from a failure on the part of their principal to prosecute the appeal. In *Murdock v. Brooks*, 38 Cal. 596, it was held that when the party in whose favor the undertaking was executed had had the benefit of a stay of execution the sureties could not be heard to say that the undertaking was void because all the forms of the statute, through their omission, were not complied with, and that the failure of the sureties to justify constituted no defense. In *People v. Shirley*, 18 Cal. 121, it was said: "The justification forms no part of the defendants' contract, and in no manner affects their liability." We do not think that it was competent for the defendants, after they had executed the undertaking, to avoid their liability thereon by any act of their own, or any failure to comply with a provision which is intended solely for the protection of the respondent.

3. The contention that no appeal was taken cannot be maintained. Section 974, Code Civil Proc., provides that "the appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party;" and the provision in section 978 that the appeal "is not effectual for any purpose, unless an undertaking be filed," implies that, when the undertaking is filed, the appeal is effectual. The subsequent clause in section 978 that unless, when an exception has been taken to their sufficiency the sureties justify within five days thereafter-

er, "the appeal must be regarded as if no such undertaking had been given," is to be construed, not as having the effect, *ipso facto*, to vacate the appeal already completed, but as giving to the respondent the right, if he shall choose to avail himself thereof, to move for its dismissal, upon the ground that since it was taken it has become ineffectual. The jurisdiction of the superior court attached upon the perfecting of the appeal, by the filing of the undertaking, and, having once attached, could be divested only by an order of dismissal, or some other act of that court. This principle was recognized in *Coker v. Superior Court*, 58 Cal. 179, where it was said that, when the papers have been served and filed within the time limited therefor, "the appeal is completed; and although some of the papers which make up the appeal may be defective, or may not have been served or filed in the order named in the statute, or an execution may have been issued on the judgment and levied, yet they are, unless fatally defective, sufficient to confer jurisdiction upon the appellate court, and to stay proceedings on execution according to section 979, Code Civil Proc." The principle was also recognized in *Wood v. Superior Court*, 67 Cal. 115, 7 Pac. Rep. 200, where it was held, under a state of facts almost identical with those in the present case, that the superior court should have granted the motion made on behalf of the respondent to dismiss the appeal. The expression used in the opinion, "the appeal was not perfected, and the superior court has no jurisdiction of the case," must be read in connection with the matter before the court, which was a review of the action of the superior court in proceeding to try the case. The court meant by that expression that the superior court had no jurisdiction against the objection of the respondent to try the case, or to change the judgment of the justice's court. It did not mean that it had no jurisdiction of the appeal; otherwise it would not have directed a dismissal thereof. It follows that the superior court in the present case had jurisdiction to dismiss the appeal, and that upon such dismissal the appellants became liable for the amount of the judgment appealed from. The judgment and order of the court below are affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

90 Cal. 364

GODDARD *et al.* v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 14, 335.)

(*Supreme Court of California*. July 25, 1891.)

WRIT OF PROHIBITION—ASSIGNEE IN INSOLVENCY—JURISDICTION.

A writ of prohibition will not be granted to compel the superior court to discontinue an action by an assignee against petitioners to recover the property of the insolvent, on the ground that the assignee acquired no title to the property in controversy, since the court has jurisdiction to determine that question in the pending suit.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Petition of Goddard and others for writ of prohibition to superior court of San Francisco to compel the discontinuance of a suit against petitioners. Writ denied.

Sullivan & Sullivan, (T. I. Bergin, of counsel,) for petitioners. *Naphtaly, Freudenrich & Ackerman* and *E. H. Rixford*, (T. H. Rearden, of counsel,) for respondent.

DE HAVEN, J. This is an application to this court for a writ of prohibition to the superior court of the city and county of San Francisco, department 3, JOHN F. FINN, Judge, commanding and directing said court and judge, and assignee and receiver appointed by said court, to desist from further proceeding in the matter hereinafter stated. It is alleged in the petition that on December 1, 1890, W. H. Eastland and John Fowler were copartners, residents of this state, and doing business in the city of San Francisco under the name of Eastland, Fowler & Co., and as such partners were indebted to the petitioners in a large sum; and, in order to secure the same, the said firm made a transfer and conveyance of certain of its assets to the petitioners, and possession thereof was given to them. On the 9th of December, 1890, the said W. H. Eastland and John Fowler filed their petition in insolvency in the said superior court. The said petition is entitled "In the matter of W. H. Eastland and John Fowler, copartners," and recites that it is made by said named persons, "copartners in business." Such proceedings were thereafter had that an assignee of said insolvents was appointed, and the clerk of said superior court executed to said assignee an assignment and transfer, purporting to convey to said assignee "all the estate, title, right, and property of W. H. Eastland and John Fowler, and of the copartnership of Eastland, Fowler & Co., in and to all the assets of said Eastland and Fowler, and of said copartnership." Thereafter the said assignee, by virtue of said assignment, brought and is now maintaining an action in said superior court against the petitioners, to set aside the transfer made to them by the firm of Eastland, Fowler & Co., on December 1, 1890, alleging that said transfer was a fraudulent preference, and in violation of the insolvent act of 1880. In said action a receiver has been appointed, and he has, by the order of said court therein, taken possession of the said property claimed by petitioners and in controversy in said action. It is also shown that, prior to the appointment of said assignee, a receiver was appointed in the insolvency proceedings to take possession of the property of said insolvents until the appointment of an assignee, and he was directed by the court to commence the action now pending in said court against petitioners, and that said action was brought by him, and upon the appointment of said assignee the latter was substituted as plaintiff, and the action is being continued in the name of said assignee. The writ applied for is asked to prohibit the said superior court, and its judge, and also the assignee of said insolvents, and the receiver appointed in the said action against

petitioners, from further proceeding upon the orders appointing said assignee and receiver, and from exercising the powers in said orders, or either of them, granted, with regard to the property transferred to petitioners by the said firm of Eastland, Fowler & Co., on December 1, 1890.

It is claimed by petitioners that the said superior court in the insolvency proceedings never acquired jurisdiction over the assets of the firm of Eastland, Fowler & Co., because the said petition of W. H. Eastland and John Fowler in insolvency was not filed by or on behalf of the said firm of Eastland, Fowler & Co., and contains no averment of the existence, at any time, of such a firm. Upon this assumption it is argued that the assignee appointed in said proceedings acquired no title to the property of said firm. We do not find it necessary to determine whether this contention of petitioners, in regard to the effect and scope of the insolvency proceedings, is correct or not, as, in any view, we are clear that the writ applied for must be denied. The respondent court has jurisdiction of the action of said assignee against the petitioners here, and of the parties thereto, and had to appoint a receiver to take possession of the property in controversy, and its jurisdiction is in no wise affected by or dependent upon the proceedings in insolvency. If, as claimed by the petitioners, the assignee acquired no title to the property in controversy by virtue of these proceedings, they will have ample opportunity to present and have that question determined in the action, to which they are parties, now pending in the superior court. The order appointing the assignee in the insolvency proceedings has already been made, and it is not the office of a writ of prohibition to prevent him from prosecuting such suits as he may deem proper for the recovery of property which he claims is vested in him as such assignee. Writ denied.

We concur: MCFARLAND, J.; HARRISON, J.; SHARPSTEIN, J.; GAROUTTE, J.; PATERSON, J.

90 Cal. 342

ANZAR v. MILLER et al. (No. 12,938.)

(Supreme Court of California. July 24, 1891.)

MEXICAN GRANTS — ADVERSE POSSESSION — WHEN TITLE VESTS.

1. A Mexican grant not confirmed by the land commissioners confers no title, although judicial possession of the land was given the grantee. Following *Botiller v. Dominguez*, 9 Sup. Ct. Rep. 525.

2. The fee of lands held under an imperfect grant vests for the first time upon the issue of a patent, and no length of adverse possession prior thereto will support the statute of limitations.

Commissioners' decision. Department 2. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

Action to recover real estate by P. E. G. Anzar against Henry Miller and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Oney, Chickering & Thomas, for appellants. William Reude, for respondent.

TEMPLE, C. Defendants appeal from the judgment and an order refusing a new trial. This action is brought under sections 380 and 738 of the Code of Civil Procedure, to try title to, and recover possession of, 28.41 acres of land in the county of San Benito. The plaintiff derives title under a patent from the United States in confirmation of a grant made by a prefect to Mariano Castro, May 19, 1839. The defendants claimed under a grant to one Jose Modesto, an Indian, dated March 23, 1843. Judicial possession was given to Modesto, March 28, 1843. Defendants also plead the statute of limitations. The claim of Modesto was never presented to the United States board of land commissioners for confirmation. On the trial the defendants relied upon the grant to Modesto and the judicial possession as a perfect grant, not forfeited by non-presentation; but since this appeal was taken, the supreme court of the United States, in the case of *Botiller v. Dominguez*, 130 U.S. 238, 9 Sup. Ct. Rep. 525, declared that all Mexican grants, whether perfect or not, must have been presented to the land commissioners on pain of forfeiture. The only defense left is therefore the plea of the statute.

In addition to their claim under Modesto, the defendants also procured a patent from the state of California, to which the lands had been listed by the United States. Of the defendants' possession it is sufficient to say, that since 1861, they have maintained an adverse possession of the demanded premises, sufficient in all respects to constitute a bar under the statute, if the plaintiff's title could thus be barred prior to the issue of the patent. The grant to Castro was for a plot of ground 100 varas front and 200 varas deep, a square of 100 varas in front of his house, "being the spot which is occupied by his garden and the four pieces of land [*suertes de tierra*] which he cultivates on the Ricon de Pajaro; without detriment, however, to the Indians, who there have lands, which have been granted to them." The Ricon de Pajaro contained about 100 acres of land, and the evidence seems to show that Castro cultivated different portions in different years. The grant was therefore an imperfect grant, and it has been held repeatedly that in such cases the fee was in the United States, and vested in the patentee for the first time upon the issuance of the patent. This precise question was presented in *Gardiner v. Miller*, 47 Cal. 570, and was there fully considered, and a conclusion reached which has since been uniformly adhered to, and we are entirely satisfied with its correctness. It is there said: "The grant had passed a present and immediate interest in the general tract, to the extent of the quantity designated; but that quantity had to be segregated, and until the segregation the title attached to no particular part of the premises. The principal question, therefore, is whether the statute then commenced to run against the right of the government thus to segregate and perfect the grantee's interest. * * * By the patent thus issued, the government divested itself of any interest in the tract described, and the eby the legal title to the

particular tract became, for the first time, vested in the grantee under Sutter." It was therefore held that, inasmuch as the statute could not run against the title while held by the United States, it did not commence to run against the claimant until the patent issued to him. The same ruling was made in *Henshaw v. Blissell*, 18 Wall. 255.

Some doubt is supposed to have been raised upon this question by some remarks of Mr. Justice Fox in *Norris v. Moody*, 84 Cal. 143, 24 Pac. Rep. 37. This part of Justice Fox's opinion, however, did not receive the approval of a majority of the court; and it is obvious, from what has been said, that the ground upon which it is held that the statute does not begin to run until the patent issues is not because of any qualification in the statute, but because, the fee being in the United States, such statute cannot affect it; and it may be added that because such statute, so construed, would be violative of the treaty under which the United States acquired the country. In *San Jose v. Trimble*, 41 Cal. 536, which is relied upon here, it is intimated that a grantee may be barred by the statute as to the right he has before the patent, and that he may acquire a new right by the patent; and the intimation is that in such case the new right is not barred. A similar idea is advanced in *Hayes v. Martin*, 45 Cal. 559. These cases are not favorable to appellants. We are not called upon to express an opinion as to the operation of the statute upon a perfect grant in which the title was not in the United States, or as to the grants the survey of which had been approved under the act of congress passed June 14, 1860. There is nothing in the case to raise any question of laches. The plaintiff asserts no equitable rights, and, whatever may be said as to the form of the action, it is simply to recover land. In such case the statute of limitations generally furnishes the rule by which to determine whether the delay to assert the right is fatal. We think the judgment should be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

90 Cal. 379

HOWELL v. BURLINGAME *et al.* (No. 14, 083.)

(Supreme Court of California. July 30, 1891.)

REVIEW ON APPEAL—CONFLICTING EVIDENCE.

Where the sole question is one of fact, and the evidence, though conflicting, is sufficient to justify the findings, the judgment will be affirmed.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action by Charlotte Howell against E. C. Burlingame and one Marsh. Judgment for plaintiff. Defendants appeal. Affirmed.

Albert M. Stephens, for appellants. Minor & Woodward, for respondent.

BELCHER, C. C. This is an action to recover damages for alleged willful and mali-

cious trespasses on real property of the plaintiff. The case was tried by the court without a jury, and the findings were that the defendants "wantonly and maliciously, unlawfully and with force," committed the trespasses complained of, and thereby damaged the plaintiff in the sum of \$800, and that \$200 more should be allowed as exemplary damages. Judgment was accordingly entered against both defendants for \$1,000 and costs. The defendants moved for a new trial, which was denied, and have appealed from the judgment and order. The only contention on the part of appellants is that the evidence was insufficient to justify the findings as against the defendant Marsh. It is said: "There is no evidence whatever to sustain the finding that Marsh wantonly or maliciously trespassed upon the property." And again: "The complaint alleges that Marsh committed the trespass at the instigation of Burlingame. The facts are that Burlingame committed the trespass himself, and that Marsh had nothing whatever to do with it." We have carefully read over all the evidence presented in the record, and, in our opinion, it was sufficient to justify the findings as against both defendants. It is true there was some conflict, but in such cases the decision of the trial court is ordinarily held conclusive in this court. We advise, therefore, that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

90 Cal. 381

PEOPLE v. CESENA. (No. 20,749.)

(Supreme Court of California. July 30, 1891.)

RAPE—EVIDENCE—NEW TRIAL.

1. A conviction of assault with intent to rape will not be reversed on account of discrepancies in the testimony of certain children, witnesses for the state, when such discrepancies are no greater than should be expected from their tender ages, and their statements are strongly corroborated by other evidence and by defendant's own testimony.

2. The refusal of the trial court to grant a new trial on the ground of newly-discovered evidence will be affirmed when such evidence is merely cumulative or contradictory of the state's testimony, and counter-affidavits show that unless such testimony is false defendant must have known of it before.

3. Counter-affidavits are competent on such motion to show that defendant has not exercised due diligence.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; J. K. ALEXANDER, Judge.

Marcos Cesena was convicted of assault with intent to rape, and from the judgment of conviction he appeals. Affirmed.

Morehouse & Keauey and Mr. Tuttle, for appellant. W. H. H. Hart, Atty. Gen., for the People.

TEMPLE, C. The defendant, having been convicted of an assault with intent to commit rape, appeals from the judgment and an order refusing him a new trial. He does not complain of any ruling at the trial, nor does he deny that there is

some evidence tending to prove the charge against him, but he contends that the testimony of the main witnesses against him is contradictory, and so improbable that they are not to be believed; that it furnishes proof of a conspiracy; and that the charge is a pure fabrication. But it does not strike us in that way; the discrepancies in the statements of the children are not more than should be expected from their tender age. Then there is much to corroborate their account. Indeed, the testimony of the defendant himself, carefully analyzed, affords many items strongly confirming their story. The statements as to the time when Cesena left the saloon constituted only conflicting testimony, and was properly left to the jury. We do not attribute very much importance to the testimony as to time. It is easy to be mistaken in such matters. And then the value of the evidence depends largely upon the credibility of the witnesses, a matter peculiarly for the jury. The newly-discovered evidence is all cumulative, or simply contradictory of the testimony of the people, and the counter-affidavits show that, if the story be not a pure fabrication, the defendant must have known of it and of the witness. Counter-affidavits may be used on such motion, to show that due diligence has not been used. Such applications are addressed to the discretion of the trial court, and the presumption is that the discretion was properly used. We see no reason for interfering with the action of the court in this case, whether its decision were based upon lack of due diligence, or a belief that the proposed evidence would not render a different result probable, though a new trial were had. We think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

90 Cal. 334

PECK *et al.* v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY. (No. 14,053.)

(*Supreme Court of California.* July 31, 1891.)

ROAD SUPERVISORS—REMOVAL OF OBSTRUCTION—MANDAMUS—SUFFICIENCY OF PETITION.

1. Under Pol. Code Cal. § 2643, which gives boards of supervisors general supervision over highways, with power to abolish or abandon such roads as are not necessary, a petition for a writ of mandate to compel the board to remove an obstruction from a highway is insufficient, when it fails to show that the obstructed road had not been abandoned and discontinued by the board.

2. Pol. Code Cal. §§ 2645, 2731, make it the duty of road overseers, under the direction and supervision of the road commissioner, and pursuant to orders of the board of supervisors, to take charge of the highways, and keep them clear from obstructions. *Held*, that a petition for a writ of mandate to compel the board of supervisors to remove an obstruction from a highway is insufficient when it fails to state that the attention of the road commissioner or road overseer had ever been called to the obstruction, or that either of them had ever been asked to have it removed.

3. The duty to remove was on the road overseer, and he should have been made a party to the proceeding.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Application by George H. Peck and J. C. Hannon for a writ of mandate to the board of supervisors of Los Angeles county. Writ denied. Petitioners appeal. Affirmed.

John Mansfield and Edgerton & Blades, for appellants. Frank P. Kelly, O'Melveny & Henning, and James McLachlan, Dist. Atty., for respondent.

BELCHER, C. C. This is an application for a writ of mandate to compel the board of supervisors of Los Angeles county "to clear of obstructions, repair, open, put in condition, and keep in condition for public travel," a portion of a road situate in that county. A demurrer to the verified petition was interposed and sustained by the court below. The applicants declined to amend, and thereupon judgment was entered dismissing the proceeding. The appeal is from that judgment. The demurrer was upon several grounds, and, in our opinion, was properly sustained, for the following reasons:

1. Boards of supervisors have general supervision over the roads within their respective counties. They must lay out and establish such highways as are necessary for public convenience, and may abolish or abandon such as are not necessary. Pol. Code, § 2643; County Government Act, § 25, subd. 4. It is not stated in the petition, and it in no way appears therefrom, that the obstructed road had not been abandoned and discontinued by the respondent board.

2. It is made the duty of road overseers, under the direction and supervision of the road commissioners, and pursuant to orders of the board of supervisors, to take charge of the highways within their respective districts, and to keep them clear from obstructions and in good repair. Pol. Code, §§ 2645, 2731, et seq. It is stated in the petition that the road complained of is within a certain named road-district, but it is not stated that the attention of the road commissioner or road overseer had ever been called to the alleged obstruction, or that either of them had ever been asked to have the obstructions removed.

Writs of mandate are issued only to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Code Civil Proc. § 1085. The duty here was upon the road overseer, and he should at least have been made a party to the proceeding. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

90 Cal. 339

HINKEL v. DONOHUE *et al.* (No. 13,318.)

(*Supreme Court of California.* Aug. 1, 1891.)

PRACTICE—DISMISSAL OF ACTION.

Under Code Civil Proc. Cal. § 581, which provides that an action may be dismissed by

plaintiff at any time before trial on payment of costs, provided no counter-claim has been made, or affirmative relief sought, by cross-complaint or answer, defendant cannot file such pleadings after an order of dismissal has been filed by plaintiff with the clerk who is authorized to enter the same, though it was not entered at the date of its filing.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action in ejectment by Patrick Donohue and others against John Hinkel. Suit dismissed on plaintiff's motion. Defendants appeal. Affirmed. For former report, see 26 Pac. Rep. 374.

Mich Mullany and W. C. Burnette, for appellants. *O'Brien, Morrison & Dalinger*, for respondent.

HARRISON, J. The plaintiff commenced an action in ejectment against the defendants by filing a complaint on the 23th of November, 1887. Summons was issued thereon upon that day, but no service thereof was ever made upon either of the defendants. March 16, 1888, the attorneys for the plaintiff filed with the clerk of the court the following paper writing, viz.: "[Title of court and cause.] The above-entitled cause is hereby dismissed, and the clerk of the above-named court is hereby authorized to enter said dismissal of record. O'BRIEN & MORRISON, Attorneys for Plaintiff." At the time of filing said dismissal, no appearance had been made in the action by or on behalf of either of the defendants, and the said dismissal was within a day or two thereafter entered by the clerk in his register of actions. September 13, 1888, the appellants served upon the plaintiff and filed with the clerk an answer to the complaint in said action. October 17, 1888, the attorneys for the plaintiff served upon the defendants and filed with the clerk a notice that on October 26, 1888, the plaintiff would move the court for an order "that a judgment of dismissal of said action be entered without prejudice, at plaintiff's costs, *nunc pro tunc*, as of March 16, 1888, and striking out the answer filed herein September 13, 1888. October 18, 1888, the defendants filed a cross-complaint, which on the same day was served upon the plaintiff's attorneys; and on the 20th of October, 1888, the attorneys for the plaintiff served upon the defendants, and filed with the clerk, a notice that on October 26, 1888, they would move the court for an order "striking out the so-called cross-complaint that was filed herein on the 18th day of October, 1888." When these motions came on for hearing, they were granted by the court, and an order was made that a judgment of dismissal of the action be entered, and that the cross-complaint be stricken from the files. Judgment dismissing the action was thereupon entered January 17, 1889. From this judgment the defendants have appealed, bringing up the foregoing matters by bill of exceptions. Section 581, Code Civil Proc., provides that "an action may be dismissed, or a judgment of nonsuit entered, in the following cases: (1) By the plaintiff himself at any time before trial upon payment of costs:

provided, a counter-claim has not been made or affirmative relief sought by the cross-complaint or answer of the defendant. * * * The dismissal mentioned in the first two subdivisions of this section is made by entry in the clerk's register; judgment may thereupon be entered accordingly." At the time the plaintiff gave the notice of his intention to move for an order that a judgment of dismissal of said action be entered, the defendants had not sought any affirmative relief by their answer, nor had they filed any cross-complaint. The above section of the Code gave to the plaintiff the right to have the action dismissed upon the mere filing of the dismissal, and to have judgment entered thereon accordingly. The defendants could not, by filing a cross-complaint, after receiving this notice, deprive the plaintiff of this right. The fact that before the motion was heard by the court the defendants filed a cross-complaint did not impair the right of the plaintiff to have the motion determined according to the facts as they existed when the notice of the motion was given. The order when made, and the judgment entered in pursuance of the order, related to the first step taken in its procurement, and is to be regarded as having been made at that date. The right of the plaintiff as it existed October 17, 1888, to have his motion granted, did not depend upon the relative speed of himself and the defendants in any race to procure the first hearing before the court. Indeed, even if it had been a matter of discretion with the court to grant or deny the motion of the plaintiff, we think that, under the facts disclosed by the record herein, it would have been an abuse of discretion had the judge refused to grant the motion. When the matter came before the court for hearing, and it determined that the plaintiff's motion should be granted, the court, upon having its attention called to the fact that subsequent to the making of the motion the defendants had filed a cross-complaint, was justified in striking that also from the files. The judgment is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(90 Cal. 393)

ANGLO-NEVADA ASSUR. CORP. v. NADEAU'S Ex'rs et al. (No. 14,217.)¹

(Supreme Court of California. Aug. 1, 1891.)

EXECUTORS—FAILURE TO PRESENT CLAIMS—FORECLOSURE OF MORTGAGE—WAIVER.

Code Civil Proc. Cal. § 1493, provides that all claims arising on contracts, whether due or not, must be presented within the time allowed in the notice for presenting claims against the estate of the decedent, and claims not so presented shall be barred. Section 1500 provides that no action shall be brought on any claim against an estate unless the claim is first presented to the executor or administrator, except that an action may be brought by any holder of a mortgage to enforce the same against the property mortgaged, where all recourse to any other property of the estate is expressly waived in the complaint. Held, that where the holder of a mortgage commenced an action to foreclose less than two years after the time allowed for presenting claims had expired, and about six months after the note matured, the complaint expressly

¹ Rehearing denied.

waiving all recourse to other property, the action was not barred, although the claim was never presented for allowance.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Anglo-Nevada Assurance Corporation against executors of Nadeau et al. to foreclose a mortgage. Judgment for plaintiff. Defendants appeal. Affirmed.

S. M. White and Chapman & Hendrick, for appellants. *Jarboe Harrison & Goodfellow* and *Graves, O'Melveny & Shankland*, for respondent.

VANCLIEF, C. Action to foreclose a mortgage executed by decedent on the 10th day of November, 1886, to secure payment of a promissory note for the sum of \$150,000 and interest, dated November 6, 1886, payable "on or before September 6, 1889." Nadeau died January 15, 1887. His will was admitted to probate, and his executors appointed, April 18, 1887. Pursuant to an order of the probate court, notice to creditors was published on April 25, 1887, and the 10 months within which creditors were required to present their claims expired February 25, 1888, about 18 months before the maturity of the note. This action was commenced March 29, 1890, nearly 6 months after the maturity of the note. Neither the note nor the mortgage was ever presented to the executors for allowance, but in the complaint all recourse against any other property of the estate than the mortgaged property is expressly waived. Judgment of foreclosure was rendered in the usual form, except that there was no judgment for a deficiency, nor for counsel fees. This appeal is from the judgment upon the judgment roll, including a bill of exceptions, showing that it was stipulated at the trial that the facts stated in the answer of the defendants (the substance of which is included in the above statement) are true. There was also a demurrer to the complaint on the ground that it does not state a cause of action, and on the further ground that "it appears from said complaint that the plaintiff's alleged cause of action is barred by the provisions of section 1493 of the Code of Civil Procedure."¹

Counsel for appellants contend that plaintiff's entire claim arising upon the note and mortgage was barred by sections 1493 and 1500 of the Code of Civil Procedure, because it was not presented to the executors for allowance within 10 months from the publication of notice to creditors; and that it does not come within the

exception contained in section 1500, (viz., "an action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint,") because, when the action was commenced, plaintiff had no right to enforce the mortgage against any property of the estate, and therefore could not have "expressly waived in the complaint" a right that it did not then have. No authority is cited for this except a legal definition of the verb "to waive," from which counsel deduce the proposition that nothing else than an existing right can be waived. But this deduction is not warranted by the decisions from which the definition relied upon was extracted: no authority of lexicographers. The verb "to waive," as well as the noun "waiver," is properly used in different senses. Webster defines the verb thus: "(1) To relinquish; to give up claim to. (2) To throw away; to cast off; to reject; to desert. (3) (Law.) (a) To throw away; to relinquish voluntarily, as a right which one may enforce, if he chooses. (b) (Old Eng. Law.) To forsake; to desert; to abandon." The same author defines the noun "waiver" as follows: "(Law.) The act of waiving, or not insisting on, some right, claim, or privilege." In the third definition above, an example of a voluntary relinquishment is given, viz., "as a right which one may enforce, if he chooses;" but this does not imply that one may not relinquish, "give up claim to," or "abandon" a thing to which he has no right; and an example might have been given of such relinquishment of a "claim to" something without right, for both the verb and the noun are often properly used in this sense, and the legislature may have so used the verb, if that meaning was intended. Besides, it is not clear that the plaintiff had no right to "recourse against" other than the mortgaged property at the time it filed its complaint. Plaintiff may have had the right, though the remedy for its enforcement depended upon the contingency of whether or not the defendants would plead the statute of limitations. If there had been no waiver in the complaint and no plea of the statute of limitations, plaintiff might lawfully have taken judgment for a deficiency, and might have enforced such judgment against other than the mortgaged property. However this may be, the object of the exception, in section 1500 of the Code of Civil Procedure, is to require a plaintiff to put his waiver upon record, in his complaint, so that there may be no question that he had waived recourse, etc.; and it is immaterial whether or not he had made the waiver before his complaint was drawn, by failure to present the claim to the executors within the 10 months or otherwise. The construction contended for by counsel for appellants would deprive the exception of any effect in all that large class of cases in which the mortgage debt does not become due until after the expiration of the 10-months notice to creditors; yet there is no conceivable reason why the legislature should have intended to exclude this

¹Sec. 1493. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever. * * *

Sec. 1500. No holder of any claim against an estate shall maintain any action thereon, unless his claim is first presented to the executor or administrator, except in the following cases: An action may be brought by any holder of a mortgage or other lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint. * * *

class of cases from the exception. Finally, the question as to the construction of the exception has been decided by this court adversely to the contention of appellants' counsel in a number of cases: *Society v. Hayes*, 56 Cal. 303; *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. Rep. 580; *Dreyfuss v. Giles*, 79 Cal. 409, 21 Pac. Rep. 840; *Bank v. Charles*, 86 Cal. 323, 24 Pac. Rep. 1019. I think the judgment should be affirmed.

We concur: BELCHER, C. C.; FITZGERALD, C.

BEATTY, C. J. Owing to the disqualification of HARRISON, J., in the foregoing opinion, McFARLAND, J., will act with the remaining justices of department 1.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

90 Cal. 397

DYKE *et al.* v. BANK OF ORANGE *et al.*
(No. 14,351.)

(Supreme Court of California. Aug. 8, 1891.)
MONEY JUDGMENT—DOCKET ENTRY—USE OF DOLLAR-MARK.

In a docket entry certain figures were placed under the words "amount of judgment," and other figures underneath the first were preceded by the word "costs." The last two figures of each sum were divided from the others by a vertical red line, the customary dollar-mark being omitted. *Held*, that the words "amount" and "costs" indicated a money judgment, and the red line the division of the sums into dollars and cents, and that the judgment was sufficiently docketed to create a lien, under Code Civil Proc. Cal. § 672, providing that, if judgment be for the recovery of money, the amount must be stated in the docket under the head of "Judgment;" if for any other relief, its general character must be stated.

Commissioners' decision. Department 2. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Action by Lydia A. Dyke and F. M. Dyke against the Bank of Orange and F. M. Harris, sheriff, to enjoin an execution sale of their homestead under judgment recovered against them by the defendant bank. Decree for plaintiffs, and defendants appeal. Reversed.

Ray Billingsley, for appellants. Chas. S. McKelvey, for respondents.

VANCLIFF, C. The plaintiffs are husband and wife, and own a tract of land in Orange county, upon which they reside, and which they claim as a homestead. On October 30, 1888, the defendant Bank of Orange obtained a judgment against F. M. Dyke and others for the sum of \$394.82 debt, and \$34.40 costs. On July 8, 1890, an execution was issued on this judgment, and placed in the hands of the defendant, Harris, who, as sheriff, on July 9, 1890, levied the same on a part of plaintiffs' homestead, and advertised it for sale. This action was brought to enjoin the sale. The plaintiffs prevailed, and the defendants bring this appeal from the final decree upon the judgment roll, including a bill of exceptions.

The plaintiffs' declaration of homestead

was recorded on the 12th day of August, 1889, more than nine months after the rendition of the judgment against F. M. Dyke, on which the execution was issued; and the only material question presented for decision is, was the judgment properly docketed so as to become a lien on plaintiffs' land before the recording of their homestead? There is no question that the judgment was properly docketed on October 31, 1888, in all respects, except as to the requisite statement of the "amount" of the judgment, which the court found to have been stated in the third column of the docket, under the heading "Amount of Judgment," as follows, and not otherwise:

AMOUNT OF JUDGMENT.		
	894	82
Costs.....	34	40

(Folio 74.)

Red

As conclusions of law, the court found that this was not a sufficient statement of the amount of the judgment; that the "judgment did not become and was not a lien upon the homestead premises" before the declaration of homestead was recorded; and that the plaintiffs were entitled to the relief demanded. Counsel for appellants contend that the conclusions of law are not supported by the facts found, and I think this point should be sustained. Section 672 of the Code of Civil Procedure provides: "If judgment be for the recovery of money or damages, the amount must be stated in the docket under the head of 'Judgment;' if the judgment be for any other relief, a memorandum of the general character of the relief granted must be stated." In the first place, the word "amount," in its connection with the numeral figures, indicates that the judgment is for money or damages, since the amount of any other kind of relief is not required to be stated, nor could a memorandum of "the general character" of other kinds of relief be expressed by numeral figures, however written or marked. In the second place, the word "costs," immediately preceding the figures 8440, indicates that those figures represent money, since judgments for costs are always for money. Finally, the position of the figures in the columns headed "Amount of Judgment," inclosed by double lines, and divided by a single red line, plainly indicates that the figures on the left of the red line represent dollars, and those on the right represent cents. This mode of writing dollars and cents is more generally practiced, and quite as well understood as that in which the dollar-mark (\$) is used. It is almost universally practiced where sums of money are to be written in columns, as in blotters, journals, ledgers, and statements of accounts. When so written, not only courts, but all persons of common education, readily read and understand the figures as representing a definite number of dollars and cents. In this form statements of accounts are ordinarily reported to the courts by executors, administra-

tors, referees, and masters in chancery. When and where was an exception to such a report sustained on the ground that it was unintelligible?

A question similar to the one under consideration was decided in the case of *De Lashmutt v. Sellwood*, 10 Or. 319, in which the court, by *WATSON, C. J.*, said: "The objection that it does not appear from the docket entry what the figures in the column headed 'Amount of Judgment,' stand for presents a question by no means new in this court. In the case of *French v. Rogers*, disposed of at the last term, we held, in effect, that any mark commonly understood and ordinarily employed in business transactions to denote the division of figures, obviously representing money, into dollars and cents, would suffice for that purpose in entries of this character. Such we deemed the mark ordinarily used in setting down sums of money on paper to denote the amount represented by the two figures on the right as cents, and that represented by the figures on the left as dollars; and the same effect, in our judgment, must be allowed to the lines and spaces in the ruled money columns in regular account books or official records similarly prepared. General usage and common understanding have given such marks and lines, when so employed, a signification by which, not individuals only, but courts as well, are enabled to determine what, and what amount, figures so placed were intended to represent, with as much ease and almost as much certainty as though the dollar-mark itself, or written words, even, had been used to express the same meaning." Upon this point the respondent cites several cases in which it was held that mere numeral figures in a tax assessment roll do not express the value of the property assessed, viz.: *Hurlbutt v. Butenop*, 27 Cal. 50; *Brady v. Seamen*, 30 Cal. 610; *People v. Savings Union*, 31 Cal. 132, and *People v. Hastings*, 34 Cal. 571. As to these cases, it is to be remarked, in the first place, that in none of them are the numeral figures written in columns similar to those in the docket in this case. In none of them is there any line or mark separating dollars from cents. In none of them are the figures written in the form commonly employed in account-books and records to denote that they are intended to represent dollars and cents. In the second place, while admitting that the strict rule applied to the assessment cases may be too firmly established to be overruled or disregarded by the courts in that class of cases, I think there is no necessity for extending it to the class to which this case belongs. The only case in this court, except the assessment cases, having any bearing upon the question under consideration, that I have been able to find, is that of *Hibberd v. Smith*, 50 Cal. 511. In that case the alleged defect in the docket was that it did not state the Christian name, nor the initials of the Christian name, of the judgment debtor; yet this court held that the docketing was sufficient to constitute a lien upon the land of the judgment debtor. I think the judgment should be reversed, and that the

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court below should be directed to render judgment upon the findings of fact in favor of the defendants.

We concur: *BELCHER, C. C.; FITZGERALD, C.*

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to render judgment upon the findings of fact in favor of the defendants.

90 Cal. 386

JONES v. TALLANT et al. (No. 13,265.)

(*Supreme Court of California.* Aug. 1, 1891.)

COMPROMISE — PAROL EVIDENCE — HARMLESS ERROR.

1. The owner of certain bonds, pledged to secure a debt, gave a written order for their delivery to another, who paid the debt with money borrowed by him for that purpose, pledging the bonds as security, and thereafter paid interest on the loan. He afterwards contributed to the expense of litigating the bonds, and the former owner acknowledged that he no longer claimed any interest in them. Upon the death of the first owner, his son claimed that they were part of the estate, and, after an investigation and on the advice of his attorneys, entered into an agreement with the person to whom they had been delivered, by which, in consideration of \$1,500, the son acknowledged that they were not part of the estate, and were the property of the other party, who in turn agreed to make no claim on the estate. By direction of the son, the bonds were not inventoried, and no claim against the estate was ever made. The agreement was never rescinded, nor was the \$1,500 ever repaid or tendered by the son or his heirs. *Held*, that the evidence sustained a finding that neither the son nor his heirs had any interest in the bonds, and that they were the property of the other party.

2. The admission of parol evidence of a written contract was harmless error, where the contract was afterwards introduced.

Commissioners' decision. Department

1. Appeal from superior court, city and county of San Francisco; *F. W. LAWLER, Judge.*

Action by *Charles A. Jones*, administrator of *Louis G. Partridge*, against *Elizabeth Tallant* and others, to determine the right of plaintiff in certain bonds pledged to defendant Tallant by defendant John Partridge. Trial to the court. Judgment for defendant John Partridge, and plaintiff appeals. Affirmed.

Peter G. Partridge, the father of *Louis G. Partridge*, and the uncle of *John Partridge*, was the owner of the bonds in suit, and had pledged them to a bank as security for a debt of \$7,000. Demand for payment having been made, *John Partridge* paid the debt with funds borrowed by him from defendants Tallant & Co., and the bonds were delivered to him by the bank on the written order of *Peter Partridge*. *John Partridge* pledged them to Tallant & Co. as security for the money advanced to pay the debt to the bank, and thereafter paid interest to Tallant & Co. on the loan. At this time the bonds were worth but little, but afterwards appreciated in value, as the result of litigation, to the expense of which *John Partridge* contributed. Upon learning of this litigation, *Peter Partridge* stated that he had no claim to the bonds; that

they belonged to John, who had paid his money for them. Peter Partridge died, leaving a will devising all his property to Patrick Partridge, his brother, disinheriting his son Louis. Louis threatened to contest the will, and an agreement was made between Patrick and Louis, by which he withdrew his objections to the will, and allowed the same to be probated in consideration of his receiving half of his father's estate. Louis claimed that the bonds were part of the estate, and his attorneys investigated the matter, and reported to him that John claimed the bonds had been given to him by Peter in consideration of his having paid the debt to the bank. The accounts kept by John with Peter Partridge showed an item of \$7,000 which John claimed was the amount paid to the bank, and this item was indorsed by Peter Partridge, "Audited and correct." Upon advice of his attorney, and at the same time the first agreement was made, Louis entered into an agreement with John, (Exhibit B,) by which, in consideration of \$1,500, he acknowledged the bonds as the property of John, and no part of the estate of Peter, and John agreed to make no claim against the estate. The money was paid, and by direction of Louis the bonds were not inventoried by the administrator. No claim against the estate was ever made by John Partridge. After the death of Louis, his widow filed a petition in the estate of Peter Partridge, alleging that the bonds were part of its assets; and an order was made directing them to be inventoried, and a decree subsequently rendered which, without determining the question of ownership, adjudged that the interest of said estate in the bonds should be distributed to the heirs of Louis, subject to administration of his estate. The sum of \$1,500 was never repaid or tendered to John by Louis or his heirs, nor was any attempt to rescind the agreement (Exhibit B) ever made. The court found that Louis and his heirs had no interest in the bonds, and that they belonged to John, subject to the claim of Tallant & Co.; and that Louis, after full investigation of the rights and ownership of John in and to said bonds, entered into the agreement, (Exhibit B.)

T. Z. Blakeman, for appellant. *Pillsbury & Blanding* and *E. J. Pringle*, for respondents.

FOOTE, C. This action was brought to determine the right of the plaintiff, as the administrator of Louis G. Partridge, deceased, to certain bonds which are claimed to have belonged to Louis G. Partridge, subject to a claim of Elizabeth Tallant and others, as pledgees, for money advanced upon the bonds to John Partridge. There is no question made as to the right of the pledgees to be reimbursed the money due them, whether the bonds properly belonged to Louis G. Partridge in his life-time, or whether they properly belong to John Partridge. The appeal is from a judgment in favor of the defendants, and an order denying a new trial.

The contest here is mainly as to wheth-

er the findings of fact, which show that the estate of Louis G. Partridge and his heirs at law have no interest in the bonds, and that they are the legal property of John Partridge, subject to the claim of Elizabeth Tallant et al., are sustained by the evidence; and, further, whether the court erred in permitting Mr. Thomas B. Bishop to testify as to an agreement between Louis and John Partridge, which had been reduced to writing. After a careful examination of the whole record, we are satisfied that the evidence is sufficient to support the findings. And particularly is this the case with reference to those which show the nature of the agreement between John and Louis Partridge, whereby it is evident that for an adequate, sufficient, valuable consideration, which has never been returned or offered to be returned to John Partridge, Louis, with a full knowledge of the facts and circumstances of John's claim to the bonds, and acting under the advice of able attorneys, voluntarily entered into the agreement marked "Exhibit B," whereby he in effect transferred to John all his (Louis') interest in the bonds, and acknowledged John as the owner thereof, and the administrator and heirs of Louis are bound by his acts.

As to the matter of the evidence of Mr. Bishop, even conceding that the portion referring to the terms of the written agreement was inadmissible, it is plain that no injury resulted, as the instrument itself was placed in evidence, and was controlling in the matter. We perceive no error in the record, and advise that the judgment and order be affirmed.

We concur: **BELCHER, C. C.; FITZGERALD, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

90 Cal. 410

INGERMAN v. MOORE et al. (No. 12,733.)

(*Supreme Court of California.* Aug. 5, 1891.)

MASTER AND SERVANT—DANGEROUS MACHINERY—HARMLESS ERROR.

1. Where an employee was injured while operating a scantling machine and saw, by a projecting set-screw which was concealed below the saw, the fact that he had been employed for nine months in putting lumber in place to be cut by the saw, and had run the machine for 18 days in the absence of the foreman, is not sufficient evidence to warrant a court to say that, as a matter of law, he was experienced, and knew the location of the set-screw, and the danger of putting his hand below the saw.

2. In such case, it was not error to instruct that if defendants were negligent in not giving proper instructions to the servant, and warning him of danger, it was immaterial whether the hand was pulled off by the set-screw or cut off by the saw.

3. Where the record of a particular ruling is not embodied in a bill of exceptions, it forms no part of the record on appeal, and leave will not be granted to file the same afterwards as an additional record.

In bank. Appeal from superior court, city and county of San Francisco; *T. K. Wilson*, Judge.

Action by *Ingerman* against *Moore* and

others to recover damages for personal injuries. Judgment for plaintiff. Defendants appeal. Affirmed.

Wm. F. Herrin and Jarboe, Harrison & Goodfellow, for appellants. Pillsbury & Blanding, for respondent.

DE HAVEN, J. This is an action to recover damages for a personal injury sustained by the plaintiff, and alleged to have been caused by the negligence of the defendants. The complaint alleges, in substance, that at the date of receiving the injury, and for some time prior thereto, plaintiff was employed by defendants in their saw-mill; that his regular work was to assist the man in charge of a "scantling-machine and saw" for cutting lumber, plaintiff's duty being "to put the lumber in place, to be run through the machine and cut by the saw." On or about February 14, 1884, the man regularly employed to run this machine became sick, and plaintiff was directed by the defendants to take his place for the time. The plaintiff expressed a doubt as to his ability to do so on account of his inexperience, but was assured by defendants that he was qualified to take charge of this work, and he did so. While engaged in this work, in removing some slivers from under the saw, plaintiff's sleeve caught on a set-screw fixed upon and projecting from a shaft located below the saw, which shaft worked the rollers carrying lumber to the saw, and by means thereof the arm of plaintiff was wound around the shaft, and so broken as to necessitate amputation. It is alleged that the plaintiff did not know of this set-screw, and could not see the same, and was not acquainted with the danger of removing the slivers, and that in the attempt to remove the same he acted in the same manner as he had seen the man do who had regular charge of the machine. The complaint further alleges that the work of running the machine was dangerous, and plaintiff was inexperienced and ignorant of the dangers attending the same, and that defendants knew this, and neglected to warn him of such dangers, or properly instruct him in such work. In their answer the defendants allege that plaintiff was employed to take the place of the foreman on the scantling-machine, when for any reason necessary; that he had frequently done so, and was fully acquainted with the work, and never expressed any doubt of his ability to run the machine and saw; that he had been fully instructed and warned concerning the saw, and the mode of using it, and of the danger of said employment; and that plaintiff knew the work was dangerous, and that it was fraught with danger to attempt to remove slivers from the saw when in motion. Plaintiff recovered a judgment for \$12,500, and costs. The defendants appeal.

The principles of law governing this class of actions are clearly defined. It is well settled that one who enters the service of another takes upon himself the ordinary risks of the employment, and if he is an adult, and engages to do a particular work, the employer has a right to presume, unless otherwise informed, that the

employee is competent to perform it, and understands and appreciates such risks. But, on the other hand, when one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate unless with care, and by one familiar with its structure, the employer is bound to give him such instructions as will cause him to fully understand and appreciate the danger attending the employment, and the necessity for care. This rule is thus stated by the supreme court of Wisconsin: "We think that it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part." *Jones v. Mining Co.*, 66 Wis. 277, 28 N. W. Rep. 207. It is true this rule which requires the employer to give proper instructions is most frequently applied in cases where persons of immature years are employed about dangerous machinery, but the same principle governs where the person so put to work is of mature years, but without experience in the particular work, and without knowledge of the actual dangers attending it. But, of course, the fact that the person injured was of mature years, as was the plaintiff here, is a matter for the careful consideration of the jury in determining whether he fully understood and appreciated the dangers of his position. It is claimed by the appellants that they were not guilty of any negligence towards plaintiff, and that plaintiff by his own want of care contributed to the injury which he received. In passing upon the question of defendants' alleged negligence, it was necessary for the jury to determine: (1) Was plaintiff in fact inexperienced in the work in which he was engaged? and, if so, (2) were defendants informed of this fact? (3) If defendants were so informed, did they neglect to give him notice of the location of the set-screw, and to instruct him in the manner of running the machine, so as to guard him against the injury which he received?

The verdict of the jury necessarily implies that all of these questions were answered affirmatively in the minds of the jury, and upon all of them there is a substantial conflict in the evidence, unless it can be said as a matter of law that, upon the plaintiff's own statement, showing the length of time he had been employed as assistant on the machine, and how much he had himself run it in the absence of the foreman, the jury ought to have found that he was not inexperienced in the place he was temporarily filling, and not without knowledge of the location of the set-screw, and the danger to be incurred

from placing his hand where he did while the machine was running. It appears from plaintiff's own testimony that he had worked inside of the mill, taking lumber from the big saw, for nearly two years, and had been employed as assistant on the scantling-machine,—that is, in putting the lumber in place to be cut by the saw,—for about nine months; and during that time he had, upon different occasions when the foreman was absent, run the machine, in all 18 days prior to the accident. It does not appear that plaintiff's duty as assistant was such as would necessarily give him knowledge of the structure of the machine, or of the existence of the projecting set-screw, which was a concealed danger. It is not shown that he had ever been called upon, or that it was any part of his duty, to become acquainted with this machinery, or to adjust it when out of order. It is doubtless true that some men, with the same opportunity, would have become familiar with its mechanism, and fully qualified to take charge of it, but it is a matter of common experience that all men would not. There is a difference in the capacity of men to acquire a particular knowledge of machinery, or the arrangement of its parts, or manner of construction; some having greater power of observation, and more desire to investigate and understand, than others. The extent of plaintiff's knowledge of this machinery was therefore a question of fact for the jury to determine from all the evidence before them, and we think it was fairly submitted to them in the instructions of the court.

The defendants insist that the plaintiff was himself guilty of contributory negligence in attempting to remove the sliver without stopping the machinery. We think, however, that upon the evidence in this case this was a question of fact to be determined by the jury, and the finding upon this point would largely depend upon plaintiff's knowledge, or want of knowledge, of the location of the set-screw. If he knew the screw was there and projecting, it was gross carelessness for him to place his hand where he did, with this shaft in motion. If he was ignorant of its existence, it was still a question for the jury to consider whether he was exercising due care in what he did, unless he knew that he could remove the sliver with safety to himself. In reaching a conclusion the jury might properly consider that he had often seen such obstructions removed from near the same place when the saw was in motion, and had received no notice that it was dangerous to do so, and that to have stopped the machinery, in order to remove the sliver, would have occasioned delay in the work, and that it was not the custom to do so. It seems clear to us that the inference to be drawn from these facts would not necessarily be that the plaintiff was guilty of culpable negligence, and different persons might fairly dissent as to the proper conclusion to be reached. In such a case the question to be decided is one of fact for the jury, and not of law for the court. And when the matter has been

passed upon by the jury, and the judge of the trial court is satisfied with their finding, the verdict is conclusive of the question here. The law upon this point is clearly stated in the case of *Coombs v. Cordage Co.*, 102 Mass. 585, as follows: "Whether it was possible for the plaintiff to have met with the accident from inadvertence or want of acquaintance with the danger of his position, without being chargeable with a want of reasonable care, we think is a question to be submitted to the jury. The facts that he saw, or might have seen, the machinery in motion, and might have known that it was dangerous to expose himself to be caught in it, are considerations which should be regarded on one side. On the other, some allowance should be made for his youth, his inexperience in the business, and for the reliance which he might have placed upon the direction of his employers. It has been held in other cases that previous knowledge of a danger is not conclusive evidence of negligence in failing to avoid it." In the case of *Swoboda v. Ward*, 40 Mich. 420, the plaintiff had been working in the mill for about 14 days, carrying slabs from the gang-saws, and placing them on the rollers; and when injured he had taken hold of a heavy slab, too heavy for one man to carry, and was pulling it, walking backwards, when he slipped back against the cog-wheels near the slab run, and his feet were caught and leg drawn into the cog-wheels, and permanently injured. It was shown that he had not been warned about the cog-wheels, and had never noticed them until he was hurt, but that he could have seen the cogs if he had stopped work to look for them, and that he was without experience and knowledge in mills. Upon these facts the court held that the question of contributory negligence was for the jury, and that the trial court erred in holding, as a matter of law, that there was such negligence. The court there said: "The plaintiff at the time of the injury was properly engaged in the active discharge of his duty. He testified that he had not been warned about these cogs, and had not noticed them until after he was hurt. Contributory negligence presupposes the doing of some act which ought not to be done, or the omission to do something which should be done,—in other words, a want of due care. 5 Amer. Law Reg. (N. S.) 405, note. If he did not know of the exposed and dangerous condition of these cogs, then by remaining at work he was not doing something which he should not have done; and the effort he was making, at the time of the accident, to remove the slab, showed no want of due care on his part, but, on the contrary, was commendable. Even if he had known of the cogs and their unguarded condition, it would not thereby conclusively follow that he could not recover. Other facts and circumstances would have to be considered in connection therewith,—his age, his intelligence, his experience, and such like,—so that the jury might ascertain and determine whether he fully understood and appreciated the danger." See, also, *Dowling v. Allen*, 74 Mo. 13.

The jury must have found in this case that plaintiff was without knowledge of the existence of the set-screw, and did not know that he was exposing himself to danger from it when he placed his hand where he did. We do not feel authorized to disturb the verdict of the jury on this point.

The instruction complained of, to the effect that, if defendants were negligent in not giving proper instructions to plaintiff, it was immaterial whether his hand was pulled off by the screw or cut off by the saw, could not, upon the evidence before the jury, have injured the defendants.

We have not overlooked the fact that in this case the defendants did not manage their mill in person, and did not personally employ plaintiff, or have any communication with him personally. If their superintendent, or other foreman, was negligent in putting the plaintiff to work without proper instructions, such negligence is in law that of the defendants, and they are liable for it.

The defendants have appealed from the order of the superior court made April 30, 1888, denying their motion for a new trial, and upon the argument of this case suggested a diminution of the record, and asked leave to file as an "additional record" the previous order of that court made in this action January 30, 1888, granting a new trial thereof, and the subsequent order vacating and setting this aside, and reinstating the motion for a new trial. It is claimed by the appellants that the power of the court was exhausted when it granted the motion for a new trial, and that its subsequent orders vacating this and denying their motion for a new trial were absolutely void. This additional record is not embodied in any bill of exceptions, and we do not think it forms any part of the record on this appeal. Judgment and order affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; GAROUTTE, J.

HARRISON, J., being disqualified, did not participate in the foregoing opinion.

90 Cal. 402

MURRAY v. HOME BENEFIT LIFE ASS'N.
(No. 13,356.)

(Supreme Court of California. Aug. 5, 1891.)

MUTUAL BENEFIT INSURANCE—WAIVER OF FORFEITURE.

An insurance policy provided for six assessments per annum, and that no claim could be made thereunder if payment was not made within 30 days from the date of notice that an assessment was due. The assessments of June 1st and August 1st were unpaid on September 1st, and the company wrote the assured: "According to the conditions of your certificate of membership No. 8,361, an assessment amounting to \$29.40 will be due and payable at this office on the 1st of October, 1886. The assured died September 30th. Held, that the letter waived the right to declare the policy forfeited for non-payment, when due, of the June and August assessments.

Department 2. Appeal from superior court, San Francisco county; WALTER H. LEVY, Judge.

Action by Murray against Home Benefit Life Association, to recover on an insur-

ance policy. Judgment for defendant. Plaintiff appeals. Reversed.

L. T. Hengstler and J. Alva Watt, for appellant. Van Ness & Roche, for respondent.

DE HAVEN, J. The plaintiff is the beneficiary named in an insurance policy upon the life of one Lemuel T. Murray, the policy being a certificate of membership, issued by defendant to said Murray, upon accepting him as a member of said Home Benefit Life Association. By the terms of the certificate, the holder was to pay to the defendant six assessments per annum, at stated times and in stated amounts, and it was also provided that no claim was to be made thereunder "should the member neglect or omit to pay the last assessment that may have been levied on the certificate within thirty days from the date of the notice thereof." Upon September 1, 1886, the assessments which had fallen due on June 1st and August 1st of that year were still unpaid, and the defendant on that day addressed a note to said Murray, calling his attention thereto, with a request that he remit the amount due. At or about the same day it also addressed to him this letter: "According to the conditions of your certificate of membership No. 8,361, an assessment amounting to \$29.40 will be due and payable at this office on the 1st of October, 1886. Remittances should always be made payable to Home Benefit Life Association, San Francisco, Cal. Return this notice, with remittance." On September 22, 1886, the said Murray, unable from sickness to make the payment in person, sent to the defendant the amount due on assessments for June and August of that year, which the defendant declined to receive, its president saying that he could not, under the circumstances, "but would be only too happy to do so" when Murray should come and tender it himself. Murray died on September 30, 1886. The plaintiff was nonsuited, and the only question before us is whether, upon the foregoing facts, the certificate or policy was in force at the date of Murray's death.

There can be no doubt that the failure of the deceased to pay the assessments of June and August within 30 days after notice thereof, released the defendant from all further liability upon the certificate held by him, if the defendant company had so elected; but conditions like that before quoted from this certificate, which in effect provide for a forfeiture of all rights thereunder unless payment of assessments is made within the time specified, may always be waived by the party for whose benefit they are inserted in the contract, and the rule is firmly established in this class of cases that if the insurance company, after knowledge of any default for which it might terminate the contract, enters into negotiations or transactions with the assured which recognize the continued validity of the policy, and treat it as still in force, the right to claim a forfeiture for such previous default is waived. *Viele v. Insurance Co.*, 26 Iowa, 9; *Insurance Co. v. Young*, 86 Ala. 424, 5 South. Rep. 116; *Titus v. Insurance Co.*, 81 N. Y.

419. Imposing or collecting an assessment by a mutual insurance company, after the company has knowledge of facts entitling it to consider the policy no longer binding upon it, without its assent, is upon this principle held to be a waiver of the right to claim the forfeiture, which otherwise it might have insisted upon. The cases are numerous which hold that the acceptance of a premium, after the time when it should have been paid, is a waiver of the forfeiture which might have been enforced because it was not paid when due, and precisely the same effect is given to an agreement to accept, at a future time, such overdue premium, and a tender in pursuance of such agreement. In speaking of acts showing an election to continue the existence of the policy of insurance, and to waive a forfeiture incurred, the supreme court of the United States, in the case of *Insurance Co. v. Norton*, 96 U. S. 234, say: "It is conceded that the acceptance of payment has this effect; and we do not see why an agreement to accept and a tender of payment according to the agreement should not have the same effect. Both are acts equally demonstrative of the election of the company to waive the forfeiture of the policy." The respondent, while not disputing the general rule that a forfeiture may be waived at the option of the person entitled to enforce it, insists that the letters of the defendant, above referred to, show only an offer by it to waive the previous default in the payment of the June and August assessments, upon condition that such past-due assessments were immediately paid, and while the insured continued in the same state of health. There are no such conditions expressed in these letters, and we do not think any such arise therefrom by legal implication. The first, calling attention to the assessments already due, and requesting payment, specified no time within which such requested payment was to be made. A tender, therefore, within a reasonable time, would have been sufficient to satisfy the requirements of this letter; and it cannot be said, as a matter of law, that the tender made was not within such time. But the letter notifying the insured that an assessment would be due and payable on October 1st, and in substance requesting payment, of itself constituted a waiver of the previous default, and must be construed as an unconditional offer to accept payment of that assessment on or before the date named. It was, in effect, an assertion that the certificate was still in force, and, notwithstanding previous defaults known to the defendant, would remain in force until the date therein named for such payment. As already stated, this notice was sent after full knowledge by defendant of the non-payment of the previous assessments; and if it was the intention to make the acceptance of the amount to become due on this assessment conditional upon the payment of such prior assessments, immediately upon the receipt of the other letter, it should have so stated; but, not having done so, we think the legal effect of this letter was to waive the previous forfeiture, and continue the certificate in force until

October 1st; and this being so, the insured had the right at any time after receiving it, and before October 1st, to make payment of all assessments accruing prior thereto, and necessary to be made in order to give the certificate continued existence.

Forfeitures are not favored, and it necessarily follows, from the rule that a forfeiture will not be enforced unless specifically and definitely provided for in the contract that a waiver thereof will be treated as unconditional unless it clearly appears that it was otherwise understood by the parties. The supreme court of the United States in *Insurance Co. v. Norton*, supra, say: "It is true, we held in *Stat-ham's Case*, 93 U. S. 24, that in life insurance time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given the courts should be liberal in construing the transaction in favor of avoiding the forfeiture." And there is nothing unjust in this rule, as the party entitled to claim a forfeiture need not waive it, but may stand upon his contract as written, or, if he desires to waive his strict right only upon condition, the condition can be specified so as to leave no doubt of the real intention. In giving further time for the payment of the assessments of June and August, by its letter of September 1st, the defendant could, if it had so desired, prevented all controversy by fixing the time within which they must be paid, or by requiring immediate payment, as was done by the insurance company in *Servoss v. Society*, 67 Iowa, 88, 24 N. W. Rep. 604, a case cited and relied upon by respondent. The fact that no tender of payment was made by the insured until his last illness was upon him, and near his death, we do not regard as material. If the certificate was then in force, and we hold that it was, he had a right to pay what was then due. It was not made a condition of defendant's offer to receive said assessments that he must be in good health at the time of payment. As the case must be remanded for a new trial, it is proper to add that the questions asked on the cross-examination of the plaintiff, relating to the policy held by the deceased in another company, and the payment of premiums therein, are not relevant to any issue in this case. Judgment and order reversed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

(3 Cal. Unrep. 426)

HOME OF CARE OF INEBRIATES v. REIS,
Treasurer. (No. 13,741.)

(Supreme Court of California. Aug. 6, 1891.)

MANDAMUS — PRACTICE — SETTING ASIDE SUBMISSION.

Where, on an application for a writ of mandate against a city treasurer, the supreme court, after the cause is submitted, concludes that the constitutionality of certain acts must be determined, which questions have not been argued, the submission will be set aside, and an opportunity for argument thereof will be afforded.

In bank.

Application for writ of mandate by the Home of the Care of the Inebriates against

Reis, as treasurer of the city of San Francisco.

Tilden & Tilden, for petitioner. *John H. Dnist and George Flournoy, Jr.*, for respondent.

PER CURIAM. This cause was submitted upon an argument which raised but a single question, viz., whether the act of the legislature, approved March 17, 1876, was repealed by the act of 1889. Upon mature consideration, the court has concluded that a writ of mandate cannot be awarded without determining other questions, viz.: The constitutionality of the acts of April 7, 1870, and March 17, 1876; and whether the treasurer of San Francisco, in view of the provisions of section 82 of the consolidation act, can be compelled to pay any unaudited claim. These questions ought not to be decided without argument, and the submission of the cause is therefore set aside, in order that such argument may be had.

(6 N. M. 72)

BROOKS v. UNITED STATES.¹

(*Supreme Court of New Mexico. July 31, 1891.*)

RECOGNIZANCE—ACTION FOR BREACH—PLEADING.

A declaration in an action for breach of a recognizance is fatally defective, where it fails to allege that the principal cognizor was ever called in court, or that his default was judicially declared.

Error to second district court; *W. H. Brinker*, Judge.

Action by the United States against *George L. Brooks* upon a recognizance given by *Ernest L. Lapham* as principal, and said *Brooks* and others as sureties. Judgment for plaintiff, and defendant *Brooks* brings error. Reversed.

N. B. Field, for plaintiff in error. *E. A. Fiske*, for the United States.

LEE, J. One *Ernest L. Lapham*, being indicted and convicted in the second judicial district court for an alleged postal embezzlement, took an appeal to this court, and, pending that appeal, was released from custody upon entering upon a recognizance, with four sureties, conditioned for his appearance at the next term of the supreme court to receive the judgment on the said appeal, and to abide the decision of the said supreme court, "and to render himself in execution, and to obey every order and judgment which should be made in the premises by said supreme court." Subsequently an action on the said recognizance was brought in the same district court by the United States against the said *Ernest L. Lapham* and his sureties, of which the present plaintiff in error is one. In the action the plaintiff therein sets up the bond, and alleges as a breach that the said *Lapham* did not appear in the supreme court to receive its judgment, etc., but so to do did fail; that he absconded, and was absent from the territory during the entire term of that court to which he was bound to appear; but it does not aver that any judgment or order was ever made or rendered in the case by the supreme court, or that the said *Lap-*

ham was ever called in that court, or that any default was entered against him therein, or that any forfeiture of said recognizance was therein adjudged or entered of record. The surety, *Brooks*, demurred to the declaration upon various grounds going to its sufficiency, and the case comes before us for review of the judgment of the district court overruling that demurrer, and assessing damages against him.

In the consideration of this case the court deems it unnecessary to pass upon any of the points raised, except those going to the sufficiency of the allegations in the declaration of the breach of the recognizance. A recognizance is a contract of record. According to the ancient common-law procedure, the usual, if not the only, mode of enforcing it upon a breach of its conditions was by the adjudication of a forfeiture by the court, upon its taking judicial notice of the breach, and afterwards proceeding to collection by execution. The forfeiture, in such a case, was a judgment. Although, in modern times, the practice has grown up of bringing an action in debt for the recovery of the amount due on a forfeited recognizance, we are unaware that such an action has ever been sanctioned, except after a precedent forfeiture of record. Such an action is analogous to an action upon a judgment. The contract of recognizance is a judicial contract, entirely within the control of the court in which it is taken, and which always has discretion to grant relief from its enforcement. No part of this discretion is vested in the public prosecutor, and he is not at liberty to proceed by action until the judicial will has first been made known by its judgment upon a breach of its condition. Every precedent of such action, which we have found, indicates that such suits are always based on recognizances duly forfeited by judicial order, and that the declaration in every such case must allege that the defendant in the recognizance was duly called at the proper time and place, and the recognizance forfeited. It is unquestionable that the breach must be established by record, and cannot be shown by proof *affande*. *People v. Van Eps*, 4 Wend. 388. It is essential to a breach of the contract of a recognizance that the declaration must show that the party who was to appear was solemnly called and warned before his default was entered. *Dillingham v. U. S.*, 2 Wash. C. C. 422; *State v. Grigsby*, 3 Yerg. 280; *Urton v. State*, 37 Ind. 339. "The fact that the cognizor had absconded, and could not have answered the call, even if properly made, is of no importance. A recognizance is not forfeited, except by the failure of the principal cognizor to appear and answer to a call made at the proper time and place." *U. S. v. Rundlett*, 2 Curt. 41. The declaration being fatally defective, the court below should have sustained the demurrer. The judgment will be reversed, and cause remanded for proceedings in accordance with the views herein expressed.

O'BRIEN, C. J., and *SEEDS, FREEMAN*, and *McFIE, JJ.*, concur.

¹ Rehearing denied, 27 Pac. Rep. 510.

(6 N.M. 15)

TRAMBLEY et al. v. LUTERMAN.*(Supreme Court of New Mexico. July 24, 1891.)***WATER-RIGHT—USE BY PRESCRIPTION.**

Where an artificial ditch or *acequia*, fed from the waters of a non-navigable stream, and constructed through the adjoining lands of different owners, principally for irrigating and domestic purposes, has been continuously and adversely used by one of such owners during more than 21 years for the additional purpose of supplying power to propel a grist-mill, operated by and situate upon land belonging to one of such owners. *Held*, that a party subsequently buying a piece of the land through which the ditch runs, situate near and above the place where such mill is erected, and more than 20 years after the waters of the *acequia* had been partially devoted to the running of the mill, buys the same subject to the rights of the mill-owner to appropriate enough of the water therefrom for such especial or additional use. *Held, further*, that, while such subsequent purchaser may draw water therefrom for the ordinary purposes of irrigation, he may not appropriate the same for some especial purpose,—for instance, to operate a wool-cleansing establishment,—whereby the prior proprietor is deprived of enough water with which to operate his mill.

(Syllabus by the Court.)

Appeal from district court, San Miguel county; E. V. LONG, Judge.

J. D. O'Bryan, for appellant. Lee & Fort, for appellees.

O'BRIEN, C. J. This suit was brought by Peter and Ernestine Trambley for the purpose of restraining appellant, the defendant in the court below, from diverting the waters out of the artificial race or ditch of appellees situate on the Gallinas river, near Las Vegas, in San Miguel county, to a wool and pelt cleaning establishment of the defendant, thereby depriving complainants of enough of water with which to operate their mill. It appears from the record that in 1849, Rafael Garcia erected a grist-mill on the Gallinas river at the town of Las Vegas, San Miguel county. The machinery of the mill was propelled by water taken from an artificial ditch or *acequia* supplied from the river. In 1859, Miguel Desmarais, becoming the owner of this property, erected a new mill thereon, and continued to own and operate the same till October, 1864, when he sold it to Juan Francisco Pinard, who used it until May, 1867, when he conveyed it to complainants, who thereupon went into possession, and used the same without interference until the summer of 1886, when defendant, Luterma, erected a wool and pelt cleaning establishment just above complainants' mill, and by means of dams, boards, and obstructions placed in the ditch of complainants, penned back, and by means of an outlet diverted and took, the water from the ditch for the purpose of carrying the same to his wool and pelt washing establishment; that plaintiffs, on account of such diversion of the water from the ditch, are deprived of a supply sufficient to operate their mill; and commenced this suit for relief, praying in their bill that the defendant be restrained from diverting, taking out, or interfering with the water in the ditch or *acequia*. Defendant's answer to the bill sets up various grounds of defense. The principal ones

relied upon, deemed necessary to be considered in determining the case, are: (1) That complainants have shown no exclusive right to the use of the water from the *acequia*, either by grant or prescription; (2) if such right ever existed, it was lost by failure of complainants, and of those through whom they claim, to comply with the conditions expressly imposed, or by repeated changes made by complainants as to the manner of appropriating the water; (3) that complainants have no right thereto by use or adverse possession; and (4) that complainants are estopped by their "words, acts, and silence" from denying the defendant's right to appropriate enough of the water from the *acequia* to operate his wool-cleansing establishment. The action was tried before a master, who filed substantially the following findings of fact: "(1) That, prior to the year 1846, the owners of the land on the east side of the Gallinas river, opposite the town of Las Vegas, had constructed an irrigating ditch, the head of the ditch being north of the town, and the supply of water taken from the river; that, after the construction of the ditch, one Rafael Garcia, who owned the land under the ditch, applied to his co-owners of the land along the ditch for the privilege of using the water not necessary for irrigation flowing in the ditch, to drive a flour-mill which he was about to erect, and that, in accordance with such application, a number of the owners of land along the ditch, and claiming to represent all the owners of the land, gave to Garcia an instrument in writing, of which the following is a translation: 'In this place of Las Vegas, the twelfth day of the month of May of the year 1846, before me, Citizen Manuel Duran, justice of the peace of this district, appeared in their own proper persons Citizens Jose Gonzales, Juan Jose Martin, Guadalupe Baca, invited also by the citizen Rafael Garcia, whom I certify to know, and the first named say for themselves and in the name of other persons, owners of the *acequia* which waters the tillable land on the other side; and whereas, Garcia has solicited permission to erect a mill on said *acequia*, obligating himself to maintain the dam and trench in good order, and furnish two *peones* for cleaning the same; only conceding the good-will and consent of all the others who are concerned in the before-mentioned *acequia*, with the condition that the announced mill does not interfere with the irrigation of the land, and grind only when it does not impede irrigation by anybody; and in order that Garcia may remain secure and as provided for his mill he solicited their free consent, and giving herewith Garcia power that if at any time hereafter any person should make any infringement that they should be debarred by this deed to do so; that now or hereafter, in this place above or below, another mill nor any other manufactory should be placed, and, if placed, it should not be permitted, it being the will of the undersigned that said Garcia shall enjoy alone the benefit and grace of the will of the undersigned, having solicited me, the said justice, to execute these pre-

ents, and to authorize the same with the power which is conferred upon me by right and by law. Signing with the undersigned and those of my assistants, which I hereby do on account of not having a clerk, and none being in this department, on common paper, on this, the 12th day of May, 1846. [Signed] MANUEL DURAN, JOSE GONZALES, JUAN JOSE MARTIN, JOSE GUADALUPE BACA. Assistants: JESUS GALLEGOS and ANTONIO MA. GONZALES. Recorded book 1, pages 195 and 196, Records of San Miguel county.' (2) That Garcia some time between the years 1846 and 1848 built a small Mexican mill on the ditch or *acequia*, and used the waters therefrom for the purpose of running his mill, subject, however, to the right of the adjoining occupants to appropriate water therefrom for domestic and irrigating purposes. That Garcia died in the year 1855, leaving as his only heir Agapito Garcia, who shortly afterwards, about the year 1856, sold the mill and the land whereon it stood to Merritt and Kihlberg, from whom, through several mesne conveyances, the property came into the hands of complainants on the 10th day of May, 1867. That the original mill built by Rafael Garcia was run continuously by the water from the ditch up to the year 1860, when it was rebuilt to its present size by Miguel Desmarais, the owner at that time. That the mill, as rebuilt, has been continuously run by water taken from the ditch to the present time, except for a short period, when steam power was introduced to help out the water-power. (3) That complainants have been the owners of the mill and land whereon situated for the past 20 years, and have operated the mill during that time, repairing the dam in connection with the other owners of the land along the ditch, keeping the ditch in repair, and having the use of all the surplus water of the ditch during that period, not used for irrigation or domestic purposes by the other owners of the land. That complainants derived their paper title to the land and appurtenances through six successive and regular deeds of conveyance, all duly recorded, beginning with one dated May 13, 1856, from Garcia and wife to Merritt and Kihlberg, and ending with one bearing date May 10, 1867, from Juan Francisco Pinard to complainants, Peter Trambley and Ernestine, his wife. (4) That when the mill is running the water appropriated from the *acequia* to operate the same, after passing over the mill-wheel, returns by a sluiceway to the river below the mill. (5) That on the — day of —, 1886, the defendant, George Luterman, bought a piece of land situate between the ditch which supplies complainants' mill and the Gallinas river, and five or six hundred yards above the mill, for the purpose of erecting a 'wool pulling and cleaning establishment'; that defendant had inquired of complainants before buying as to where he could find a convenient location for such an establishment, and that complainants had directed him to the place now occupied by defendant, and they had also inquired of them how much water he would use, and he informed

complainants that he would use six inches square of water, to which information plaintiffs made no response. (6) That defendant erected a building, involving considerable expense and outlay, by the end of June, 1886, at which time he constructed a flume from the ditch which supplies the mill, but on his own land, and diverted from that ditch, by means of boards placed across it, sufficient water for his use, which water is let into the flume through an aperture nine inches wide and three inches high; and that the defendant has since used from the ditch the quantity of water passing through the aperture or flood-gate two or three days each week, during the months of December until March, starting his cleansing or washing operations from 10:30 A. M., and continuing until 4:50 P. M., or even later. (7) That defendant, during the time that he has conducted such establishment, assisted plaintiffs at their written request in rebuilding the dam in the river where the ditch receives its supply of water, as well as in repairing the ditch; that defendant has title to the land which he occupies under divers deeds of conveyance duly recorded running from May 24, 1882, to April 24, 1886, when one Ben Bruhn, the last grantee, conveyed the premises to the defendant; and that, in addition thereto, the latter obtained from several owners of the land along the *acequia* the following agreement or license for the use of the water: 'Know all men by these presents, that we, the owners of land along the *acequia* in East Las Vegas, in consideration that George Ludeman has erected a wool-cleaning establishment on his land also fronting on said *acequia*, and that he will continue the said establishment, do hereby give our consent that he may use the water from said *acequia* at such times as we do not require the same, for the purposes of his establishment; but this permission on our part shall never be construed into a right in the said George Ludeman to the use of the said water against our wishes, and for any longer time than it is our pleasure to permit the same. Witness our hands, etc., this last day of April, A. D. 1887. LORENZO LOPEZ. ANICETO BACA. S. P. CLEMENTE. B. PAPAN.' (8) That the defendant's establishment is built some distance from the *acequia* towards the river, and the water he uses passes out of his establishment after the use, and wastes into the river. That during the time of low water in the river, and during the hours that defendant is using the water for his establishment, the plaintiffs suffer loss from the use of the water by the defendant for his establishment, a loss which is measured by about one-fourth of the capacity of the mill for grinding. This loss, however, does not occur during the rainy season, or at such other times when there is plenty of water in the river. From which findings the master drew the following conclusions of law: "(1) That the original writing given by the land-owners to Rafael Garcia, the proprietor of the mill first built, if not a grant in terms to him of an easement in the water of the ditch, to use for driving his flour-mill, against

all persons, except for irrigation and domestic purposes, was at least an executed license after the erection of the mill, and by the long use of the water by Garcia and his assignees and privies in estate became irrevocable, and an easement appurtenant to the mill. The erection of a new mill by Desmarais in the place of the old one built by Garcia on the same land, and the use of the water in the same ditch, in the same way and for the same purpose, would not destroy this right; but the 26 years' use by plaintiffs and their immediate grantors, Pinard and Desmarais, would only strengthen it, and of itself be sufficient to create such an easement in plaintiffs. (2) I conclude, in regard to the question of estoppel that the construction of the wool-washing establishment on defendant's own land, in sight of plaintiffs, and a general knowledge of the purpose for which the building was being constructed by the defendant, without active opposition from plaintiffs, would hardly work an estoppel against plaintiffs, at least unless it appeared that plaintiffs knew especially how the water was to be used and disposed of after use by the defendant, and the manner in which it might affect their water-power, and acquiesce in it. (3) That the diversion of the water from the said ditch by the defendant, to the damage of plaintiffs, and allowing the water to waste into the river, for any other purpose than the ordinary irrigation of his land and domestic purposes, is such an infringement of plaintiffs' rights as to entitle them to a restraining order of the court, enjoining defendant from using the water during the seasons of low water in the river for washing wool or other manufacturing purposes, unless the water so used is returned to the ditch above plaintiffs' mill, and without serious diminution in quantity." Counsel for appellant presented objections and exceptions to the report, all of which were overruled. The court thereupon confirmed the report, and entered a decree in favor of complainants in substantial conformity with the master's decision, from which the defendant has taken this appeal.

The substance of the errors relied upon by appellant to secure a reversal may be briefly stated as follows: The court below erred in overruling defendant's exceptions to the findings and decision of the master, and in entering judgment in accordance with the master's report, (1) because the deed from Agapito Garcia does not convey any right to the use of the water in the *acequia*, nor do any of the subsequent deeds do so until 1864, when Desmarais conveyed to Pinard; (2) that it was error to find, if there had been no easement, that there was an executed license; (3) in failing to find that on the removal of the little Mexican mill in 1860, and the substitution of a distillery therefor, the license, if any, expired, and did not revive in favor of Desmarais when he built the new mill; (4) in failing to find that Martin, who executed the license to Garcia in 1846, had previous to 1838 sold the property of which the land of the defendant is a part to one Romero, and that at the time the Garcia license was

granted the present mill-site of the defendant belonged to the Romero heirs. The other assignments are of a similar nature, all charging error in failing to find such facts as in appellant's opinion tended to show that complainants had no exclusive right to appropriate the waters from the ditch for the use of their mill. Upon a careful examination of all the testimony in the cause we are unable to discover any errors prejudicial to defendant's rights, either in the findings or in the refusals to find. They appear to us satisfactory and complete, fully warranted by the evidence, and cover all the issues involved in the pleadings. That additional findings, at least in part, might have been made, we concede, but they would be redundant, rather than material, and could not change the result. The ditch or *acequia* in controversy was made in the year 1846, before the acquisition of the territory by the United States. The rights of the parties to the use of the waters therein then attached according to the laws, customs, and usages in force in the republic of Mexico. It is apparent that when defendant bought his mill-site in 1886 the Trambleys personally, and by their predecessors through whom they claimed title and took possession, had occupied and used the premises continuously during 40 years for substantially the same purposes for which they were used when this suit was commenced; hence, when defendant purchased he knew or might have known of the existence of this servitude upon the land which he bought. His grantors, the Romeros, were present, and were well aware that complainants and their predecessors had enjoyed this easement unchallenged for almost double 20 years. No objection had been made; no license had ever been requested from the Romeros. This is sufficient to create an easement. "There need be no claim of right in words, or an admission by the owner of the land in words, that he knew of the adverse cause and claim of right. Twenty-one years of adverse use continually and uninterruptedly, with the knowledge and acquiescence of the owner of the land, in the absence of any evidence of permission or license, is sufficient proof of the existence of such easement." *Blake v. Everett*, 1 Allen, 248. When defendant in 1886 bought the premises on which he afterwards erected his wool-cleansing establishment, he bought the same subject to complainants' easement,—a burden upon his estate as valid and effectual as if evidenced by a recorded incumbrance in writing. *Blake v. Everett*, supra. In this view of the case it is not important that Juan Jose Martin did not in 1846 own the land now owned by the defendant. The reason is obvious. It is true at common law the right of every riparian proprietor to the use of the stream is an incident to the ownership of the lands bordering upon the stream, and arises *ex jure nature*. "The right exists whether defendants exercised it or not, and the riparian proprietor may begin to exercise it when he will. It does not depend upon occupancy, and is not limited by the prior occupation of others, not amounting to an adverse enjoyment by

prescription; but, the rights of the different proprietors being equal, and each being entitled to the use of the stream for any lawful purpose, it is wholly immaterial who was first in time." Gould, Waters, § 286. But, says BIGELOW, C. J., in *Fuller v. Manufacturing Co.*, 16 Gray, 43, 44: "To the extent to which the descent or fall of water in a stream is taken up and occupied by the erection of dams for the purpose of carrying mills, the right of other owners on the same stream who have not improved their sites for the creation of water-power and driving of mills is abridged and taken away. In such case, prior occupancy gives prior title. Although the right to the use of the water is inherent in or appurtenant to land, it is nevertheless in a certain sense a right *publici juris*, and subject to the rule of law which regards the erection of a dam for the purposes of creating mill-power a profitable, beneficial, and reasonable use of the stream, of which riparian proprietors on the same stream who have not appropriated the force and fall of the water on their own land cannot complain." "The right thus to appropriate water exists without private ownership in the soil as against all persons but the government or its grantees, possession of public land which has not been surveyed, or patented gives rise to no riparian rights in the streams which flow through it." Gould, Waters, § 230; *Lake v. Tolles*, 8 Nev. 285. But common law, as to rights of riparian owners, is not in force in this territory, nor in California, Nevada, and other Pacific states. Gould, Waters, *supra*, § 223; Acts N. M. July 20, 1851; Acts N. M. Jan. 7, 1852; *Kidd v. Laird*, 15 Cal. 101; *Butte T. M. Co. v. Morgan*, 19 Cal. 609. "The reasons," says SANPETERSON, C. J., "which constitute the ground-work of the common law upon this subject remain undisturbed. The conditions to which we are called to apply them are changed, and not the rules themselves. The maxim, *sic utere tuo ut alienum non lædas*, upon which they were grounded, has lost none of its governing force; on the contrary, it remains now and in the mining regions of this state as operative a test of the lawful use of water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel, *ubi currere solebat*, without diminution or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses; but this rule is not applicable to miners and ditch-owners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose which is not only compatible with its diversion from its natural channel, but more frequently necessitates such diversion, and, moreover, does not require the water in a pure state in order to insure its reasonable and beneficial use. Yet the maxim above mentioned, upon which the rule is founded, is equally as applicable to the ditch-owner and the miner as to the riparian proprietor, and neither can so use the water as to injure and prejudice the

prior rights of a like use by the other." *Hill v. Smith*, 27 Cal. 476, 482. Besides, it is well recognized that at common law the party who has used water for a special purpose and in a particular manner adversely and uninterruptedly for 21 years may not be disturbed in such use by a subsequent locator. *Williams v. Nelson*, 23 Pick. 141; *Stein v. Burden*, 24 Ala. 130; *Townsend v. McDonald*, 12 N. Y. 381. The law of estoppel invoked by appellant is not applicable. Complainants do not deny to the defendant the qualified right to appropriate water from the ditch to enable him to carry on his business. They simply deny him the right to take it in such quantities as to deprive them of enough to operate their mill. They admit his right subordinate to their prior right. When they saw him, in 1886, build his establishment, and knew that he would require some of the water from the ditch for the use of the same, they did not know and were not informed that the defendant would require enough for his use to interfere with the successful running of their mill. They were not bound to object, and their failure to do so does not deprive them of their remedy. *Lux v. Higgin*, 69 Cal. 255, 10 Pac. Rep. 674. The other objections urged by appellant are equally untenable. He insists, for instance, that, if the original license created an easement, it has been lost by repeated changes. But complainants do not ground their right to the use of enough of the water from the ditch to carry on their mill upon the so-called license to Garcia, but upon title acquired by long-continued adverse use. "And when water has been lawfully appropriated the priority thereby required is not lost by changing the use to which it was applied. If the original appropriation was for a saw-mill, the water may be used for a grist-mill subsequently erected." *Maeris v. Bicknell*, 7 Cal. 261; *Hill v. Smith*, 27 Cal. 476; *McDonald v. Mining Co.*, 13 Cal. 220. We have carefully examined the other points contained in the brief of the learned counsel for appellant, but fail to notice any not sufficiently answered in what we have already said. Finding no material error in the record, the judgment appealed from will be affirmed.

SEEDS and McFIE, JJ., concur.

LEE, J., having been of counsel in the case in the court below, took no part in this case in this court.

(5 N.M. 674)

TOWN OF ALBUQUERQUE v. ZEIGER.

(*Supreme Court of New Mexico*. July 24, 1891.)

MUNICIPAL IMPROVEMENTS—PAVING AND CURBING—ASSESSMENTS—INJUNCTION.

1. Towns incorporated and organized in accordance with the provisions of title 28, c. 2, Comp. Laws 1884, are not empowered to levy a special assessment upon lots or blocks situate within the corporate limits for the purpose of raising money to pay the expenses incurred by the corporate authorities in curbing and improving public streets in front of such lots or blocks, unless the same be done in accordance with the provisions of section 1685, Comp. Laws 1884.

2. If these municipalilities proceed to enforce

the payment of such assessments by sale of the property fronting upon streets so curbed or improved, equity will grant relief restraining such sale, if necessary, to prevent a cloud upon the owner's title.

(*Syllabus by the Court.*)

Error to district court, Bernalillo county; H. W. BRINKER, Judge.

W. H. Whiteman and N. C. Collier, for plaintiff in error. *N. B. Field*, for defendant in error.

O'BRIEN, C. J. Charles Zeiger, defendant in error, owns in the town of Albuquerque, a municipal corporation organized under the general laws of this territory, a part of lot 12, in block 18, of the New Mexico Town Company's addition to Albuquerque. This lot abuts upon Railroad avenue. In 1886 the town trustees passed a resolution providing for the improvement of this avenue by the construction of a stone curbing from the west side of First street to the east side of Fourth street, assessing \$101.50 as a special tax upon the part of lot 12 owned by the defendant in error, as its proportionate share of the cost of such construction. This assessment, together with one for the general tax of that year, was placed in the hands of the sheriff, *ex officio* collector of taxes, to enforce payment thereof by sale of the lot in question or otherwise. Thereupon Zeiger tendered to the sheriff the full amount of the tax assessed and due for general municipal purposes, but refused to pay any part of the amount specially assessed for the improvement of the street. The sheriff, as directed by the town, refused to accept the sum tendered, unless the special assessment was also paid, and proceeded to enforce the collection of the amount claimed by advertising for sale Zeiger's part of the lot before mentioned. To prevent this, Zeiger, on or about February 24, 1888, filed his bill in equity against the plaintiff in error and the sheriff, setting out in detail the several acts of the town in making the special assessment to pay the cost of constructing the stone curbing in front of his lot, alleging that the same was wholly unauthorized; that he had tendered to the sheriff \$191.94, the full amount of his taxes claimed for general purposes, before the same became delinquent, and that the latter refused to accept the same in default of the sum assessed for the improvements made upon Railroad avenue. He then alleges that he brings into court said sum so offered to the sheriff, and tenders the same to plaintiff in error in discharge of all lawful taxes assessed against him. He further alleges that the defendant sheriff, as *ex officio* collector, is advertising his property for sale to pay the said taxes, and the said unlawful special assessment, and that the sheriff has threatened to sell and will sell said property unless restrained from so doing by order of the court; that, in case of such sale, a cloud will be cast upon his title to the property sold; "that he will be compelled to redeem the same at great expense, and will be unable to recover back the amount so wrongfully assessed against him, and will be otherwise irreparably damaged," etc. Then follows prayer for general relief and the

issuance of a writ of injunction. The defendants, town and sheriff, filed a general demurrer to the bill, which was overruled, the injunction prayed for issued, and defendants allowed to plead over. Refusing to do this, final decree was entered in favor of plaintiff, making the injunction perpetual. An appeal from such judgment was afterwards taken, but the same was not prosecuted. The case is here on writ of error sued out by the defendant town.

We will remark, with regard to the points raised by the defendant as to the right of plaintiff in error to concurrent remedies by appeal and writ of error, as well as to failure of the defendant sheriff to join in suing out such writ, that, they having already been decided against the defendant in error, the only questions presented for determination now, are: (1) The legality of the special assessment; (2) the right of defendant in error to the relief sought in his bill. The provisions of law upon which plaintiff in error relies as authorizing its action in the premises are found in the following sections and subsections of title 28, c. 2, of the Compiled Laws of 1884: "Section 1635. No street or highway shall be opened, straightened, or widened, nor shall any other improvements be made, which will require proceedings to condemn private property, without the concurrence in the ordinance or resolution directing the same of two-thirds of the whole number of the members elected to the council or board of trustees, and the concurrence of a like majority shall be required to direct any improvement or repair of a street or highway, the cost of which is to be assessed upon the owners, unless two-thirds of the owners to be charged therefor shall petition in writing for the same." "Section 1622. The city council and board of trustees in towns have the following powers: * * * Subsec. 6. To contract an indebtedness on behalf of the city, and upon the credit thereof, by borrowing money or issuing the bonds of the city or town, for the following purposes, to-wit: For the purpose of erecting public buildings; for the purpose of constructing sewers for the city or town; for the purpose of purchase or construction of water-works for fire and domestic purposes; for the purpose of the construction or purchase of a canal or canals, or some suitable system for supplying water for irrigation in the city or town; for the purpose of the construction or purchase of gas-works for manufacturing illuminating gas, or purchasing illuminating gas; and for the purpose of supplying a temporary deficiency in the revenue for defraying the current expenses of the city or town. The total amount of indebtedness for all purposes shall not at any time exceed five per centum of the total assessed valuation of the taxable property in the city or town, except such debt as may be incurred in supplying the city or town with water and water-works; and no loan for any purpose shall be made, except it be by ordinance, which shall be irrepealable until the indebtedness therein provided for shall be fully paid, specifying the purposes to which the funds to be raised shall be applied, and providing for the levying of a

tax not exceeding in total amount for the entire indebtedness of the city and town (excepting such debt as may be incurred in supplying the city or town with water-works) eight mills upon each dollar valuation of the taxable property within the city or town, sufficient to pay the annual interest and extinguish the principal of such debt within the time limited for the debt to run, which shall not be less than ten years nor more than thirty years, and providing that said tax, when collected, shall only be applied to the purpose in said ordinance specified, until the indebtedness shall be paid and discharged; but no such debt shall be created except for supplying the city or town with water, unless the question of incurring the same shall, at a regular election of officers for the city, be submitted to a vote of such qualified electors of the city or town as shall in the next preceding year have paid a property tax therein, and a majority of those voting upon the question by ballot deposited in a separate ballot-box shall vote in favor of creating such debt. *Seventh.* (1) To lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, parks, and public grounds, and vacate the same, and to direct and regulate the planting of ornamental and shade trees in such streets, avenues, and public grounds." *Id.* subsec. 71: "All cities and incorporated towns constructing such water or gas works are authorized to assess, from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water or gas, such water or gas rents as may be agreed upon by the council or trustees, or upon each vacant lot in front of which the pipes commonly called 'street mains' are laid; but such vacant lots as do not take water from such 'street-mains' shall not be assessed more than one-half as much as may be assessed against the same amount of frontage of lots occupied by a one-story building; and gas should be charged for by the foot, and then only to such as use it; and at the regular time of levying taxes in each year said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rent hereby authorized, shall be sufficient to pay the expenses of running, repairing, and operating such works; and if the right to build, maintain, and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any purpose, such city or town shall levy each year and cause to be collected a special tax, as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, or company constructing said works: provided, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year." *Id.* subsec. 75: "Each municipal corporation may, by general ordinance, prescribe the mode in which the charge on the respective

owners of lots or lands, and on the lots or lands, shall be assessed and determined for the purposes authorized by this act; such charge, when assessed, shall be payable by the owner or owners, at the time of the assessment, personally, and also be a lien upon the respective lots or parcels of land from the time of the assessment. Such charges may be collected, and such lien enforced, by a proceeding in law or in equity in the district court of the proper county, either in the name of such corporation or of any person to whom it shall have directed payment to be made. In any such proceedings, where pleadings are required, it shall be sufficient to declare generally for work and labor done and materials furnished on the particular street, alley, or highway, or for water-rent or gas used. Proceedings may be instituted against all owners, or any of them, to enforce the lien against all the lots or land, on each lot or parcel, or any number of them, embraced in any one assessment; but the judgment or decree shall be separately for the amount properly chargeable to each. Any proceedings may be served in the discretion of the court for the purpose of trial, review, or appeal." The first section cited has no application, for the reason, among others, that two-thirds of the owners to be charged with the expense did not petition the board of trustees for the making of such improvement; at least the record does not disclose such fact, and the bill impliedly denies it. It hardly admits of argument, that the other provisions of the statute neither expressly nor by necessary implication grant the power to levy a special tax upon the property beneficially affected, to pay the expenses incurred in curbing or otherwise improving the streets of an incorporated town. This will appear evident when the question is examined in the light of the powers conferred by subsections 71 and 75, construed in connection with statutory provisions regulating the taxing power. Subsection 71 authorizes and regulates the levy and collection of special assessments for the payment of water and gas rents; the reference therein to a power "to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water and gas rent hereby authorized, shall be sufficient to pay the expenses of running, repairing, and operating such works," cannot be construed as in any manner favoring a special assessment for the curbing and improvement of streets. But the seventy-fifth subsection appears to be the one upon which the town mainly relies for its authority to act in the premises. That only grants the power to fix by ordinance the manner "in which the charge on the respective owners of lots or lands and on the lots and lands shall be assessed and determined for the purposes authorized by this act;" and the only question left for determination is, does the act authorize special assessments against the owners of the lots or against the lots themselves to pay the amount incurred by towns in curbing and improving of streets? No such authority,

given in express words, can be found in the act. It is true that city councils and boards of trustees in towns, by the provisions of section 1622, are authorized "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, parks, and public grounds;" also "to provide for and regulate cross-walks, and curbs and gutters," but it cannot be seriously claimed that the conferring of such powers, either expressly or by necessary implication, grants the right to a city or town to levy a special assessment to pay the expenses of curbing a street, upon the lot abutting on the street where such curbing is done, nor upon the owner of such lot. From a careful reading of all the statutory provisions upon the subject we are of the opinion that no such power has been conferred. We are otherwise supported in this conviction by the fact that the legislature has in no wise restricted the several cities and towns in the exercise of the extraordinary powers claimed, and it appears unreasonable that the legislature would intrust to these various municipal bodies unlimited power to confiscate the property of the citizen to pay the expense of improvements made upon adjoining streets, without as much as intimating, in the laws purporting to confer such power, one word of information or instruction as to the manner of its exercise. Such extraordinary powers should be clearly granted. *Wright v. Chicago*, 20 Ill. 252; *Shackelton v. Guttenburg*, 39 N. J. Law, 660.

The only question remaining is, had Zeller a right to resort to a court of equity to restrain the sale of his lot and the forced collection of the assessment? We are clearly of the opinion that he had.

The suit was not instituted to correct errors or irregularities in the special assessment proceedings, nor to restrain the collection of the tax on account of illegality in the manner of enforcing its payment, but defendant in error in his bill distinctly alleges that the town had no rightful authority to make such assessment, and that its attempted forcible collection was wholly unwarranted; that, notwithstanding this total want of power, the town was proceeding to sell the lot, and thus cast a cloud upon his title, etc. The bill states enough to bring the case within the scope of well-recognized principles of equity jurisdiction. It is well settled that, where public functionaries, individuals, or corporations have power to act, and are proceeding in the execution of their trust in an irregular or unlawful manner, courts of equity will not ordinarily interfere; but if they depart from the "power which the law has vested in them," or "if they assume to themselves a power over property which the law does not give them," they are not considered as acting within the scope of their authority, and such unauthorized acts may be enjoined. Courts of equity will also restrain the collection of a tax levied without authority of law. *Frewin v. Lewis*, 4 Mylne & C. 254; *Trust Co. v. Weber*, 96 Ill. 346; *McClure v. Owens*, 21 Iowa, 133. "When invoked, equity will entertain jurisdiction in all cases where the taxes have

been levied without authority." *Kimball v. Trust Co.*, 89 Ill. 613; *Town of Lebanon v. Railway Co.*, 77 Ill. 539. "If the illegal taxes are assessed, and are threatened to be collected, the appropriate remedy is to restrain the collection by injunction." *Railroad Co. v. Lafayette*, 22 Ind. 262; *Foot v. Milwaukee*, 18 Wis. 270. The equitable doctrine here announced has peculiar application to such states and territories as make tax-decids *prima facie* evidence of the regularity of all prior proceedings, including the levy of the taxes according to law. Such is the law of this territory. Section 2893, Comp. Laws 1884. See 1 High, Inj. §§ 525, 526; *Fowler v. City of St. Joseph*, 37 Mo. 228; *Jenkins v. Rock Co.*, 15 Wis. 11. It follows that the demurrer to the bill was properly overruled, and that the judgment below must be affirmed.

LEE, MCFIE, and SEEDS, JJ., concur.

(6 N. M. 27)

GILDERSLEEVE v. NEW MEXICO MIN. CO.
et al.

(Supreme Court of New Mexico. July 24, 1891.)

ADVERSE POSSESSION—MEXICAN GRANT—WILLS.

1. A grantee from the republic of Mexico of land situated in New Mexico (then part of Mexico) was in possession of part of the land, claiming title to the entire grant, until his death, in 1841. The grantee devised the land to his widow by a will executed in accordance with an ancient custom of New Mexico, but not in accordance with the laws of Mexico. The widow continued in possession until 1853, when she conveyed to a third person, who was in possession under the deed until 1864, when such last grantee conveyed to defendant. Defendant immediately took possession under the deed, put valuable improvements on the land, and operated mines thereon for 20 years, when the heirs of the original grantee brought an action for the possession of the same, alleging that the will devising the land to the widow of the original grantee was invalid, because not executed in accordance with the laws of the republic of Mexico. The original Mexican grant was confirmed by act of congress in 1861, the confirmation being defined as a relinquishment of all claim on the part of the United States, but providing that it should "not affect the adverse right of any other person." A patent was issued to defendant in 1876. *Held*, that defendant, at the time the action was brought, had acquired title by adverse possession, under Comp. Laws N. M. § 1880, which provides that possession of land granted by the government of Mexico for 10 years under a deed, devise, etc., purporting to convey a fee-simple, shall give a good title.

2. A will executed before a judge, and attested by two witnesses, in New Mexico, while a province of the republic of Mexico, in accordance with a custom which had prevailed more than 100 years, though not in accordance with the laws of Mexico, which required wills to be executed before a notary and seven witnesses, is valid *ex necessitate rei*; the government of Mexico having never furnished the province of New Mexico with such an officer as a notary, before whom wills could be executed.

Error to district court, Santa Fe county; R. A. REEVES, Judge.

Action to try title by Charles H. Gildersleeve against the New Mexico Mining Company and others. Judgment for defendants. Plaintiff brings error. Affirmed.

H. L. Warren, Thomas Smith, G. C.

Preston, and E. A. Flske, for plaintiff in error. E. L. Bartlett, for defendants in error.

O'BRIEN, C. J. The subject-matter of the controversy involved in this suit is a tract of mining and pastoral land embracing about 69,458 acres, situate in Santa Fe county, known as the "Ortiz Mine Grant," conceded, in accordance with the laws of the republic of Mexico, in the year of 1833, to Jose Francisco Ortiz and Ignacio Cano. The latter, prior to his death, in 1836, conveyed to his co-tenant, Ortiz, all his title and interest in the grant. It is not disputed that thereafter, in the year 1840 or 1841, Jose Francisco Ortiz and Dona Ines Montoya, his wife, jointly executed an instrument in writing, known as a "mutual will," of the tenor following: "Third Stamp. [Stamp.] Two Reals.

"For the years of one thousand eight hundred and forty and one thousand eight hundred and forty-two. At the city of Santa Fe, capital of the department of New Mexico, on the fifteenth day of the month of August of one thousand eight hundred and forty-one, before me, the citizen Albino Chacon, constitutional alcalde of the same, and by operation of law judge of the first instance, those of my attendance being present, with whom I act by special authority, appeared Don Jose Francisco Ortiz, a resident of the Real de Oro, and his living wife, Dona Maria Ines Montoya, both of whom I certify I know; and they together stated that whereas, God has not been pleased to give them from their marriage a child or forced heir living, they agree with each other that the one who shall survive the death of the other shall be the sole heir to everything that may be recognized as their property, in livestock, real estate, chattels, or in any other manner, without any relative of either of them preventing it, through any privileged right that he may allege; but in case that it should so happen, and that it should be attempted by any of them to institute suit against the surviving party, the testators from this time request the national justices, and in particular those who may have cognizance of this matter, that they be not heard either in or out of court, but rather they give authority to the judges in order that by all the rigor of law they may force and compel them to what is stipulated by this document, and to the guaranty thereof, as fully as if it were in definitive sentence pronounced in adjudicated cause, acquiesced in by them, and not appealed from. In witness and guaranty whereof they thus request me to authenticate it, which I do according to the provisions of law, with my attending witnesses; to which I certify.

"JOSE FRANCO ORTIZ.

"MARIA INES MONTOYA.

"[De Assa.]

"JOAQUIN YOMUJANO.

"JOSE ALBINO CHACON.

[De Assa.]

"FRANCO BACAY ORTIZ."

Joan Franco Ortiz dying in 1848, in the possession of the land, his widow, Maria Ines Montoya, continued in possession till 1853, when she conveyed the same to one

John Grenier, who held such title until August 19, 1854, when he conveyed the same to Charles E. Sherman and his associates; who in turn, on July 10, 1864, conveyed the same to the New Mexico Mining Company, which took immediate possession thereof, and it and its co-respondents have since continued in the possession of the whole, or a portion thereof; that said Ortiz grant, in 1861, was duly confirmed by an act of congress; and thereafter, on May 20, 1876, a patent therefor was duly issued to the New Mexico Mining Company. The patent contains, among other exceptions, the following reservation or proviso: "The confirmation of this said claim and this patent shall only be construed as quitclaim or relinquishment on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever." Plaintiff in error asserts his deraignment of title to an undivided one-fourth interest in the premises, as follows: Denying the validity of the "mutual will," hereinbefore set out, he claims that said Jose Francisco Ortiz died intestate in 1848, leaving no direct heirs; but that he left, as "collateral heirs," an only sister, Maria de Luz Ortiz, and Abran, Estefan, Ramon, Esmerejildo, Prudencia, and Macedonia Ortiz, children of his deceased brother, Ignacio Ortiz; that said Maria de Luz, sister of Jose Francisco Ortiz, subsequently intermarried with one Manuel Sanchez, and that she died intestate, leaving five children surviving; that one of said children, Rosaria, married one Rafael Romero, and that she some time thereafter died intestate, leaving one child as heir, a daughter, Josefa Romero, who afterwards married Jesus Garcia. It appears in evidence, and is not seriously disputed, that all of the foregoing representatives of Jose Francisco Ortiz, to-wit, the children of his brother Ignacio, and the children and grandchildren of his sister Maria, had conveyed, at different times before the commencement of this suit, all their estate in the property in controversy to Elias Brevoort, and that the latter on July 1, 1880, conveyed an undivided one-half thereof to the plaintiff in error and one John H. Knaebel; that Knaebel, on July 7, 1886, reconveyed his interest therein to said Brevoort. The contention of the plaintiff in error is that said "mutual will" is not only false and fraudulent, but void for want of proper execution; and hence that the widow of said Jose Francisco Ortiz only took at his death an undivided one-half of his realty; that said collateral heirs of Ortiz took the remaining moiety; and that through their several and other mense conveyances to his grantor, Brevoort, he is entitled to an undivided one-fourth interest in the whole of the grant. Under the pleadings, the issues presented were: *First*, whether the interest in the grant of which Ortiz was seised passed, at the time of his death, in 1848, by virtue of the mutual will, to his widow, and from her to the respondent the New Mexico Mining Company, or whether it passed to the descendants of his brother and sister, and from them to the complainant, to the extent of the quantity claimed in his bill of

complaint; and, *second*, admitting that the interest of Ortiz descended to the heirs of his brother and sister, is not complainant barred of the relief sought by the statute of limitations?

The suit from its commencement, in January, 1883, to the 25th day of December, 1888, when the final decree dismissing the bill was entered, had undergone various mutations as to parties, pleading, reports, and rulings, and it would subserve no useful purpose to attempt to give a summary of such complicated changes. The case was submitted to a master, and complainants introduced proofs before him at divers times tending to support the allegations contained in his bill. Defendant introduced in evidence the mutual will, and proof tending to show that the same had been executed by Ortiz and his wife, in the presence of the alcalde and two assisting witnesses, and that such was the usual manner of executing wills in New Mexico at the time this will was made, and for more than 30 years prior thereto. Defendant also introduced evidence tending to prove that, upon the death of Jose Francisco Ortiz, his widow, claiming under the will, took possession of the premises in question, and that she continued in such possession openly and notoriously until December, 1853, when she conveyed them; that her grantee entered into the possession thereof, and continued therein until they were conveyed to the New Mexico Mining Company, in 1864, when the latter entered into and has ever since continued in the actual possession thereof. There was also evidence tending to show that the respondent company and its grantees had worked and operated the mines upon said grant, built a large number of houses thereon, and kept tenants continually occupying said houses, built and operated two separate gold-mills, and spent several hundred thousand dollars in the improvement of the property, and regularly paid the taxes thereon. Complainant offered no testimony in rebuttal of such proof. Testimony was also introduced tending to show that there never had been such an office as an *escribano* or notary within this territory, as appeared from the records of the surveyor general's office, and that such office was the repository of the ancient Mexican archives and of wills, deeds, and other written documents affecting real estate; that the custodian of such office had thoroughly examined all of the wills upon file, some of which went back for a period exceeding 100 years, and that more than 90 per cent. of them had been executed before an alcalde and two witnesses. The master, when the case was last heard, found in favor of the respondents upon the plea of the statute of limitations, and passed upon no other matter, except that he found the mutual will to be invalid. Upon the final hearing of the master's report, that court confirmed the same, and dismissed the bill, deciding that the will of Ortiz was valid and operative, and that the statute of limitations had run against complainant's cause of action. Complainant, by writ of error, brings such decree to this court for review.

The errors assigned by complainant to

warrant a reversal of the judgment are seven in number. The two principal ones relied upon in argument are: *First*, error committed in the district court in holding and decreeing that the bill of complaint and cause of action therein set out was and is barred by the statute of limitations, and in overruling plaintiff's exception to so much of the master's report as found in favor of the bar of the statute. *Second*, error committed by the court below in holding and decreeing that the "mutual will" offered in evidence by the defendant was a valid and legal will, and in sustaining the exceptions of the defendant in error to so much of the master's report as held that said will was inoperative and invalid.

It is not disputed that Jose Francisco Ortiz was in the actual possession of a portion of the grant at the time of his death in 1848, claiming the whole of it, and that he was succeeded in such possession by his widow, who continued therein until 1853, when her grantee, John Grenier, took and held such possession until he conveyed his estate therein to Sherman and others, who took and continued such possession until 1858, when they conveyed to the New Mexico Mining Company. The latter company and its associates appear to have taken immediate possession under the deed, and to have continued to use and occupy, at least portions thereof, to the present time. Complainant does not claim possession for himself, nor in behalf of any of his grantors, since the death of Ortiz, in 1848. His proof shows that strangers, at different times, had entered and used certain portions of the grant, but in no way connects his claim of title with any real or supposed rights accruing to such occupants by virtue of such possession. The boundaries of the grant had not been fixed until September, 1861, when the surveyor general of New Mexico transmitted to the commissioner of the land-office at Washington an official survey of the tract known as "Private Land Claim No. 43." It appears that congress, by an act approved March 1, 1860, entitled "An act to confirm a certain private land claim in the territory of New Mexico," had, on the report of the surveyor general of the territory, dated November 24, 1860, and before the filing of the official survey and the field-notes in the commissioner's office, confirmed the grant according to the recommendation of the surveyor general, and in advance of the filing of the official description of the grant. The act became operative to pass the title to the grant at least as soon as its boundaries were definitively fixed by the official survey, etc., of the surveyor general, filed with the commissioner of the general land-office. The history of the grant and the language of the act of confirmation leave no doubt as to the intention of congress: "Provided, that the foregoing confirmation shall only be construed as quitclaim or relinquishment on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever." In 1876, (May 20th,) a patent issued to the New Mexico Mining Company for "the tract of land embraced

and described in the foregoing survey, excepting and reserving from the transfer by these presents so much of the land embraced in said survey as is included within the survey of the Canon del Agua grant, approved by the surveyor general of the territory of New Mexico, on the 16th day of October, 1866, and patented to Jose Serafin Ramirez, his heirs and assigns, on the 1st day of July, A. D. 1875, and estimated to contain about 259 acres as aforesaid; and with the further stipulation that, in virtue of the provisions of the aforesaid act of congress approved March 1, A. D. 1861, the confirmation of this claim and this patent shall only be construed as quitclaim or relinquishment on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever." It is clear that, so far as the rights of the parties to this suit are concerned, the act of confirmation of 1861 was a grant *in presenti*, and in effect conveyed the title as soon, at least, as the boundaries were officially and definitely ascertained. It is true, in the patent, about 259 acres, covered by the act of confirmation, are excepted and reserved to Jose Serafin Ramirez. The right to make such reservation is expressly stipulated in the act of confirmation. The patent operated only as convenient documentary proof of the original grant, and of its subsequent ratification by congress, on the terms therein expressed. *Langdeau v. Hanes*, 21 Wall. 521. Elias Brevoort, through whom complainant claims title, obtained deeds, in 1873, from the collateral heirs of Jose Francisco Ortiz, purporting to convey all the interest which they had in the grant. Neither plaintiff, nor any one of those through whom he claims title, was ever in the possession of the premises, or any part thereof, either in privity with or adverse to defendants, or their grantees, at least since 1848. Defendants, on the contrary, maintain, and offered evidence tending to prove, that for more than 20 years prior to the commencement of this suit they had been in actual possession of a portion and in the constructive possession of all the premises in controversy, openly, continuously, and adverse to all the world; claiming title to the whole thereof through the grant and the act of confirmation of 1861. Section 1880, Comp. Laws N. M., provides that where any person shall be in possession for 10 years of any land granted by the government of Spain or Mexico, "holding or claiming the same by virtue of a deed or deeds of conveyance, devise, grant, or other assurance purporting to convey an estate in fee-simple, and no claim by any suit in law or in equity effectually prosecuted shall have been set up or made to said lands, tenements, or hereditaments, within the aforesaid time of ten years, then, and in that case, the person or persons, their children, heirs, or assigns, so holding possession as aforesaid, shall be entitled to keep and hold in possession such quantity of land as shall be specified and described in his, her, or their deeds of conveyance, devise, grant, or other assurance as aforesaid, in preference to all, and against all,

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and all manner of person or persons whatsoever."

We are of opinion that the evidence in the cause amply sustains the finding of the master that the bar of the statute had attached before complainant brought his action. The testimony, it is true, is somewhat conflicting as to the nature and extent of defendants' actual possession; still there is enough evidence, in our opinion, tending to show that defendants had maintained an open, adverse, and continuous possession under claim of title in fee for more than 10 years before the bringing of this suit. This we hold is sufficient to bar plaintiff's right of recovery.

This brings us to the consideration of the second assignment of error, the invalidity of the "mutual will" of Jose Francisco Ortiz and wife. This instrument was executed within the limits of the present territory, while the same was a political department of the republic of Mexico. It is a very peculiar document, almost unknown to our jurisprudence. If it were recognized by the laws of the sister republic, and executed in accordance therewith, or in accordance with prevailing customs and usages, having the force of law, it is the duty of the courts of this territory to give it the same legal effect as it would receive had no change of government taken place. "The laws heretofore in force concerning descents, distributions, wills, and testaments, as contained in the treatise on these subjects written by Pedro Murillo Velarde, shall remain in force, so far as they are in conformity with the constitution of the United States and the state laws in force for the time being." Section 1, Kearny Code, Sept. 22, 1846; *Leitensdorfer v. Webb*, 20 How. 177. Escribiche (*Dict. de Leg. y Jur.* p. 1498) defines such instrument as follows: "A mutual testament is one which two persons reciprocally make in favor of the survivor, as when husband and wife constitute themselves heirs, the one to the other, in case of their dying without forced heirs. In the execution of these testaments, whether open or sealed, the same solemnity should be observed and the same number of witnesses should be present as in those made by a single testator, except that the number of witnesses need not be doubled because of there being two testators." The instrument in question was what is known as an "open" or "nuncupative" testament. The two kinds of wills are thus defined by Velarde, (*Prac. de Test.* cap. 1, p. 3): "As a person may declare his will by writing or by word of mouth, it follows that wills are divided into two classes,—written, generally called '*cerrado*' or sealed, when the testator expresses his will on paper written and sealed, declaring it to be his testament, in the presence of seven witnesses, and before a notary, who should sign their names upon the cover or envelope with the testator; nuncupative, which is also called '*abierto*' or open, and which is the most common, and is authenticated when the testator manifests his will by word of mouth before witnesses, with the formalities required by law." After enumerating

the several formalities required in the execution of wills, he proceeds: "The second formality is the presence of witnesses. For an *abierto* or open will, three are, at least, required, residents of the neighborhood where the will is made; besides, it should be executed before a notary public, or *escribano publico*. If there be no notary, five witnesses, residents of the neighborhood, should be present; and if that number cannot be obtained, three will suffice." This testament, executed in 1841, one of the joint makers dying in 1848, is an ancient document. No *indicia* of suspicion, fraud, or alteration appear upon its face. It is found in the custody of those claiming and holding possession of the property referred to therein, including the Alcalde Chacon. It purports to have been executed by the parties in the presence of three attesting witnesses. Hence every reasonable presumption should be indulged in favor of its validity. Assuming that five witnesses, residents of the vicinity, could not be obtained to attest its execution, we are of the opinion that the will was executed in the presence of three witnesses, and that such number was sufficient to make its execution regular and valid. Besides, there is abundant evidence showing that the republic of Mexico never furnished the department of New Mexico with such an officer as an *escribano publico*, before whom wills could be executed according to the provisions of law; that, in such emergency, the people of this distant dependency, *ex necessitate rei*, had been accustomed to execute such instruments in presence of an alcalde or judge of the first instance, before two attesting witnesses; that such custom had been general, continuous, accepted, and recognized as having the force of law for at least a hundred years before the date of the will in question. The expert, Diego Archuleta, a Mexican lawyer, and former member of the Mexican congress, swears positively to the existence of this custom. An examination of the archives, deeds, wills, etc., in custody of the proper depository in Santa Fe, corroborates the testimony of the expert on this point. Such being the custom, a will executed in accordance therewith is valid. *Adams v. Norris*, 23 How. 353; *Panaud v. Jones*, 1 Cal. 497; *Von Schmidt v. Huntington*, Id. 55; *Castro v. Castro*, 6 Cal. 158; *Tevis v. Pitcher*, 10 Cal. 465. In connection herewith, see *Pino v. Hatch*, 1 N. M. 130; *Hayes v. Bona*, 7 Cal. 154. It is always safe to adopt every reasonable presumption in favor of the validity of an instrument of this character. Husband and wife, in the absence of children, determine, in view of the probable death of the one before the other, to make adequate provision for the wants and comforts of the survivor. The husband dies in 1848. The widow claims and asserts her rights under the will as the absolute owner of all the property of which he died possessed. She disposes of such rights to *bona fide* purchasers. For more than 40 years before this suit was commenced, they occupy, improve, and pay taxes on this property. Plaintiff's grantor, and those through

whom such grantor claims title, relatives of the deceased Ortiz, and residing in the vicinity of the grant, remain silent; acquiesce by such silence in the disposition so made of the property for so long a period, while the same is being enhanced in value by the capital and labor of honest purchasers or occupants. In fact, not a word is heard from any of the kindred in relation to the matter until they relinquish, for a trifling consideration, all their interest therein to plaintiff's grantor. Aside from the merits of the case, public policy does not favor the disturbing of vested rights without very grave and satisfactory reasons. The foregoing views dispose of all questions raised by plaintiff in error, and render unnecessary a consideration of the points raised by defendant as to the legal status of the cross-bill and the charge of champerty. We may state, however, as a matter of justice to the professional character of the gentleman charged, that we do not find any ground upon which to base even a suspicion of improper conduct. Finding no error in the record, the judgment should be affirmed.

LEE, SEEDS, and McFIE, JJ., concur.

(N.M. 1)

PEREA v. COLORADO NAT. BANK OF TEXAS.
(Supreme Court of New Mexico. July 24, 1891.)

GARNISHMENT—ISSUES TO BE TRIED—VERDICT.

1. Comp. Laws N. M. § 2159, provides that when an officer fails to find sufficient property to satisfy an execution he shall notify all persons who may be indebted to defendant not to pay the same, but to appear before the court, and make true answers on oath concerning his indebtedness. *Held*, that the question of the indebtedness of the garnishee to defendant in the execution was the only issue which could be tried on the garnishee's answer.

2. Where a garnishee answered that he was not indebted, a verdict: "We, the jury, by the direction of the court, find the answer of the garnishee is not true, and that said garnishee has property in his hands belonging to the defendant * * * sufficient to pay plaintiff's execution,"—does not find the amount of the garnishee's indebtedness to the execution defendant, and is insufficient to sustain a judgment.

3. The answer of the garnishee was *prima facie* evidence of the matters therein contained; and, where evidence was introduced to contradict the answer, the truth of the answer becomes a question of fact for the jury.

Error to district court Bernalillo county; W. H. BRINKER, Judge.

Proceeding in garnishment by Colorado National Bank against Pedro Perea, garnishee. Judgment for the bank. The garnishee brings error. Reversed.

The plaintiff in error was on the 11th day of June, 1887, summoned as the garnishee of Jesus M. Perea, his brother, under an execution issued out of the district court for Bernalillo county upon a judgment of that court in favor of defendant in error and against said Jesus M. Perea, for \$4,794.90, rendered on the 3d day of May, 1887. At the September term, 1887, allegations were filed setting up that the garnishee had received 20,000 head of sheep from the judgment debtor, and had never paid any sum whatever therefor, but was

still indebted for the same; that the sheep were so received for the purpose of hindering, delaying, and preventing the creditors of Jesus M. Perea from collecting their indebtedness; and that the garnishee was indebted to the judgment debtor in a large sum for goods, wares, and merchandise, and in the sum of \$34,000 for real estate. With these allegations were filed interrogatories to the garnishee, inquiring fully into the transactions between the garnishee and the said Jesus M. Perea. At the same time the garnishee filed his answer, admitting that he had received the sheep, but denying that he had not paid for them, and denying that he received them for the purpose alleged, and denying that he was indebted to said Jesus M. Perea in any sum. By his answer to the interrogatories he showed that on the 29th day of January, 1887, Jesus M. Perea sold and transferred to him said sheep and some other personal property, and a considerable amount of real estate, the consideration thereof being the assumption and payment by Pedro Perea of a large number of debts of said Jesus M. Perea, aggregating about \$100,000, a considerable portion of which had at the time of answering been actually paid. The consideration expressed in the written transfers of said property was \$60,000 for the personal property and \$34,000 for the real estate. Plaintiff filed also a denial of the truth of the answer. The case was tried upon the issue thus formed, and by direction of the court the jury returned a verdict in favor of the plaintiff below, and a judgment was entered against the garnishee for \$5,604.70 and costs. The defendant made a motion for a new trial, which was denied. The judge afterwards refused to sign a bill of exceptions, on the ground that the time for the presentation of the same had expired, and that he had no power to do so. He subsequently did sign a bill certifying an exception to his refusal to settle the first bill tendered. The bill signed contains the bill which the judge refused to settle and the amendments proposed by counsel for the plaintiff below.

Catron, Knaebel & Clancy, for plaintiff in error. *W. B. Childers*, for defendant in error.

LEE, J., (after stating the facts as above.) This was a garnishment proceeding under an execution, as provided for by section 2159 of the Compiled Laws of the territory, which reads as follows: "When any execution shall be placed in the hands of any officer for collection he shall call upon the defendant for payment thereof, or to show him sufficient goods, chattels, effects, and lands whereof the same may be satisfied; and if the officer fail to find property sufficient to make the same he shall notify all persons who may be indebted to said defendant not to pay said defendant, but to appear before the court out of which said execution issued, and make true answers on oath concerning his indebtedness, and the like proceedings shall be had as in cases of garnishees summoned in suits originating by attachments." This section, as well as that per-

taining to attachment proceedings, was adopted substantially from the statutes of the state of Missouri by the legislature of the territory, and it is a well-recognized principle that thereby the legislature adopted the judicial construction that had been given to it in that state at the time of its adoption. The supreme court of the United States says that this is a received canon of construction fully acquiesced in by that court; that, where English statutes—such, for instance, as the statute of frauds and the statutes of limitations—have been adopted into our own legislation, the known and settled construction of the statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority. *McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. Rep. 142; *Pennock v. Dialogue*, 2 Pet. 1. In Alabama it was held that the legislature in that state in adopting the Code must be presumed to have known the judicial construction which had been placed upon the former statutes, and therefore the re-enactment in the Code of the provisions substantially contained in former statutes was a legislative adoption of their known judicial construction. *Duramus v. Harrison*, 26 Ala. 326. In applying this rule to the statute in question, we must presume that it was adopted by the legislature in view of the judicial construction it had received prior to its adoption by the supreme court of Missouri, and in referring to the rulings of that court upon the statute in question we find, in *Van Winkle v. McKee*, it was held "that a deed of assignment void as to creditors did not create the relation of debtor and creditor between the grantor in the assignment and the assignee. The validity of the assignment cannot be tried in a court of law upon an issue made between a judgment creditor and the assignee garnished on an execution under the provisions of the act in question." *Van Winkle v. McKee*, 7 Mo. 435. In *Lee v. Tabor*, 8 Mo. 233, it was held: "In a proceeding of garnishment under attachment such an issue could be made and tried,"—but in referring to the case of *Van Winkle v. McKee*, supra, the court said: "That case arose on construction of the statute giving plaintiff in execution a right to garnishee the debtors of the defendant. The reasoning of the court in that case would certainly apply to this; and, were the phraseology of the statute concerning attachments as circumscribed as that in relation to executions, we would feel no hesitation in pronouncing alike judgment." Under the execution law a garnishment is given against the debtors of the defendant in the execution. The statute concerning attachments gives an original writ against the lands, tenements, goods, moneys, effects, and credits of the debtor, in whosoever hands they may be, and directs that all persons shall be summoned as garnishees who are named as such in the writ, and such others as the officer shall find in possession of moneys, goods, or effects of the defendant; but no such provisions are made for garnishment under execution. In the case of *Wood v. Edgar*, 13 Mo. 451, the court briefly, yet

explicitly, sets forth what this court believes to be the correct construction of the statute. Wood had recovered judgment against Collins & Workman for \$1,273, and garnished Edgar. Edgar answered that he held in his hands \$1,000, in American gold, deposited by Collins & Workman, to be used by him in compounding with the creditors of Collins & Workman. The court, in passing upon the case, said: "We concur in this case in the construction which the circuit court gave to the sixth section of our act concerning executions. We do not understand that under this section a person having possession of property of the defendant in the execution can be garnished. That section is confined to debtors of the defendant, and in this respect is more limited in its operation than the corresponding section of the attachment law. No necessity is perceived for giving this statute a more enlarged construction. Gold and silver coin are subject to be seized on execution, like any other property not exempted by law; and the same vigilance which enables the creditor to garnish the person in whose possession it happens to be found would enable him to levy directly upon the money. So, also, it could be reached by attachment, if the case in other respects authorized one. If the garnishee in this case had been the depository of a horse or other chattel than the gold coin belonging to the defendant, it could hardly admit an argument that such a depository was not a debtor of the defendant within the meaning of the act. The principle is not changed by the fact that the property was current gold coin, since an execution reaches that under the law. The only question, is, was Edgar, the garnishee, a debtor of Collins, the defendant? He had received from Collins \$1,000 in American gold, with directions as to the disposition of it. He was in no sense a debtor to Collins." Nor is a factor having in his possession goods consigned for sale a debtor, within the meaning of the statute. *Pratte v. Scott*, 19 Mo. 625. In a garnishment under an execution it was held by the court: "In order that an indebtedness may be liable to garnishment, it must be shown to be absolutely due, as a money demand unaffected by liens or prior incumbrance or condition of contract." *Scales v. Hotel Co.*, 37 Mo. 520; *Weil v. Tyler*, 38 Mo. 545, 43 Mo. 581. The above cases clearly indicate the construction that was given by the supreme court of that state, and their rulings upon it appear to have been uniform, until the statute itself was changed by legislation on adoption of the Code, in 1855, and, outside of the fact that we may regard them authoritative upon us under the rule before given, we do not see why the construction they put upon it should not be accepted by us as the correct one. This kind of garnishment is a proceeding relating to process. It is one of the modes pointed out by the statute by which an execution may be executed. It is not a new suit, but an incident or auxiliary of the judgment, and a means of obtaining satisfaction of the same by reaching the defendant's creditors. *Tinsley v. Savage*, 50 Mo. 141. The statute is

in derogation of the common law, and therefore to be strictly construed, and its provision cannot be extended by construction. *Ford v. Dry-Dock Co.*, 50 Mich. 358, 15 N. W. Rep. 509. The only authority for the proceeding is that directly conferred by statute which in terms provides that if the officer fails to find property to satisfy the execution he shall notify persons indebted to the defendant not to pay said defendant, but to appear in the court out of which the execution was issued and make true answers concerning the indebtedness. The only thing he is to answer to is indebtedness to the execution defendant. The only issue authorized by the statute to be tried is his indebtedness to the execution defendant. And this brings it directly under the general rule that in garnishment proceedings recovery can be had only upon such claims as the principal debtor might himself enforce by action at law in his own name. *Henry v. Smith*, 7 Ired. 349; *Webster v. Steele*, 75 Ill. 546; *May v. Baker*, 15 Ill. 90; *Swann v. Summers*, 19 W. Va. 115; *Hoyt v. Swift*, 13 Vt. 133; *Bridgen v. Gill*, 16 Mass. 522; *Hassle v. Congregation*, 35 Cal. 385, 386; *Freem. Ex'ns.* §162; 2 *Wade, Attachm.* §448; *Goodde v. Barr*, 64 Wis. 662, 26 N. W. Rep. 114; *Adams v. Barrett*, 2 N. H. 875; *Piper v. Piper*, Id. 439.

The record shows that the jury returned the following verdict: "We, the jury, by the direction of the court, find that the answer of the garnishee is not true, and that the said garnishee has property in his hands belonging to the defendant, Jesus M. Perea, equal to the amount of and sufficient to pay the plaintiff's execution." The verdict does not find the matter of indebtedness—the real question in issue—one way or the other, and is not a verdict upon the issues authorized by statute or made by the pleadings; and in such cases, says the supreme court of the United States: "The rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious. It results from the nature and the end of the pleadings. Whether the jury find a general or special verdict, it is their duty to decide the very point in issue; and, although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to the court or to the appellate court that the finding is different from the issue, or is confined to a part only of the issue, no judgment can be rendered on the verdict." In this case the finding is different from the issue, and, though in the nature of a special finding, does not find the fact authorized by the statute to be tried, and comes directly within the rule thus laid down by the supreme court. *Patterson v. U. S.*, 2 *Wheat*. 222.

It is contended that, the bill of exceptions not having been signed and settled by the judge, we are to presume the evidence sustains the findings of the court, but there is evidence in the record, without reference to the bill of exceptions, that we must consider,—that is, the answer of

the garnishee, which is to be taken as true until denied, and stands as evidence for him until overcome by evidence on the part of the plaintiff. This proposition is fully sustained by the following authorities: *Davis v. Knapp*, 9 Mo. 657; *McEvoy v. Lane*, Id. 48; *Quarles v. Porter*, 12 Mo. 70; *Stevens v. Gwathmey*, 9 Mo. 636. In *Holton v. Railroad Co.*, it is held that the answer of a garnishee makes a *prima facie* case for him, and, whether it be a denial or an affirmation of new matter, it must stand until overthrown by evidence on the part of the plaintiff. *Holton v. Railroad Co.*, 50 Mo. 151. Therefore the facts set forth in the answer of the garnishee that he was not indebted to the defendant, that he had no property in his possession belonging to him, and that the property in question had been purchased by him from the defendant, and paid for, long prior to the issuing and service of the notice of garnishee, and that the same was not done for the purpose of defrauding the creditors of the defendant, being *prima facie* facts in evidence on behalf of the garnishee, it would throw the burden of overcoming this evidence on the part of the plaintiff; and the court, in taking the case from the jury in order to render the judgment he did, would have to find as a matter of fact that the answer was untrue, and that the transaction was fraudulent; that there was property in the possession of the garnishee belonging to the execution defendant; that it was subject to execution under the law, and that its value was at least the amount of the judgment,—each of which would be a controverted question of fact which the court under the ruling of the supreme court of the United States is bound to submit to the jury under proper instructions. *Barney v. Schmelder*, 9 Wall. 248; *Hodges v. Easton*, 106 U. S. 408, 1 Sup. Ct. Rep. 307. It is also contended by counsel for defendant in error that, while the recourse as a general rule is limited by the extent of the garnishee's liability to the defendant's debtor, this is not true where the garnishee is in possession of the effects of the defendant under a fraudulent transfer from the latter. That, as a proposition of law, is correct if the garnishment was under an attachment proceeding, as we have before noticed, but if we could give the proceeding in this case the full scope and power of an attachment proceeding, as is contended for on half of the defendants in error, and could consider the question of the transfer of the property of the defendant to the garnishee for the purpose of defrauding, hindering, and delaying the creditors of the defendant, as a proper issue to be tried and determined under the proceedings in this case, there would still remain for us to determine the question as to the power and authority of the court in taking the case from the jury and directing a verdict, and the sufficiency of the verdict to authorize the judgment. In the supreme court of the United States it has been held: "Where matters alleged to have been fraudulent are being investigated in a court of law it is the province of the jury to find the facts under the instructions of the court." *Gregg v. Sayre*,

8 Pet. 252. And again the same court says: "It would seem to be difficult on principle to maintain that the possession of goods sold is *per se* fraud, to be so pronounced by the court, as that cuts off all explanation of the transaction which may have been entirely unexceptionable. If circumstances at law may be proven to rebut the presumption of fraud, the case must be submitted to the jury." In concluding the opinion, says Justice McLEAN: "Few questions at law have given rise to a greater conflict of authority than the one under consideration. But for many years past the tendency has been in England and the United States to consider the question of fraud a fact for the jury under the instructions of the court, and the weight of authority seems to be now in this country favorable to this proposition." *Warner v. Norton*, 20 How. 448. And it has thus been held in some of the states that the jury must be permitted to consider and draw their own inferences from badges of fraud, and the court should not interfere to formulate conclusions for them. *Leasure v. Coburn*, 57 Ind. 274; *Herkelrath v. Stookey*, 63 Ill. 486; *King v. Russell*, 40 Tex. 183; *Waite, Fraud Conv.* § 226. When fraudulent intent is not apparent on the face of the deed, it is a question of fact for the jury, and the court has not the power to infer the intent. Thus the question of fraudulent intent is almost uniformly submitted to a jury, and it is regarded as an error for the court to interfere with the province of the jury in this particular. Id. § 204. *Peck v. Crouse*, 46 Barb. 131; *Monteth v. Bax*, 4 Neb. 171; *Vance v. Phillips*, 6 Hill, 433; *Hobbs v. Davis*, 50 Ga. 214; *Murray v. Burtis*, 15 Wend. 214; *Plow Co. v. Wing*, 85 N. Y. 426; *Van Bibber v. Mathis*, 52 Tex. 409; *Winchester v. Charter*, 102 Mass. 272; *Pelser v. Peticolas*, 50 Tex. 638; *Wessels v. Beeman*, 66 Mich. 343, 33 N. W. Rep. 510. The last case cited is directly in point. The plaintiff sued defendants for alleged unlawful conversion of certain tobacco and unstamped cigars and other property seized on an execution at the suit of a judgment creditor of his vendor, which sale was attacked as fraudulent in fact as to creditors, etc. The bill of exceptions, not being in proper form, was not regarded as a part of the record, or read or considered, by the supreme court; but the circuit judge charged the jury as follows: "I think the sales from Aaron Wessels to Wm. E. Wessels must be regarded as void under all the testimony, as I view it. Gentlemen of the jury, I do not think the entry upon the books referred to by counsel for the plaintiff affords the proof she claims, by showing that the United States government consented to the sale from Aaron Wessels to William Wessels. The sale, as shown by the testimony in the case, is void, and the plaintiffs received no title thereby. The property either belonged to Aaron Wessels or to the general government, and the plaintiff cannot maintain this action. You will therefore render a verdict in favor of the defendant and against the plaintiff." The supreme court held this instruction to be error, and says: "Whether the sale from Aaron

Wessels to William E. Wessels was fraudulent as to creditors was a question of fact, and should have been submitted to the jury under proper instructions." Counsel for the defendant insisted that the sale was void as a matter of law, because there was no delivery, and the sale was not followed by an actual and continued change of possession, but the court held that delivery and possession appeared, though imperfectly, as a controverted question of fact, and should have been submitted to the jury, and that a new trial for that reason must be granted. In that case, as in this, the evidence was not in the record, yet the court held that the question of the sale from Aaron Wessels to William Wessels, although imperfectly, appeared as a controverted question of fact, that should have been submitted to the jury. In this case the same question appears, but not imperfectly. The answer of the garnishee denies the indebtedness and the fraudulent purchase of the property, and avers that the same was purchased from the defendant by him, and fully paid for, before the garnishment proceeding was issued; and this answer has the effect of and stands as evidence on his behalf until overcome by evidence on the part of the plaintiff. Therefore, for the purpose of this question, it is immaterial what the testimony of the plaintiff might have been. It would still be a controverted question of fact, even if the testimony on the part of the plaintiff was overwhelming, and showed the answer of the garnishee to be untrue in every particular; it would only be a conflict in evidence, and show that there was a discrepancy in the testimony. The supreme court of the United States in *Barney v. Schmeider*, 9 Wall. 253, holds: "Where there is any discrepancy, however slight, the court must submit the matter to which it relates to the jury, because it is their province to weigh and balance the testimony, and not the court's."

In endeavoring to apply the statute in question to the proceeding and verdict in this case, it becomes very apparent that the legislature did not design it a remedy to try the right of property under, and to determine the fraudulent transfers of property between the parties. How is the court to determine whether the judgment should go or execution should issue against the garnishee for goods and chattels of the execution defendant claimed in a general charge to be in his possession? In other forms of actions the pleadings make a direct issue as to the specific property in question. In a proceeding in garnishment under an attachment where the right of the garnishee is protected by an indemnity bond, if property is found in his hands, its value has to be assessed before judgment can be given against the garnishee; and that would be a question for the jury, and they would have to make a finding upon it before the liability of the garnishee would incur in this case, where the record contains no description of the property by which it is capable of identification. The court must necessarily be in

the dark as to what property the garnishee would be chargeable with; and the findings in this case do not throw any light on the question whatever, but they do show how inadequate the provisions of the statute (to give the construction contended for) would be to protect the rights of parties in proceedings under it. In *Bethel v. Linn*, 63 Mich. 464, 30 N. W. Rep. 84, in a proceeding which the legislature unquestionably designed for the trial of issues of that kind the same question arose, and the court, in order to sustain the act, says: "It is the duty of the court to sustain the law and preserve the remedy designed by the legislature, if there appears to be any way in which these statutes can be carried out and made effectual, and thinks the difficulty can be avoided by requiring special verdicts to be returned by the jury, embodying the property in the garnishee's hands for which they adjudged him liable; and suggest the following questions to be submitted to the jury in such cases: 'What property do you find to have been in possession or under the control of the defendant at the time of the service of the writ of garnishment upon him for which, under the evidence and the law as given by the court, he is liable as garnishee? What do you find the value of such property to be under the testimony and the law as given to you by the court?' The facts which the court in the above case required to be specially found by the jury in order to give effect to the statute would be equally applicable in this case. All the facts which the court directed the jury to return in the case under consideration might have been true, and yet there might not have been any liability on the part of the garnishee. He might have in his possession property belonging to the defendant, and yet that property might be mortgaged to its full value, or it may have come into his possession by accident, or without his knowledge or consent. In either event the fact found would be true, and yet, as it has often been held under such circumstances, no liability would attach to the garnishee. There may have been evidence from which the jury could have found indebtedness on the part of the garnishee to the defendant arising from a fraudulent transfer of property, but they did not find it, and the court, independently of the verdict, could not find it. It was impossible, therefore, that a judgment could be pronounced for the plaintiff upon the verdict as directed, and the court could not, consistently with the constitutional right of a trial by jury, direct the jury to return a part of the facts, and itself determine the remainder, without a waiver on the part of the defendant of a verdict by a jury. *Hodges v. Easton*, 106 U. S. 408, 1 Sup. Ct. Rep. 307. As we find error upon the face of the record that requires us to grant a new trial, we do not consider the question as to the bill of exceptions. The cause is reversed, and remanded for a new trial.

O'BRIEN, C. J., and JEDDS and McFIE, JJ., concur.

(N. M. 44)

PRYOR v. PORTSMOUTH CATTLE CO., Limited.

(Supreme Court of New Mexico. July 25, 1891.)

SALE—ACCEPTANCE—INSTRUCTIONS.

1. In an action of trover, it appeared that three years prior thereto plaintiff made an executory contract to purchase a number of cattle of a certain grade and quality. Of those offered to him, he accepted 118, and placed his brand thereon, but rejected the balance, on the ground that they were not of the required grade, placing a different brand thereon, and turned them loose on the plains, notifying the vendors of his rejection thereof. There was no further contract or arrangement between them. Two years later defendant, having purchased from the original owners all their cattle except those rejected by plaintiff, shipped away a portion of the latter without objection from plaintiff, who was in defendant's employ. Afterwards plaintiff learned that the original owners had charged him with the value of the rejected cattle. Plaintiff testified that he believed that defendant had purchased them from the original owners. *Held* insufficient to establish plaintiff's ownership of the rejected cattle.

2. Where plaintiff testified that he did not know whether the brand of the cattle in dispute had been recorded or not, and there was no other evidence in regard thereto, an instruction that a recorded brand was a mode of establishing the ownership of property, and that when an animal is found bearing such brand the law provides that from that proof alone the jury may find that the animal belongs to the owner of the brand, and that this is a proper mode of proving the ownership of property "where all these facts are before the jury," is misleading, since it assumes that the brand was recorded.

3. An instruction that a verdict and judgment for plaintiff would operate to transfer all his title to the cattle to defendant was misleading, and contained an incorrect proposition of law, since the title does not pass till satisfaction of such judgment.

Appeal from district court, San Miguel county; E. V. LONG, Judge.

Action of trover by David C. Pryor against the Portsmouth Cattle Company. Judgment for plaintiff. Defendant appeals. Reversed.

Frank Springer, for appellant. William Breeden, M. W. Mill, and E. A. Fliske, for appellee.

O'BRIEN, C. J. This is an action in trover brought by the appellee, David C. Pryor, in the district court of Colfax county, to recover of the appellant, the Portsmouth Cattle Company, the sum of \$9,000 damages, as the value of 300 head of cattle, alleged to be the property of the plaintiff, and to have been unlawfully taken by the defendant company, and converted to its use. The defendant pleaded the general issue. The cause was tried to a jury, at the April term, 1886, of the district court of Colfax county, resulting in a verdict in favor of the plaintiff for \$3,000. Defendant thereupon moved for a new trial upon the following grounds: That the verdict is unsupported by the evidence; that it is contrary to the weight of evidence; that it is contrary to the instructions of the court; that it is excessive; that there was no proof of a demand or refusal before suit; that the court erred in admitting upon the trial certain testimony over defendant's objections; that it erred in refusing to give certain instructions asked by defendant; that it erred in

giving certain instructions excepted to by defendant; and lastly, that the verdict is against both the law and the facts. And thereupon, by agreement of parties, the venue was changed to San Miguel county, where on the 3d of December, 1886, the motion for a new trial was overruled, and judgment entered upon the verdict. A bill of exceptions was thereafter settled and signed, and defendant took his appeal from such judgment to this court, where the same has since been pending. The principal facts in the case may be briefly stated as follows: In the winter of 1880, the plaintiff, David C. Pryor, contracted with the Pryor Bros., of Colorado, for the purchase of four or five hundred head of cattle of a certain grade and quality, to be delivered to him on his range in Colfax and Mora counties, N. M. In the fall of 1881, Pryor Bros. drove their cattle from Colorado to Mora county, in this territory, and turned them loose upon the common or open range. That, of the number so driven down, 400 head were segregated from the herd, and tendered to plaintiff in accordance with his contract. That all of the cattle so turned over to him did not suit him. That they were not such as he had agreed to purchase. That in consequence he only accepted 118 of the number, which he branded in his individual brand, the "Comet," and the remaining 282 head he put into a brand called the "3P," thinking and determining that they should go back to the Pryor Bros., as they were not the kind of cattle he liked. A few days afterwards he wrote to one of the Pryor Bros. in Colorado that he had not received the kind of cattle that he wanted. Of those that he had put into the 3P brand, 50 were cows, and 232 were steers, ranging from 2 to 3 years old. Plaintiff at this time, and up to the fall of 1882, was in the employment of Pryor Bros. In the same year Pryor Bros. sold their cattle in New Mexico, but not those bearing the 3P brand, to Underwood, Clark & Co., who transferred their purchase to the defendant, the Portsmouth Cattle Company. In September, 1888, plaintiff was employed as supervisor or manager of their cattle by the defendant company. In the month of October following, the defendant company shipped, under charge of plaintiff, 400 head of steers from Raton, in Colfax county, to Kansas City, Mo. This shipment was consigned to commission men in the name and for the benefit of Pryor Bros., it being part of the contract between them and Underwood, Clark & Co., at the time the former sold the cattle to the latter, that Pryor Bros. were to market the beeves, and apply the proceeds towards the payment of notes given for a balance due on the purchase. In this shipment plaintiff saw from 35 to 50 or 60 steers in the 3P brand. He made no claim at that time to any one for the value of these steers, nor did he assert any claim of ownership. For the first time, in the fall of 1884, one year after this consignment, plaintiff demanded payment for such cattle in the 3P brand as the defendant company had used or disposed of, but he is not certain whether he asked pay for all in that brand on the range. His

reasons for not claiming such cattle were that he thought his brothers had sold them, and he says: "I wrote to him, and he never paid any attention to it, and I was charged with the cattle." He supposed, at the time, that his brothers, or one of Pryor Bros., had sold them to Underwood, Clark & Co. His testimony on this very important question is: "Question. State your name and residence. Answer. My name is David Pryor, and I live in Colorado. In 1880, up to 1883, I have lived in this county, and a portion of the time in San Miguel county. In 1882 I worked on this range, in this county and Mora county. In the fall of that year I received from my brother—He brought one hundred head of cattle from Colorado to New Mexico; in the fall of 1881, it was. I received four hundred head of cattle, which as my property I was to place in my individual brand. Up to this time I had no brand in Colfax or Mora counties. These cattle which my brother sent me were not the kind of cattle in the bill I liked, or he agreed to let me have. So I branded out of the 400 head what I wanted, in my individual brand, which was the Comet 2 V's, and a bar directly behind it; V's pointing towards the head, on inside the other, and the bar directly behind it; and then the remainder of these cattle, which amounted to 282 head, that I branded, I put in three P's, thinking and determining that they should go back to Pryor Bros., as they were not the kind of cattle I liked. A few days after which time I wrote to one of my brothers—the one in Colorado, I think—that he had not sent me the kind of cattle I liked. Q. Well, how many cattle do you swear were in that herd in Raton, with the 3P brand on them? A. I think I can swear there were thirty-five. Q. That is as near as you can come to answering the question, is it? A. Yes, sir; I think it is. Q. (By a juror.) Did I understand you, you never sold the 3P brand at all? A. Never sold any 3P brand. Q. What has become of them? A. I don't know. Redirect examination by Mr. Breeden: Q. Now, Mr. Pryor, this last answer of yours, as to how many cattle you saw—state fully about the number of cattle you shipped up there,—the three P cattle. A. I stated in the first statement that I could swear as many as thirty-five, and in the next statement I said I could swear there was thirty-five. I would like to state, that being my property at that time, or should have been, I noticed them closer than I did other cattle. Q. Is that all? A. There was something else I omitted to state. The reason. I didn't claim those cattle was because I thought my brother had sold them, and I wrote to him, and he never paid any attention to it, and I was charged with the cattle. Q. (By the court.) As I understand you, you supposed your brother had sold them. A. Yes, sir. Q. And when you came to settle for them, they had been carried into your account with them? A. Yes, sir. Q. (By Mr. Breeden.) You supposed that your brothers had sold them with other cattle that they had sold? A. I supposed that he had sold them to Underwood, Clark & Co. I had very little

dealings with my brothers for two or three years. I didn't see them only for a little while at a time. I had never seen the bills of sale, or contracts to Underwood, Clark & Co. Q. When you ascertained that your brothers had not sold that brand, what did you do? A. Why, I called on Mr. Holmes for a settlement in Kansas City. Q. Why did you call on Mr. Holmes? A. Because I knew he used some of the cattle, and I knew that they were claiming the brand. Q. Did you claim that Mr. Holmes got them? A. No; but the Portsmouth Cattle Company, through Mr. Holmes. Q. Then you called on Mr. Holmes as the manager of the Portsmouth Cattle Company? A. Yes, sir." He further on states that he had never had a bill of sale for the 3P brand of cattle, and never called on Pryor Bros. to settle with him for the price of the cattle as sold by them, for the simple fact that they didn't sell them.

The foregoing contains all of the substantial proof offered as to the conversion of certain cattle in the 3P brand, included in the shipment from Raton to Kansas City in the fall of 1883, as well as the principal parts of the testimony offered in support of plaintiff's ownership. Without further adverting to the proceedings on the trial, or discussing the various points very ably presented by counsel in their respective briefs as to the several acts of the defendant company in reference to the cattle in controversy, we must determine from the evidence whether plaintiff has a right to bring this action against the defendant. If he had not, the conduct of the defendant in the premises must be immaterial to him, and that must determine the case as far as his rights are concerned. Was he, at the time of his alleged acts of conversion, the owner of the property? He predicates his cause of action upon his unqualified ownership. The undisputed facts upon this important phase of the case appear to us simple and decisive. In the fall of 1881 he received, in accordance with the terms of an understanding or executory contract had with Pryor Bros., of Colorado, 400 head of cattle. He examined them, accepted only 118 of the number, and put them in his own recorded brand, the "Comet." The remaining 282 he did not accept, because they did not suit him; were not such as he had bargained for; did not put them in the Comet brand, but put them in a new brand, not his own, for the purpose of identification; turned them loose upon the common range, where they mingled with other animals pasturing thereon belonging to Pryor Bros. and other parties; and at once notified Pryor Bros. by mail of his action in the premises. The latter paid no attention to his letter. This conduct on the part of the plaintiff shows a consummated sale of the number of cattle accepted, if the vendors acquiesced, and as unmistakably shows a repudiation of any bargain or arrangement previously made in reference to the 282 head, discarded by plaintiff, thus relieving himself from all legal liability therefor, whether the vendors acquiesced or not in plaintiff's act of repudiation. Plaintiff, then, did

not become the owner of the 282 head; did not accept, nor agree to accept, them at the time of the tender, in the fall of 1881. The evidence fails to disclose any other dealings or transactions between him and the Pryor Bros. in respect to these cattle; no new agreement; no further delivery; no other acceptance; in fact, nothing except the persistent refusal of plaintiff to recognize the 282 head as his own until the fall of 1884, when he discovered that Pryor Bros. had him charged with the 400 head. It does not appear that even then he assented to the propriety or legality of such charge, that he agreed to pay it, or in any way rendered himself liable to Pryor Bros. for the value of the rejected animals. In the fall of 1883 plaintiff was an employe of defendant, working on the same range; assisted in collecting and shipping for the defendant about 400 head of cattle for sale to the Kansas City market; recognized in the number so shipped 35, 50, or 60, in the 3P brand, a part of the 282 rejected by him; saw them sold for more than \$1,000; never asserting any claim to the animals or their price until a year thereafter, when he found that Pryor Bros. had him charged with all the cattle sent him three years before. During this period of three years he had believed, must have believed, that these 3P brand cattle were not his, for the simple reason that he had never accepted them. Then, there was no sale of these animals recognized by plaintiff during this period. The whole tenor of his conduct is in line with that theory. It is unreasonable, if not absurd, to suppose that any man of common sense would stand silently by, and even assist the perpetrators, while from one to two thousand dollars' worth of his property is being sold, and the proceeds taken by others. And what reason does he give for his strange conduct? He thought that Pryor Bros. had sold them to Underwood, Clark & Co., and that the cattle had subsequently been transferred by them to the defendant. Would he think this if he regarded himself as the purchaser,—as the owner of the animals. There was no sale of the 400 head in the fall of 1881, unless both parties assented. Plaintiff's conduct shows that he did not assent, and it further shows that until the fall of 1884 he believed that Pryor Bros. had recognized the legal effects of such dissent. Aside from this, there is no proof of any subsequent consummated sale of these animals, nor of any ratification of prior negotiation in reference thereto. Hence we find that at the time of the alleged conversion the plaintiff was not the owner of the property, and therefore had no right of recovery, and the court below erred in refusing to grant defendant's motion for a new trial.

Defendant excepted to three of the twelve instructions given by the court to the jury. The first one had especial reference to the provision of the statute regulating the branding of animals, and declaring the legal effect thereof, when done in compliance with the statute. This instruction is quite lengthy, and we can only give portions of it: "Another sec-

tion provides that brands may be recorded in the county where the owner resides; so that a party having an established brand may have it recorded either in the county where his cattle are liable to stray and range, or in the county where he resides, or in both; and, when it is recorded under the provisions I have called your attention to, in that way it gives him a right to use the brand, and is one of the modes by which evidence of ownership by brand may be established. Now, these provisions of the Compiled Laws of the territory that I have read to you constitute a statutory mode of raising *prima facie* evidence as to the ownership of property, and when a brand has been recorded under these sections that I have read to you, and in the manner provided in these sections, and that has been proven to the satisfaction of the jury, and an animal is found bearing such brand, the law then steps in, upon its being proven that the brand has been so adopted, and thus recorded by any particular person, and that the brand is on an animal, and provides that from that proof alone the jury are warranted in finding that animal belongs to the brand thus recorded and which it bears. Now, in this territory, that is one of the modes by which the ownership of property may be proven, and it is a proper mode, where all these facts are before the jury." This instruction is misleading. It assumes that the record of the brand may have been proven, when the only fact stated in that connection was plaintiff's answer that he did not know whether the 3P brand had been recorded or not. Such answer neither proves nor tends to prove the record of the brand. The rights of the parties should not be imperiled by an instruction of this nature, especially on so vital a point as the ownership of the property in question.

Defendant excepted also to the following instruction: "(7) A verdict and judgment for the plaintiff in this case would operate to transfer to the defendant the plaintiff's title in and to the cattle on account of the alleged conversion of which this suit is brought, and the defendant would thereby be entitled to hold any of said cattle as against the plaintiff, and as against the plaintiff would be held to be the owner of the same." This is plainly erroneous, and was well calculated to facilitate the labors of the jury in finding for the plaintiff. "An unsatisfied judgment in trover does not pass the property, and is a mere assessment of damages, on payment of which the property vests in the defendant." Benj. Sales, p. 54, § 49. As there may be a new trial of this case, it is not deemed necessary to pass upon the other errors alleged in the record. The judgment is reversed.

McFIE, LEE, and SEEDS, JJ., concur.

UNION DEPOT & RAILROAD CO. v. SMITH.
(Supreme Court of Colorado. July 3, 1891.)

FALSE IMPRISONMENT—SPECIAL POLICEMAN—MAYOR'S POWER TO APPOINT—EXCESSIVE VERDICT.

1. Where a city charter provides that "the mayor may, * * * when he shall deem it nec-

essary for the peace of the city, appoint special policemen for a specified time, not exceeding two days, without the approval of the city council," one appointed by the mayor as special depot policeman for an indefinite time has no authority, after the expiration of two days, to make arrests for a violation of a city ordinance.

2. A city cannot by ordinance confer a greater power upon its mayor than that given by charter.

3. When one in the employ of a depot company arrested another for a supposed violation of an ordinance, and the company seeks to justify the arrest upon the ground that he was a duly-authorized officer, the fact that he holds a commission from the mayor is not conclusive, but it must prove that there was an appointment as required by law, and all the steps taken necessary thereto.

4. Where, in an action for false imprisonment, there has been a verdict of \$5,000, which was set aside as excessive, and on retrial a verdict of \$3,000 is rendered, it will not be disturbed on appeal as excessive.

REED, C., dissenting.

Commissioners' decision. Appeal from superior court of Denver; MERRICK A. ROGERS, Judge.

Action by Frank W. Smith against the Union Depot & Railroad Company to recover damages for false imprisonment. Judgment for plaintiff. Defendant appeals. Affirmed.

In December, 1883, while assuming to exercise police authority within the depot grounds of the appellant in the city of Denver, one E. H. Rust arrested the plaintiff, Smith, and placed him in confinement. At this time Smith was in the employ of Marrs and Middleton, baggage and transfer men, doing business in that city. Smith's duties required him to meet the incoming trains of the various roads entering the city, and solicit from the passengers the transfer both of the people and their baggage to their various destinations in the city. Whatever work was done by Smith, under those circumstances, seems to have been done on the trains before their actual arrival at the depot. At this time there was an ordinance prohibiting persons from soliciting the carriage of passengers in hacks and busses, unless the solicitor was possessed of a license issued by the city. There seems to have been a controversy between Marrs and Middleton, their employees, and the depot officers, in regard to their rights in this particular. Apparently it had been the custom of the agents of the transfer company to show the passengers which they had solicited upon the trains to the various carriages and busses under their direction. This seems to have been assumed by the hackmen, who might be termed the contending parties, a violation of the ordinance concerning solicitation. A good deal of feeling had arisen in the matter between the transfer company and its employees and other persons engaged in the same business. The employees of the transfer company were on several occasions arrested for doing this same thing, but they were always discharged on the hearing. On the day in question Smith met the incoming train at Petersburg, and sold to Miss Warren, of Colorado Springs, a carriage ticket. When the train arrived in Denver, Miss Warren was accompanied by a gentle-

man who carried her baggage, and was escorted towards the place where the carriages were standing. It does not appear that Smith solicited Miss Warren to become his passenger within the depot grounds subsequent to the time of the sale of the ticket on the train. As the parties approached the outside of the depot, Smith held up his finger, and walked towards the carriage. The parties followed him to the conveyance, were shown in, and driven off. Rust stood in the archway of the depot, and saw the parties approach the carriage, and may possibly have seen Smith indicate its locality. The circumstances occasioned a good deal of disturbance among the hackmen, whereupon Rust interfered, and took Smith into custody. The appellant contends that Rust was acting in the matter as a policeman, by virtue of a commission from John L. Routt, then mayor of Denver, which in form is as follows: "To all to whom these presents shall come, greeting: That having great confidence in the ability and integrity of E. H. Rust, I, John L. Routt, mayor of Denver, have and do by these presents constitute and appoint him, the said E. H. Rust, of the city of Denver, to the office of special police at the depot, without pay from the city; to have and to hold said office, with its emoluments, during * * *. In witness whereof," etc. "Done at Denver this 28th day of April, 1883. JOHN L. ROUTT, Mayor." In 1883 the legislature issued a special charter for the city of Denver, which provided for the creation of a police department, and conferred upon the mayor authority to appoint the general police of the city, with the concurrence of the common council, and authority to appoint special police under certain circumstances. This authority is found in section 8, art. 5, and is as follows: "The mayor may, upon any emergency or riot, pestilence or invasion, or at any time when he shall deem it necessary for the peace, good order, and health of the city, appoint special policemen for a specified time, not exceeding two days, without the approval of the city council." This was the only provision contained in the charter giving to the mayor authority to appoint police, except with the concurrence of the common council, and the only provision under which special police could be appointed. Some ordinances of the city were introduced in evidence from which a more enlarged authority might be deduced, but there was nothing in the charter which warranted the ordinances. Before Rust received his commission or attempted to act as a depot policeman, he had been hired by the depot company. He was afterwards paid by them, and was in general subject to their orders, superintendence, and direction. He wore the uniform of an officer, and perhaps occasionally received orders from the chief of police of the city, and, in accordance with a direction which he received from the chief, turned over whomsoever he might arrest to the general police of the city, who afterwards confined them, if need be, in the city jail. But, notwithstanding these facts, it may be

said that he was under the control and direction of the depot company and its superintendent, who hired and discharged men who acted in this capacity. When the depot was built, a cell had been constructed in the basement about 8 by 10 feet in size. It had no outer window, and was entered from the engine-room, in which there was a small gas-jet. This furnished the only light, and it reached the cell through a small hole cut in the door. The cell was empty, save for some old blankets. Without permitting Smith to turn over the checks which he had collected on the train to any of his co-employees, Rust took him down to this cell, incarcerated him, and did nothing further concerning it except to notify the man relieving him that he wanted Smith turned over to the city policeman when he should come around. Smith remained in the cell for about an hour, and was then, by Rust's successor, turned over to Price, one of the regular police officers, taken up to the city jail, and put into what is termed a "bull-pen," which is an unfurnished cell, about 6 feet wide and 15 feet long, with a row of cells on either side. The other occupants were negroes and drunken men, and the place was dirty and noisy. Here Smith stayed until midnight, when he was released on bail. In the morning Rust filed a complaint before the police magistrate, charging Smith with a violation of the ordinance prohibiting the soliciting of passengers for carriages without a license. Smith was tried, and acquitted, and thereupon brought this suit against the company to recover for the false imprisonment. The case has been tried three times. The jury disagreed on the first trial, and on the second rendered a verdict for Smith for \$5,000, which was set aside by the court as excessive. The judgment appealed from is for \$2,000, which was the amount of the last verdict.

Teller & Orahoud, for appellants. Puttersen & Thomas, for appellee.

BISSELL, C., (after stating the facts.) The offense for which the arrest was made was committed, if at all, by the violation of a municipal ordinance. To settle the rights of the plaintiff, and determine the responsibilities of the defendant, the status of the individual who made the arrest must first be ascertained. The radical difference between the powers and duties of a regularly constituted police officer and those of a private person in respect of these matters make the inquiry fundamental and primary. A private individual could never take a person into custody or restrain him of his liberty because of the commission of such an offense. It was only in emergencies, and because of the right of society to defend itself against sudden assaults, that the private person might act. It is otherwise with an officer. He may arrest when he has reasonable grounds to suspect that a felony has been committed, and justify by proof of a ground which the law deems reasonable. The defense of an individual, however, must rest upon proof both of a reasonable ground and of the actual

commission of the felony. This has been the law from the very earliest times. 1 Hale, P. C. 587; Beckwith v. Philby, 6 Barn. & C. 635; Neal v. Joyner, 89 N. C. 287; Rohan v. Sawin, 5 Cush. 281; Burns v. Erben, 40 N. Y. 463. This rule has never been extended so as to protect the officer in case of an arrest for misdemeanor, except it be committed, or his information concerning it be acquired, under particular circumstances. Cooley, Torts, p. 174, and notes. Wherever the right of a police officer to arrest for a misdemeanor has been conceded, it has not been held to include an authority broad enough to embrace arrests for violations of municipal ordinances. To justify the arrest by an officer for an offense of this description, a statute must be found clothing the officer with the right, which must be exercised under the circumstances designated by the enactment. Doubts have been expressed as to the constitutionality of the legislation upon this subject; but it may now be said to be fairly well settled that an ordinance of this sort will be taken as a ground of authority to the policeman, where jurisdiction on this matter is expressly conferred by the general law of the state. White v. Kent, 11 Ohio St. 550; Pesterfield v. Vickers, 3 Cold. 205. A statute upon this subject has been enacted in this state, and doubtless a policeman would be authorized to make an arrest, for a violation of a municipal ordinance, where the offense was committed in his presence.

Such being the law, the importance of the preliminary inquiry as to Mr. Rust's position becomes evident. The question is disposed of in two ways. In the first place, it is practically settled by the verdict of the jury to whom was submitted the question whether or not at the time of the arrest Rust was acting as a special policeman under and by virtue of the commission and appointment, or whether he was acting as a representative and agent of the depot company. Upon this issue the jury found directly against the appellant, and their verdict upon this subject may well be accepted as conclusive upon this appeal. The evidence clearly tended to show that at this time Rust was in the employ of the depot company, which hired him and paid him his wages, and that practically he was under their orders, direction, and control. While it may be true that, in some minor particulars, he took orders from the chief of police with reference to the disposition of the prisoners, and the time and way in which they should be turned over to the regular officers, in general he was under the direction and control of the superintendent of the depot company, to whom alone he looked for instructions, and whose orders he chiefly obeyed. As the evidence fully justifies the verdict, the court would not feel at liberty to disturb the findings regardless of the question of law involved in the matter. It is equally true that, as a matter of law, it cannot be held that Rust was a policeman, acting as such at the time of the making of the arrest. Whatever power as a police officer Rust had, must be taken to be conferred by the commission

which was issued to him by the mayor. This warrant would not clothe him with the authority of a police officer, in the absence of power in the mayor to make the appointment; nor in the absence of this appointive power can the commission be taken as conclusive evidence of his right to assume the functions with which it apparently invests him. In 1883 the legislature granted a new charter to the city of Denver, which was in full force in April, at the time of Rust's appointment. The charter provided for the establishment of a police department, and defined the rights of the mayor in this respect. Article 5 contains whatever there is in the charter upon this subject. Its various sections contain a full statement of the requisites for the creation and organization of the police force of the city. It delegates to the mayor whatever of authority he had to create or appoint a policeman, special or general. A casual examination of the charter will demonstrate that at the time the mayor issued the commission to Mr. Rust he had no power to appoint a special policeman, except under certain emergencies, and for certain designated purposes, and for a certain period of time.

It is idle to contend that a power of appointment may be looked for in the ordinances adopted by the city, for a municipal government would be powerless to confer upon the mayor an authority greater than that expressed in the charter. The authority of a municipal government over matters of this description is always defined by the statute, and circumscribed by its limitations. In this case the charter confers authority solely upon the mayor in respect of this matter, and it must be taken that as to it the municipal government is without the power of restriction or extension, for nowhere in the statute is this power expressly granted to it. The power thus conferred upon the mayor is evidently not broad enough to include the right to appoint a special policeman for an indefinite period, without confirmatory action on the part of the council, which must be held essential to the continued duration of a commission. Under these circumstances, the defendant company failed to make the proof necessary to this defense. When they undertook to defend that which was plainly established to be a wrong, committed with their assent and by their direction, and by one of their duly-constituted agents, the burden was upon them to show that the individual thus acting was protected by the authority produced in his behalf. It is evident that the defense was not established, because the mayor who issued the commission was without power to thus commission a special police officer, and that Rust's authority under the commission could not continue up to the time of the arrest. It is further evident that there was a failure of proof in this respect, because, wherever there is a limitation upon the power of an official who attempts to act, the evidence of his action must be presumed to be only of an act done subject to the limitation; and, where parties contend that the appointment was confirmed by the common council, whereby

their agent became a general police officer with full powers as such, it is incumbent upon them to make proof of that municipal action which is essential to the creation of the authority.

It is contended, upon argument, that the commission was conclusive upon the question of the existence of the authority which it apparently delegated, and that it must be presumed to have been issued under those circumstances which are essential to the exercise of the power of appointment. However true this may be, and however applicable it may be under certain circumstances, it cannot be conceded that the courts are without the right to investigate the existence and extent of the power of appointment in the executive who undertakes to exercise it. The authorities which hold that the commission presupposes the regularity of all proceedings antedating it proceeds upon the hypothesis that the executive issuing the commission is clothed with the power which he has attempted to exercise. Wherever the statute contains an express limitation upon the power, and the appointment is shown to be within the prohibition expressed, or wherever an appointment may be made with or without a limitation of time for its duration, the commission cannot be taken as conclusive evidence, either of the legality of the appointment or its duration. The contention in this particular might easily be conceded, and yet it be held that it is incumbent upon the defendant, when he makes a defense by commission under these circumstances, to make proof which shall show it to be a continuing and existent authority. Rust was in the simple position of an agent of the depot company, acting in their behalf and by their direction, and without such police authority or right as is essential to a successful defense in an action for the unauthorized arrest. That a corporation is responsible for a wrong committed by their agent, acting in their behalf and under their authority, is well established, and the reasons supporting the doctrine need not be expressed. *State v. Railroad Co.*, 23 N. J. Law, 369; *Railway Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. Rep. 1286; *Krulevitz v. Railroad Co.*, 143 Mass. 228, 9 N. E. Rep. 613.

It is insisted that the verdict is excessive, and that for this reason the judgment should not be permitted to stand. A very strong argument in favor of this contention is based upon the necessity which exists in all large cities to control and regulate the traffic carried on at its railroad terminals. The right of corporations in control of depots and railroad terminals to make rules and regulations for the due restraint and control of the business within those limits must be conceded. The immense number of passengers and the enormous amount of baggage which must be disposed of, the outside aids absolutely essential to the due transaction and proper handling of this traffic, necessitate the concession that the company must have the right to make such rules and regulations as may, by experience, be found essential to its control, regulation, and safety. The absence of

any necessity for the course pursued in this case is an answer to the contention that the affirmance of this judgment will result in the abrogation of all authority to control and regulate railroad traffic at such points. At the time that the arrest was made there was no attempted interference with either the property of the corporation, the privileges of the officers or agents, or the rights of any passengers. So far as the case discloses, if the carriage of passengers was solicited by the plaintiff under the direction of the Denver Transfer Company, it was not done at the depot, but upon the train, and not within the limits of the municipality. The right to do this identical thing had been continually asserted by the transfer company and its agents whenever it was denied by those who represented the depot corporation. The difference of opinion on this subject had resulted in numerous arrests, and the complaints filed against the persons arrested had been dismissed as often as they were brought to a hearing. There was nothing, then, in the circumstances which required immediate action on the part of the depot authorities, either to save the passengers from annoyance or to protect the company in its rights. The argument *ab inconvenienti* falls to the ground, and it remains to determine whether under the general rules covering this class of cases the verdict should be taken as excessive. The situation of the controversy seems to furnish an answer to the argument. The case has been thrice tried. The first trial resulted in a disagreement; the other two trials resulted in a verdict for the plaintiff. The first verdict was for \$5,000, which was set aside, and the case again submitted to the jury, which assessed the damages at \$3,000. Whatever may be the personal judgment of this tribunal as to the extent of the injury, these successive verdicts ought to control the determination. *Interest reipublice ut sit finis litium*. It is a case peculiarly within the province of a jury. Their right to assess the damages within any apparently reasonable limit ought not to be interfered with. An examination of all the cases upon both sides of this question clearly demonstrates that there is no uniform rule by which the amount of damages can be measured. There is the widest diversity of opinion among the courts as to the judgments which shall be allowed to stand. The range is wider probably in such cases than in any other. *Richmond v. Roberts*, 98 Ill. 472; *Draper v. Baker*, 61 Wis. 450, 21 N. W. Rep. 527; *Railroad Co. v. Bigelow*, 68 Ga. 219; *Railway Co. v. Gilbert*, 64 Tex. 536.

The current of authority will not support the contention that the verdict is excessive. It was a most unwarrantable interference with the personal liberty of a citizen, under circumstances indicating an oppressive use even of a supposed authority. The law would have been as well vindicated, the rights of the public conserved, and the corporation protected in the transaction of its business, by a prosecution in the regular courts. Under these circumstances, and in view of the large

discretion left with juries as to the damages which shall be allowed in cases of this description, the verdict cannot be disturbed. These considerations dispose of all the questions that require discussion. Exceptions were taken to rulings upon the admission and exclusion of testimony, and to some of the instructions which were given to the jury. Under the principles expressed in this opinion, these objections were not well taken, nor are they deemed of sufficient general importance to necessitate a discussion to sustain the action of the trial court in these particulars. There are no errors apparent which will necessitate a reversal, and it is recommended that the judgment be confirmed.

RICHMOND, C., concurring. REED, C., dissenting.

PER CURIAM. We have decided to adopt the conclusions reached by the Honorable Commissioner in the foregoing opinion upon such matters as are essential to sustain the judgment of the court below. While the damages are unusually large for such a case, we do not feel warranted under the circumstances in disturbing the judgment of the court below on this account. Three different juries tried the case, two returning verdicts, the first verdict being almost double the one before us. It is only when the amount of the damages found by the jury is so great or so small as to clearly indicate that they were influenced by passion or prejudice that courts of last resort will interfere. Some deference should also be paid to the action of the trial judge, who hears the testimony of the living witnesses. The weight of his opinion supporting that of the jury is an additional reason for not interfering upon appeal. It has been said that in such cases the wrong must be very gross and the damages enormous for the court of review to interpose.

The judgment of the court below is affirmed.

GONDER v. MILLER. (No. 1,338.)

(Supreme Court of Nevada. July 27, 1891.)

EJECTMENT—PRIMA FACIE CASE—INCLOSING PUBLIC LANDS.

In an action of ejectment to recover a tract of unsurveyed government land, evidence tending to prove prior possession and an ouster establishes a *prima facie* case, and a nonsuit will not be granted on the ground that plaintiff's possession was unlawful, under Act Cong. Feb. 25, 1883, declaring that the inclosure of public lands to which the person making the inclosure has no claim or color of title or asserted right, made in good faith, with a view to entry under the land laws of the United States, or any inclosing of such lands whereby others are prevented from settling thereon under the land laws of the United States, is illegal, there being no evidence that defendant's rights were better than plaintiff's.

Appeal from district court, White Pine county; THOMAS H. WELLS, Judge. Action of ejectment by D. A. Gonder against H. L. Miller. Defendants motion for nonsuit granted. Plaintiff appeals. Reversed. *Rives & Judge*, for appellant. *Frank X. Murphy and Thomas Wren*, for respondent.

BELKNAP, C. J. This is an action of ejectment for the recovery of the possession of a tract of unsurveyed government land containing about 40 acres. Plaintiff introduced testimony tending to prove prior possession of the demanded premises, and an ouster, and rested his case. No evidence was introduced tending to show the nature of defendant's claim. A motion for nonsuit was granted, upon the ground that plaintiff had not acquired, nor shown any intention of acquiring, the government title to the land. In support of the ruling, respondent relies upon the provisions of an act of congress entitled "An act to prevent the unlawful occupancy of public lands," approved February 25, 1885, (23 St. at Large, 321.) The provisions of the act upon which reliance is placed are those which declare that the inclosure of any portion of the public domain to which the person making the inclosure has no claim or color of title or asserted right, made in good faith, with a view to entry under the land laws of the United States, or any fencing or inclosing of such lands whereby others are prevented from settling thereon under the public land laws of the United States, is unlawful. Prior to the adoption of this statute, the supreme court of the United States in *Atherton v. Fowler*, 96 U. S. 513, and other cases, had held that a pre-emption right to public land could not be initiated by intrusion upon the possession of another. In that case the court said: "It is not to be presumed that congress intended, in the remote regions where these settlements are made, to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invaders. In the parts of the country where these pre-emptions are usually made, the protection of the law to rights of persons and property is generally but imperfect under the best of circumstances. It cannot, therefore, be believed, without the strongest evidence, that congress has extended a standing invitation to the strong, the daring, and the unscrupulous to dispossess by force the weak and the tried from actual improvements on the public land, in order that the intentional trespasser may secure by these means the preferred right to buy the land when it comes into market." Pages 516, 517. Advantage was taken of this ruling to fence large bodies of public land by persons having no claim of right thereto, to the exclusion of persons desiring to make *bona fide* settlements thereon. To protect actual settlers in good faith against this wrongful interference, congress declared the acts prohibited by the statute misdemeanors, punishable by fine and imprisonment, and authorized the president to employ force to remove and destroy the inclosures. The act does not, however, in terms permit a private person to dispossess the occupant of an unlawful inclosure, and the reasons given in *Atherton v. Fowler* refute such a construction. The case of *Laurendeau v. Fugell* (decided by the supreme court of Washington Territory in the year 1889) is directly in point. In that case the plaintiff held by possession only. Defendant, whom

the court presumed to be a pre-emptor, broke down a portion of plaintiff's fence, entered upon and took possession of the land. It was claimed that plaintiff was within the prohibitions of the act of congress forbidding the fencing of public lands, and therefore defendant could lawfully enter. Upon this point the court said: "To invoke the act of 1885 as a license to opposing claimants, pre-emptors, and the like, of a law unto themselves that either may break down the inclosure of the other and lawfully enter, is to use a rule made for desperate cases, requiring desperate remedy, and in itself exceptional; to overturn the law; to bring chaos instead of social order; to make the court a useless formality, and the law an object of contempt." 21 Pac. Rep. 30. It is unnecessary for us to go to the full extent of the Washington case, for the reason that in the case at bar no evidence was introduced touching defendant's claim, and, for aught that appears, he may have had no better right than the plaintiff. Upon the facts, we consider that plaintiff established a *prima facie* case, and that the nonsuit ought not to have been granted. The judgment of the district court is reversed, and cause remanded.

MCDERMOTT v. MURPHY *et al.*

(Supreme Court of Montana. Aug. 10, 1891.)

SHERIFFS—CUSTODIAN OF ATTACHED PROPERTY—RECOVERY.

1. Where a sheriff, at the request of an attaching creditor's attorneys, employed a custodian for the goods attached, the fact that the attaching creditor paid several hundred dollars as compensation to the custodian raises the presumption that he authorized such employment, and the sheriff can recover the balance of the compensation paid the custodian.

2. The sheriff can recover the costs of employing such custodian, though he did not render a bill therefor before the rendition of a judgment in favor of the attaching creditor; and the fact that, some time after the employment of the custodian, he refused to substitute for him another, employed and offered by the attaching creditor, is immaterial, since, being responsible for the goods, he has a right to choose a custodian therefor.

Appeal from district court, Jefferson county; THOMAS J. GALBRAITH, Judge.

Action by John McDermott against John L. Murphy and another to recover sheriff's fees. Judgment for plaintiff. Defendants appeal. Affirmed.

Toole & Wallace, for appellants. *Cowan & Parker*, for respondent.

BLAKE, C. J. This action was tried by the court without a jury, and the findings of facts were, in substance, as follows: The respondent was the sheriff of Jefferson county, territory of Montana, during the years 1885 and 1886. Two writs of attachment issued October 15, 1885, out of the district court of Lewis and Clarke county, in two actions, then commenced, respectively, by the said appellants, as the plaintiffs, against the McGregor Mining Company, and were forwarded by mail to the respondent by their attorneys, with directions to this officer to levy upon and attach all the real and personal property of said company in said Jefferson county.

By these writs the sheriff was commanded to attach and safely keep all of such property, in one case to answer the sum of \$4,806.99 and costs, and in the other to answer the sum of \$2,807 and costs. The respondent returned October 27, 1885, to the district court of Lewis and Clarke county said writs of attachment, whereon he certified that certain property had been levied upon, and that the amount of his fees under each writ was \$30.45. The respondent hired October 19, 1885, Edward Welmer, at the request of the attorneys of the appellants, and placed him as custodian in charge of the attached property, and agreed to pay him for his services at the rate of four dollars per day. The appellants and their attorneys were "aware from the start of Welmer's said employment, and of his acting thereunder," a period of 465 days. The respondent, prior to December 5, 1885, notified the parties of the charge for the custodian, and requested payment thereof; but the appellants were dissatisfied therewith, and sent, December 10, 1885, one Taylor, as their agent, to take possession of the property. The respondent refused to relinquish the custody thereof, and was informed in February, 1886, by said attorneys that this matter "would have to be settled upon the taxation of costs in the attachment suits when the judgment was rendered; when, upon presentation of his claim, the court would determine what keeper's fees he was entitled to charge. * * * Upon the proper order of plaintiff, McDermott, drawing on the defendants herein, and the plaintiffs in said attachment suits, the said defendants on the 1st day of July, 1886, paid to said Welmer, upon his claim for services, the sum of \$200; and upon the 22d day of August, 1886, the further sum of \$100; and that they thereafter refused to further pay any of said claim." Judgment was entered December 7, 1886, in each of said suits, in favor of the respective appellants, and against said company, for said sums and costs. No claim of fees or costs for the expense of the custodian was filed by the respondent until he learned through the newspapers of the entry of the judgments, when he sent by letter, postage prepaid, a copy of his bill therefor to the clerk of the district court of Lewis and Clarke county, and also each of the appellants. The costs which were taxed did not include any part of the amount in controversy. The following were the conclusions of law: "(1) That considering the nature and character of the property attached, to-wit, among other things, machinery and fixtures, it was necessary and proper for the sheriff, to-wit, the plaintiff, to employ Welmer, or some other proper custodian, to take care and protect said property. (2) That the amount agreed to be paid said Welmer for his services per day is reasonable. (3) That the plaintiff has sent by mail, postage prepaid, to the clerk of the proper court of Lewis and Clarke county, and to the defendants, a statement of said claim for Welmer's services; * * * that said statement was received by said clerk,

and also by said plaintiffs; and that, unexplained, it was the duty of the plaintiffs' attorneys to have filed said statement with said clerk in due form, in order that the proper court might take proper action thereon. (4) That said attorneys, as a matter of law, had full power and authority to bind said clients, to-wit, Murphy and Clarke, by their said action, touching the employment by this plaintiff of said Welmer as custodian." Judgment was entered thereon for the respondent. This appeal has been taken from the order overruling the motion for a new trial. We are satisfied from an examination of the evidence that the findings of the facts should not be disturbed, and it is our province to draw the legal deductions.

The appellants deny the authority of an attorney, by virtue of his employment, to bind his clients for the payment of the services of said Welmer as the custodian. The respondent asserts that this is like any other case of agency, and that the acts of the attorney, which are unauthorized, can be ratified by the principal. It is shown by the findings that the appellants knew "from the start" of the employment of Welmer, and made partial compensation therefor, and a discussion of these points is rendered useless. We shall deal with the action as if it were based upon an agreement which had been made by the appellants and respondent. It has been stated that the services of Welmer were necessary for the protection of the attached property; that the amount which was paid for the same by the respondent was reasonable; and that a statement of the costs and fees embracing this item should have been filed by the appellants in the proper court for taxation.

The sole question is whether, under the statutes prescribing the duties and fees of sheriffs, which were in force during the aforesaid times, this action is prohibited. Our attention has not been directed to any law of this nature. The respondent was liable for the preservation of the property, and had the power to appoint his agents, and could lawfully reject Taylor as a custodian. The appellants by this conduct recognized the necessity for the services of Welmer or some person in this respect. The respondent did not live in the county in which the judgments were entered against said company, and had no opportunity to be heard in relation to this compensation in the district court of Lewis and Clarke county. It was not his fault that the promise of the attorneys for the appellants for the settlement of this controversy at the time of the entry of the said judgments was not fulfilled. The authorities are controlled by statutes to such an extent that we derive from them slight aid, and content ourselves with these references: Crock. Sher. (2d Ed.) § 824; Smith, Sher. pp. 524-526; Mecham, Pub. Off. § 889. It is therefore ordered and adjudged that the judgment be affirmed.

HARWOOD and DE WITT, JJ., concur.

In re **MACKNIGHT.**

(Supreme Court of Montana. Aug. 10, 1891.)

CONTEMPT—CERTIORARI—SUPREME COURT.

1. Const. Mont. art. 8, § 3, provides that the supreme court shall have power * * * to hear and determine writs of *habeas corpus*, * * * *certiorari*, * * * and such other original and remedial writs as may be necessary or proper to complete exercise of its appellate jurisdiction." Held, that the supreme court had authority to issue a writ of *certiorari* to the district court to review a proceeding in contempt.

2. Defendant published, in a newspaper in reference to proceedings then pending for the probate of a will, the following article: "An old Montanian, who is familiar with the * * * Davis Will Case, * * * said: 'Prejudice! Why, of course, there is prejudice. I tell you there is money enough in this business to corrupt every corruptible man in the state. * * * Unless a change of venue is granted, the jig is up for the contestants of the will.'" Held not a contempt of the court in which the proceeding was pending.

3. A witness may refuse to answer a question which is not pertinent to the issue before the court, and such a refusal does not give the court jurisdiction to imprison him for contempt.

Petition for *habeas corpus* by James A. McKnight.

Elbert D. Weed and *Jonn M. McDonald*, for petitioner. *Thompson Campbell*, for the State.

HARWOOD, J. By return made to the writ of *habeas corpus*, and the writ of *certiorari* issued in aid thereof, it appears that the prisoner was adjudged, by the district court of the second judicial district, guilty of having committed a contempt of that court, and was therefor committed to jail. The facts and proceedings whereby the judgment and order of commitment were made appear by the return as follows: A certain newspaper, known as the "Helena Daily Journal," printed and published at the city of Helena, and of general circulation, contained in its issue of July 7, 1891, among other items, the following: "Why There's Prejudice. An old Montanian, who is very familiar with all the ins and outs of the Davis Will Case, was discussing yesterday the subject of the change of venue, asked in this celebrated case, when he said: 'Prejudice? Why, of course, there's prejudice. The money involved in this case has turned the head of every man, woman, and child in Silver Bow county. Republicans and Democrats are sworn allies and friends in all that pertains to keeping the estate in the hands of the Butte parties, and they stood together for the re-election of Judge McHatton solely because they knew that he could never be won over to any other view of the will than the Butte view. This was why no Republican nomination was made, and why McHatton was so readily adopted as the candidate and elected by so pleasing a vote. I tell you there is money enough in this business to corrupt every corruptible man in the state, and it has caused a deadly bias in the minds of some men who could not be bought with money at all. There are not more than one or two cases to-day before the courts of this country in which the stake involved is so great. Nothing like a fair trial ca-

ever be had in Silver Bow county, as neither a judge nor a jury could be obtained there that would render a decision in accordance with the evidence. Therefore, unless a change of venue is granted, the jig is up for the contestants of the will.' This gentleman is a Republican who travels a good deal about the state, but a Democrat beside him, who has been a good deal in Silver Bow county, said he had to admit the truth of the stricture."

On the 9th day of July, 1891, Hon. JOHN J. McHATTON, judge of department 1 of said court, made and filed in his court an affidavit setting forth that an action or proceeding for the probate of an alleged will of Andrew J. Davis, deceased, was pending in said court; that such case or proceeding was generally known as the "Davis Will Case;" that said MacKnight and other persons named in the affidavit were the editors and publishers of said newspaper, and published the matter recited; and that "said publication has come under the observation of the judge of said court, and the charges therein made are false and contemptuous." Upon the filing of the affidavit, said court issued an attachment for the persons charged with commission of contempt by said publication. In the proceedings which were afterwards had before said court, in the matter of this alleged contempt, the petitioner, MacKnight, appeared to show cause why he should not be punished for contempt as charged; and answered, admitting that he was the managing editor of said newspaper at the time of said publication; admitted that he alone wrote and caused to be published in said newspaper the matter recited; but denied that the same was a contemptuous act towards said court, or the judge thereof, or was so intended by the author and publisher thereof. Then followed an inquiry before said court, wherein said MacKnight, under oath, explained to the court where and under what circumstances he heard the comments, which were recited in the publication. He stated, in effect, that at the time he wrote and published said comments a proceeding for an order for a change of the place of trial of the contest of said alleged will, in said Davis Will Case, was being heard upon appeal by the supreme court of this state; that he had heard much comment by various persons, at different hotels, upon the streets, and about the courthouse in the city of Helena, in relation to said application for a change of venue, some of which expressions, uttered by several persons, were put together, and made up the matter published; that said matter was published in a column which purported by its heading to contain street gossip and incidents of interest. At this point the inquiry was directed to the ascertainment of the names of the persons who had made the comments mentioned. In answer to questions calling for the names of such persons, the witness said: "There were individuals that made some of the comments in the article whose names I cannot possibly recall, but it was in private conversation." In only one case could the witness recall the person who

stated what constituted a portion of the comments published, namely, that which related to the political situation in Silver Bow county at the time of the last election. The witness said: "As a matter of fact, the gentleman who made those remarks did not wish them printed. He had no feeling or interest in the 'Davis Will Case.' I gave him my word that I would not in any way disclose his name, and wrote the paragraph several days after the conversation." The name of the person in question was demanded by the court under peril of commitment for contempt if the witness refused to disclose it; but the witness declined to state the name of such individual without his permission. A continuance was then had to give the witness an opportunity to consult said person to find whether it would be agreeable to have his name mentioned to the court in this proceeding. On resuming the hearing, the witness stated that the individual in question, whose comments had been thus taken by the witness and published, would not consent to have his name given to the court, and the witness declined to disclose it; whereupon the court adjudged the witness guilty of contempt for refusing to disclose the name of the person demanded, and refused to pass upon the original charge of contempt in said proceeding, and refused to hear counsel for prisoner upon the question as to whether in law any contempt had been committed, and ordered the prisoner committed to jail. It is this imprisonment which the prisoner insists is illegal.

Upon the hearing before this court, counsel who appeared in the court below, as *amicus curiæ* in the proceedings, also appeared here, and raised the point that this court has no jurisdiction to bring up for review by writ of *certiorari* the proceedings of the lower court in the matter in question. In support of this position, he cites that clause of section 8, art. 8, of the constitution, which provides that the supreme court "shall have power, in its discretion, to issue and to hear and determine writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, prohibition, and injunction, and such other original and remedial writs as may be necessary or proper to complete exercise of its appellate jurisdiction." Counsel contends that the writ of *certiorari*, and others named in said clause can only be issued by this court when the same are necessary or proper in the exercise of its appellate jurisdiction, and therefore the issuance of the writ of *certiorari* in this case was irregular, because it was not in aid of appellate jurisdiction of this court. His position is that the latter words of said clause relate to the writs specifically mentioned, and restrict this court to the use of said writs, in the exercise of its appellate jurisdiction only. The case at bar presents a striking illustration of the error involved in such a construction of said clause of the constitution as is contended for by counsel. It is clear that this court is given power to issue, hear, and determine all of the writs mentioned, among others the writ of *habeas corpus*. That is conceded by all, but the contention is that this court can

issue, hear, and determine said writs only in the exercise of its appellate jurisdiction. Now, how would the writ of *habeas corpus* be ordinarily used by the supreme court in the exercise of its appellate jurisdiction? So the writ of *certiorari* is among the writs which this court is expressly authorized to issue, hear, and determine. Yet that writ is peculiarly inapplicable to use in aid of appellate jurisdiction; and, indeed, cannot be lawfully issued in cases where error may be reached by appeal. Code Civil Proc. § 555. Is it to be presumed that the framers of the constitution placed within the jurisdiction of this court these writs, the use and effect of which, in the actual administration of law, is so well defined, and some of which are in no way adapted to, or used in, the exercise of appellate jurisdiction, and then restricted the use of said writs by this court simply to the aid of its appellate jurisdiction? We think not. The clause carries no such purport with it. The writs named are defined in law; and their use in the administration of justice is fixed by long usage and well-settled principles.

It is provided in the constitution that this court shall have power "to issue and to hear and determine" said writs, which are known and certain implements of courts. Their office being known, the framers of the constitution understood exactly what jurisdiction was being granted by placing them within the power of the court to issue, hear, and determine. In that there was no uncertainty as to jurisdiction. But the constitution does not stop there. It adds: "and such other original and remedial writs as may be necessary or proper to complete exercise of its appellate jurisdiction." These other original or remedial writs are restricted to the exercise of appellate jurisdiction. Why? Because otherwise this grant of jurisdiction to frame, issue, hear, and determine new writs, heretofore unknown in the administration of justice, would have been the granting of an unknown, unlimited, and undefined power; therefore such other writs were limited to the exercise of appellate jurisdiction. To further indicate the use which it was intended should be made of the writ of *certiorari*, the same section of the constitution provides that "each of the justices of the supreme court may issue and hear and determine writs of *certiorari* in proceedings for contempt in the district court." The jurisdictional question raised by counsel is not sustained.

Returning to the consideration of the merits of the proceedings under review, we find counsel for the prisoner challenging the legality of the imprisonment by two propositions: *First*. That if a contempt was committed by such publication, as charged, then the contempt was committed by that act; and relevant inquiry ceased when it was ascertained who was the author and publisher; that the prisoner admitted the writing and publishing of the comments as charged, and any inquiry beyond that was irrelevant and illegal; that refusal to answer such irrelevant questions was a legal right of witness, and commitment for such refusal was unlaw-

ful. *Secondly*. That in the main proceeding the matter charged, to-wit, the writing and publishing of the matter set forth, did not in law amount to a contempt of court, and therefore the court was proceeding without jurisdiction, and all questions pertaining to the matter in such proceeding were irrelevant and unauthorized, and the witness had a legal right to respectfully decline to answer any or all questions in a case where the court was without jurisdiction.

We are of the opinion that in this case the law fully sustains both propositions in favor of the prisoner. As to the first proposition, the record shows that the prisoner appeared before the court, and admitted every fact charged as constituting the contempt. What fact there was in the charge not admitted, or what relevancy there was in the questions which the prisoner refused to answer, the counsel who acted as *amicus curiæ* was unable to explain, and we have been unable to ascertain. It is provided in sections 659, 660, Code Civil Proc., that witnesses shall answer questions legal and pertinent to the matter in issue. They are not bound to answer questions irrelevant to the issue. *Ex parte Zeehandelaar*, 71 Cal. 238, 12 Pac. Rep. 259. After the prisoner had admitted the facts set forth in the charge as constituting contempt, if, then, an inquiry as to facts outside of that charge was necessary to establish contempt, it follows that no contempt was charged in the proceeding. But suppose the prisoner had answered the question put to him, and said that A. made the remarks about the "political situation in Silver Bow county." Would the offense charged, to-wit, the publication of said remarks, have been any more certain, or would the gravity of the offense been any greater or less, than it would have been if B. had made those remarks? Suppose, again, the prisoner had answered that A. made the remarks, and A. had been called and questioned, and said that he got the idea from B.; and B. had been sent for, and testified that he got the matter from C., and so on *ad infinitum*. How much would this have added to or subtracted from the offense charged against MacKnight, and the punishment due therefor? It is not unlikely comments were made in reference to the application for change of venue, mentioned in the article. Parties on one side of the motion were insisting that the people of Silver Bow county, for various reasons, had become biased or prepossessed with one view of the contest. It was also suggested, and attempted to be shown, that the judge of the lower court was biased and prejudiced. The motion was brought before the supreme court on appeal, and these propositions as to bias and prejudice were uttered, published, commented upon, and considered. Now, are the parties who entertained and expressed the views that bias and prejudice existed in peril of the jail of Silver Bow county?

The main charge preferred against the prisoner is not within the acts defined by statute as contempts, nor is it within the general definitions of that offense, as found in the authorities upon this subject.

The principal ingredient of the definition of "contempt" is disregard of the authority of the court. It is provided in our statute that certain acts or omissions described "are contempt of the authority of the court—*First*, disorderly, contemptuous, or insolent behavior towards the judge while holding court, tending to interrupt the due course of a trial or other judicial proceeding; *second*, a breach of peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of the trial or other judicial proceedings." Code Civil Proc. § 584. Definitions taken from works of authority are as follows: "A willful disregard or disobedience of a public authority." Bouv. Law Dict. "Disrespect; willful disregard of the authority of a court or legislature." And. Law Dict. "Contempt is disorderly or insolent language or behavior in the presence of a legislature or judicial body, tending to disturb its proceedings, or impair the respect due its authority; or a disobedience to the rules or orders of such a body, which interferes with the due administration of law." 3 Amer. & Eng. Enc. Law, 777. Mr. Bishop, in his work on Criminal Law, introduces this subject with the following declaration: "No court of justice could accomplish the objects of its existence unless it could in some way preserve order and enforce its mandates and decrees. The common method of doing these things is by process of contempt." 2 Bish. Crim. Law, § 243. Counsel cites, in support of the proceedings, the law as laid down by Blackstone. This eminent commentator on the laws of England gave his works to the world many years before the adoption of the constitution of the United States, and at a time when a censorship of the press was thought to be a proper office of government. It is well known that in his time the English courts assumed a much wider scope on the subject of applying the process of contempt to restrict the freedom of speech and publication than in more recent times. And yet this proceeding cannot be supported by citations from Blackstone, without culling from his text the most general observations. The case of *Territory v. Murray*, 7 Mont. 251, 15 Pac. Rep. 145, is cited in support of this proceeding. That case, we think, has no application to the case at bar. The offender in that case was a suitor before the court. He concocted a scheme, and invented a fictitious set of facts, in relation to the very case under adjudication, in which he was a party. He caused to be telegraphed a statement of the fictitious and alleged events, which he had conjured into apparent existence, and caused the same to be published so as to get it communicated to the attention of the court; and it was clear that he did all this to cause an impression upon the mind of the court which he thought would work to his benefit in the litigation where he was interested. That case, it seems to us, ought not to have misled either court or counsel in the case at bar. The publication in the *Murray Case*, *supra*, was put out of consideration; the court observing that the offender had used the press to communi-

cate to the court the fictitious matter which he had concocted, and which he hoped would have an influence. The court passed by the publisher, and turned its attention to the offending suitor. A review of authorities shows clearly that a suitor is held to a stricter accountability for his conduct than parties in no way connected with the litigation.

It is not to be understood that this court approves the propriety of publishing comments of the nature contained in the article in question. We are passing upon a question of law, as between the rights of a citizen and the power of a court to summarily imprison upon a charge of contempt. It is from this point of view that we are considering the publication, and the proposition to punish therefor. The article in question contains expressions concerning a state of influence and feeling. As before observed, the object of the power to punish by process of contempt is to enforce obedience and respect to the authority of the court. For this purpose the power is given, and to this purpose the power is limited. It is not to enforce sentimental respect. That must be gained by other means, and will flow ungrudgingly from a generous and law-abiding people to that court where law and justice is administered with able, fearless, and impartial fidelity. The power to punish for contempt being given to preserve proper order within the precincts of the court; to silence and remove those disturbing elements which interfere with or interrupt the due and orderly progress of judicial business; to disarm and punish disobedience or resistance of the lawful authority of the court,—we scan the acts charged and admitted in the case at bar, to see wherein they run counter to this authority of the court. It is clear that the publication of the views expressed as to bias in no way interrupts the orderly progress of the said court in its adjudications; at least, no such effect has been suggested, and it does not appear in the nature of the comments. The authority of the court is bowed to with unhesitating submission, even by the parry bold enough to publish the comments in question. Sometimes courts have interposed to prevent publication of matter in reference to the merits of cases pending, and which seems to have a prejudicial influence thereon. But in the case at bar nothing was said in relation to the merits of the case or the litigants tending to prejudice. We do not understand that the suggestion that the judge of a certain court, or the people of a certain place, are biased in their view of a certain case in litigation, would make them biased or more biased. Conceding that would be near conceding the charge of bias already. If the assertion that there is a bias, subjects to punishment for contempt, then how would those who make application for a change of venue on that ground, and those who asserted bias and the facts which support the assertion, escape?

Such is not the law, because that character of assertion does not interfere with the authority of the court. It follows, then, that this character of assertion

stands in that broad field covered by constitutional sanction of the freedom of speech and press. What was the purpose of this constitutional guaranty? Was it to grant freedom to ordinary speech and publication which could excite the resentment of no one? If that was the purpose, then it would be as needful to put into the constitution a provision that people may freely walk the streets quietly and peaceably. The history of the struggle for supremacy of certain principles and ideas shows the purpose of the law, when such principles or ideas are clothed with that force and dignity, and inscribed upon our constitution or statute. And so the history of the struggle for the establishment of the principle of freedom of speech and press shows that it was not ordinary talk and publication, which was to be disenthralled from censorship, suppression, and punishment. It was in a large degree a species of talk and publication which had been found distasteful to governmental powers and agencies. The people of this state did not omit that guaranty of freedom of speech and publication from their constitution, with the ordinary responsibility attached to the misuse thereof. Article 3, § 10. It is ordered that the prisoner be discharged.

BLAKE, C. J., and DE WITT, J., concur.

(11 Mont. 27)

SWEETLAND v. OLSEN.

(Supreme Court of Montana. July 13, 1891.)

EFFECT OF DEED—WATER-RIGHTS.

1. A conveyance of land, "with all appurtenances," conveys the grantor's water-right necessary to its use and enjoyment.

2. In an action to establish a water-right, a written declaration of the amount of water appropriated by the respective parties, which was duly verified, and filed for record, may be received in evidence to prove their intention as to the amount of water each was to have under the appropriation, though the statute did not require such declarations to be filed.

Appeal from district court, Fergus county; CHARLES H. BENTON, Judge.

Action by Mary M. Sweetland against Ingebreth Olsen to establish a water-right. Judgment for plaintiff. Defendant appeals. Affirmed.

E. W. Morrison and Wade & Blackford, for appellant. Masseno Bullard, for respondent.

HARWOOD, J. This action was brought to obtain judgment, declaring plaintiff's prior right, as against defendant, to the use of one-half of the waters of Dawkins creek, for the irrigation of plaintiff's lands, described in her complaint, situate in Fergus county, and for an injunction prohibiting defendant from further interference with her alleged right to said water. Defendant by answer controverted the allegation of plaintiff's complaint, and set forth facts whereby he claimed to be entitled to the first use of all of the waters of said creek. A trial was had before the court and a jury, wherein each party appeared and introduced testimony to establish their respective claims to the use of

said water in controversy. The jury returned a verdict in favor of plaintiff, upon which judgment was rendered granting plaintiff the relief demanded. This appeal was taken from said judgment, as well as from an order overruling defendant's motion for a new trial, assigning errors of law occurring at the trial, and insufficiency of the evidence to justify the verdict of the jury. It is urged by counsel for appellant that the court erred in giving the jury an instruction to the effect that a conveyance of land, "with all appurtenances," operated, without any further express grant of a water-right, to convey to the grantee a water-right appropriated, owned, and used by the grantor, and necessary for the proper irrigation of the land granted. This instruction is in entire harmony with the law as heretofore declared by the supreme court of Montana, in the case of *Tucker v. Jones*, 8 Mont. 225, 19 Pac. Rep. 571, supported by authorities there cited; and we think this holding is also in harmony with the general principles announced in *Donnell v. Humphreys*, 1 Mont. 518. After a careful review of the authorities upon this point, presented in briefs of counsel, we express, without hesitation, our adherence to the doctrine that a water-right acquired and used for a beneficial and necessary purpose, in connection with the realty, is an appurtenance thereto, and is conveyed as such, in a grant of the realty, unless expressly reserved from the operation of the grant.

During the progress of the trial William Wunderlin was introduced as a witness on behalf of plaintiff, and testified that he and J. B. Dawkins, in the year 1881, entered certain claims adjacent to said creek, and also appropriated the waters of said creek, each appropriating one-half thereof; that in February, 1882, the witness and said Dawkins made declarations in writing of their respective claims and appropriations of said water, and caused the same to be recorded. A certified copy of each of said declarations was thereupon shown to the witness, and by him identified as copies of the two declarations referred to. The same were then offered in evidence, to which defendant objected, on the ground that such declarations were incompetent, irrelevant, and immaterial, because it appeared that the declarations were filed prior to the passage of any act requiring a record of water appropriation to be made. Plaintiff's counsel answered said objection, by stating that the instruments were offered to prove the intention of the parties in making their appropriations, and the quantity of said water each intended to claim. Thereupon the court admitted said declarations, to which action of the court defendant excepted, and assigns the same as error. The plaintiff claimed to be the owner of one-half of the waters of said creek by virtue of the alleged appropriation and use thereof by William Wunderlin, and the conveyance thereof afterwards to plaintiff. Defendant claimed the same water,—that is, all of the waters of said creek,—by reason of the alleged appropriation and use thereof by J. B. Dawkins, and the conveyance thereof to defend-

ant. It is therefore important to ascertain what were the original appropriations made by said Dawkins and Wunderlin as to time and quantity of appropriation. It appears from said declarations that the same were sworn to and subscribed, February 10, 1882, by said Dawkins and William Wunderlin, respectively, before the same notary public, and were caused to be recorded. It does not appear which was first recorded. The two declarations are alike in terms, with the exceptions of the name of the declarants, and a reference to the different branches of said creek, the waters of which are declared to be claimed by the subscriber. Each claims 160 inches of the waters of said creek, describing the creek as rising from a certain spring, and (quoting from Dawkins' declaration) "running thence in a north-westerly direction to section 18, township 14 north, of range 15 east, where it branches into two distinct streams, of which I claim the upper one, or the one running in a nearly north-easterly direction, while the other running in a more westerly direction is claimed by William Wunderlin." The declaration signed and sworn to by William Wunderlin likewise describes said spring and creek, and asserts his claim to the waters of the lower branch, "or the one running in a north-westerly direction, while the other one, running in a more northerly direction, is claimed by J. B. Dawkins." It is true there was no statute of Montana at the time requiring the execution and recording of a declaration of the appropriation and claim of water-rights. But if parties voluntarily make, subscribe, and verify declarations of their respective claims, or appropriations of certain quantities of the waters of a certain creek, the question before us is as to the admissibility of such declaration as evidence tending to show the intention of such appropriators, as to quantity and time, of the appropriation, as well as the understanding of the parties respecting each other's rights in and to any of the waters of the stream in question, if such matters are explained by the writing offered. We think that character of evidence is of the best type, always preferable if it can be had. The objection made to the introduction of those declarations, on the ground that no statute required the same to be made, would apply with equal force to all documentary evidence, except in the small number of cases where a statute requires that a writing shall be made upon the subject. It is true, also, that the making and recording of a declaration was not sufficient in itself to establish the right of declarant to the use of the water therein described. Such right could only be acquired by the actual appropriation, diversion, and use of a quantity of the waters of the stream for a beneficial and lawful purpose. The objection of defendant to the introduction of said writings proceeded upon the ground that it was the actual appropriation and use of waters which matured a right thereto, and not the making and recording of a declaration. But the declarations were offered as evidence tending to show what the intention, understanding, and action

of the original appropriators were in relation to the waters in dispute, and for such purpose were admissible.

It is further contended by appellant that the evidence is insufficient to justify the verdict of the jury. Under this assignment, it is urged that plaintiff in her complaint alleges that she became possessed of the right to the first use of one-half of the waters of said creek by conveyance of certain land, together with said water-right, to her by William Wunderlin; and that it appears from the evidence that a portion of said waters claimed by plaintiff was originally used by one Joseph Wunderlin, for the irrigation of his land adjoining the land of the said William, his brother; and therefore said William owned only one-half of the waters of said creek used by the Wunderlin brothers,—that is to say, one-fourth of the waters of said stream; hence it is insisted that in that particular the verdict is not justified by the evidence. We do not find, from an inspection of the record, that appellant is sustained in this position. Plaintiff sets forth in her complaint, in effect, that she is the owner of two quarter sections of land, described, one of which she became possessed of by grant from William Wunderlin, and that she acquired the other by grant from Joseph T. Wunderlin and wife. Plaintiff further alleges that in the first instance the one-half of the waters of said stream, which plaintiff claims, was appropriated and diverted by said William Wunderlin onto the quarter section then owned by him; and that afterwards the said water-right was conveyed to this plaintiff by said William Wunderlin. Turning to the evidence before us in the record, we find, in addition to the documentary evidence introduced by plaintiff, that both William and Joseph Wunderlin were present and testified. William testified, in effect, that in August, 1881, the waters of said creek were appropriated and claimed by J. B. Dawkins and himself, both being settlers upon lands adjoining said creek; that each of said original appropriators claimed and diverted one-half of the waters of said creek, by each taking the waters of one branch thereof, whereby the said waters were and continued to be divided into two equal streams: that "afterwards, [quoting from the testimony of William,] in February, when Dr. Rotwitt came along, we had him make out the papers, which were put on record;" referring to the declarations which were considered above. William testified that he personally did the work of excavating the ditches by which said portions of the waters of the creek were diverted, both for himself and Dawkins, in the first instance; that in 1883 Dawkins proposed to William that they use the waters of said creek in common, and take the water out at any place either desired, up the creek; and that either might use all of the water when the other was not in need of his proportion thereof; to which proposition William consented. This witness further testified that he and his brother Joseph "were partners, and what one had the other had;" that he caused the waters of said creek to run through his ditches onto his

land, and also onto adjoining land belonging to his brother Joseph; that both said brothers were interested in the second ditch made by them. Joseph Wunderlin testified that in 1883 he used one-half of the waters of said creek on his brother's land; that he used said water in 1884, in the upper ditch, and it ran down through his garden, and spread out over his brother's land, and over his own land. He also testified that he and his brother William were partners. Upon this evidence it is insisted by appellant that, if any claim to any portion of the waters of said creek was proved in favor of said William Wunderlin, it was a claim or right, not to one-half of the waters of said stream, but to a common partnership interest with his brother Joseph in one-half of the said waters. As before observed, the plaintiff's complaint alleges her ownership of two quarter sections of land acquired by grant from said Wunderlin brothers. It was these two quarter sections which are referred to in the evidence as the land of William and Joseph Wunderlin. It appears from the record that said brothers held their lands severally, but farmed jointly, and otherwise had their interests in common. It does not appear in the record that William at any time conveyed to his brother Joseph any interest in the one-half of the water of said stream, which it is alleged, and the evidence tends to prove, was originally appropriated by William; but it is shown that William and Joseph, during some time, used said water in common. Now, it is neither possible, nor is it necessary, in this action, to ascertain what, if any, interest Joseph may have acquired in the waters of said creek appropriated by William, by reason of the partnership relation of said brothers in the use of said water, for the reason that plaintiff succeeded by grant to the interests of both said brothers by purchase of their lands and water-right which attached as an appurtenance thereto; all of which is set forth in plaintiff's complaint, and covered by the evidence introduced. We have carefully considered all specifications presented wherein it is claimed by appellant's counsel that the evidence is insufficient to justify the verdict, and find not only that there is ample testimony upon these points, but that the testimony is of a very satisfactory character, both documentary and parol, so far as can be judged from this record. It is true there is a marked disagreement of witnesses on behalf of the respective parties upon certain points, but in this conflict the jury found where the preponderance was, which is the especial province of a jury in such cases; and it is a well-established rule that this court will not disturb a verdict on the alleged ground of insufficiency of evidence, where such verdict is supported by substantial testimony, although there is conflicting testimony as to facts which the jury must find in order to arrive at a verdict. We find no error in the record. It is therefore ordered that the judgment and order overruling appellant's motion for new trial be affirmed, with costs. Judgment affirmed.

BLAKE, C. J., and DE WITT, J., concur.

(11 Mont. 1)

In re DAVIS' ESTATE.

(Supreme Court of Montana. July 18, 1891.)

PROBATE APPEALS—CHANGE OF VENUE—PREJUDICE OF JUDGE—PREJUDICE OF PEOPLE—SUFFICIENCY OF AFFIDAVITS.

1. Since the adoption of the constitution which abolishes probate courts, and transfers jurisdiction in probate matters to the district courts, Code Civil Proc. Mont. § 421, relating to appeals from district courts, governs in matters of probate appeals, instead of Prob. Prac. Act Mont. § 824, which regulated appeals from the probate court. Following *Estate of McFarland*, 26 Pac. Rep. 185.

2. Although Code Civil Proc. Mont. § 444, which provides for appeals from final judgments of the district court, "or any part thereof," does not apply to an order denying a change of venue, yet when two appeals are taken from such an order, and each is an appeal from the whole order as well as a part thereof, and the transcript embodies every act of the court and the testimony which was adduced, such appeals will be entertained and treated as one appeal.

3. Code Civil Proc. Mont. § 62, relating to change of venue, "when there is reason to believe that an impartial trial cannot be had," does not include the ground of the bias or prejudice of the court.

4. Prob. Prac. Act Mont. § 110, providing for the transfer of proceedings in matters of probate to another court when the judge is "disqualified to act from any cause," relates only to the statutory disqualifications existing at the passage of that act, and does not include the ground of the judge's prejudice.

5. On a motion for a change of venue in a probate proceeding, on the ground that an impartial trial could not be had, the affidavits in support of the motion were by two non-residents of the county, and referred to newspaper clippings, and to statements made by several persons that the people of the county were prejudiced in the matter. Only one of these persons was named, but it was stated that they all refused to make affidavit to their statements. No excuse was given for not compelling them to appear in court and substantiate their statements. Eleven residents of the county made affidavit that there was no prejudice, and it appeared that the newspaper clippings were comments upon actions of the court in the appointment of an administrator, and were published without any authority from the party whose cause they favored. *Held*, that it was not an abuse of discretion to refuse a change of venue.

Appeal from district court, Silver Bow county; JOHN J. McHATTON, Judge.

A proceeding by Henry A. Root and Maria Cummings to contest the will of Andrew J. Davis. Order denying a change of venue. Contestants appeal. Affirmed.

Toole & Wallace, McConnell & Clayberg, Robt. G. Ingersoll, and Nathaniel Myers, for appellants. W. W. Dixon, John F. Forbis, and M. Kirkpatrick, for respondent.

BLAKE, C. J. This is an appeal from an order overruling the motion of Henry A. Root and Maria Cummings for a change of venue upon the following grounds: "First. There is reason to believe that an impartial trial cannot be had in said county of Silver Bow. Second. The citizens, inhabitants, and tax-payers of said county are interested in said proceedings, are biased and prejudiced against contestants, and in favor of proponent; and because the ends of justice will be promoted by said change." The order was made May 2, 1891. The body of one notice of

appeal recites "that the contestants * * * appeal from the order of the court overruling their motion for a change of venue, on account of the prejudice of the judge of said court, * * * and from the whole thereof, to the supreme court of the state of Montana." In another notice, this language is used: "The contestants * * * appeal from the order of the court overruling their motion for a change of venue, on account of the prejudice of the inhabitants of the county, and for the reason that an impartial trial cannot be had therein, * * * and from the whole thereof, to the supreme court of the state of Montana."

The issues which are to be tried in this proceeding should be considered before we discuss the questions which have been raised. Andrew J. Davis died March 11, 1890, in the county of Silver Bow, in this state. John A. Davis filed, July 24, 1890, in the court below, his petition, and alleged that the deceased had left a will, which first came to his knowledge and possession upon the 15th day of July, 1890. He therein stated the value of the estate to be about four and one-half millions of dollars, and the heirs to be 14 persons, who, with the exception of the petitioner, were non-residents. The entire estate, subject to a life maintenance of three parties, was devised by this instrument to said John A. Davis. The will, according to the record, was executed in the state of Iowa in the month of July, 1866. Said Root and Mrs. Cummings, who are two heirs of the deceased, filed in writing their objections to the probate of this instrument, and averred, in substance, that the same was a forgery, and, if ever executed, was revoked by the deceased during his life-time by the making of other wills. John A. Davis in his replication denies that the deceased ever executed another will, and alleges that, if he had, the instrument which was made in the year 1866 was republished. The contestants demanded a trial by a jury of these issues.

The affidavits, pleadings, and documentary evidence, which were submitted upon the hearing of the motion, relate to the grounds which are specified in the notices of appeal. It is claimed by John A. Davis, who is the respondent, that this court has no jurisdiction to review the action of the court below. The contention is that this order is not enumerated in section 324 of the probate practice act, concerning appeals from the probate court, and that there is no other legislation upon this matter. These proceedings recently received the careful investigation of this court in *Estate of McFarland*, 10 Mont. —, 26 Pac. Rep. 185, and were adjudged invalid; and it was further held that appeals in the district court in "matters of probate" must be regulated by section 421 of the Code of Civil Procedure. Under its terms, an appeal may be taken "from an order granting or refusing to grant a change of the place of trial." We are thereby expressly empowered to inquire into the merits of this appeal.

But the respondent insists that each of the notices is of an appeal from a part of the order before us, and that such prac

tice is without legal sanction. The transcript contains one motion for a change of the venue, which sets forth two grounds, and one order overruling the same, and two distinct notices of appeal and undertakings on appeal. We confess that we do not understand the reasons for bringing into this tribunal more than one appeal in this matter. The judge of the court below, however, seems to have treated the subject in like manner, and employs in the order these words: "The motions of contestants for a change of venue herein, having come on regularly to be heard, * * * it is now ordered and adjudged that said motions for a change of venue be, and the same is, denied and overruled." The counsel for the appellants may have been controlled by this peculiar phraseology. The supreme court of California allows an appeal to be taken from a portion of an order. *Dimick v. Deringer*, 32 Cal. 488; *Estate of McCauley*, 50 Cal. 544. The cases of *Barkley v. Logan*, 2 Mont. 296, and *Plaisted v. Nowlan*, Id. 359, on which the respondent relies, are easily distinguished. When they were decided, the statute relating to appeals was as follows: "An appeal may be taken to the supreme court from the district courts in the following cases: *First*. From a final judgment entered in an action or special proceeding commenced in those courts, or brought into those courts from other courts." Civil Prac. Act, 7th Sess. § 380. This section was subsequently amended, and now reads: "An appeal may be taken to the supreme court from the district courts in the following cases: *First*. From a final judgment, or any part thereof, entered in an action or special proceeding commenced in those courts, or brought into those courts from other courts." Code Civil Proc. § 444. Aside from this radical difference between the statutes, supra, it is obvious that a judgment, which is the final settlement of the rights of the parties to an action, cannot be placed upon the same level with an order respecting the place of a trial. In the case at bar, each appeal is from the whole order, as well as a specified part thereof, and the transcript embodies, without any omission, every act of the court, and the testimony which was adduced. If we regard as irregular the taking of two appeals, when one is sufficient, the fact does not, in this instance, deprive the contestants of any substantial right.

We will now consider the first ground on which the motion for a change of the place of trial is founded: "There is reason to believe that an impartial trial cannot be had in said county of Silver Bow." It is contended that this subdivision includes the ground that the judge of the court below is biased and prejudiced against the appellants, and our attention is directed to the following statutes: "If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, or if, for any cause, the court orders the place of trial to be changed, it must be transferred for trial to a court the parties may agree upon by stipulation in writing, or made in open court, and entered in the minutes;

or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist, as follows: * * * If in the probate court, to some other probate court." Id. § 63. "The court may, on good cause shown, change the place of trial in the following cases: * * * When there is reason to believe that an impartial trial cannot be had therein." Id. § 62. "When a petition is filed in the probate court, praying for admission to probate of a will, or for granting letters testamentary or of administration, or other proceedings are pending in the probate court for the settlement of an estate, and the presiding judge of the court is disqualified to act from any cause, upon his own or the motion of any person interested in the estate he must make an order transferring the proceeding to the probate court of an adjoining county; * * * and thereafter the probate court to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction of the estate." Prob. Prac. Act, § 110. Under the constitution, the judge of the district court possesses the jurisdiction which was formerly lodged in the probate judge, and it is argued that a broad and liberal construction must be given to the clause, "disqualified to act from any cause." We think there are other statutes which should be examined in this connection. "A judge shall not act as such in any of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity within the third degree; or when he has been attorney or counsel for either party in the action or proceeding." Code Civil Proc. § 547. This number of disqualifications has been enlarged in the following section: "No probate court shall admit to probate any will, or grant letters testamentary or of administration, in any case where the judge thereof is interested as next of kin to the decedent, or as a legatee or devisee under the will, or when he is named as executor or trustee in the will, or as a witness thereto, or is in any other manner interested or disqualified from acting." Prob. Prac. Act, § 109. The bias or prejudice of the judge is not referred to as a disqualification, or as a cause for the change of the place of trial, in any statute affecting the district or probate courts in civil or probate proceedings. But, in the title regulating the procedure in the courts of justices of the peace, we find the mandatory provision that, "if either party make affidavit that he has reason to believe and does believe that he cannot have a fair and impartial trial before such justice, the action shall be transferred to some other justice of the same county; and, in case of a jury being demanded, and affidavit of either party is made that he cannot have a fair and impartial trial on account of the bias or prejudice of the citizens of the precinct or township against him, the action shall be transferred to some other justice of the peace in the county." Code Civil Proc. §

780; *Flagley v. Hubbard*, 22 Cal. 34. In the criminal practice act, it is provided as follows: "Any defendant, in any indictment or information, may be awarded a change of venue upon a petition setting forth that he has reason to believe that he will not receive a fair trial in the court in which such indictment or information may be pending, on account that the judge is interested or prejudiced, or is of kin to, or shall have been counsel for, either party, * * * or that the inhabitants of the county are prejudiced against the applicant, so that he cannot expect a fair trial." Section 226. The intention of the legislature is uttered plainly and directly with relation to the bias or prejudice of justices of the peace, and the judges of the courts where an indictment or information is pending. What legal inference can be drawn from the comparison of the statutes, *supra*? One potent fact in the history of this legislation during the territorial period is very useful and important in expounding the will of the law-makers. We allude to the question which arose in *Godbe v. McCormick*, 1 Mont. 105. When the fourth legislative assembly convened, in November, 1867, section 21 of the civil practice act was in effect the same as section 62, *supra*, Code Civil Proc. By an act approved December 6, 1867, this section was amended in some particulars, as follows: "*Second*. When there is reason to believe that an impartial trial cannot be had in said cause by reason of the bias or the prejudice of the judge before whom the same is pending, or by reason of the bias or prejudice of the citizens of the county where said action is pending: * * * provided, however, that when an affidavit is made by any party to said action or proceeding, or by his or their attorney, that the party making the application, and on whose behalf the affidavit is made, cannot have a fair and impartial trial in said action by reason of the bias or prejudice of the judge before whom said action is then pending, such judge shall, and it is made his duty to immediately, order said action to be transferred to some other county in said territory, outside of his judicial district. * * * This act shall apply to all actions now pending, or that may hereafter be brought, in the territory of Montana." St. 4th Sess. 68. *McCormick* filed December 7, 1867, his motion and affidavit for a change of the venue of the action by reason of the bias and prejudice of the judge. The court sustained a motion to strike from the files these papers, and tried the cause. It was held in *Godbe v. McCormick*, *supra*, that this act was upon a rightful subject of legislation, and did not divest the district courts of their common-law jurisdiction. The judgment was reversed upon the sole ground that the court was required to obey the statute and change the venue. The same legislative body passed the civil practice act, which was approved December 23, 1867, and repealed the amendment, *supra*, and section 21 was re-enacted without any modification. The law upon this subject has remained in force since that date. The following statute has existed from its approval, January 11, 1865:

"That the common law of England, so far as the same is applicable and of a general nature, and not in conflict with special enactments of this territory, shall be the law and rule of decision, and shall be considered as of full force, until repealed by legislative authority." St. 1st Sess. 356. In *Turner v. Com.*, 2 Metc. (Ky.) 626, the court said: "At common law there were but two objections that went to the disqualification of a judge to try a cause, to-wit: Interest in his own behalf in the result, or being of kin to others interested therein. 2 Bac. Abr. tit. 'Courts.'" In *Peyton's Appeal*, 12 Kan. 407, the court said: "It will be admitted that at common law prejudice did not disqualify a judge." In the opinion in *Conn v. Chadwick*, 17 Fla. 439, by Mr. Justice Westcott, it is said: "In the time of Bracton and Fleta, a judge might be refused for good cause, but at the common law, as administered in England and the United States for centuries, judges and justices could not be challenged. There were disqualifying causes, such as interest and being of kin to the party."

We will comment upon the decisions of states in which similar statutes are enforced. A leading case upon this branch of our inquiry is *McCauley v. Weller*, 12 Cal. 500, and Chief Justice TERRY in the opinion says: "The application for a change of venue was made upon affidavits setting up that defendants could not have a fair and impartial trial in the court below, on account of the bias of the presiding judge." The statute, which is in substance section 547, *supra*, of the Code of Civil Procedure, is cited; and the court proceeds: "These are the only causes which work a disqualification of a judicial officer. The exhibition by a judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper, and reprehensible, as calculated to throw suspicion upon the judgments of the court and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground that the judge is disqualified from sitting." The additional reasons which are presented in support of this rule appear to be unsound, and we concur with Mr. Hayne in the following observation: "The true reason of the rule in *McCauley v. Weller*, that bias does not disqualify a judge, is that such ground is not specified in the statute as a ground of disqualification." Hayne, *New Trials*, § 52. This authority has been followed in many cases. *People v. Williams*, 24 Cal. 31; *People v. Shuler*, 28 Cal. 490. The case of *McCauley v. Weller*, *supra*, was heard at the January term, 1859, and Bulwer Con. Min. Co. v. Standard Con. Min. Co., 83 Cal. 589, 23 Pac. Rep. 1102, was determined at the April term, 1890, and it is said: "As to the appeal from the order denying defendant's motion to change the place of trial, it is to be observed that the only ground of the motion alleged or attempted to be proved was that the judge of said court is disqualified from acting in said case on account of his bias and prejudice against

the defendant and A. Pettibone, its president and resident manager; which is not one of the grounds of disqualification enumerated in section 170 of the Code of Civil Procedure, and therefore not a ground of disqualification." The commissioners of the state of California with reference to this section say in their report: "The three causes stated in the text are the only ones which work a disqualification of a judicial officer." In *Allen v. Reilly*, 15 Nev. 452, the court said: "Defendant then moved for a change of venue, on the ground that he could not have a fair and impartial trial before the judge presiding, because he and defendant had been, and then were, bitter personal enemies. The motion was supported by the defendant's affidavit setting out the facts just stated, but it was denied by the court. The judge was not disqualified under the statute. Comp. Laws, 950." The statutes of California and Nevada, which are relied on in the opinions, supra, are identical in their provisions with section 547, supra, of our Code of Civil Procedure. Let us weigh the authorities with which the appellants sustain their position. In *Peyton's Appeal*, supra, a motion was made that the venue be changed on the ground of the bias or prejudice of the judge. It was held that the proceeding before the court was criminal in its nature, and the defendant had the right to have the same removed under this provision of the Criminal Code,—"Where the judge is in any wise interested or prejudiced. * * * The fourth section of the act relating to the district courts provides for the selection of a judge *pro tem* in certain cases.—"When the judge is interested, or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or otherwise disqualified to sit." In ascertaining the meaning of the expression, "or is otherwise disqualified to sit," the case of *Turner v. Com.*, supra, is approved, and it was decided that the change of venue should have been granted, or the trial should have been had before a judge *pro tem*. The appellant in *Turner v. Com.*, supra, filed affidavits, and asserted that the presiding judge was his personal enemy, and that he believed that he could not and would not do him justice upon the trial. He asked that some impartial lawyer be substituted in the place of this judicial officer, and the application was refused. It is stated in the opinion of the court by Mr. Justice SMITH that the statute of 1815 "provided that, in all suits cognizable in any of the circuit courts of the state where either party should conceive that he or she would not receive a fair trial in the court in which such suit might be pending, owing to the interest or prejudice of any judge or judges of said court, * * * such party might, upon the terms and in the manner therein prescribed, apply for and obtain a change of venue; thus making the prejudice of the judge a ground for a change of venue." In order that another remedy might be obtained by the election of a special judge under these circumstances, the framers of the constitution of the state of Kentucky inserted this

section: "The general assembly shall provide, by law, for holding circuit courts, when, from any cause, the judge shall fail to attend, or, if in attendance, cannot properly preside." In pursuance of this power, the legislature enacted a statute which reads as follows: "When, from any cause, the judge of the circuit fails to attend, or, if in attendance, cannot properly preside in a cause or causes pending in such court, the attorneys of the court who are present shall elect one of its members then in attendance to hold the court for the occasion, who shall accordingly preside." The court construed the phrases, "any cause," and "properly preside," and concluded that the framers of the constitution, by the section, supra, "must be presumed to have referred to the laws then in force, prescribing what was a legal cause to prevent a circuit judge from trying a case;" and that said act of 1815 specified, among other such causes, the prejudice of a judge. It was therefore adjudged improper for the circuit judge to preside in the case, after the objections of the appellant were presented, and try and determine the issues. It is pertinent to notice at this time a sentence from the *American and English Encyclopedia of Law*: "Bias or prejudice on the part of the judge is generally held to be a sufficient ground for a change of venue." Volume 3, p. 93.

We have examined all the cases which are referred to in the accompanying note, and comprise the appellate courts of the states of Illinois, Indiana, Iowa, Wisconsin, Minnesota, and Kansas. The foundation of every decision is a statute which defines in express terms the bias or prejudice of the judge to be a disqualification. Some of the acts which are quoted are as mandatory as the foregoing law in *Godbe v. McCormick*, supra. The solitary authority for the principle which is upheld by the appellants is *Williams v. Robinson*, 6 Cush. 333. The statute establishing the police court in Taunton provided that the special justice "shall have power, in case of the absence, sickness, interest, or any other disability of the standing justice," to hear and determine the case, "the said cause being assigned on the record." The following entry appears in this book: "This action is tried by the special justice, the standing justice having, before the action was commenced, heard the facts in the case, as stated by the plaintiff, and being, therefore, somewhat interested in the plaintiff's favor." The eminent jurist, Mr. Justice METCALF, in the opinion, said: "Conscious bias or prejudice in favor of one of the parties, or against the other, caused by hearing an *ex parte* statement of the facts of the case, is an inability or disability to try the case, within the just meaning of the statutes. * * * It was not necessary that the statutes should enumerate all the disqualifications of the standing justice. The rules of the common law and the principles of natural justice are to be applied in the construction of these statutes." It was held that the special justice lawfully tried the action. We are not aware of any decision which entertains these views. We have declared

that the bias and prejudice of a judge did not constitute disqualifications, according to the common law. In *Com. v. McCloskey*, 2 Rawle, 369, Mr. Justice ROGERS for the court says: "If the legislature should pass a law in plain, unequivocal, and explicit terms, within the general scope of their constitutional power, I know of no authority in this government to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to the principles of natural justice; for this would be vesting in the court a latitudinarian authority which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well-being of society, or, at least, not in harmony with the structure of our ideas of natural government. Justice is regulated by no certain or fixed standard, so that the ablest and purest minds might sometimes differ with respect to it." We also cite from *Potter's Dwar. St.* 61: "The legislature possesses, certainly, an equal, if not a superior, right, to the courts, to determine, by their opinion, what laws are consistent with the abstract principles of natural justice."

From this review, the deduction is clear that there is no statute which authorizes the change of the place of trial of this proceeding by reason of the bias and prejudice of the judge of the court below. This is the rock on which our judgment stands. We have seen that the legislative assembly has spoken in emphatic tones of the rights of suitors in justices' courts, and defendants in certain criminal proceedings, to procure a change of the venue on account of the bias or prejudice of the judge; but it has been silent for decades upon this cause with regard to parties in the district and probate courts. The court below did not have the power to grant the motion for this ground, and it is needless to look at the evidence thereon. We reiterate our criticism concerning the reasons which have been given by some courts which have reached the same results. We disapprove every suggestion, and claim that a judge who is swayed by personal bias or prejudice is powerless to injure his foes, or render aid to his friends, because his errors can be corrected upon appeal to a superior tribunal. There are presumptions in favor of his rulings which cannot be ignored, and he can make orders which cannot be disturbed unless there has been a gross abuse of his discretion. It is admitted that the place of the trial of this proceeding can be changed under section 62, *supra*, Code Civil Proc., if the people of the county of Silver Bow are biased and prejudiced against the appellants, so that there is reason to believe that an impartial trial cannot be had therein.

There are no legal questions for our determination. An order refusing the application for a change of venue will not be set aside, in the absence of an abuse of judicial discretion. *Territory v. Corbett*, 3 Mont. 50; *Kennon v. Gilmer*, 5 Mont. 257, 5 Pac. Rep. 847; *Territory v. Manton*, 8 Mont. 95, 19 Pac. Rep. 387. In these cases, the affidavits were adjudged insufficient to support the grounds which had been

alleged in the motion. The court points out accurately in *Kennon v. Gilmer*, *supra*, the character of the proof which is required, and the form of the affidavit, which purports to narrate the language of the witnesses. These matters are essential, and should be observed, to enable the court to decide whether there is bias or prejudice in the community. This application is accompanied by the affidavits of George O. Freeman and said Root. They also embrace nine clippings from two newspapers, which were published in Butte, the county-seat of the county of Silver Bow. Freeman deposes that he is a resident of Helena, in this state; that he went to Butte, March 21, 1891, for the purpose of interviewing the residents and property owners of the county concerning the sentiment respecting the contest of said will; that he remained there until March 30, 1891; that he interviewed in the neighborhood of 50 prominent men of Butte, and asked them what they thought the chances were for a fair and impartial trial; that, with two exceptions, such of these persons advised him that there was a strong sentiment in the county, and particularly in the town of Butte, in favor of John A. Davis and Andrew J. Davis, Jr., his son, and against said Root and Mrs. Cummings; that these persons said that John A. Davis was an old resident of Butte, and the favored brother of the deceased; that the deceased made most of his money in Butte and said county, and that the people of Butte would get the benefit of it in preference to some outside place; that Andrew J. Davis, Jr., was entitled to have the First National Bank of Butte; that, if John A. Davis was successful in said contest, he would respect the wishes of the people of Butte, and keep the money there, and that Butte would get the benefit of it; that, if said Root and Mrs. Cummings were successful in said contest, the money of the estate, and the proceeds of the property, would be turned from Butte, and that Butte would be the loser; that affiant, at each interview, had severally requested these persons to make an affidavit setting forth, in substance, the above facts and opinions, "but that in each and every instance, with but two exceptions, said persons refused so to do, giving as their reasons for such refusal that they did not desire to get mixed up in said matter unless they were compelled to; that they would not do so willingly;" that affiant interviewed one Julian, a reporter upon the Butte Mining Journal, and that Julian made the same statements as the other persons; that Julian refused to make an affidavit, but said that "he did not wish to willingly get himself mixed up in the case; but that if called into court, and made to do so by the judge, he would tell the truth, just as he had told affiant;" that affiant visited during this time the following places in Butte: "Lynch's Saloon, the Silver Bow Club, the Mint Saloon, real-estate office of W. McC. White, Gamer's boot and shoe store, D. M. Newbro Drug Company's store, and the several hotels in the city of Butte;" and that he met "a great many people" who in conversations uttered the above facts and

opinions; that the questions about the Davis estate and said contest were matters of general comment; and that "only two persons expressed themselves otherwise than as against the said Root and Cummings, and in favor of John A. Davis and Andrew J. Davis, Jr." Said Root deposes that he is a resident of said Helena, and, in addition to some of the facts in the affidavit of said Freeman, says that said bank has a large portion of the money and assets of said estate; that said bank, with the exception of a small interest, belongs to said estate; "and that said bank does a general large and extensive business in accommodating the merchants and business men of said city and county;" and that the newspapers of Butte have been trying to mould the minds of the community generally in favor of John A. Davis, and against said contestants and non-residents. The respondent files the affidavits of John A. Davis, W. McC. White, Luther C. White, Fred Wey, James Lynch, Robert Grix, Victor E. Goldsmith, James W. Forbis, George W. Irwin, Roderick D. Leggat, and Henry G. Valiton. The said clippings were published in the *Inter-Mountain* and *Butte Mining Journal*, and are confined chiefly to comments upon the action of the court below in appointing John A. Davis to be the general administrator of the estate. These articles, however, viewed as a whole, express in positive and forcible terms the same facts and opinions which are stated in the affidavits of Root and Freeman. One of them, which was printed April 30, 1890, assumes to give the views of 15 citizens of Butte, who are named by the reporter of the *Mining Journal*, of the appointment of John A. Davis. The affidavits of the respondent are made by residents of Butte, and deny that any bias or prejudice relative to the contest of said will exists in Butte or the county of Silver Bow. John A. Davis deposes that the articles were published in the newspapers without his knowledge or wishes, and that said bank "transacts only a portion of the banking business of said city, and that only a portion of the business men of the city of Butte, and of the county of Silver Bow, are customers of, or have any business with, said bank, there being four or five other banks doing business in said city of Butte." The parties who were engaged in business at the aforesaid places have contradicted in their affidavits, respectively, the above statements of Freeman. Forbis deposes that he had an interview with said Julian, and then narrates a conversation which differs materially from the report of Freeman. It is significant that said Julian is the only person who is designated in the affidavit of Freeman to corroborate his testimony, and that no excuse is offered for the failure to attempt to secure the presence in court of a number of the citizens of Butte, and especially of the two men who seem to have been friendly to the contestants. In *Territory v. Manton*, *supra*, Chief Justice McConnell in the opinion referred to the practice in deciding upon the proof of the grounds in an application for a change of venue, and said: "The court should deter-

mine the question from the facts shown, upon a procedure for that special purpose, either by testimony taken by affidavits, or witnesses called and examined in open court, or before the judge at chambers, as the case may be." It would have been the proper mode in this proceeding, when about 50 persons were found, who refused to furnish their affidavits, and one party was apparently testifying upon both sides, to have invoked the process of the court, and compelled all of them to attend the hearing and give their evidence. There might have been added to this list of witnesses, the names of the editors and reporters of the said newspapers, who could be questioned as to their source of information, and the citizens who were interviewed April 30, 1890, according to the *Butte Mining Journal*. But no effort of this nature has been made. John A. Davis is shown to have had no relation to the articles in the said newspapers, and this application rests upon the affidavits of Root and Freeman, who are non-residents of the county of Silver Bow. Upon the entire evidence, and under the practice which has prevailed in the courts of the territory and state, we must hold that there has been no abuse of judicial discretion in refusing to grant the motion upon the second ground. It is therefore adjudged that the order of the court below be affirmed.

HARWOOD and DE WITT, JJ., concur.

SWEENEY v. GREAT FALLS & CANADA RY. CO.

(*Supreme Court of Montana*. July 18, 1891.)

APPLICATION FOR NEW TRIAL—HEARING.

The district court has no power to refuse to hear a motion for new trial, on the ground that the statement was not filed within the time contemplated by a stipulation between the attorneys, although such objection may be a proper ground for refusing to grant the motion.

Appeal from district court, Cascade county; C. H. BENTON, Judge.

Action by George Sweeney against the Great Falls & Canada Railway Company. Judgment for plaintiff. The court refused to hear defendant's motion for a new trial. Defendant appeals. Reversed.

On a trial of this case January 27, 1891, a verdict was rendered in favor of plaintiff, on which a judgment on the same day was entered for plaintiff against defendant for \$7,500. On February 2, 1891, the defendant filed and served its notice of intention to move for a new trial. On the 3d of February, 1891, the following stipulation was entered into in open court between the counsel for the respective parties: "Stipulated by attorneys Taylor & Pigott that defendant have until April 1st to make and serve statement and bring on motion for a new trial." Taylor was attorney for defendant and Pigott for plaintiff. On March 31st defendant filed with the clerk, and served on the plaintiff's attorneys, his statement on motion for a new trial. April 1st in open court, defendant presented the statement to the judge, and asked that it be settled, and the motion for a new trial be heard. To

this the plaintiff objected, on the ground that service was not had upon him in time to bring said cause to a hearing on April 1st, as contemplated by the stipulation. The application to settle the statement was denied, and the court also refused to hear the motion for the new trial for the reason set forth in the plaintiff's objection. Defendant offered and moved the court to extend the time to enable plaintiff to prepare and serve amendments to the statement, and to extend the time for settling the statement and hearing the motion. The court held that the defendant had not complied with the stipulation, in that he had served and filed the statement on March 31st, and called up the motion on April 1st, and that on account thereof, and of the said stipulation, the court had no jurisdiction or authority to extend the time or pass upon the motion. Afterwards, on April 11th, 10 days having expired since the statement was served on plaintiff, and no amendments being served, the judge settled the statement, and certified it. On April 20th, five days' notice having been given to plaintiff, the defendant brought his motion for a new trial before the court, and moved that the same be heard; upon which the court made the following order: "That the motion for a new trial be denied a hearing on the ground that February 3, 1891, it was stipulated that such motion should be heard April 1st." Defendant appeals from the order of the court of April 1st, refusing to hear his motion for a new trial, and also from the order of April 20th, refusing to hear such motion.

George W. Taylor, for appellant. *Baum & Bishop*, for respondent.

DE WITT, J., (after stating the facts as above.) It appears that the respondent made objections to the time of serving the statement on motion for a new trial, and to the hearing of the motion. The court wholly refused to hear the motion. This was not the proper practice. In *Quivey v. Gambert*, 32 Cal. 309, the court says: "A party moving for a new trial is entitled to a ruling upon his motion upon the basis upon which he presents it, in order that he may have and enjoy unimpaired his right of appeal to this court. If his notice or statement has not been served or filed within time, that is a good reason why his motion should be denied when finally brought to hearing, but, under the method of procedure prescribed by the Code, it not intended that the record upon which the motion is made may be first stricken out, and the motion then denied. Such a course is, in effect, a denial of any hearing upon the motion, and of an appeal to this court where an appeal is given. * * * If the notice and statement, or either of them, is not filed within time, he [respondent] may safely rely upon such facts as fatal to the motion, when brought to a hearing. If, however, as is generally the case, there is some doubt as to whether they are within time, and he does not desire to take any risk, he may propose amendments without waiving his right to object that they are not within time, by a simple preface that he does so

without prejudice to his right to object at the hearing to the notice or statement upon those grounds. By so doing he waives nothing. On the contrary, he preserves all his rights in the premises. The court will then proceed to settle the statement, and at the hearing pass upon the objections so reserved. If the motion is denied, an appeal can be taken to this court, where the whole matter can be reviewed upon the record upon which the court below heard the motion. Such is the plain and obvious course prescribed by the statute, and no departure from it can be indulged, without, as we have seen, mischievous if not absurd results." In *Lucas v. Marysville*, 44 Cal. 212, we find: "In the case of *Quivey v. Gambert*, it was held that it was not good practice to strike from the files a proposed statement on motion for a new trial, upon the ground that the right to move had been waived or lost, but that objections to the right of the moving party to be heard upon the motion should be made at the hearing; and the rule in this respect, indicated in that case, has since then been followed in this court." Mr. Hayne, in commenting upon these cases, adds: "The objection that the proposed statement was not in time must be reserved before proposing amendments; if not, it is waived, and cannot afterwards be made, either on motion to strike out the statement or in any other manner. When reserved, the objection must (if not sustained at the settlement) be incorporated in the settled statement, together with the matter in its support. If it be not so incorporated, the presumption is that the proposed statement was in time, and that all the proceedings in its preparation were regular. This presumption is conclusive; for the statement, when certified and filed like other records, imports absolute verity, and cannot be contradicted or added to by affidavits upon a motion to dismiss, or in any other manner. The objection must therefore be apparent upon the face of the statement itself; and, if so apparent, it is manifest that it may be urged as a reason why the motion for a new trial should be denied, both in the lower court on the hearing of the motion, and in the supreme court on appeal from the order granting or refusing a new trial. This being the case, the inauguration of a separate line of proceedings by a separate motion to strike out the statement, or a motion to dismiss the motion for a new trial, is not only utterly useless, but is open to the very grave objection of involving two appeals before the motion for a new trial can get to the supreme court." If it be improper to strike out a statement, or to dismiss the motion for a new trial, and if the moving party is entitled to a hearing of his motion, the district court in the case at bar certainly erred in refusing to hear appellant's motion. The court should have heard any objections that the plaintiff might offer to the proposed statement, and incorporated the same in the statement. A record of the whole matter would have then been preserved for the review of this court on appeal. It appears from this record that the judge below settled the statement.

It is therefore now ordered that the order of the district court refusing to hear the motion for a new trial be reversed, and the case is remanded to that court, with directions to hear and determine that motion. There is also before us an appeal from the judgment. We will not pass upon that appeal until the district court has opportunity to decide the motion for a new trial in accordance with the views above expressed.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 549)

STATE v. THOMPSON.

(Supreme Court of Montana. July 18, 1891.)

RAPE—INDICTMENT—ALLEGATION OF TIME—*IDEM SONANS*—FORMER CONVICTION—JEOPARDY—NEW TRIAL.

1. An indictment for rape, charging that the offense was committed "on or about" a certain day, sufficiently alleges the time, under Crim. Pr. Act, § 166, providing that "the precise time of the commission of an offense need not be stated in the indictment, but it is sufficient if it is shown to have been before the finding of the indictment, and within the statute of limitations, except where time is an indispensable ingredient of the offense."

2. Where the name of the prosecutrix in a rape case was so differently pronounced by the witnesses that the judge could not determine whether the name was *idem sonans* with that alleged in the indictment, the question was properly submitted to the jury.

3. A defendant once convicted, who obtains a new trial on his own motion, cannot plead the former conviction in bar to the second trial, on the ground that by a second trial he would "be twice put in jeopardy for the same offense."

Appeal from district court, Jefferson county; WILLIAM H. HUNT, Judge.

George F. Thompson was convicted of the crime of rape, and he appeals. Affirmed.

This is an appeal by the defendant from a judgment on conviction for the crime of rape. Three points are relied upon by the appellant, which may be stated as follows: (1) The indictment, in charging the time of the commission of the offense, uses this language: "On or about the 12th day of April, A. D. 1889." The criminal practice act of this state declares: "Sec. 166. The precise time of the commission of an offense need not be stated in the indictment, but it is sufficient if it is shown to have been before the finding of the indictment, and within the statute of limitations, except where time is an indispensable ingredient of the offense." The appellant contends that, notwithstanding this statute, the allegation "on or about" is insufficient, and renders the indictment fatally defective. (2) That there is a fatal variance between the name of the person upon whom the offense is charged to have been committed, as set out in the indictment and the proof on the trial of the cause. The name of the injured person is written in the indictment "Ellen Souderland." What appeared as to her name on the trial is as follows: She testified, "My name is Ellen Soderlund." The reporter adds, "Given as she spelled it." There is nothing here in the record to indicate which of the English sounds of the letter "o" was used, or whether the sound was

a Swedish one, to which race the witness belonged. Again, in the evidence she speaks of her name as "Soderlund," and mentions her brother and sisters as "Soderlund," that is to say, so the name is written in the record, but with no information as to the sounds of the letters. Again, the record states that the father of the girl, "C. W. Souderland," as the reporter writes it, testified as follows: "Question. What is your name? Spell it. Answer. C. W. Saderlund. In English, I spell it 'Sonderlund.' Q. How do you spell your name in English? A. 'Sonderlund,' and pronounce the same. Q. How do you pronounce it in your own language? A. 'Soederland.' Q. I will ask you this question. If the diphthong 'oe' is not a combination of the vowels 'oe'; is it 'o' with two dots over it? A. I can't say about that. Q. Would it be correct to spell your name in Swedish this way, (handing witness paper on which the name is spelled 'Soederland?') A. Yes, sir. Q. Is that the way you spell it in Swede? A. No, sir." The court then adds in the bill of exceptions: "The difference in sound between the name used in the indictment and that given upon repeated pronunciations by the witnesses on trial warranted the court in submitting the question of *idem sonans* to the jury. Both witnesses were Swedes, and spoke with marked accents." Again, a doctor who testified called her "Soderlund." The defendant moved for his discharge, upon the ground of a variance between the indictment and the proof, as to the name of the injured person. The court refused to discharge the defendant, but submitted to the jury the question whether the name as found in the indictment was *idem sonans* with that described in the proof. The following was the instruction: "The name of the prosecutrix is a material averment of the indictment in this case, and the court instructs you that '*idem sonans*' means 'of the same sound.' If the difference (if you find from the evidence that there is any difference at all) in sound of the name of the prosecuting witness as laid in the indictment, and as proved, is so slight that they cannot readily detect the difference, if any there is, in the pronunciation of the two names,—the name as charged in the indictment and the name as proved by the evidence,—then the names are said to be *idem sonans*. But if you find from the evidence that the name as charged in the indictment, when pronounced in the English language, differs materially in sound from the name of the prosecuting witness as proven on the trial, according to the English pronunciation, then the two are not *idem sonans*, and this is a fatal variance, and the defendant must be acquitted. Whether there is such a material difference or not is a question for you to determine from all the evidence in the case." The appellant insists that the names by the ordinary rules of English spelling are so dissimilar that the court should have pronounced them not to be *idem sonantes*, and it was error to submit the question to the jury. (3) In addition to his plea of not guilty, the defendant pleaded former conviction. The court instructed the jury that by the laws of the state, and under

the records in evidence, there had been no jeopardy which entitled the defendant to an acquittal under this plea, and that on the issue of former conviction the jury should find for the state. The facts upon which defendant based his plea were shown upon the trial to be that a former trial was had February 21, 1890, on which defendant was found guilty, and sentenced to confinement for 17 years in the penitentiary. On April 15, 1890, defendant himself moved for a new trial, which motion was granted by the court May 6, 1890. The new trial so applied for and granted was had January 6, 1891, and from the judgment on conviction on that trial the defendant is now appealing to this court. Appellant refers us to section 18, art. 3, Const.: "No person shall be compelled to testify against himself, in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense." In the criminal practice act we find the following: Chapter 13 defines a new trial, and the grounds upon which it shall be granted, and the procedure by which it may be obtained; and section 352 says: "The granting of a new trial places the parties in the same position as if no trial had been had. The former verdict cannot be used or referred to, either in the evidence or the argument." Appellant contends that the statute cited attempts to make nugatory the constitutional provision quoted above, and that the statute, in attempting to abridge the constitutional right, is unconstitutional and void; that is to say, that, under the constitution, a defendant once convicted, and obtaining a new trial, upon his own application, as in the case at bar, can plead the former conviction in bar; section 353, Crim. Prac. Act, to the contrary notwithstanding.

Word & Smith and H. R. Melton, for appellant. H. J. Burleigh, Co. Atty., and Henri J. Haskell, Atty. Gen., for the State.

DE WITT, J., (after stating the facts as above.) The first question which we meet is whether, under our statute, section 166, Crim. Prac. Act, the allegation of time, "on or about the 12th day of April, A. D. 1889," is sufficient. The obnoxious words, in appellant's view, are "on or about." Appellant argues that a single certain day must be laid in the indictment, although the proof is sufficient if it bring the offense within the statute of limitations. Appellant cites from Archbold's Criminal Practice & Pleadings, (page 275:) "Formerly, the indictment must have stated, either expressly or by way of reference, the day, month, and year on which each material fact stated in it took place; otherwise the indictment would be bad." He refers us to Whart. Crim. Law, § 261: "Time and place must be attached to every material fact averred, but the time of committing an offense (except where the time enters into the nature of the offense) may be laid on any day previous to the finding of the bill, during the period within which it may be prosecuted." He cites Judge DEADY, district of Oregon, in U. S. v. Winslow, 3 Sawy. 337, as follows: "Every indictment must allege a day and a year certain on which the offense was

committed. 1 Bish. Crim. Law, § 239. This is the common-law rule. The Code of Criminal Procedure of this state, which has been adopted by this court as a rule of practice, does not change the law. On the contrary, the form of an indictment given in section 70 indicates an absolute averment as to the time of committing the offense. An allegation that a crime was committed 'on or about' a certain day does not show but the action is barred by the lapse of time." Consulting the Criminal Code of Oregon, to which Judge DEADY refers, we find that section 70 gives a form of indictment, in which the required allegation of time is set out in the following words: "The said A. B., on the — day of —, 18—." As Judge DEADY says, the form indicates an absolute averment as to the time of committing the offense. But, on the contrary, the statute of this state does seem to change the common-law rule. Instead of indicating an absolute averment of time, it says that the precise time need not be stated. Appellant cites *Roberts v. State*, 19 Ala. 526. But in that case the indictment stated no time whatever. The same is true in *Erwen v. State*, 13 Mo. 306; *People v. Lafuente*, 6 Cal. 202, presented by appellant as authority, simply holds that, "a particular day having been laid on which the offense is charged to have been committed anterior to the finding of the indictment, there is no necessity for an averment that the crime was committed before the bringing of the indictment." Another case is *State v. Hanson*, 39 Me. 337, wherein the averment of the indictment was that the defendant appeared before the court, during a certain term named, and there made false answers, without stating any month, or day of the month, during that term, when those answers were made. The prosecution was for perjury, and the indictment was held to be defective in not stating time. We have referred to these cases which appellant has pressed upon our consideration as authority for his position that the allegation "on or about" is insufficient, in order to show that none of them are in point upon the construction of our statute. Section 166, Crim. Prac. Act. On the other hand, there is satisfactory authority construing statutes similar to ours, to the effect that the words "on or about" are sufficient. Counsel might have gone further in Archbold's Criminal Practice & Pleadings, (page 278,) where that author says: "But now, by St. 14 & 15 Vict. c. 100, § 24, no indictment for any offense shall be holden insufficient 'for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense,' etc." It appears that, even in the birthplace of the common law, the rigors of its construction have been modified. Mr. Wharton, whom appellant cites as holding the position which he advocates, says, in a later section of the same work, (section 266,) that the words "on or about" were held to be surplusage, and refers to Indiana cases construing a statute similar to ours, which cases we cite further on. Mr. Bishop (Crim. Prac. § 242) says: "Where the time is set down as 'on

or about' the day mentioned, the allegation is insufficient; yet in some of the states there are statutes by force of which this form becomes adequate;" citing *Cokeley v. State*, 4 Iowa, 477; *People v. Aro*, 6 Cal. 207; *Hampton v. State*, 8 Ind. 336; *Hardebeck v. State*, 10 Ind. 469. In the case at bar it is not contended that time is an indispensable ingredient of the offense. The matter is as well put in *Hampton v. State*, 8 Ind. 336, as in any other case, where the statute construed is practically identical with that of this state. This case is approved in *Farrell v. State*, 45 Ind. 373. To the same effect see *People v. Littlefield*, 5 Cal. 355, and *State v. Harp*, 31 Kan. 498, 3 Pac. Rep. 432, in which are collected the following cases, which we have examined with satisfaction: *State v. Tuller*, 34 Conn. 280; *People v. Kelly*, 6 Cal. 210; *State v. Elliot*, 34 Tex. 148; and other cases above cited. In *Rawson v. State*, 19 Conn. 291, is an instructive discussion of the strictness of the common law in construing indictments, and the reason for the modern modification for that strictness. In point at this place is section 171, *Crim. Prac. Act*, which provides: "No indictment shall be quashed or set aside for any of the following defects;" among others "for any surplusage or repugnant allegation, where there is sufficient matter alleged to indicate the crime and person charged, or for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant, upon the merits." We fully agree with the cases which have construed statutes similar to our sections 166 and 171, and are of the opinion that any other view than that the words "on or about" a certain day do not vitiate the indictment would be to declare that those statutes are idle and meaningless words.

2. It is contended that the court erred in not holding, as a matter of law without submitting it to the jury, that the name "Ellen Souderland," as found in the indictment, was not *idem sonans* with the name of the injured person, as proved on the trial. We understand, from a review of the authorities, that the rule is that, if the question of *idem sonans* arises on demurrer, it is for the court; but, if on an issue of fact, it is for the jury. "The question of whether one name is *idem sonans* with another is not a question of spelling, but of pronunciation, depending less upon rule than upon usage, which, when it arises in evidence on the general issue, is for the jury, and not for the court, and was rightly submitted to the jury in this case." *Com. v. Donovan*, 13 Allen, 571. In *Com. v. Warren*, a very recent case in the same court, 143 Mass. 568, 10 N. E. Rep. 178, we find the following language: "The province of the court and jury in cases like the present is governed by the following rule: If two names, spelled differently, necessarily sound alike, the court may, as matter of law, pronounce them to be *idem sonans*; but, if they do not necessarily sound alike, the question whether they are *idem sonans* is a question of fact for the jury;" citing cases. So it would seem from this case that if the names are necessarily

pronounced in a certain manner, and there cannot possibly be any doubt as to their pronunciation, the question is one for the court. But where it is a question of fact, whether the names under consideration are *idem sonantes*, and the matter arises on the issue, the question is for the jury. See *Whart. Crim. Ev.* 96; *Whart. Crim. Law*, 597; *Whart. Crim. Pl. & Pr.* § 119; *Ward v. State*, 28 Ala. 53; *Barnes v. People*, 18 Ill. 52; *Com. v. Mehan*, 11 Gray, 321; *Com. v. Jennings*, 121 Mass. 47; *State v. Malia*, 79 Me. 540, 11 Atl. Rep. 602; *Underwood v. State*, 72 Ala. 220; *Schooler v. Asher*, 13 Amer. Dec. 232, and note; *Donnel v. U. S.*, 39 Amer. Dec. 457; *State v. Havely*, 21 Mo. 498; *Lawrence v. State*, 59 Ala. 61; *People v. Flick*, (Cal.) 26 Pac. Rep. 759. Now, as to the facts in the case at bar. The indictment reads "Souderland." The witnesses variously describe the woman as "Soderlund," "Sonderlund," and "Soederland." The person bearing the name was a foreigner, a Swede. The sounds of the same characters, as letters, are widely different in different languages. The witnesses who gave the verbal pronunciations of the name on the trial were Swedes, and spoke with marked accents. The sounds which they uttered have not been absolutely preserved in the written record. We have no positive information as to the sounds which they gave to the vowels used in the name. We must rely upon the bill of exceptions which the judge certified who tried the case. From that it appears that the name was repeatedly pronounced. The judge could not say that the name as pronounced was *idem sonans* with the name in the indictment. He says that the difference in sound warranted him in submitting the matter to the jury. This court cannot now hear the sounds. We cannot construct them from the recorded collection of letters which have different sounds in well-spoken English, to say nothing of Swedishly-accented English. We are of opinion that the question is just such a one as should have gone to the jury, and that the district court committed no error in so submitting it. Appellant refers us to *State v. Sullivan*, 9 Mont. 490, 24 Pac. Rep. 23. But that case was not decided upon the point made in the case at bar. In *State v. Sullivan* the question of *idem sonans* was not submitted to the jury, and the action of the court in deciding that matter was not objected to or assigned as error.

3. The plea of former conviction. The appellant to some extent renews the discussion had in the case *In re Thompson*, 9 Mont. 388, 23 Pac. Rep. 933, wherein the petitioner was the same person who is herein the appellant. It may be appropriate to observe that in that hearing the petitioner contended that his conviction and imprisonment were illegal, because there had been no trial. Now, he insists that the events of that trial were a former jeopardy. If a conviction, it must have been a trial. But we will not go into the events of that trial. We have not changed our views held on the *habeas corpus* hearing, which were that the petitioner there, the appellant here, had a

trial. Whatever irregularities there occurred we did not inquire on the hearing of the writ. But it appears that the district court took notice of the events on that trial, with the result that it granted defendant a new trial. Therefore the only proposition now before this court is whether a defendant, once convicted, and obtaining a new trial, on his own motion, can plead the former conviction in bar to the second trial, which he has obtained. The constitution says that he shall not be twice put in jeopardy for the same offense. The statute declares that, if a new trial be granted, he shall be in the same position as if no trial had ever been had. This constitutional and statutory provision is common to most of the states of the Union. The cases cited by appellant of discharge of a jury after the trial is commenced, and before completed, for reasons within or without the control of the court, on motion of the prosecutor, or of the court's own motion, are not in point in this investigation. Again, the question of the conviction of a less degree of a graded crime being a bar to prosecution for the higher degree is not in this case, and the authorities are not in point. The real point in this appeal was summarily dismissed in *Territory v. Hart*, 7 Mont. 496, 17 Pac. Rep. 718. But the zeal and earnestness of counsel induce us to add a few of the innumerable authorities from other courts. *People v. Webb*, 38 Cal. 480; *Jones v. Com.*, 20 Grat. 848; *People v. Gilmore*, 4 Cal. 376; *People v. March*, 6 Cal. 546; *People v. Olwell*, 28 Cal. 462; *People v. Barric*, 49 Cal. 342; *People v. Hardison*, 61 Cal. 379; *People v. Schmidt*, 64 Cal. 262; *People v. Travers*, 73 Cal. 580, 15 Pac. Rep. 293; *State v. Rover*, 10 Nev. 388; *State v. Knouse*, 33 Iowa, 368; *Johnson v. State*, 29 Ark. 31; *Jones v. State*, 55 Ga. 625; *Lewis v. State*, 1 Tex. App. 323; *Stuart v. Com.*, 28 Grat. 350; *Ventch v. State*, 60 Ind. 291; *Smith v. State*, 41 N. J. Law, 598; *State v. Stephens*, 13 S. C. 285; *Simco v. State*, 9 Tex. App. 338; *Kendall v. State*, 65 Ala. 492; *State v. Blaisdell*, 59 N. H. 328; *State v. Hart*, 33 Kan. 218, 6 Pac. Rep. 288; *Bohannon v. State*, 18 Neb. 57, 24 N. W. Rep. 390; *State v. Anderson*, 89 Mo. 312, 1 S. W. Rep. 135; *People v. Palmer*, 109 N. Y. 413, 17 N. E. Rep. 213; *Younger v. State*, 2 W. Va. 579,—which are some of the cases which the industry of the county attorney has presented for our consideration, and we find laying down the principle as common learning, and undisputed law. We do not consider the proposition as one open to discussion, and hold that the district court committed no error. The judgment is affirmed, and it is ordered that it be carried into effect as adjudged by the lower court.

BLAKE, C. J., and HARWOOD, J., concur.

In re SHANNON.

(Supreme Court of Montana. July 20, 1891.)

CONTEMPT—POWER OF POLICE COURT.

The act of incorporation of the city of Butte (Comp. St. Mont. div. 5, § 371) confers on the police magistrate exclusive jurisdiction of

actions arising under the city ordinances, and, in addition, the same jurisdiction as is conferred by law on justices of the peace. Code Civil Proc. Mont. §§ 816, 817, provide that a justice may punish any person guilty of a contempt in his court as defined by this act, by fine or imprisonment or both; but the fine shall not exceed \$100, nor imprisonment one day. Section 534 provides that such punishment may be inflicted for "disorderly, contemptuous, or insolent behavior towards the judge while holding court, tending to interrupt the due course of a trial or other judicial proceeding," and for "any other unlawful interference with the process or proceedings of a court." *Held*, that the police magistrate has no power to inflict a fine, with imprisonment in default of the payment thereof, on the writer of a newspaper article attacking the system of city ordinances under which the police court is organized, and declaring that abuses have existed thereunder, but without mentioning any specific case in such court.

James W. Shannon was summarily fined and imprisoned for contempt by the police magistrate, and made application for a writ of *habeas corpus*.

Daniel E. Waldron and Alex. C. Botkin, for petitioner.

HARWOOD, J. It appears that the petitioner was proceeded against in the court of the police magistrate of the city of Butte, upon a charge of having committed contempt of said court, in that the petitioner, on the 28th of June, 1891, caused to be printed and published in the *Daily Miner*, a newspaper printed and published in said city, a certain article in terms as follows: "Card from J. W. Shannon. Butte, June 26. To the editor of the *Miner*: In this morning's *Miner* an article on the local page recites, aulmadverts, and moralizes upon a case in the district court which was appealed from a lower court, and in the determination of which the local government was put to cost of more than \$200, to save defendant from paying the paltry fine of \$5.00, when, according to a jury of his peers, he had done no wrong. * * * I grant you that this is a representative case, and illustrates a flagrant and frequent abuse, with the emphasis on 'frequent.' But it is to the remedy proposed that this deponent would demur. 'Fix a limit to appeal cases.' Never. The right of appeal should be neither limited nor abridged. The right of vindication is cheap, at any cost. Why not correct the necessity of such appeals? Why not modify our ordinances so that the court and prosecuting attorneys shall not be interested in their own convictions? Pay them fixed salaries, and free them from the imputation of running 'a cost shop,' and waxing fat at the expense of victims who get into their toils. They would not then find it necessary to reject the *res gestæ*, which would fix the blame where it belongs. There would then be no inducement to make a double case, and a double set of costs, yielding double fees in every case of breach of the peace. Now, it will not be denied by any well-read attorney that in all well-regulated police courts the practice in such cases is that where an investigation shows both parties to be guilty, and equally guilty, the court then and there, having both parties present, fines the defendant

on the complaint, and summarily fines the complaining witness. Such practice, however, would not subserve the mercenary purposes of a prosecutor, who regards a public office, not as 'a public trust,' but as 'a private snap.' It is time that in the city of Butte the statute of limitations should run on a certain kind of high-handed practice. *J. W. SHANNON.*" This publication was alleged in the proceedings to be "a contemptuous and insolent article, concerning the proceedings of said court, and the practice therein." Upon the hearing, the petitioner raised the question of the jurisdiction of the court to proceed against him as for contempt upon the matter set forth, and insisted that the facts set forth did not constitute a contempt of court, and therefore that the court had no jurisdiction to entertain the proceeding. The police magistrate, however, found the petitioner "guilty as charged, and ordered and adjudged that he pay a fine of fifty dollars, and costs of this prosecution, amounting to the sum of ten dollars, and stand committed to the county jail until such judgment is satisfied." The proceedings of said court in the matter under consideration, and files and records concerning the same, duly authenticated by certificate and seal, are made a part of this application, to show wherein the imprisonment is "alleged to be illegal," and "in what the alleged illegality consists." Comp. St. div. 5, § 1165. And upon the showing it is insisted here by counsel for petitioner that the imprisonment is illegal, because the judgment and commitment proceeded upon a charge which in law does not constitute a contempt of said court, and hence the court was without jurisdiction to assess such punishment. The act of incorporation of the city of Butte grants to the police magistrate "exclusive jurisdiction to try and determine all actions arising under the ordinances of the city, and, in addition, the same jurisdiction conferred by law upon justices of the peace." Id. § 371. The statute of this state, defining the jurisdiction of a justice of the peace, provides that "a justice may punish any person guilty of a contempt of this court, as defined by this act, by fine or imprisonment, or both; but the fine shall not exceed one hundred dollars, nor imprisonment shall not exceed one day. The acts for which the person is convicted shall be particularly specified in the justice's docket, and the judgment entered thereon." Comp. St. div. 1, §§ 816, 817, (Code Civil Proc.) Section 584, Code Civil Proc., defines certain "acts or omissions in respect to a court of justice, or proceedings therein" which constitute "contempts of the authority of the court." There is some controversy in the reports and authorities as to whether a statute defining what shall constitute contempt operates to take away common-law jurisdiction of courts of record in such proceedings, and leaves the court with only statutory jurisdiction and power to punish only where the act or omission comes within the express provisions of statute, or whether such statutes are only declaratory of the common law in part, or supple-

mental to it, and leave the court free to exercise common-law jurisdiction upon this subject, in cases not provided for by statute, where such case was formerly cognizable at common law. *Clark v. People*, 12 Amer. Dec. 177, and note; *State v. Galloway*, 98 Amer. Dec. 404, and note, and cases cited. That question was touched upon by the learned judge in delivering the opinion of the court in *Territory v. Murray*, 7 Mont. 251, 15 Pac. Rep. 145, although that case was declared to be within express provisions of our statutes. But such questions do not concern this injury. The justice court is not one of general or common-law jurisdiction. Its jurisdiction is restricted to the limits prescribed by statute. In cases of contempt, the statute provides that such courts "may punish any person guilty of a contempt, as defined by this act." Therefore the power of a justice of the peace to punish for contempt is confined to the acts or omissions prescribed in section 584 of the Code. The jurisdiction of the police magistrate in question to punish in cases of contempt rests upon the same provisions, by reason of the statute investing him with the jurisdiction of justice of the peace. If, then, the police magistrate has power to visit punishment upon the petitioner for contempt of his court, for the publication of said article, it must be found that such act is one defined in section 584, Code Civil Proc. By consulting that section, it is readily seen that no such act is within its terms. The first and ninth subdivisions of said section contain the only provision under which it could be contended that this proceeding is authorized. These provisions are as follows: "First, disorderly, contemptuous, or insolent behavior towards the judge while holding court, tending to interrupt the due course of a trial or other judicial proceeding;" "ninth, any other unlawful interference with the process or proceedings of a court."

The power of inferior courts to punish persons for contempt, in cases where the act for which the punishment is adjudged did not occur in the presence of the court, is questioned by some authorities, and denied altogether by others. Mr. Bishop, in his work on Criminal Law, states the result of his investigation of the subject as follows: "Contempts against justices of the peace:—Distinguished from superior courts of record. What has been said thus far refers particularly to contempts against higher courts of record. But there is an opinion, which may perhaps be well founded, that the authority of justices of the peace is somewhat more limited. They may commit for contempts in their presence while holding their court; but Mr. Gabbett observes that 'courts of inferior jurisdiction cannot attach or commit a party for any contempt which does not arise in the face of the court.' And there are many expressions in the English books apparently sustaining this general proposition. Thus, though the present county courts are of record, and by the statute are permitted to commit only for contempts in court, still, being of inferior jurisdiction, it is strongly intimated that

the same result would proceed from common-law principles. It is also held in England that the sessions cannot proceed in this way against a man for disobeying an order of filiation, but only on his recognition; and we have some American *dicta* limiting the power of justices of the peace to contempts in court. In reason, this power does not extend as far as that of high tribunals, still there may be circumstances in which it should be permitted to some scope beyond this narrowest limit." 2 Bish. Crim. Law, (7th Ed.) § 263, and cases cited. Undoubtedly, the statute of Montana extends the power of justices of the peace beyond the narrowest limits referred to by the learned author. But that power cannot be extended beyond the statute. Its exercise must be confined to acts mentioned in the statute, occurring in the presence of the court, or so near as to "interrupt the due course of a trial or other judicial proceeding;" or, when exercised in reference to acts done out of court, the act must be one expressly defined by statute; such, for example, as unlawful interference with the legal execution of processes. None of these would include power to punish for the expression of sentiments through the medium of the public press or otherwise, regarding the practice of the court, or of results or abuses alleged to flow from the past administration of such court. A power to punish for such utterance, or to silence the voice of comment upon such matters, would be the discovery of an unknown quantity in jurisprudence, and the exercise of it would be a menace to a free and spirited people. The constitutional right of freedom of speech, written in the tenth section, article 3, of our constitution, would be set at naught by the exercise of such a power, whenever that freedom of speech happened to be directed to the action of public courts. There is no such exception. We speak now of the discussion of matters pertaining to courts, or the practice therein, which have no tendency to affect the merits or result of particular cases pending, which class of discussion is entirely distinguished from publications which are designed and put forth for the purpose and have a tendency to influence the result of particular cases. So far as the article in question refers to any particular case, it refers to one determined in the district court. Viewing the contents of this publication alone, free from any knowledge of local events, which might possibly direct the course of imagination, we are struck with surprise that the honorable police magistrate entertained an affidavit which declares that the publication was a "contemptuous and insolent article concerning the proceedings and practice" in his court. The article says the case in point was "appealed from a lower court." We have judicial knowledge, and no doubt every well informed person in this jurisdiction who reads the newspapers has knowledge otherwise, that the police court is not the only court there lower in rank than the district court. But it is said that the reference in said article to "ordinances" and "to the city of Butte," might fairly be taken as

referring the remarks to the police court. Granting all such inferences, still it may be asked, what is there in the article to indicate that the case in point was adjudicated in, or appealed from, said court, as administered by the present incumbent, or that the abuses mentioned occur under his administration? The article is directed against a system, and avers that abuses have prevailed under such system, and proposes a change, to remove temptations which invite abuse. But it does not follow that there may not be as pure an administration of justice in said police court under the present police magistrate as ever will, or could be, under any other system, although the present system may not be the best, and even tend to invite abuse. We are therefore surprised that the magistrate so readily adopted the conclusion that the article referred to the "practice and proceedings" in his court. Nevertheless, if the article had expressly referred to past proceedings and practice of said court under the present magistrate, this proceeding and summary punishment would not apply. If the article was libelous, there are other remedies, and it may be observed, moreover, that summary punishment for contempt in such a case is no vindication of past practice and proceedings of courts; no more than lashes vindicate the cause relied on to justify the chastisement. It is ordered that the writ of *habeas corpus* issue, and, if the imprisonment is found to be based upon the proceedings set forth in the application, the prisoner will be summarily discharged.

BLAKE, C. J., and DE WITT, J., concur.

MILLS v. CITY OF LOS ANGELES. (No. 14,035.)

(Supreme Court of California. Aug. 17, 1891.)

ADVERSE POSSESSION—LAND IN STREET—APPEAL.

1. In an action to quiet title to a strip of land lying in a street, it appeared that plaintiff's grantor took possession of a tract of land in Los Angeles in 1842, while the present city was a pueblo, and built a house thereon. The official survey of 1849 showed that the house extended across the street. In 1855 the city bought a portion of the tract shown to be in the street. The land in controversy was continuously inclosed and occupied from 1842 to 1887. A patent was issued to the city for the pueblo lands in 1876. Plaintiff shows no grant from the pueblo or the city. *Held*, that plaintiff could not recover, as the land in controversy was in the street as shown by the official map of 1849, and the fact that plaintiff's grantor maintained an obstruction in the street did not affect the dedication, or give him title by adverse possession.

2. The fact that the city purchased a part of the tract of land lying in the street is not sufficient to show that the city recognized a right to the street in plaintiff's grantor.

3. The exclusion of proper evidence is not prejudicial error, where it appears that, if admitted, it would not have benefited the party offering the evidence.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action to quiet title by Howard W. Mills against the city of Los Angeles. Judge

ment for defendant. Plaintiff appeals. Affirmed.

Graves, O'Melveny & Shankland and Chapman & Hendricks, for appellant. Chas. McFarland, for respondent.

TEMPLE, C. Plaintiff appeals from the judgment and order refusing a new trial. The action is to quiet title to a strip of land in Los Angeles 16 feet wide, extending westerly from Main street along Second street, and constituting a portion of Second street, as now laid out and used. The answer denies the title of plaintiff, avers title in defendant, and dedication of the land as a public street. It is admitted that Los Angeles was a Mexican pueblo, and continued to be such until its organization under the laws of the state in 1850, and that the land was a portion of the pueblo lands. In 1842 Tomas Urquidez took possession of a tract of land which included the land in controversy, and erected an adobe building which extended entirely across what is now Second street, near the junction of Main and Second; and the strip claimed by plaintiff, who derives title from Urquidez, was continuously inclosed and occupied up to 1887. A patent was issued to the city of Los Angeles for the pueblo lands in 1875, and another in 1876. Plaintiff shows no grant for the lands from the pueblo or the city, or any other source, except from Urquidez and those who succeeded him as grantees. But he claims that possession is evidence of title. Possession is sufficient evidence of title as against a mere trespasser without right, but is of no value as against the patent to the city, unless it constitutes a bar under the statute of limitations. It seems immaterial to this inquiry whether prior to the patent the pueblo had an inchoate title to the lands, or only a limited authority within defined limits over public lands which had been assigned for the use of the public. By the patent all the lands included in it passed to the city, except such as were held under grant from the pueblo or city, or under grant from Mexican authorities. Under the stipulation, *prima facie*, the title is in the city, and the plaintiff who seeks a judgment adjudging him to be the owner must show, by competent proofs, title in himself. He has not attempted to show, and does not claim to have, a title from Mexico. Has he then acquired title from the pueblo or city, or by adverse holding barred her right? It may be assumed that the statute did not begin to run against the city until the patent was issued, in 1875. There is no evidence of an approved survey of the pueblo lands, under the act of congress of June 14, 1860.

Plaintiff claims that the city has recognized his right, and, although his briefs do not make it very clear in what way such recognition can confer title, he seems to argue that in some way the city is estopped from denying his title, or the acts referred to raise the presumption of a grant from the city or pueblo. Where there is a question as to whether one holds in subordination to another, or whether he holds adversely, the fact that the title has been recognized is important,

but evidently mere recognition cannot confer title. There must be something in the nature of an estoppel. In 1849 the pueblo adopted a map and survey as official. On this map Second street appears as now located and used. But at the intersection of Second and Main streets it shows Second street was occupied by the buildings of plaintiff's predecessor. In other words, that it was not an opened street, and could not be, until the buildings were removed. Occupants of the land claiming under Urquidez have had the land assessed to them, and the city has collected the taxes upon it. In 1855 one Dryden, claimant of a portion of the property, sold a portion of Second street to the city, which paid him \$1,000 therefor, and took his deed. Dryden's deed covered the balance of the street adjoining plaintiff's claim, and the calls of the deed bound it upon Anderson's land. Plaintiff derives title from Anderson. In 1872 the council referred the matter of the obstruction in Second street to a committee, which reported that Anderson stood upon his rights. In 1884 the council passed an ordinance directing proceedings for the condemnation of this strip, and in 1885 another in reference to compensation for the strip. In all this we see nothing that can estop the city, or tends to raise a presumption of a grant, and the latter is completely disproved by the fact that Anderson petitioned the council for a grant to this and other land on the Urquidez tract. There is no evidence that any claimant under Urquidez ever pretended that there was a grant from the city or the pueblo to Urquidez. So far as the record shows, all disclaimed such grant, and asked for and received, after the controversy arose, deeds from the city. But the plaintiff claims that the strip is included in a deed from the city to Anderson, upon his petition dated August 6, 1855. He petitioned for the land fronting 18 yards on Main street. Previously, February 17, 1855, he had presented a petition showing that he had purchased property which extended five feet "in a street that is intended to be opened as soon as required; I therefore wish to exchange that same quantity of land for the same quantity on the other side of my lot," etc. The petition of August 6th for a deed was referred to a committee, which reported in favor of granting it on condition that Second street be made his southern boundary, and the council ordered "that title be given to the petitioner on the conditions mentioned in the report." The mayor's report shows that a deed was given to Anderson, which described the land as beginning at the corner of Main and Second streets.

The deed itself was offered in evidence, and excluded on the objection of defendant. This ruling is assigned as error. The offered deed also described the land as bounded on Second street, which it says constitutes the southern boundary. If the plaintiff, in connection with the offer of the deed, proposed to show that it included the land,—and he claims that is shown,—the deed should have been admitted, and then a finding, founded upon proper and legal evidence, would have been conclusive

here. But now, if we can see that the deed if admitted would have been of no advantage to appellant, it is not prejudicial error. As the land granted is bounded upon the line of Second street, and the description commences with the call for the corner of Second and Main streets, it would seem that the deed does by express language exclude the land in controversy; and this, no doubt, is the reason why the court ruled it out. But it is contended that the corner of Second and Main streets, and the call for Second street as the southern boundary of the land conveyed to Anderson, refers to that street as opened by the purchase from Dryden, which is bounded upon the land of Anderson. The Dryden purchase was for 66 feet of Second street, and plaintiff contends that, when Anderson asked to exchange 5 feet in the street for 5 feet on the other side of his lot, he was claiming 5 feet of the ground conveyed by Dryden, and by that conveyance made a part of Second street. But this reasoning seems forced and far-fetched. We have not been able to find in the record any evidence that Second street was then open to the public. The deed from Dryden to the city bears date August 15, 1855. It appears that he was not to give possession for two months after the conveyance. Anderson's petition, in which he offers to exchange, bears date February 17, 1855, nearly six months prior to the conveyance. He must, therefore, have referred to the street as marked out on the official map. Anderson's petition for a deed is dated August 6, 1855, and the order allowing him a deed on condition that he accept it with the boundary on Second street was made August 30, 1855. The city had not then taken possession. Anderson filed still another petition, September 18, 1855, which also shows that the street had not yet been opened. And then the fact that Anderson's petition was granted only on condition that he would accept it with the boundary on Second street shows that they did not give him the land asked for, but required him to give up his claim to the land on Second street. But the presumption would be that the point called for is the corner of the streets as fixed on the official map, and the circumstances would be required to show very clearly that something different was intended to justify a different conclusion. But the record does not show that Second street had been opened to use, or was defined in any way save by the official map. Appellant contends that the confirmation of the title of the city inures to his benefit under section 14 of the act of congress passed March 3, 1851. But that section is for the benefit of those who but for it could, and to prevent forfeiture must, have presented their claims individually. Neither Urquidez, nor any of those claiming under him, have shown a claim which could have been so presented. To have the confirmation and patent inure to his benefit, he must show a grant from the pueblo or city. Plaintiff has not expressly claimed that he acquired title under the statute of limitations, but perhaps that claim is involved in his contention. The Ord map, made in 1849, being the official map of the city, is

evidence that as early as 1849 the premises were declared a public street. That it was occupied by a trespasser would not affect the dedication. Such obstruction would not manifest an intention on the part of the city or pueblo to withhold that part of the street from public use, but only that there was an obstruction to be removed. There was no necessity for an acceptance by the public by using the proposed street to complete the dedication. The city was not only proprietor, but the political authority to lay out, establish, and to accept streets which were offered to the public by ways of dedication. In *City of Eureka v. Armstrong*, 83 Cal. 623, 22 Pac. Rep. 328, and 23 Pac. Rep. 1085, it was said: "The common council must be the proper body to accept a dedication. If not, who is there that can give a formal acceptance?" The pueblo was, or represented, the proprietor. Its authorities also represented the public, and were authorized to lay out streets. In fact, to accomplish the purpose for which pueblos were formed and lands assigned to them, they must do so. Lots cannot be sold or villages built up without streets. At first streets would naturally exist only on paper. But they were necessary to designate the lots and the different classes of land belonging to a pueblo. Whether they had been accepted and used by the public, so that they could not have been changed or otherwise disposed of by the municipal authorities, is not material to this inquiry. That question seems to have been considered important in *San Francisco v. Calderwood*, 31 Cal. 585, and *San Francisco v. Canavan*, 42 Cal. 555. In the last case it was said: "Until accepted, the dedication, whether made by deed or otherwise, may be revoked by the owner of the land;" and this was applied to a supposed dedication by ordinance of a public park. But it does not follow, because the city might revoke the dedication until it had been used, that therefore, before such revocation, it should not be considered as a park. Of course no adverse rights could be acquired in this property after it had become a public street. We think the judgment and order should be affirmed.

We concur: FITZGERALD, C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

90 Cal. 444

EMERIO *et al.* v. ALVARADO *et al.* (No. 13,276.)

(Supreme Court of California. Aug. 7, 1891.)

TENANCY IN COMMON—DEED OF CO-TENANT—DESCRIPTION—ACKNOWLEDGMENT—TAX TITLES—ASSESSMENT—PRIORITY OF MORTGAGE—ESTOPPEL—ATTORNEY AND CLIENT—AMENDMENTS TO ANSWER—DELAY IN FILING.

1. Where a co-tenant conveys a specific tract, which is less than his undivided interest in the common land, by deed of bargain and sale, describing the tract by metes and bounds, or other sufficient description, and purporting to convey the whole title to such tract in severalty, such tract should be allotted in partition to the grantee in severalty, whenever it can be done without material injury to other co-tenants not join-

ing in the deed; and the tract so conveyed should be charged, in proportion to its value, against the interest of the grantor, under Code Civil Proc. Cal. § 764, providing that, whenever it shall appear in an action for partition of lands that one or more of the tenants in common, being the owner of an undivided interest in the lands sought to be partitioned, has sold to another a specific tract by metes and bounds out of the common land, and executed a deed of conveyance purporting to convey the whole title to such tract in fee-simple and in severalty, such tract shall be allotted and set apart in partition to such purchaser, his heirs and assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract can be so allotted without material injury to the rights of other co-tenants not joining in such conveyance; and, such statute being merely declaratory of the existing law, the rule therein prescribed applies to conveyances executed prior to its enactment.

2. A deed by a co-tenant, conveying a specific part of the common land, is not void.

3. Where a co-tenant sells a fractional undivided interest in a specific tract of the common land, and executes a quitclaim deed purporting to convey his interest in such specific tract in fee, the grantee should be allotted in partition such fractional interest only.

4. A conveyance by a co-tenant and his wife described the premises as "all our right, title, and interest in and to all the land inherited by us, or either of us, from one C., the father of" the co-tenant. The father had devised to the co-tenant a certain undivided share of "all my property, rights, and actions, together with all the land of my Rancho San Pablo." The father had applied to the Mexican government for a grant of three leagues, and, after his death, one of his sons renewed this application, and afterwards made another for four leagues, on which the grant was finally made to the heirs of the original applicant. A vendee of the co-tenant's grantee claimed a specific tract of the common land under his deed, but it did not appear that such specific tract was within the grant applied for by the father. *Held*, that the description in the deed from the co-tenant was insufficient to pass title to such specific tract. BEATTY, C. J., dissenting.

5. A certificate of acknowledgment of a deed taken by a justice of the peace, which fails to show of what county he was a justice, or whether he was a justice of any county, or in what county or state the acknowledgment was taken, is fatally defective.

6. Error in excluding evidence offered by one party cannot be assigned by another party, who did not except.

7. One co-tenant cannot acquire a tax-title to the premises to the prejudice of the others.

8. Revenue Act May 15, 1854, § 90, (St. Cal. 1854, p. 88,) providing that the tax-deed shall be *prima facie* evidence of certain matters, was repealed by Revenue Act April 29, 1857, § 55, (St. Cal. 1857, p. 344;) and the introduction of a tax-deed under the former statute, without proof of the preliminary steps necessary to vest the power of sale, does not show a *prima facie* title.

9. Where, under Revenue Act Cal. May 15, 1854, an assessment of lands owned by "Castro" was made in the name of "Castro," the assessment and the tax-deed, describing the lands as having been assessed to "Castro," are void; the rule of *idem sonans* not applying to assessments for taxes.

10. Where there is no dollar-mark or other character in the assessment and duplicate rolls, showing what was meant by the figures in the columns headed "Value" and "Taxes," the assessment, and tax-deed based thereon, are invalid.

11. A deed purported to convey "all the right, title, and interest" of the grantor, being an undivided interest in a specific tract of lands held in common. The grantee executed a deed purporting to grant, bargain, and sell the specific tract, and reciting that it was the same land thus

conveyed to him. At that time the grantor in the second deed had no general interest in the common land, as his grantee knew, but he subsequently acquired one. *Held*, that the grantee in the second deed took only an undivided interest in the specific tract. BEATTY, C. J., dissenting.

12. Under the California statutes in force in April, 1853, which provided that every conveyance of real estate, which shall not be duly recorded, shall be void against a subsequent purchaser or mortgagee for value in good faith whose conveyance or mortgage shall be first duly recorded, a mortgage, executed after a deed to another person, but recorded before it, has priority.

13. The grantee in such deed, being junior to the mortgage, is a proper party to the foreclosure, and is concluded by decree therein against him.

14. A finding that the mortgagee had no notice of the grantee's rights is conclusive on appeal, when the evidence is not brought up, and such finding is not affected by a finding that the grantee's tenant was in possession when the mortgage was given, since possession is not notice, but only evidence of it.

15. One whose interest in lands held in common had been exhausted, conveyed a specific tract of 300 acres thereof in consideration of a reconveyance of a specific tract of 27 acres out of the 800. The grantee in the first deed subsequently acquired an undivided interest in the common lands from other co-tenants. *Held*, that such subsequently acquired interest should not be applied in partition to effectuating the grant of the 27-acre tract under the rule prescribed in Code Civil Proc. Cal. § 764.

16. A notary public of the county of C. took an acknowledgment of a deed therein. His certificate was as follows: "State of California, city and county of S. On this day * * * before me, H. I. Tillotson, a notary public in and for said city and county, appeared," etc.; and it was signed, "H. I. Tillotson, Notary Public." The certificate stated that he had "affixed his official seal," which contained the words "Notary Public, C. County." He was not a notary for the city and county of S. *Held*, that the acknowledgment was fatally defective, under Civil Code Cal. §§ 1188, 1189, requiring the name and quality of officers taking acknowledgments to be in the certificate, and section 1193, requiring that they must authenticate their certificates by affixing their signatures followed by their names and seals of office. BEATTY, C. J., dissenting.

17. The record of a deed so acknowledged does not impart constructive notice, under Civil Code Cal. § 1161, providing that, before it can be recorded, an instrument must be acknowledged, and the acknowledgment certified, as required by law. BEATTY, C. J., dissenting.

18. One claiming title under a void tax-deed of the share of certain co-tenants allotted them in partition, executed a deed of bargain and sale purporting to convey the whole title to a specific tract. The deed described the premises as "being a portion of lands allotted in partition to" the co-tenants, and covenanted that neither the grantor nor the co-tenants had done, or suffered to be done, anything whereby the premises, or any part thereof, are, or hereafter may be, impeached, charged, or incumbered in any manner. The grantee, afterwards acquiring an undivided interest in the common land, conveyed all his right, title, and interest therein to his grantor, reserving the specific tract previously conveyed. *Held* that, as it was the intention of the first grantor to convey a perfect title to the specific tract, he was estopped to impeach it.

19. Where a contract between an attorney and his client provided that, in consideration of professional services to be rendered in an action for partition, the attorney should receive a share of the interest of the client when the partition suit should be determined, and it does not appear that any services were rendered or performance thereof waived, such contract confers no legal or equitable right in the land, and titles based thereon are void.

20. The original answers in a cause were filed in 1868, and judgment rendered in 1878. After reversal on appeal, the cause came on for trial in January, 1885. In December, 1885, counsel asked leave to file amendments to the answer, and the amendments were then drawn and verified. The court, after repeatedly urging counsel to present them, and after granting one continuance for that purpose, peremptorily ordered them to be filed October 1, 1886; but they were not presented until January, 1887, after the case had been declared substantially closed. There was no excuse offered for the delay. *Held*, that the court properly refused to receive them.

21. Notice by the purchaser to the owner or occupant of lands sold for taxes is essential to the validity of the tax-deed, under Pol. Code Cal. § 3785, providing that the purchaser must, 30 days prior to the expiration of redemption, or 80 days prior to application for a deed, serve on the owner or occupant a written notice stating the sale, its date and amount, and the time of expiration of redemption, or when application for deed will be made.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action for partition by Joseph Emeric and others against Alvarado and others. Trial to the court, and decrees rendered, from which different parties appeal. Affirmed.

Wm. Matthews, Wm. Leviston, Wm. Miltzer, Garber & Bishop, Stanley, Stoney & Hayes, W. H. L. Barnes, E. Kirkpatrick E. J. & J. H. Moore, Flournoy & Mhoon, E. J. Pringle, Taylor & Haight, Geo. E. Lawrence, Henry E. Highton, and A. H. Loughborough, for appellants. Theodore H. Hittell, William C. Belcher, and W. H. H. Hart, for respondents.

MCFARLAND, J. This is an action for the partition of a tract of land called the "San Pablo Ranch," containing 17,938.59 acres. It is situated in what is now Contra Costa county, and was granted by the Mexican government, and afterwards patented by the United States to the successors of Francisco Maria Castro, who died on the 5th day of November, 1831. The action was commenced on November 19, 1867, in the district court of the fifteenth judicial district in and for the city and county of San Francisco, and an interlocutory decree was rendered in that court on July 15, 1878. Several appeals were taken, and the judgment and order denying a new trial were reversed by this court, because the findings as to two or three issues were deemed defective; and furthermore, and mainly, because the decree determined rights, interests, and shares in the land only as they existed in the hands of the original tenants in common, and did not determine the present rights, interests, and shares of all the parties to the suit as they existed at the time the action was commenced. Most of the findings of the district court were approved, and the cause was remanded to the superior court, (successor to said district court,) with instructions to find on certain issues mentioned; and "upon the findings heretofore made and herein approved, and those hereafter to be made under the directions of this court," to proceed and specify in its interlocutory decree the "rights and interests of all parties to the

action," and adjudge partition between them according to such rights and interests. *Emeric v. Alvarado*, 64 Cal. 627, 2 Pac. Rep. 418. It was established by the first decree, and the decision of this court, that the persons denominated "original tenants in common," and the shares belonging to each, were as follows: Martina Castro de Alvarado, fifteen equal twenty-second parts of said rancho; Antonio Castro, Joaquin I. Castro, Juan Jose Castro, Gabriel V. Castro, Victor Castro, and Jesus Maria Castro, each one equal twenty-second part; and Luisa Moraga de Briones, Maria de los Angeles Moraga de Briones, Jose Moraga, Guadalupe Moraga de Martinez, and Francisca Moraga, each one equal one-fifth of one equal twenty-second part of said rancho. (The seven persons first above named were children of Francisco Maria Castro, and the five persons last named were children of Francisco Castro de Moraga, a deceased daughter of said Francisco Maria Castro.) After the cause went back to the superior court, further findings were had; and that court—Judge JAMES G. MAGUIRE presiding—with great care, and in a systematic method that must have cost great labor and thought, found, determined, and stated the interests and shares, not only of the said original co-defendants, but of all persons holding or claiming under them, and being parties to this action; and entered an interlocutory decree adjudging partition among the parties in accordance with the findings. The case now comes here the second time upon numerous appeals from the interlocutory decree, and from an order denying a motion for a new trial. There are several hundred parties to the action. The interests of many of the parties to the appeals are friendly as to some matters and hostile as to others, so that they are appellants as to some points and respondents as to others, thus presenting different and contradictory claims upon the same transcript. The findings of fact of the superior court number 274, many of them having numerous subdivisions, and they were all necessary to the disposition of the case. These findings, with the conclusions of law, the original findings of the district court, and the last interlocutory decree occupy 752 pages of the printed transcript No. 13,276, while there is much additional matter in the other transcripts. It is apparent, therefore, that the labor of the court below must have been very great; and that it would be impossible to give here a full statement of the whole case in detail without exceeding all reasonable limits of an opinion. As, however, the opinion of this court delivered on the former appeal contains quite an extensive history of the case, and as the points arising on the present appeals may be grouped into a few general classes, we think that the case can be disposed of without much detailed statement of facts. There are five separate transcripts.—Nos. 13,276, 13,275, 13,871, 13,984, and 14,006. In the present opinion, rendered in No. 13,276, we will consider and determine all the points made in all the appeals, and judgments will be rendered in the appeals based upon the other transcripts

according to the conclusions declared in this opinion. (The references here made to the transcript refer to transcript 13,276, unless otherwise stated.)

I. Specific Tracts. At various times individual tenants in common, owning large undivided interests in the ranch, undertook by grant, bargain, and sale deeds, to convey the whole of particular parts of the ranch described by metes and bounds, or other sufficient description, as though the grantor owned in severalty the particular part conveyed. The lands described in these conveyances are called "specific tracts." There are more than a hundred of such tracts, and they are designated in the findings by numbers. The court below found that these specific tracts, conveyed by deeds purporting to convey the whole title, "should be allotted and set apart in partition as a portion of the shares and interests of such co-tenants, and in such manner as to make such deeds effectual as conveyances of the whole title to such segregated parcels, if the same can be done without material injury to the rights and interests of other co-tenants who did not join in such conveyances, or those claiming under such other co-tenants, or any of them; and the tracts so conveyed are to be charged in proportion to their value to the interests in said rancho of the said grantors." This finding is attacked as erroneous by some of the appellants, who contend—*First*, that such a conveyance is void; and, *second*, that, if not void, the grantee under it of a specific tract should take, on partition, only such a share as is equal to the undivided interest which the granting co-tenant had in such specific tract. Upon this subject it is declared in section 764 of the Code of Civil Procedure as follows: "Whenever it shall appear, in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance purporting to convey the whole title to such specific tract to the purchaser in fee-simple and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs and assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury to the rights and interests of the other co-tenants who may not have joined in such conveyance." If this section of the Code controls in the case at bar, then the question under discussion must be answered adversely to the contention of appellants. But the part of the section above quoted was not enacted until 1376; and, as the conveyances here involved were made prior to that time, it is contended by appellants that the said provision of the Code is not applicable to this case. Of course, if this amendment to the section was an entirely new provision, and completely changed the old law upon

the subject, it would not be retroactive, and could not destroy or seriously disturb prior vested rights. But, in our opinion, the law was substantially the same before the amendment as after it. From a general statutory enactment not expressing a design to change the law there arises no necessary presumption that the law was different before the enactment. It was said at a very early date in the history of our jurisprudence that "to know what the common law was before the making of a statute, whereby it may be known whether the statute be introductory of a new law or only affirmatory of the common law, is the very lock and key to set open the windows of a statute," and that "in all general matters the law presumes the act did not intend to make any alteration." These rules were approved by our predecessors, the learned Justice FIELD delivering the opinion of the court, in *Baker v. Baker*, 13 Cal. 95, 96. Statutes are frequently intended to remove all doubt and uncertainty as to some principle of law, and to state, in apt, distinct, and explicit language, what the law is upon a particular subject; and we think that such was the effect of the amendment which we are now considering. In the same amendment it was also enacted, for the first time, that, when a co-tenant had made improvements on a part of the common land, that part should be allotted to him, on partition, without considering the value of such improvements, if the same could be done without material injury to the other co-tenants; but it is not contended that such was not the law before the amendment. In *Seale v. Soto*, 35 Cal. 102, (decided in 1868,) the lower court had ordered in its interlocutory decree "that there be set off to the said several parties such portions of said premises as will include their respective improvements, provided, always, that the rights or interests of neither of the other parties be prejudiced thereby;" and this court held, on appeal, that the order was "equitable, just, and proper," and "cannot be successfully assailed."

The decision of this court on the former appeal, if not declaring, as the law of the case, that the rule laid down in section 764 should govern, is at least strong authority to that point. Mr. Justice THORNTON, who delivered the leading opinion in the case, when giving reasons for the proposition that an interlocutory decree should determine the rights of all the parties, urges, as an argument, the consideration that otherwise the provisions of section 764 could not be carried out. He quotes the section in full, and says: "We cannot see how these provisions can be carried out by the referees unless the interest of each party is ascertained by the court and stated specifically in the decree. And when the decree for partition is made, as it is in this case, the court must determine under which of the original co-tenants each party claims, and state it in the decree, so that the referees can perceive clearly and be enabled to execute the provisions in section 764 when inserted in the decree." None of the other justices dis-

sent from this part of the opinion, although Mr. Justice Ross holds that it was sufficient, in the first instance, to determine the shares and interests of the original co-tenants. The concurring opinion of Mr. Justice McKee merely fortifies the opinion of Justice Thornton as to the proper character of the interlocutory decree, and says, among other things, as follows: "The next step in order is to ascertain and determine the respective rights and interests of each of the tenants in common in the mode prescribed by sections 763, 765, and 769 of the Code of Civil Procedure, and adjudge partition between them according to their respective rights." Moreover, in the findings of the district court which were then under the review of this court, there was a finding on the subject of specific tracts to the precise effect, and in the identical language, of the finding of the superior court which we are now considering, and the superior court was directed to "proceed upon the findings heretofore made and herein approved." Therefore, whether or not the decision can be taken as a direct adjudication of this point, it is evident that, in the judgment of the court at that time, the true rule on the subject is that declared in section 764. And we are satisfied, upon principle and authority, that such is the correct rule.

It is clear that a deed made by one co-tenant conveying a specific part of the land of the co-tenancy is not void. That was definitely settled in *Stark v. Barrett*, 15 Cal. 362. In that case one of the co-tenants (Vaca) had undertaken to convey all his right, title, and interest in and to a tract containing 1,500 acres, being a part of the common land; and it was argued, and authorities cited to the point, that the conveyance was void because it destroyed the unity of possession, because it impaired the right of the other co-tenants to partition, and imposed additional burdens on them when seeking partition, etc. But the court, after reviewing the authorities, held definitely that such a conveyance was not void, although, as against the other co-tenants, the grantee might lose his rights on partition. And, of course, where, as in the case at bar, a co-tenant undertakes to convey the whole title to a specific tract, his conveyance, under well-settled principles, operates as an alienation of, at least, all the right and interest which the grantor had in the specific tract; so that he comes within the rule that his conveyance is not void, as established in *Stark v. Barrett*. *Freem. Co-Tenancy*, § 204 et seq. Furthermore, when a co-tenant undertakes by a bargain and sale deed to grant a specific tract in severalty, although his deed will not convey the interests of his co-tenants, he is estopped under well-settled rules from denying, as against his grantee, that he owned a less interest than his deed purports to convey. And, under equally well-settled rules, if he afterwards acquires the title of his co-tenants in the specific tract, such title will inure to the benefit of his grantee; and if, upon partition, such specific tract be allotted to him, then it happens that he does acquire his co-tenants' title, and it passes to his grantee.

But a suit in partition under our Code is, in its nature and essence, equitable, (*Emery v. Alvarado*, 64 Cal. 619, 2 Pac. Rep. 418; *Gates v. Salmon*, 85 Cal. 593;) and the court in its decree, proceeding to do what is "equitable, just, and proper," will not only allot to a co-tenant that part of the common land upon which he has valuable improvements, but will also set apart a specific tract to the share of a co-partner who has undertaken to convey the title in fee to such tract in severalty, so that the grantee may have that which is justly his, when such disposition of the land can be made "without material injury to the rights and interests of the other co-tenants." See 1 Story, Eq. Jur. § 656c; *Freem. Co-Tenancy*, §§ 202-205; *McKee v. Barley*, 11 Grat. 340; *Campau v. Godfrey*, 18 Mich. 27; *Holcomb v. Coryell*, 11 N. J. Eq. 548; *Nichols v. Smith*, 22 Pick. 319.

There are no decisions in this state which assert a different rule. *Gates v. Salmon* (reported in 85 and also in 46 Cal.) is cited on both sides. In the case as reported in 85 Cal., the only point decided is that, in a suit for partition, grantees of specific tracts are necessary parties to the action; and the views expressed in the opinion on the general subject are in harmony with the conclusion above stated. In the case as reported in 46 Cal., it is stated that the grantees of specific tracts, under certain deeds, acquired the interests which their grantors had at the time of the execution of the deeds; but the character of such deeds does not appear, nor, in the confused state of the pleadings and issues and parties in that case, does it appear against whom the statement is intended to apply, or between what parties the question was raised. Of course, one tenant in common cannot, as against his co-tenants, absolutely convey away the interests of the latter in any part of the common land. In *Pfeiffer v. Regents*, 74 Cal. 156, 15 Pac. Rep. 622, a tenant in common had undertaken to grant to a stranger the right to perpetually divert water from the common land upon the several land of the grantee; and in support of that grant the respondent had cited *Stark v. Barrett* and *Gates v. Salmon* and other cases in which the rule applicable to conveyances of specific tracts was discussed, and had sought to invoke that doctrine in behalf of the asserted water-right. And it was in that connection that the court said that the former decisions on the subject should not be pushed further; that is, that they should not be so extended as to embrace the asserted right of one tenant in common to create an easement on the common land. The case, however, recognizes the rule as hereinbefore stated. (It may be remarked, as was said in that case, that it appears, from many cases in the California Reports, to have been a common custom among the owners of large Mexican grants in California for individual co-tenants to convey specific parcels of the common land. The custom probably grew out of the fact that during the long periods of time necessary to complete titles, to obtain patents, and to make partitions there could be but little beneficial use of the land, unless it

were segregated into parcels by the co-tenants and their grantees.) Our conclusion on this point is that the court below was right in holding that specific tracts embraced in deeds purporting to convey the whole title should be allotted in severalty to the grantees therein, and charged, respectively, to the shares and interests of the granting co-tenants, where it could be done without material injury to the rights of the co-tenants not joining in such deeds, in manner asset forth in the findings and decree.

2. There were also quitclaim deeds of interest in specific tracts; and with respect to them the court found as follows: "And it further appearing that various of said co-tenants sold fractional undivided interests in specific tracts out of the common land of said rancho, and executed to the purchasers deeds of conveyance purporting to convey interests in such specific tracts to the purchasers in fee, the interests described in such deeds should be allotted and set apart in partition to such purchasers, or their grantees, respectively, in such manner as to make such deeds effectual as conveyances of such interests, if the same can be done without material injury to the rights and interests of other co-tenants who did not join in such conveyances, or those claiming under such other co-tenants, or any of them; and the interests so conveyed, and hereinafter designated as fractional interests of specific tracts, are to be charged in proportion to their value to the interests in said rancho of the same grantors." We see no error in this finding. The grantees in such a deed cannot expect, or legally claim, more than the deed purports to convey, which is merely the share of the grantor in the tract. The contention of some of the appellants that such a deed should be filled by an allotment of the whole tract in severalty cannot be maintained, and where there is a covenant of warranty in such a deed it attaches merely to the interest which the deed purports to convey. *Kinball v. Semple*, 25 Cal. 441; *Gee v. Moore*, 14 Cal. 472; *Morrison v. Wilson*, 30 Cal. 344; *San Francisco v. Lawton*, 18 Cal. 465; *Barrett v. Birge*, 50 Cal. 655; *Brannock v. Monroe*, 65 Cal. 491, 4 Pac. Rep. 488.

II. Appeals of Maraschi et al., on Transcript 13,275. The views and conclusions above expressed on the subject of specific tracts, and the distinction between a deed purporting to convey the whole tract in severalty and a deed purporting to convey only the grantor's interest in the tract, are determinative, against the appellants, of the appeals taken from the interlocutory decree by appellants Maraschi, Ruth Ann Boyd, administratrix, Boorman, administrator, et al., and by appellants Pitman, Gill and Mayhew; all founded on transcript No. 13,275. We have carefully examined the able brief of counsel for those appellants, in which it is argued that the grantors in certain deeds which do not purport to convey more than the interests of the grantors in certain specific tracts should have allotted to them the whole of said tracts; but we do not think it necessary to discuss that question any further. In addition to what we have before said,

it is sufficient to say that, in our opinion, the law is correctly stated in section 764 of the Code of Civil Procedure.

2. And such views are also determinative against the appellants of the appeals taken by the appellants William Meyer, Richard O'Neill, et al., whose contention on this point has been very ably presented by their counsel.

3. The appeal of Pitman, Gill, et al., from an order denying them a new trial, based on the record in transcript No. 13,284, presents no point not raised by their appeal from the interlocutory decree.

III. Specific Tract No. 41. The court found that specific tract No. 41 should be allotted to John Davis; and appellant Emily S. Tewksbury contends that the part of the decree so allotting said tract is erroneous. John Davis deraigns title to said specific tract No. 41 through a deed from James T. Dean; and the title of Dean came through a deed to him from Gabriel Castro and his wife, Marcelina Castro, made on August 20, 1853. This latter deed was duly executed in every respect, except this: the notary who took the acknowledgment failed to certify that the wife acknowledged it "on examination apart from and without the hearing of her husband." Therefore, if, at the date of the deed, the title to said tract No. 41 was in the wife, Marcelina, it did not pass to Dean; but if the title was then in the husband, Gabriel, it did pass to Dean. Appellant contends that the title was then in the wife, because on November 15, 1851, Gabriel Castro (under whom both parties claim) and his wife made a deed to one Jesus Acosta, which, as is contended, embraced said tract No. 41, and on the same day said Acosta executed a deed to the said wife, Marcelina, which, as is contended, also embraced said tract. These two last deeds were without consideration, and were intended to consummate a gift from the husband to the wife. These deeds were recorded; but the court finds that Dean purchased in good faith, for a valuable consideration, and without notice of said deeds.

We think that said deed from Gabriel Castro and his wife to Acosta did not convey said specific tract No. 41. In the first place there was no description in said deed which embraced said tract. The only description, or attempted description, of land in said deed is as follows: "All our right, title, and interest in and to all the land inherited by us, or either of us, from Francisco Maria Castro, the father of said Gabriel Castro." There is no reference to the San Pablo rancho, nor is there any description by metes and bounds, or by common name, or by any sort of designation by which real property is usually described. There is no mention of any county, state, or nation. The whole of the force, point, and virtue of the alleged description rests solely on the word "inherited." But Gabriel Castro, son of Francisco Maria Castro, did not really inherit any part of the San Pablo rancho from his father. If any interest in the ranch passed to the son from the father, it passed by the will of the latter, in which there was the following clause.

"I order, and it is my will, to leave, as in fact I do leave and give, all my property, rights, and actions, together with all the land of my Rancho San Pablo, to my wife one-half, and the remaining half equally between my legitimate sons and daughters, each being owner of his equal part or share of the effects." 64 Cal. 549, 2 Pac. Rep. 426. But one who gets property by will does not inherit; he takes by purchase, and not by descent. We are well aware that, in construing deeds and other contracts, the strict legal meaning of a word will not be adhered to where the context fairly shows that a different meaning was intended; but where there is no such context, and the word alone is relied on, it is difficult to see why it should be given any other than its legal meaning. Moreover, the grant for which Francisco Maria Castro made several applications in his life-time included only three square leagues. (It is not necessary here to linger over the question whether any grant was ever made of any land to said Francisco. The facts are stated in the original findings, and may be found in 64 Cal., commencing at page 543, and 2 Pac. Rep. 421. The real grant upon which title vested was made after his death to his wife and children, upon application of his son Joaquin I. Castro.) After the death of Francisco, his son Joaquin renewed his father's application for the three leagues; but, before any final action on that application, he made another application for four leagues. It was upon this final application that the only grant ever consummated was made, and there is no showing that specific tract No. 41 was within the land applied for by Francisco.

Again, we think that the certificate of acknowledgment of the deed from Gabriel Castro and wife to Acosta is fatally defective. It commences as follows: "Be it remembered that on the fifteenth day of November, A. D. 1851, before me, Gustavus Harper, one of the justices of the peace in and for said _____, came the above-named," etc.; and it is signed, "Gustavus Harper, J. P." This certificate shows neither venue nor jurisdiction. It does not appear from it of what county Harper was a justice, or whether he was a justice of any county, or in what county or state the acknowledgment was taken. The fact that the name of a certain state and county were written at the commencement of the deed has no more significance than the appearance of those names in the body of the deed, where they usually appear, would have had. Defects in certificates of acknowledgment should be usually overlooked as much as possible in furtherance of justice; but in this case the defect is radical, and, so far as we can see, to condone it would not be in the interest of justice. We do not think that the allotment of specific tract No. 41 to John Davis was erroneous.

IV. Title of Ann Wilson to Specific Tract No. 42. The court allotted this tract to Ann R. Wilson; and with respect to that matter appellant Emily Tewksbury, on her appeal from the order denying her motion for a new trial, contends that the court erred in excluding from evidence a

paper claimed to be a certified copy of a deed from Juan Jose Castro to his wife, Petra Bernal Castro, dated July 15, 1852, and recorded November 1st of the same year. But appellant Tewksbury is in no position to present that point. The deed was offered in evidence by defendant Gutierrez through her attorney, George E. Lawrence, and was objected to on various grounds by the defendant Mary E. Wakeman, and also by some other parties. When the objection was sustained, an exception was taken by said Gutierrez alone, through her said attorney, Lawrence. On a subsequent day the defendant William Leviston asked in his name to have the benefit of the exception taken by Gutierrez, and his request was allowed. The proceedings with respect to the point are to be found in transcript No. 14,006, from folio 8,235 to 8,248; and there is nothing there to show that appellant Tewksbury excepted or took any step in the matter. Neither Gutierrez nor Leviston moved for a new trial. The point, therefore, does not arise on Tewksbury's appeal from the order denying a new trial, and her counsel have probably come to take that view, for in their reply brief they make no answer to the position as above stated, taken by Hittell and Belcher, counsel for respondents. It is not necessary, therefore, to discuss the objections made to the introduction of said deed; but we may say that, if the question were before us, we would be strongly inclined to hold that there was no error in excluding the deed.

V. Tewksbury Tax-Deeds. At the first trial the district court found that several tax-deeds upon which Jacob M. Tewksbury relied for title to various parts of, and interest in, the ranch, were invalid; but this court held, on the former appeal, that the findings of fact as to those tax-titles were insufficient. At the trial in the superior court the facts were fully found, and the said deeds were again found to be of no value. Appellant Emily Tewksbury now attacks the findings as to two of those deeds, viz., the deed as to C. T. Pollard of one-eighth of the rancho, dated August 25, 1856, and the deed to J. M. Tewksbury of a specific tract of 213 acres, dated October 5, 1860. With respect to these deeds it may be sufficient to say, in support of the judgment, that the court found as follows: "At the said several times that the said Jacob M. Tewksbury acquired or pretended to acquire interests in the said San Pablo ranch, or any part thereof, as hereinbefore stated, (under the tax-sales,) he became or was a tenant in common in the whole of said rancho with said Martina Castro de Alvarado, and others;" and that there was evidence to support this finding. Tewksbury, therefore, being an owner, and being under "a legal or moral obligation to pay the taxes, he could not, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by buying from a stranger who purchased at the sale." *Moss v. Shear*, 25 Cal. 45.

There are other reasons why the tax-

sales were not valid, which we notice briefly.

1. The deed to Pollard was made under the revenue act of May 15, 1854, (St. 1854, p. 88.) Appellant merely introduced the tax-deed, relying upon it as making a *prima facie* case, and introduced no other evidence. Section 90 of the said act of 1854 provided that the deed should be *prima facie* evidence of certain things, but section 55 of the revenue act of April 29, 1857, expressly repealed said section 90 of the act of 1854. St. 1857, p. 344. And in the absence of the effect given to the deed as evidence by the statute, proof of the preliminary steps necessary to vest the power of sale was essential. *Keane v. Cannovan*, 21 Cal. 291. In the case of *Moss v. Shear*, supra, cited by appellant, the point that the tax-deed was not *prima facie* evidence was not made by counsel or noticed by the court. The other cases cited were under the act of 1857.

Furthermore, the assessment was invalid because the owner was Castro, and the assessment was made to "Castero." *People v. Whipple*, 47 Cal. 591; *Crawford v. Schmidt*, Id. 617; *Kelsey v. Abbott*, 13 Cal. 609; *Smith v. Davis*, 30 Cal. 537. *Lake Co. v. Mining Co.*, 66 Cal. 17, 4 Pac. Rep. 876, is also to the same point; for while the tax-sale involved there was governed by the subsequent amendment to the revenue law, which provided that a mistake in the name of the owner of real property should not invalidate the assessment, (Pol. Code, § 3628.) the court applied the rule to the assessment of personal property; and held that a mistake in the name of the owner, less important than the one in the case at bar, was fatal, saying that "in making the assessment the provisions of the statute under which it is to be made must be observed with particularity." It is contended by appellant that "Castero" sounds like "Castro," and by respondents that in pronouncing the former name the accent should be on the second syllable, thus making the sound entirely different; but it is not a case to which the rule of *idem sonans* applies. Tax proceedings are *in invitum*, and, to be valid, must closely follow the statute; and *idem sonans* applies to cases of pleas of misnomer and issues of identity, where the question is whether the change of letters alters the sound, not to assessments, and other cases of description, where the written name is material. "Different letters will make different names, though the sound be the same." *Com. v. Gillespie*, 7 Serg. & R. 478. The deed to Pollard described the land sold as having been assessed to "Castro," and does not purport to be made in pursuance of an assessment to "Castero." The assessment was invalid because on the original assessment roll there was nothing to show what valuation had been put on the land and improvement attempted to be assessed to Castro; and on the duplicate roll referred to in the deed there is nothing whatever to show what was meant or intended by the figures in any of the columns headed "value" or "taxes." The exhibits there referred to are to be found in the original of transcript 13,276. The duplicate roll is

the tax collector's warrant. Act 1854, §§ 85, 88. There are other objections to the assessment and deed not necessary to be here noticed.

2. The tax-deed to Tewksbury of the specific tract of 218 acres, founded on proceedings under the revenue act of 1857, was also valueless, because the assessment upon which it was based was invalid. With respect to this assessment the court finds—both as to the original assessment, and the duplicate roll—that "there is no dollar mark, word, abbreviation, or other character or thing in said book, or any page thereof, to show what was meant or intended by the figures in the columns headed 'Value' or 'Tax.' That such a defect is fatal to an assessment has been too long the established law to be now questioned; it has become a rule of property. *Huributt v. Butenop*, 27 Cal. 57; *Brady v. Seamen*, 30 Cal. 611; *People v. Savings Union*, 31 Cal. 132; *People v. Hastings*, 34 Cal. 571; *People v. Hollister*, 47 Cal. 408. We think, also, that the attempted description of the property sought to be assessed was fatally defective; but we do not deem it necessary to discuss that question here.

VI. Specific Tract No. 30. On June 1, 1859, Joseph Boyd and wife executed a deed to J. M. Tewksbury, describing a certain part of the ranch, containing 99 acres, which was afterwards designated as "Specific Tract No. 30." The court held that this deed carried only the undivided interest which Boyd then had; and appellant contends that the court erred in not holding that it carried the whole tract in severalty. This point is very meagerly argued. The general counsel for respondents say that it "specially concerns respondent Boyd, and will be very fully and ably argued by her counsel;" but we do not find it to be fully argued anywhere. The finding of the court represents that the deed contained some words purporting to grant, bargain, and sell the described tract; but it also contained these words: "Being the same land derived to the said party of the first part by a deed from Martina Perez, dated September 6, 1858." And the said deed from Martina Perez to Boyd only purports to convey "all the right, title, and interest"—being an undivided interest—in said specific tract No. 30. At the time of the deed from Boyd to Tewksbury, Boyd did not own any interest as a co-tenant in the San Pablo rancho. The only interest which he owned was the undivided interest in said specific tract No. 30, which he had obtained under said deed from Martina Perez, although several years afterwards he did acquire a similar undivided interest in the rancho, equal to 190 acres. He was therefore not in the position of one to whom the rule as stated in section 764 of the Code of Civil Procedure applies; that is, he was not one who, "being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land." Moreover, on the same day on which said deed was made by Boyd to Tewksbury, the latter made a deed to Boyd of all his

(Tewksbury's) interest in another specific tract of the rancho, and there is reason to believe, as contended by respondent, that the transaction between the parties was merely one of exchange. Tewksbury knew that the only interest which Boyd had in tract 30 was that which he had derived from Martina Perez, as stated in the deed itself; Boyd had no general interest in the rancho which he could concentrate upon the particular tract; and, as there is no evidence before us showing what circumstances there were to indicate the understanding and intention of the parties, we do not see how we can hold that the court erred in determining that the said deed was only intended to convey, and did only convey, Boyd's undivided interest in said specific tract No. 30.

VII. The Dall Claim to Specific Tract No. 115. Appellant George W. Haight contends that this tract passed from the original co-tenant, Victor Castro, to John H. Dall, (and through Dall to said appellant,) and that the court erred in not so holding. The court held that the interest claimed by Dall passed to Ephraim Leonard by virtue of the foreclosure of a mortgage made to him by said Victor Castro, and we think that the court was right. On April 21, 1853, the said Victor Castro executed and delivered to said Leonard a mortgage, with covenants of warranty, of all Castro's right, title, and interest, in law or in equity, in the rancho, and all his improvements on the same, to secure the payment of a certain promissory note of even date given by Castro to Leonard; which mortgage was duly recorded April 21, 1853. But five days prior thereto, viz., on April 16, 1853, said Castro had executed to said Dall a deed purporting to convey said tract No. 115. This deed, however, was not recorded until June 9, 1853; and, at the time of the execution, delivery, and recording of said mortgage to Leonard, the latter "had no knowledge of said previously mentioned deed of said Victor Castro to said John H. Dall." There are also these other facts: In November, 1852, Castro and Dall entered into a written contract by which Dall was to build a second story on the dwelling-house of Castro on the ranch, and Castro was to pay Dall \$2,000, and to convey to him 100 acres of land, situated on the ranch; the 100 acres, however, not being described or located. In pursuance of this contract Castro, before April 1, 1853, paid Dall the \$2,000, and put him in possession of a tract of land on the ranch which was afterwards designated as "Specific Tract No. 115." Before April 1, 1853, Dall leased said land to Charles H. H. Cook and E. W. Hiller. "Said Cook had, prior to the making of said contract between said Victor Castro and said Dall, and prior to and up to the making of said lease, lived and resided on said San Pablo rancho, acting as the servant and looking after the interest of said Victor Castro." Cook and Hiller were in the actual occupation of said tract of land at the time of the making of the said note and mortgage to Leonard. On the 16th day of April, 1853, one Smiley, who was the authorized agent of Dall, surrendered the said contract of purchase to Castro; and

Castro on the same day executed and delivered to Smiley, for Dall, the deed before mentioned. On May 13, 1856, Leonard commenced an action to foreclose his mortgage, making Dall a party defendant, with the usual averment that Dall claimed some interest, etc., in the premises, and that such interest, if any he had, was subsequent, etc., to the mortgage. Dall answered, setting up his said contract of purchase of 1852, his possession, and his said deed of April 16, 1853, his alleged priority under the same, and averring that plaintiff had notice of his title. The court, in due course, rendered judgment for plaintiff, adjudging and decreeing, among other things, that plaintiff had no notice of Dall's asserted title, and barring and foreclosing all the latter's right, title, interest, and equity of redemption in and to the mortgaged premises, and every part thereof. Under this judgment the premises were duly sold, and Leonard, becoming the purchaser, received in due course a sheriff's deed therefor. So far as appellant stands upon his unrecorded deed alone, the question is, we think, of easy solution. There is considerable abstruse learning to be found in the books on the question, who are proper parties in a foreclosure suit, and whose titles or interests can be adjudicated in such suit? In *McComb v. Spangler*, 71 Cal. 418, 12 Pac. Rep. 347, the rule was laid down that "the only proper parties are the mortgagor and mortgagee, and those who have acquired rights under them subsequent to the mortgage." In that case the wife alone had executed a mortgage on community property; the husband was made a party defendant to the foreclosure suit, and made default; and it was held that he was not estopped by the decree, because his claim to the land was "adverse and paramount to that of the mortgagor." But to apply that rule to the case of a prior unrecorded deed of the mortgagor would be to entirely ignore the statutes about recordation, and destroy the protection which they give, and upon which a purchaser may securely rely. Those statutes, at that time, provided that "every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this act, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, when his own conveyance shall be first duly recorded;" and that "the term 'conveyance,' as used in this act, shall be construed to embrace" a mortgage. Dall's deed, therefore, as against Leonard's mortgage, was void. As against Leonard it had no existence before its recordation in June following; and whatever right he could then assert under it was "subsequent to the mortgage," and could properly be subjected to the foreclosure suit.

2. It is contended, however, that because Dall's tenants, Cook and Hiller, were in possession, therefore Leonard must be held to have had notice of Dall's claim under his contract and deed. But the court finds that Leonard had no notice of such contract or deed; and, as there was no motion for a new trial, that finding is

conclusive. The force of the finding of this ultimate fact is not broken by the finding about the possession. It is to be observed that the statute makes no exception in favor of a party in possession, and the courts had to exercise some liberality of construction to make such exception. The philosophy upon which it was founded was this: That where a third party was in the open and conspicuous possession of the land conveyed, with nothing to indicate that he was not holding adversely to the grantor, the grantee, although a purchaser "for a valuable consideration," should not, in view of such pronounced hostile possession, be deemed to be a purchaser "in good faith." But the authorities on the subject in this state—many of which are cited in the briefs—go only this far: that such possession is evidence of notice, and puts the purchaser on inquiry. It is not, *ipso facto*, notice, but merely evidence tending to show notice. The first thorough discussion of the subject in this state is to be found in *Hunter v. Watson*, 12 Cal. 363. In that case the learned Justice BALDWIN, in delivering the opinion of the court, says that the question is "full of embarrassment," and comes to a conclusion with great hesitancy. He suggests "whether the statutes of registration should not be thoroughly revised, so as to secure uniform and certain rules for the disposition and protection of real estate in the future." After reviewing the authorities, he says that "some of the cases hold that mere possession is actual notice, and will not suffer any proof to be made to the contrary; other, and perhaps the greater number, hold that it is only a presumption of notice which may be rebutted; and others, again, hold that the possession is not so much notice of the title of the holder as a circumstance which should put the purchaser on inquiry;" and the utmost conclusion to which he comes is that "open, notorious possession of real estate, by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser of the first vendee's title;" and that "the possession must exist at the time of the acquisition of title or deed of the subsequent vendee." The rule, however, was modified and more fully explained in subsequent cases. *Fair v. Stevenot*, 29 Cal. 489, is a leading case on the subject. In that case Mr. Justice RHODES, delivering the opinion of the court, discusses the question very thoroughly, and says, among other things, as follows: "The fact of possession is only evidence tending to prove notice. Neither the recorded deed in the one case, nor the possession of the grantee of the unrecorded deed in the other, is the ultimate fact, but notice is the ultimate fact to be established by the evidence. Upon proof being made of the record of the deed, the notice necessarily results by operation of law; but not so upon proof of the possession, for the possession may be taken and held in such various modes, and accompanied by so many qualified circumstances, that each case must depend upon its own peculiar features, and therefore proof of possession is not decisive, without regard to the other facts of the case." In *Pico v. Gallar-*

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do, 52 Cal. 206, the court cites *Fair v. Stevenot*, and says: "The court below found that, at the date of the sale and conveyance to plaintiff, the defendants were in possession of the demanded premises. Such possession was not notice of the defendants' equities, but only evidence tending to prove notice." *Smith v. Yule*, 81 Cal. 180, is also to the same point, and the opinion in that case is very full and instructive. See, also, *Thompson v. Ploche*, 44 Cal. 516. The above cases state the true rule, and a close examination of the other California cases will disclose nothing in conflict therewith, although there is a *dictum* to the contrary in *Talbert v. Singleton*, 42 Cal. 395.

Of course, where it is claimed that the circumstances of possession in a particular case are sufficient to show notice, and that the court or jury erred in finding otherwise, such finding can be reviewed on a statement or bill of exceptions which brings up the evidence; but in the case at bar there was no motion for a new trial, (as to this matter,) and there is no evidence before us. It does appear that prior to and almost up to the very time of the execution of the mortgage, Cook, who was in possession, "resided on said San Pablo rancho, acting as the servant and looking after the interest of said Victor Castro;" and it may have appeared that Leonard had the right to suppose that the servant was acting for the master, and that, therefore, there was no such want of "good faith" as would make an exception to the statutory rule. In *Smith v. Yule*, supra, a case quite similar to the one at bar, the court say that "inquiry does not become a duty where the apparent possession is consistent with the title appearing of record," and that "the subsequent purchaser is not justly chargeable with fraud in failing to make inquiry for a prior unrecorded conveyance, unless there is some fact or circumstance, apparent to his observation, calculated to excite the suspicion of a prudent man, dealing with the property, that a prior conveyance had been made." At all events, in the case at bar, the court found as an ultimate fact that there was no notice; and, the evidence upon which the finding was based not being before us, the finding cannot be disturbed. Moreover, we think that Dall's claim of possession and notice to Leonard was conclusively adjudicated against him in the foreclosure suit. Having set up said notice in his answer, and the court having found and decreed against him, he was, in our opinion, notwithstanding some confusion of authorities on the general subject,—concluded.

VIII. Specific Tract No. 78. Specific tract No. 78 is a small tract containing 30.47 acres, and appellant Leviston contends that the court should have allotted 27 acres of said tract to him, as successor of Martina Castro, and should have charged the same to the interest and share of respondent Maria L. Velasco, and that the court erred in not so doing. The facts on this point, are, briefly, these: In July, 1878, said Martina Castro and Petra Bernal de Castro (Martina being the daugh-

ter, and Petra being the wife, of Juan Jose Castro, one of the original tenants in common) made a mortgage of all their interest in the rancho to said respondent Velasco. At the date of this mortgage, neither Martina nor Petra had any interest in the rancho, their interest having been exhausted prior to that time. (This last statement seems to be verified by the findings on the Juan Jose share and interest; at all events, the statement is made by counsel for respondent, and is not controverted by counsel for appellant.) In 1878, Mrs. Velasco commenced an action to foreclose the mortgage; but while the action was pending she dismissed it as against said Martina Castro upon an agreement that Martina should convey to Velasco a specific parcel of 300 acres, and that Velasco should reconvey to Martina, out of this parcel, a certain specific piece of 27 acres,—the said 27 acres being the tract here now in controversy. In pursuance of this agreement, deeds were interchanged between the parties at the same time, and as one transaction, no money consideration being paid by either. Velasco got nothing through her deed from Martina of the 300 acres, and, of course, conveyed back no title to the 27 of that 300 acres. The whole transaction was practically a nullity. Velasco proceeded with her foreclosure suit against said Petra, and, obtaining a decree, had all Petra's interest in the rancho sold under it. Velasco became the purchaser at the sheriff's sale, and under the sheriff's deed she got possession of a small piece of land, not being a part of the 300 acres or of the 27 acres mentioned in the said deeds between said Velasco and said Martina. Upon this small piece of land, obtained under said sheriff's deed as aforesaid, Velasco made valuable improvements. Several years after the above occurrences, viz., on September 7, 1885, Velasco purchased from the holders of an entirely different share, viz., the Alvarado share, an undivided 80-acre interest in the rancho. (This purchase was in all probability made in order that she might have some title to concentrate upon the small tract which she took possession of under the sheriff's deed, and upon which she made her improvements, as she got no title thereto under said deed.) And now appellant contends that under the general principle applied to sales of specific tracts by co-tenants of the whole rancho, as stated in section 764 of the Code of Civil Procedure, this 80 acres undivided interest thus afterwards acquired by Mrs. Velasco, in 1885, should be applied to making good and filling the said deed for 27 acres made by her to Martina, in 1879. It is evident, however, (1) that this contention of appellant does not bring him within the rule as stated in section 764; and (2) that it is entirely outside the equitable considerations upon which the principle contended for is founded. As Martina could not satisfy any part of her deed to Velasco for the 300 acres, she (and her grantee) cannot be heard to demand satisfaction of the deed of a part of said 300 acres which she, at the same time, received back from Velasco. It was the evident intention of the parties to the

transaction that the one interest should be satisfied out of the other, and that the title which Velasco conveyed back to Martina was no other or greater than the title which Martina conveyed to Velasco; and it is the intent of the parties which controls a court of equity in working out fair and just results. To hold that, under these circumstances, Velasco, while getting nothing from the deed for 300 acres, should be compelled to make good her return deed to Martina of a part of that 300 acres, would be to hold just the reverse of that which is "equitable, just, and proper." If the doctrine of estoppel be invoked, then each party would be estopped by her own deed, and the one estoppel would neutralize the other. *Carpenter v. Thompson*, 3 N. H. 204; *Kimball v. Schoff*, 40 N. H. 190. Our conclusion is that the court below did not err in its disposition of said 27 acres of specific tract 78. (The court did give a small fractional part of said 27 acres to appellant; but, as Velasco does not appeal from this part of the decree, the correctness of that ruling of the court is not before us.)

IX. Appeal of E. Kirkpatrick. This appeal rests on the contention that the court erred in holding that the attempted record of a deed from James B. and Henry V. Alvarado to A. B. Patrick, dated December 6, 1879, did not impart constructive notice to McLaughlin, the grantor of respondents, who purchased the same land from the same grantors a few months later. McLaughlin purchased for a stated sum of money, which was the "full value" of the land; and at the time he purchased and recorded his deed he had "no actual notice or knowledge, or notice or knowledge in fact," of the said deed to Patrick, "or of any fact, matter, or thing which might, could, would or should put him on inquiry concerning the same," but was "wholly ignorant of said deed of conveyance." No equities are shown in favor of said Patrick, and the only question is whether his attempted record of his deed must be held to be conclusive constructive notice to McLaughlin. We think that the court was right in holding that it did not impart such notice, on account of the insufficiency of the certificate of acknowledgment. Section 1213 of the Civil Code provides that a conveyance of real property shall be constructive notice of its contents to subsequent purchasers when it is acknowledged, or proved, "and certified and recorded, as prescribed by law." Section 1170 provides that "an instrument is deemed to be recorded, when, being duly acknowledged or proved, and certified, it is deposited in the recorder's office with the proper officer for record." Section 1161 provides: "Before an instrument can be recorded, * * * its execution must be acknowledged by the person executing it, * * * or proved by a subscribing witness, * * * and the acknowledgment or proof certified in the manner prescribed by article 8 of this chapter." In said article 8 it is provided that an acknowledgment may be made "within the city, city and county, county, or district for which the officer was elected or appointed," before either of several of-

officers, including a notary public. Section 1181. Said article also provides a form of a certificate of acknowledgment, which must be substantially followed, and indorsed on or attached to the instrument, and which requires that "the name and quality of the officer" taking the acknowledgment must be in the certificate. Sections 1188, 1189. It is also provided that "officers taking and certifying acknowledgments * * * must authenticate their certificates by affixing thereto their signatures, followed by the names of their offices; also their seals of office," if they are required to have seals. Section 1193. Now, the certificate of acknowledgment to the said deed to Patrick commences as follows: "State of California, city and county of San Francisco—ss.: On this eighth day of December, A. D. eighteen hundred and seventy-nine, before me, H. I. Tillotson, a notary public in and for said city and county." It is signed, "H. I. Tillotson, Notary Public." At the end of the certificate he says that he has hereunto "affixed my official seal," and he attaches a seal as follows: "[Seal.] H. I. Tillotson, Notary Public, Contra Costa County." The court finds that said Tillotson was not a notary public in and for said city and county of San Francisco, but was a notary in and for Contra Costa county, and that said grantors appeared before him in said last-named county, and there acknowledged said deed. It is evident that the material statements in the certificate are not true. The acknowledgment was not taken in the county of San Francisco, and the notary was not a notary of that county. The "name and quality of the officer taking the acknowledgment" was not "in the certificate," as provided by sections 1188, 1189, Civil Code; nor was the name of his office given, as required by section 1193. A notary is an officer of the county for which he has been appointed, and his proper official name is "notary public in and for" said county. Willard v. Cramer, 36 Iowa, 22. And if it be contended that a certificate, good on its face, is sufficient, although its material statements are false, —a dangerous doctrine,—still it is evident that the certificate in this case is not sufficient on its face. It states that the acknowledgment was taken in the county on San Francisco before a notary public of that county who certifies that he attaches to it his notarial seal, while the seal, and the only seal, that is attached to it is the seal of a notary public of the county of Contra Costa,—a direct failure to comply with section 1193. And so a view from any stand-point shows that the ruling of the trial court should not be disturbed. There is nothing to induce a leaning against the correctness of that ruling.

X. Specific Tract No. 90. It is contended by appellant Tewksbury that the court erred in allotting specific tract No. 90 to the grantees of William B. Fleming. On January 5, 1857, J. M. Tewksbury and Martina Perez executed a bargain and sale deed to said Fleming, purporting to convey to the latter the whole of said tract No. 90 in fee; but it is contended

that said deed should be held valueless, because at its date said Tewksbury and Perez had no interests in the rancho, although they acquired such interests soon afterwards. It is contended by said appellant—at this particular point of her appeals—that J. M. Tewksbury acquired his earliest interest in the rancho on March 7th of the same year, through a deed to him made by said Fleming. It is to be noticed, however, that, at the date of said deed to Fleming, Tewksbury had an apparent title, and claimed to have the legal title, to the Antonio Castro interest in the rancho through the tax-deed to C. P. Pollard, heretofore noticed in this opinion; and that at said date said Martina Perez claimed to own the Joaquin Castro interest through the foreclosure of a mortgage and a sheriff's sale thereunder made to her March 11, 1856. In the deed, the land—afterwards designated as "Specific Tract No. 90"—is described as "being a portion of land set apart and allotted to certain parties named as the sixth part in the partition proceedings of 1856, hereinbefore mentioned;" and the principal parties of the sixth part were Joaquin Castro and his wife, Trinidad Pacheco de Castro. The deed contains the following covenant: "And the said parties of the first part, for themselves, heirs, executors, and administrators, do hereby also covenant, promise, and agree, to and with the said party of the second part, his heirs, and assigns, that neither they nor Joaquin Castro, nor Trinidad Pacheco, his wife, certain parties named as parties of the sixth part in the above-mentioned deed of partition, have made, done, constituted, executed, or suffered any act or acts, thing or things, whatever, whereby, or by means whereof, the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be, impeached, charged, or incumbered in any manner or in any way whatever." Shortly afterwards, viz., on March 13, 1857, the said Fleming (having in the mean time become the owner of a certain undivided interest in the whole rancho, through a conveyance from Marcilla B. Bradler) executed and delivered to said J. M. Tewksbury, who accepted the same, a deed conveying to Tewksbury all Fleming's title and interest in the rancho, "excepting and reserving from the operation of this deed all that lot of land in said rancho known and designated on said Gray's map of said rancho as 'Lot A, Subdivision No. 109,' containing 214 acres of land;" being the said specific tract No. 90. It is quite clear that the intent was to convey a perfect title to said specific tract No. 90 to said Fleming, and to insure the same; and, in view of the circumstances, the appellant Tewksbury cannot now be heard to impeach said title. We see no error, therefore, in the disposition which the court below made of said specific tract No. 90.

XI. Appeals of Frank Webber et al. These appeals are from the interlocutory decree, and from an order denying a new trial, and rest, partly, upon the record in transcript No. 13,871. Appellants base

their alleged rights in the rancho upon what is known as the "lawyers' title," which was connected with, and to some extent arose out of, an attempt at a partition of the rancho made in 1856. But said attempted partition, and said lawyers' title, were at full issue at the first trial in the district court. Evidence was introduced on the issues, and the court fully and clearly found and decided against the validity of both the partition and the said lawyers' title; and that "all subsequent acts and claims thereunder, or based thereon, were and are invalid and ineffective." On the appeal these questions were elaborately argued by counsel, and this court considered them at great length in its opinion, and affirmed the decision of the lower court. It did this, not only in express terms when discussing these very questions, but also when adjudicating what had been "correctly determined" by the district court. (The findings of the district court were full on this point, and they are set forth in detail in 64 Cal., from page 569 to page 584, and 2 Pac. Rep. 441-453.) We therefore consider the question raised by these appeals and about said "lawyers' title" as having been definitely settled on the former appeal, and shall not again discuss them. Counsel for appellants suggests the point that the opinion of Mr. Justice THORNTON, delivered on the former appeal, was not the decision of the court on these questions, because, as is contended, it was not concurred in by a majority of the justices; but the point is not tenable. That opinion was expressly concurred in, as a whole, by Chief Justice MORRISON and Justice MYRICK; and Justice ROSS also concurred, except as to the two questions upon which the opinion reverses the judgment. Justice THORNTON's opinion reverses the judgment for two reasons: (1) Because the findings as to certain taxes and judgments were deemed insufficient; and (2) because, under section 760 of the Code of Civil Procedure, the court below should have determined the interests of all the parties to the action, as well as those of the original cotenants. Justice ROSS dissented upon these two points, and upon these alone; and held that the entire judgment of the court below should have been affirmed. He says: "I dissent from the judgment, and am of the opinion that the interlocutory decree appealed from should be affirmed, except with respect to the construction of section 760 of the Code of Civil Procedure, and to the findings in relation to taxes and judgments for taxes. I agree with the conclusions reached, and in much that is said in support of them, in the opinion of Mr. Justice THORNTON. I do not agree with the conclusions reached in the opinion in regard to the findings just alluded to, nor am I able to agree with my associates in their construction of section 760 of the Code of Civil Procedure." 64 Cal. 631, 2 Pac. Rep. 488. There are therefore four justices expressly concurring in the "conclusions reached" as to the partition of 1856 and the "lawyers' title." Moreover, Mr. Justice SHARPSTEIN concurs generally in the judgment, and in the conclusion "that the findings of the

court below, with the exceptions specified by Mr. Justice THORNTON, ought not to be disturbed;" and Mr. Justice MCKEE, in a separate opinion, concurs in the judgment, and makes additional arguments to the point that the interlocutory decree should have determined the rights of all the parties, but does not dissent from any conclusion stated in the opinion of Mr. Justice THORNTON.

2. These appellants contend, on their appeal from the order denying a new trial, that the court erred in refusing to allow appellants to file amendments to their answers. One of the grounds upon which the motion to make the amendments was resisted was unreasonable delay in presenting them; and we think that ground alone is abundantly sufficient to sustain the ruling of the court. The refusal of a trial court to allow an amendment to a pleading is not *per se* error. Such matters are within the discretion of the lower court, and this court will not interfere when such discretion has not been clearly abused. We see no such abuse of discretion here. The facts in relation to this point are to be found in transcript 13,871 from folio 373 to 441. The original answers of these appellants were filed in 1868, and the judgment of the district court was rendered in 1878. After the decision of this court on appeal from said judgment of the district court, and the filing of the *remittitur* in the superior court, the cause came regularly on for trial on January 26, 1885. The proposed amendments to the answers were not presented until January 5, 1887. It appears in the statement on motion for a new trial, as a fact stated, that in December, 1885, counsel for said appellants "suggested to the court that he desired to file amendments to the answer of said defendants, and" was thereupon, and several times afterwards, urged by the court and opposing counsel to present such amendments to said answers seasonably, but did not present said amendments until the 5th day of January, 1887." Moreover, it appears from the uncontradicted affidavit of Theodore H. Hittell, of counsel for respondents, which was filed in opposition to the motion to amend, that for more than six months last past he had made strenuous efforts to induce the said attorney for appellants to present their amendments; that said appellants "made application after application for delay and continuance, and thereby put off the final closing of the case much longer than it would have otherwise been put off;" that, after several such continuances, the attorney for appellants appeared in court on September 23, 1886, and asked for a further continuance, stating again that he desired to file amendments to the answers; that the amendments were already drawn, and that he would serve and present the same for filing on or before October 1, 1886; that "thereupon the court made an order, which was understood at the time to be peremptory and final as to such amendments, that they must and should be served and presented to the court on or before October 1, 1886." The amendments, however, were not presented on said October 1st, nor until the next January,

when, as stated in said affidavit of Hittell, the case "had been declared substantially closed." It appears, also, upon the face of the amendments themselves, that they had been prepared, subscribed by the attorney, and verified by the appellants, on December 12, 1885; and there is no intimation of an excuse for the delay in presenting them. Under these circumstances, we cannot see upon what ground this court can be expected to hold that the court below abused its discretion by refusing to allow the amendments. The foregoing is determinate of the point against the appellants; but we also think the other objections made by counsel for respondents to the proposed amendments were good, namely, that "the points raised by the proposed amendments had been already passed upon by the supreme court of this state upon the appeal hereinbefore taken," and that "said proposed amendments were not material amendments, and set up nothing not covered by the old pleadings."

8. We also think that the court did not err in its rulings on the William Rehnert tax-deeds. There was no sufficient proof introduced or offered to show that said Rehnert, as purchaser of property sold for delinquent taxes, gave notice to the owner or occupier of the property so purchased, as provided by section 3785 of the Political Code.¹ Moreover, Rehnert was, at the time, a tenant in common of the rancho.

XII. Alleged Insufficiency of Findings and Decree. There is some slight contention that the findings of fact and law and the interlocutory decree do not conclusively dispose of the issues of ownership, and that too much is left for the determination of the referees. We see no just ground for this criticism. The findings and decree are remarkably full. They dispose of all questions of title and ownership; and the referees are simply to determine values, and make partition among the owners, as declared and directed by the court. Of course, in this case, owing to the multitude of owners, the referees will have an arduous work to perform; but their powers are not beyond those contemplated by the Code, and are necessary to a practicable consummation of the partition.

Conclusion. There are a few respondents, and, perhaps, one or two appellants, who have not been expressly mentioned in this opinion; but their contentions are involved in, and determined by, the views and conclusions hereinbefore stated. It is our opinion that the interlocutory decree, as an entirety, and all orders denying a new trial, should be affirmed. It is ordered that in this present case, No. 13,276, the judgment and interlocutory decree,

¹ Pol. Code Cal. § 3785, provides that the purchaser of property sold for taxes must, 30 days prior to the expiration of the time for redemption, or 80 days before he applies for a deed, serve upon the owner or occupant of the property a written notice, stating that the property has been sold for taxes, the date of sale, amount of property sold, amount for which it sold, the time when redemption will expire, or when the purchaser will apply for a deed, etc.

and every part thereof, be, and the same hereby are, affirmed; and with respect to the other cases, viz., Emeric v. Alvarado et al., No. 13,275; Flood v. Alvarado, No. 13,871; Flood v. Alvarado et al., No. 13,984; and Flood v. Alvarado et al., No. 14,006, —It is hereby directed that an order be entered in each of said cases affirming the judgment and interlocutory decree, and every part thereof, and also affirming the order denying a new trial in each case in which there is an appeal from such order.

We concur: GAROUTTE, J.; SHARPSTEIN, J.; PATERSON, J.; DE HAVEN, J.

HARRISON, J., being disqualified, did not participate.

BEATTY, C. J. I concur in the judgment upon all points decided, except two: *First*. I think the certificate of acknowledgment to the deed of the Alvarados to A. B. Patrick was sufficient to make its record constructive notice to subsequent purchasers, and consequently that the decree of the superior court should have been modified in accordance with the contention of E. Kirkpatrick and the other appellants who claim under the Patrick deed. *Second*. With respect to specific tract No. 30, I think the decree should have been modified in favor of the appellant Tewksbury. I also concur in the reasoning and conclusions of the principal opinion except in a few particulars. With respect to specific tract No. 41, I concur in the conclusion reached, upon the ground that the certificate of acknowledgment of the deed from Gabriel Castro and wife to Acosta was so fatally defective that its record did not impart constructive notice to subsequent purchasers from Gabriel. But I differ with the court as to the supposed insufficiency of the description in the deed of the interest conveyed. With respect to the various tax-titles, I come to the same conclusion as to their invalidity, but do not agree with some of the grounds of that conclusion stated in the principal opinion.

90 Cal. 507

WELCOME v. HESS et al. (No. 14,245.)

(Supreme Court of California. Aug. 12, 1891.)

LANDLORD AND TENANT — SURRENDER — ACCEPTANCE — IMPROVEMENTS.

1. A landlord leased a building for five years, and after the tenants had occupied the premises for about a year they abandoned the same, and sent the keys to the landlord. About two months later the landlord painted the front of the building, obliterated the tenants' signs, and made repairs. Soon afterwards he relet the premises at a less rent, for a period of five years, without notifying the tenants that he did it on their account. *Held*, that he thereby accepted the surrender.

2. Where a landlord builds for his tenant a store-room which does not add to the value of the premises, and which is to be paid for by rents reserved in the lease, if the landlord accepts a surrender of the premises he cannot recover for building such store-room.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by A. P. Welcome against Will J. Hess et al. for the recovery of damages

Judgment for the defendants. Plaintiff appeals. Affirmed.

M. C. Hester and Judson, Hester & Wood, for appellant. Enoch Knight and Brouseau & Hatch, for respondents.

TEMPLE, C. Plaintiff appeals from an order refusing new trial. This action is by a landlord to recover damages from his tenants. He avers that in October, 1887, he owned the demised premises, and was carrying on there a lucrative bakery business, which business added largely to the value of the premises; that defendants proposed to hire the premises, bakery, and business for five years, and to purchase his horses and wagons, and the equipments of the establishment, and falsely and fraudulently represented that they would enlarge the establishment and business, and would operate the same for five years, when they would surrender the establishment and business to the plaintiff, while, in fact, they had no such intention, but their real design was to get control of the establishment and business, and to remove the same to some other locality in the city; that, believing the representations, plaintiff did execute a lease to them wherein defendants agreed to pay plaintiff for the term of five years from October 19, 1887, the sum of \$4,380, in monthly installments, \$65 per month for the first and second years, \$75 per month for the third and fourth years, and \$85 per month for the fifth year, and to surrender the premises at the end of that term in good condition; that they took possession, occupied and paid rent, until June 30, 1888, when they abandoned the premises, removed therefrom the bakery business, and since that time have been carrying on the business at another point in the city of Pasadena; that, by reason of the abandonment, plaintiff was compelled to, and did, on the 1st of September, 1888, take possession of the premises, and relet them for the term of five years, at \$40 per month, which was the best rental he could obtain. He charges that by reason of the abandonment of the premises and the diversion of the business he has been damaged in the sum of \$3,000. Plaintiff also claims to recover for the cost of adding a store-room for the defendants, which he avers added nothing to the value of the premises, and also for their failure to surrender the premises in good condition. The answer admits the lease, and that defendants moved out of the premises June 30, 1888. It avers that plaintiff had not kept his part of the agreement; that he did not give them the use of a certain outbuilding which he had agreed to furnish, and that he neglected and refused to place the premises in an inhabitable condition; that in consequence the defendants were compelled to, and did, on the 30th day of June, 1888, surrender the demised premises to plaintiff, who accepted the same, and took possession of the whole thereof. The other allegations of the complaint are denied. A jury having been waived, the case was tried by the court.

It appears that defendants removed from the premises June 30, 1888, and sent the keys to plaintiff, claiming that plain-

tiff had not complied with his contract. Plaintiff did not at once re-enter, but on August 3d commenced an action to recover rent for the months of July and August. September 1st, while that suit was pending, he called upon the defendants, and requested them to return and occupy the premises, which they refused to do. He then took possession, had the front painted in order to obliterate the defendants' sign, made necessary repairs, and tried to find a new tenant, and finally rented them to Guan Kee for a laundry, for five years from October 1st, at \$40 per month, which he says was the very best he could do. The new lease extended nearly one year beyond the term of defendants' lease. So far as appears, nothing was said or done by plaintiff, other than as above stated, to qualify his acts in taking possession and reletting. He did not inform defendants that he did not accept the offered surrender, or that he would relet on their account. This suit was commenced December 3, 1888. Do these facts show a surrender of the term? A surrender is the yielding up of an estate for life or years to the reversioner or remainder-man. Under the statute of frauds, it can be done only by express consent of the parties in writing, or by operation of law, when the parties do something which implies that both have consented. These acts are such as the parties would be estopped from disputing, and which would not be valid unless the term were ended; as, for instance, a new lease accepted by the tenant, or the resumption of possession by the landlord, if the tenant acquiesces, or the giving of a lease to another. And any act which will amount to eviction will estop the landlord, and make a formal surrender unnecessary. And, while it is said that a surrender by operation of law is by acts which imply mutual consent, it is quite evident that such result is independent of the intention of the parties that their acts shall have that effect. It is by way of estoppel. It was held in *Auer v. Penn*, 99 Pa. St. 370,—and many cases are to the same effect,—that "the landlord may accept the keys, take possession, put a bill on the house for rent, and at the same time apprise the tenant that he still holds him liable for the rent. All this, as was said in *Marselles v. Kerr*, 6 Whart. 500, is for the benefit of the tenant, and is not intended, nor can it have the effect, to put an end to the contract, and discharge him from rent." In that case the trial court had instructed the jury, in effect, that, if the tenant gives up the demised premises, the landlord may re-enter and relet, and that it is for the advantage of the tenant that he should do so, and, being for the mutual advantage of the parties, it raises no presumption that the landlord has accepted a surrender. Of this instruction the court said: "We see no error in this. It is good sense as well as good law." In that case the landlord expressly refused to accept a surrender, and notified the defendant that he would hold him for the rent. While there are many cases which hold to this view, the weight of authority and the better reason is the other way. *Ladd v. Smith*,

6 Or. 316. The term is an estate in lands. The tenant, subject to the covenants of his lease, is the owner for the term. If he leaves the demised premises vacant, and avows his intention not to be bound by his lease, his title still continues, unless the landlord has accepted the offer of surrender. The landlord has no more right to the possession or to lease than a stranger. Admit that he may take such care of the property as will prevent waste, still he must not interfere with the right of the tenant to the absolute dominion and control. If he does so interfere, it is an eviction, and the tenant will be released. The tenant cannot abandon his title; and notwithstanding he has gone out, unless the surrender is accepted, that continues. It is his right to resume possession at any time during his term. If he bring ejectment against the new tenant, what defense can the new tenant have, except that plaintiff's right has ceased? How has it ended, unless by surrender? The assertion that the reletting is for the interest of the tenant is gratuitous and unwarrantable, though, if it were true, how would that fact tend to show authority in the landlord to dispose of the tenant's property? Any person might assume authority on the same ground. The premises might be a rival business stand which the tenant desires to have kept vacant. The complaint in this case substantially avers such fact. Perhaps if the tenant finally ascertains that his landlord will not accept the offered surrender, and could continue to collect his rents, he would elect to return. It is said that defendants abandoned the premises at a time of great business depression at Pasadena. It may be that on the revival of business at the end of a few months they would have been glad to resume business there, and would have done so with profit, if the landlord had not relet. Under such circumstances, shall they continue to pay rent? If the surrender has not been accepted, have they not been evicted? But this case hardly comes up to the authorities which we have criticised. In taking possession, the landlord did not announce his intention to continue to hold the tenants. He relet without notifying the defendants that he should do so on their account. He relet for a period longer than the remainder of their term, thus showing plainly that he was acting in his own right, and not as their self-constituted agent. Under such circumstances, he cannot say that he did not accept the surrender.

The plaintiff also claims damages for the expense in building the store-room for defendants, which he avers adds nothing to the value of the premises. His own statement being taken as true, it must be admitted that he has been hardly used, and if possible, consistent with legal principles, the courts should afford him relief. It is true that a lease is not only a grant or conveyance of an interest in land, but is also a contract between the parties, and upon a breach of any promise contained in it the injured party has his action as upon other contracts; but the trouble is that, by the terms of the contract, compensation to the landlord, for this im-

provement, was to be made by the rents reserved in the lease. When, therefore, he elected to release the tenants from the remainder of the term, he gave up his stipulated mode of compensation. In other words, his acts, which estop him from claiming rent, have deprived him of his remedy. The case of *Respini v. Porta*, recently decided by this court, (26 Pac. Rep. 967,) does not really militate against these views. It was the case of the lease—if it may be called such—of a dairy of cows, the necessary buildings, fixtures, and utensils, and pasturage for the cows. The right to the land was subordinate to the business, the stock in which belonged to the lessor. It partook more of the nature of an ordinary contract than a grant of a term. The landlord in such a case, when the tenant abandons, cannot refuse to take possession, for otherwise his property would perish. An examination of the record in the case shows that the point was conceded. The only question was as to the rule of damages. As to the other claims for damage, the findings are against the plaintiff on the facts, and the evidence sustains the findings. It follows that the order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

90 Cal. 496

BRYMER v. SOUTHERN PAC. CO. (No. 14, 332.)

(Supreme Court of California. Aug. 10, 1891.)

MASTER AND SERVANT—DEFECTIVE MACHINERY—INSTRUCTIONS.

In an action by a servant against the master for injuries caused by the breaking of a chain, it was error to refuse an instruction that the master was not an insurer of the servant, and was not bound to provide machinery or appliances which were absolutely safe; that he was bound to use only reasonable and ordinary skill and diligence in procuring safe machinery; and that the mere fact that an accident occurred did not raise the presumption that the master was at fault in providing such machinery or appliances.

Department 1. Appeal from the superior court of Los Angeles county; WILLIAM P. WADE, Judge.

Action by Brymer against the Southern Pacific Company for personal injuries. Judgment for plaintiff. Order granting new trial. Plaintiff appeals. Affirmed.

Frederic Stanford, for appellant. John D. Bicknell, for respondent.

PATERSON, J. Appellant received bodily injuries while engaged with others in the employ of defendant, under the directions of a superintendent, in raising a derailed and wrecked car. He alleged that the injury occurred through the use of inadequate, inappropriate, insecure, and defective appliances furnished by defendant without proper care and caution in the selection thereof, and through the negligence and unskillfulness of the superintendent, who was engaged in directing the work on behalf of defendant. The defendant asked the court to give the follow-

ing instruction, which was refused: "As respects the duty of a master or employer towards his servant or employee in his service, the court instructs the jury, as a matter of law, that the master or employer is not bound to provide machinery or appliances which are absolutely safe. The law imposes on the master or employer only the obligation to use reasonable and ordinary care, skill, and diligence in procuring and furnishing suitable and safe machinery and appliances for the servant to perform the duties for which he is engaged. The master does not stand in the relation of an insurer to the servant against injury, and can only be held chargeable when negligence can be properly imputed to him. The mere fact that an accident occurred, by which the plaintiff was injured, does not fix the liability, or even raise a presumption that the defendant was at fault in providing machinery or appliances for the labor in which the plaintiff was engaged." The defendant moved for a new trial, and the motion was granted, on the ground that the court had erred in refusing to give the instruction above quoted. We think the instruction ought to have been given. When the employer exercises all the care and caution which a prudent man would ordinarily take for the safety and protection of his own person under the same circumstances, he cannot be held liable for the consequences of a defect in the machinery or appliances used. This is the sense in which the expression, "reasonable and ordinary care, skill, and diligence in procuring and furnishing suitable and safe machinery and appliances," was used in the instruction asked, as we understand it; and is equivalent to the rule, as stated in many of the authorities, viz., that the employer is liable only when he had knowledge of the defect, or failed to exercise reasonable diligence in procuring suitable machinery, or in the inspection of it to discover any defect that might exist. *Bajus v. Railroad Co.*, 103 N. Y. 312, 8 N. E. Rep. 529; *Railroad Co. v. McCormick*, 74 Ind. 440; *Devlin v. Smith*, 89 N. Y. 470; *Payne v. Reese*, 100 Pa. St. 301; *Hobbs v. Stauer*, 62 Wis. 108, 22 N. W. Rep. 153; *Provision Co. v. Hightower*, 92 Ill. 139; *Railroad Co. v. Ledbetter*, 34 Kan. 326, 8 Pac. Rep. 411; *Cagney v. Railroad Co.*, 69 Mo. 416; *Smoot v. Railroad Co.*, 67 Ala. 13; *Railroad Co. v. Duffey*, 35 Ark. 602. And our Code establishes the same rule: "An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care." Civil Code, § 1971. The use of the word "accident" in the instruction is not obnoxious to the criticism put upon it by appellant. The court meant to say simply that the mere fact that the chain broke would not authorize the inference that the defendant had failed to exercise reasonable care in the selection of the appliances used. Such is the fair import of the word as used, and the jury must have so understood it. It is claimed that no prejudice could have resulted from the refusal of the court to give the instruction, inasmuch as there was no evidence on the question as to whether the appliances used were defect-

ive. We cannot say, however, that there was no evidence on the subject; and there is nothing in the record to show whether the jury believed the injury was due to defects in the machinery used, or to the negligence of the superintendent. The plaintiff tendered both issues, neither was withdrawn, and it was proper to instruct the jury as to the law applicable to each of them. The views expressed render it unnecessary for us to consider the effect of the statement found in the order of the court granting a new trial, that "no other grounds assigned by defendant for the granting of a new trial are well taken." The order is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

90 Cal. 590

BALLERINO V. BIGELOW. (No. 14,181.)

(Supreme Court of California. Aug. 10, 1891.)

JUSTICES OF THE PEACE—JURISDICTION.

Under Const. Cal. art. 6, § 11, which provides that justices' courts shall have concurrent jurisdiction with the superior courts, in actions of forcible entry and detainer, where the rental value of the property detained does not exceed \$25 per month, and the whole amount of damages claimed does not exceed \$200, the allegation of a complaint that the rental value does not exceed \$25 is not conclusive of the justice's jurisdiction, but the same must be determined by the evidence.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action of forcible entry and detainer by B. Ballerino against L. M. Bigelow. Judgment for plaintiff. Defendant appeals. Reversed.

Wells, Guthrie & Lee, for appellant. *H. Allen and H. Bell*, for respondent.

FOOTE, C. Ballerino brought this action against Mrs. Bigelow, claiming that she had forcibly deprived him of the possession of certain premises, and in pursuance of such forcible entry unlawfully detains the same from him. The damages claimed was the sum of \$200, and it is also alleged in the complaint that the rental value of the premises did not exceed \$25 per month. The cause was originally brought in a justice's court, and judgment being rendered for the plaintiff, an appeal was taken upon the law and facts to the superior court of the proper county. There a trial was had *de novo*, and judgment was rendered for the plaintiff that he recover the premises and \$510 as damages, that being treble the amount of the damages sustained, which judgment for damages was awarded in accordance with the provisions of section 1174 of the Code of Civil Procedure. From this judgment, and an order denying a new trial, this appeal is taken. There are several points made for the reversal of the judgment and order, but it becomes necessary to determine but one, which, as we think, is conclusive of the matter. While the complaint only alleges that the rental value did not exceed, as a fact, the sum of \$25 a month, the overwhelming weight of the evidence is that the rental value exceeded that sum. The court below disregarded the weight

of evidence, not upon the idea that there was a conflict, in which it believed the plaintiff's evidence upon the point, but upon the theory that it was legally concluded by the allegations of the complaint as determining the question of the jurisdiction of the justice's court to try and render judgment in the cause, and that it was not bound to determine the question of jurisdiction in accordance with the evidence. This was clearly error. Says the judge below: "Concerning the value of the rents, if it had not been for the allegations of the complaint I should have found in this case, where the defendant herself is evidently anxious that the value should be put above the amount claimed, that it is more. But I think the same rule of pleading governs in this case as in any other; that the plaintiff cannot recover any more than he alleges, although the defendant seems perfectly willing that the plaintiff should consider the rental value to be greater than the amount claimed." In other words, it seems that the view of the trial court was that if a complaint states that property in San Francisco is worth not to exceed \$25 a month, and the proof shows that the rental value is \$1,000 a month or more, still the justice's court, upon a showing of facts like that here as to forcible entry, could render judgment for the possession of such valuable property. Not so do we understand the law to declare. Our view is that the damages claimed and proved is all that the defendant can recover, but the rental value is not confined to what is alleged, but extends to what is proved; and no recovery can be had where the proof shows that the court has not jurisdiction to render judgment for the possession of the premises.

It will be perceived, upon examination of the constitution of the state, (article 6, § 11,) that, after declaring the legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities, and towns, or cities and counties, and shall fix by law "the powers, duties, and responsibilities of justices of the peace," it is further provided: "Such powers shall not in any case trench upon the jurisdiction of the several courts of record, except that said justices shall have concurrent jurisdiction with the superior courts in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars per month, and where the whole amount of damages claimed does not exceed two hundred dollars," etc. Following this constitutional provision, the legislature enacted section 118 of the Code of Civil Procedure, which contains the same limit as to concurrent jurisdiction of justices with superior courts in this class of actions. Thus, the measure of the jurisdiction of justice's courts in these matters is fixed and determined by law. The appeal from the justice's to the superior court does not enlarge the jurisdiction as to such cases. It is plainly evident that the constitution and the statute, so far as concerns this case, apply two tests as to jurisdiction, both of which must be met: The plaintiff must not claim more than \$200 damages in all, nor can he re-

cover more; and the rental value of the property involved must not exceed the sum of \$25 a month as a matter of fact, to be determined by the evidence. If it had been intended that the test of jurisdiction, as to the matter of rental value, was what was claimed in the complaint, and in no wise dependent upon proof of such fact, it would have been expressed as plainly as it is with reference to the damages claimed. But the word "claimed," as applied to the question of damages, is omitted from that of the matter of rental value, and instead the words used are, "and where the rental value does not exceed twenty-five dollars a month." It was said in *Newman v. Duane*, (Cal.) 27 Pac. Rep. 66: "The plaintiff herein, by simply framing his complaint in a particular way, could not deprive the defendant of a jury trial of the issues raised by his answer." By parity of reasoning, it may be properly said that, by framing his complaint in a certain way, the plaintiff cannot confer jurisdiction denied by the constitution and the statute to a justice's court, and force the defendant to submit the right of her possession to property to the determination of a tribunal which has no right so to do; thus depriving her of the privilege guaranteed to her to have such a case tried originally in the superior court. We are therefore of opinion that the judgment is *coram non iudice*, and void, and that it and the order denying a new trial should be reversed, and the cause dismissed in the court below for the want of jurisdiction.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed, and cause dismissed in the lower court for want of jurisdiction.

90 Cal. 515

O'CONNELL *et al.* v. MAIN & TENTH STS. HOTEL CO. (No. 14,244.)

(*Supreme Court of California*. Aug. 12, 1891.)

CONTRACTS—DAMAGES FOR BREACH—APPEAL.

1. In an action to recover for a breach of contract, it appeared that plaintiffs were to furnish certain iron-work required in the construction of a building, and had made patterns, flasks, etc., for the purpose of carrying out the contract, and furnished a part of the material, when defendant refused to proceed further with the building, or receive material. *Held*, that plaintiffs could recover for loss of profits by reason of the breach of the contract, and the amount expended in preparing patterns which thereafter became useless.

2. Where plaintiffs employed another to furnish a portion of the material called for in the contract, the fact that they paid him for work done and damages sustained for failure to continue the work, after suit was brought, does not bar a right of recovery for the amount so paid, especially where it appears that the settlement was advantageous to defendant.

3. The admissibility of evidence under the pleadings cannot be raised for the first time in the supreme court.

4. A notice in a cause that defendant "intends to and will move this court to set aside the decision and judgment heretofore entered and made in said cause," (setting out the grounds,) and that the motion will be made upon a state-

ment of the case, is a sufficient notice that a new trial will be asked for, and it will be taken as so understood, when it appears that opposing counsel stipulated to extend the time within which to prepare and serve a statement on motion for a new trial.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by Martin O'Connell and others against Main & Tenth Streets Hotel Company, to recover for breach of contract and for material furnished. Judgment for plaintiffs. Defendant appeals. Affirmed.

Stephen M. White, for appellant. *Finlayson & Finlayson*, for respondents.

TEMPLE, C. This action is based upon two contracts, and the complaint contains two counts or causes of action. The first is upon an account stated for materials furnished, and as to it no question is raised. The second cause of action arises upon a contract by which plaintiffs agreed to perform certain work, according to the plans and specifications, and furnish certain materials for the construction of an hotel which defendant was then building at Los Angeles, and for which defendant agreed to pay \$40,000. Plaintiffs were to manufacture and deliver at the building all the iron-work required above the basement. After plaintiffs had furnished a small portion of the material contracted for, defendant became embarrassed and asked for delays, and finally failed to resume work upon the proposed hotel, or to receive any further material from plaintiffs. Plaintiffs, at the request of defendant, suspended work, and now sue for damages resulting from a breach of the contract. Plaintiffs recovered judgment, and the defendant moved for a new trial. It is objected that the court had no jurisdiction to entertain the motion, because, as plaintiffs claim, no notice of intention to move for a new trial was given. The notice given was that defendant "intends to and will move this court to set aside the decision and judgment heretofore rendered, entered, and made in said cause upon the following grounds, to-wit: " Then follow three of the grounds set out in section 657 of the Code of Civil Procedure, to-wit: Insufficiency of the evidence to justify the findings and decision herein, and that they were against law; errors in law, and newly discovered evidence. It also states that the motion will be made upon a statement of the case, bill of exceptions and affidavits, as defendant may be advised. A motion for a new trial is a special proceeding within the case, and I agree with respondent that the court has no jurisdiction to entertain the motion, unless the notice of intention is given substantially as prescribed. The objection to this notice is that it does not formally give notice that a new trial will be asked for. But if it does distinctly and unmistakably give that information it must be held sufficient, and I think it does. Notice is given that defendant will move to set aside the decision. I do not think of any case in which such motion is mentioned in the

practice act except for the purpose of a new trial. There might be a motion to vacate a judgment upon various grounds, but could any attorney imagine such a motion, based upon the ground of insufficiency of the evidence, or errors at law occurring at the trial, or for newly-discovered evidence, and made upon a statement of the case, unless it were a motion for a new trial under the statute authorizing and requiring these things? And respondents' attorneys were not misled, since they stipulated giving further time to defendant "within which to prepare and serve its statement on motion for a new trial." The objection cannot be sustained.

In their second cause of action plaintiffs claim, not only general damages for the breach of the contract, *i. e.*, the profits they would have made by performance, but certain special damages which they aver they have suffered in consequence of the breach. These are: (1) For iron base-plates delivered, \$981.50; (2) for expense in making patterns, flasks, and other iron-work, to enable them to perform their contract, \$1,500; and (3) for money paid one Isaacs, who had been employed to make certain wrought-iron girders, and had commenced their manufacture, as damages, \$1,500.

As to the first item there is no controversy. The expense incurred for patterns, flasks, and other iron-work, was found by the court to be certain patterns, flasks, and an oven, which were necessary to enable plaintiffs to perform their contract; that they cost \$1,600; and are worth to the plaintiffs not to exceed \$150, damage of plaintiffs of \$1,450. It is objected that the finding does not correspond with the pleadings; the oven is not mentioned in the complaint. The phrase, "other iron-work," is undoubtedly too general and indefinite, but it cannot be said that it would not include the oven. In the connection in which this phrase is used, it does not imply that the other iron-work referred to must necessarily be composed of iron. The patterns are not of iron, nor are the flasks, which are the wooden frames in which the moulds are made. If that be the sense, there would be nothing to justify the use of the word "other." The evidence as to the cost of the oven came in without objection. Had an objection been interposed, there probably would have been an amendment. It does not seem fair to allow the objection, when interposed now for the first time. Appellant, however, contends that in no case can plaintiffs recover for expenditures made in preparing to do their work. It contends that it is a breach of a buyer's agreement to accept and pay for personal property; that the detriment upon the breach of such contract is prescribed by section 3311, Civil Code, and is the excess of the amount due from the buyer over the value to the seller, with the expense of carrying to market. But this is unnecessary liberality on the part of the defendant. This rule would give plaintiffs \$40,000, less the value of the material as scrap-iron at Los Angeles. If this rule be supplemented by section 3354, *Id.*, we have just the rule adopted by the court. But

the case is not that of a seller of personal property, either on hand or to be manufactured. Upon receiving notice that defendant would not proceed with the contract, plaintiffs stopped the manufacture of the articles contracted for. They have not the material on hand therefor, and their detriment is not estimated under section 3311, Id. Plaintiffs do not gain more than they would had the contract been fully performed. In such case they would have received the cost of production and profits. They have received such costs as they have actually incurred and the profits they would have made.

The item of \$1,500 paid Isaacs is objected to because it was paid after suit brought, and because defendant had no contract with Isaacs, and was not consulted as to the settlement. The testimony showed that Isaacs had commenced the manufacture of the wrought-iron girders called for in the contract, and, when defendant declined to go on with the work, was notified by plaintiffs to stop work. He did so, but demanded compensation for work done. This was arranged at \$1,500, but was paid after suit brought. The evidence shows that the compromise was a reasonable one, and that, had Isaacs insisted upon going on with the work, defendant would have been chargeable with some \$10,000 worth of material, which, as it turned out, it did not want. The settlement was advantageous to defendant. The greatest difficulty in mastering the facts of this case here comes from the assumption of the parties and the court below that by the contract a value was placed upon specific portions of the materials contracted for. The contract is for a lump sum, and if there was any mode by which it could be ascertained what the contract price of the base-plates was, or of the wrought-iron or steel, or the cast-iron, or what profits plaintiffs would have made upon any specific portion of the work, the basis is studiously kept out of the record. The complaint does not state the value of the base-plates furnished, or the cost of production, but states that \$981.50 is the contract price. Apparently there was no contract price for them. In the evidence it appears that this price included a profit of \$270. Their cost, therefore, was \$981.50, less \$270. The same assumption that the profits were capable of being apportioned is carried into the computations showing the cost of performance and the profits. The allegation is only as to the cost of performing that part of the contract which they were precluded from performing, and the profits which they would have made upon full performance of that part of the contract which they were prevented from performing. Apparently there was not, and could not have been, any possible mode of ascertaining the profits so as to determine what profits they would have made upon such performance. But the evidence does show what would probably have been their profits upon full performance of the whole contract, and the amount recovered seems less than they would have been entitled to. The contract and its breach are suffi-

ciently alleged. The trouble, if any, arises from adopting a wrong construction of the contract in setting out in detail the source of their damages, but, as no objection is urged here upon this ground, the parties may have had some means, with which we are not furnished, of understanding the process. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

90 Cal. 504

CLARK V. GUNN. (No. 14,299.)

(Supreme Court of California. Aug. 10, 1891.)

SUMMONS—NOTICE OF RELIEF.

Code Civil Proc. Cal. § 407, provides that the summons must be directed to defendant, and must contain a notice that, unless defendant appears and answers, plaintiff will apply to the court for the relief demanded in the complaint. *Held* that, where a copy of the complaint was served with the summons, a notice, "You are notified that if you fail to appear and answer plaintiff will take judgment against you for the relief demanded in his complaint," is sufficient, though it does not state that plaintiff will apply to the court for the relief demanded.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by R. G. Clark against Eliza M. Palmer, Douglas Gunn, and C. E. Johnson, to foreclose a mortgage. Judgment for plaintiff. Defendant Gunn appeals. Affirmed.

Works, Gibson & Titus, for appellant.
Collier & Haines, for respondent.

VANCLIEF, C. This action was brought in the county of San Diego by Clark against Eliza M. Palmer, Douglas Gunn, and C. E. Johnson, to foreclose a mortgage executed by Eliza M. Palmer to secure the payment of her promissory note to the plaintiff for the sum of \$5,000 and interest. The ground upon which Gunn and Johnson were made parties defendant is expressed in the complaint, as follows: "That Douglas Gunn and Charles Edward Johnson have, or claim to have, some interest in or claim upon said premises, as mortgages or otherwise, which claims or interest were acquired by them subsequent to the mortgage of plaintiff." No relief is asked affecting Gunn and Johnson, except that plaintiff's mortgage be first satisfied from the proceeds of a sale of the mortgaged property. The summons, with a copy of the complaint, was served on Gunn in said county. The summons contained the following notice: "And you are hereby notified that, if you fail to appear and answer the said complaint as above required, said plaintiff will take judgment against you for the relief demanded in his complaint." The summons also contained a specific statement of the nature of the action, and of Gunn's interest in it as subsequent mortgagee. The defendant Gunn failing to appear within the time required by law, his default was regularly entered, and thereupon a decree of foreclosure, in the usual form, was rendered by the court on the 31st day of December, 1889. On the 23d

day of December, 1890, the defendant Gunn filed his notice of this appeal from the judgment of foreclosure. The only point made by the appellant is that the notice in the summons does not comply with subdivision 5 of section 407 of the Code of Civil Procedure, which, in a case of this kind, requires a notice that "the plaintiff will apply to the court for the relief demanded in the complaint." The Code of Civil Procedure (section 4) enacts that "its provisions, and all proceedings under it, are to be liberally construed, with a view to effect its objects and to promote justice;" and the courts have emphatically sanctioned the application of this rule of construction to section 405 of the Code of Civil Procedure, and to a similar section in the Code of New York. *Bewick v. Muir*, 83 Cal. 368, 23 Pac. Rep. 339; *King v. Blood*, 41 Cal. 315; *McCoun v. Railroad Co.*, 50 N. Y. 176. So construed, I think the notice that plaintiff would "take judgment * * * for the relief demanded in his complaint" was, in substance, a notice that he would "apply to the court" for that relief. That being the only lawful mode by which he could take it, (Code Civil Proc. § 585,) the notice, as expressed, implies that he intended to take it in that mode, and not in any unlawful manner. As the record shows that the plaintiff did apply to the court for his relief, that the court did grant such relief as was given, and that the relief given did not differ from or exceed that demanded in the complaint, it seems inconceivable that the defendant could have been misled or injured by the variance of the summons from the form of words prescribed by the Code. I think the judgment should be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(90 Cal. 289)

HICKS v. THOMAS. (No. 13,761.)

(*Supreme Court of California*. Aug. 15, 1891.)

On rehearing. For former report, see 27 Pac. Rep. 208.

PER CURIAM. The petition for rehearing in this cause is denied, but the judgment heretofore rendered is modified so as to read as follows: The order denying a new trial is affirmed, and the cause is remanded, with directions to the superior court to modify its judgment, so as to require the plaintiff to repay to the defendant the amount of money received by her, with legal interest to the date of tender, and the judgment as so modified is affirmed, the appellant to pay costs of appeal.

(21 Nev. 184)

HORTON v. NEW PASS GOLD & SILVER MIN. Co. et al. (No. 1,340.)¹

(*Supreme Court of Nevada*. Aug. 11, 1891.)

PARTNERSHIP—WHAT CONSTITUTES—OPENING JUDGMENT—AFFIDAVIT OF MERITS—ATTORNEY'S NEGLIGENCE.

1. Where a mining corporation makes a written agreement with a natural person, whereby

he is to own an undivided one-half of its mining property upon expending thereon \$10,000 in developing it, and the company is in a certain contingency to share some of the profits from working the mine, and does not hold itself out as a partner, but expressly contracts against partnership, and such contract is filed in the proper county, the agreement does not create a partnership.

2. In a proceeding to set aside a default judgment, an affidavit of merits, made by the attorney of a mining corporation, is sufficient, when it shows that he is familiar with all the facts of the case.

3. Where, on a motion to open a default judgment against a mining corporation, the affidavit shows that, after action brought against the company, it employed an attorney, and placed the matter in his hands, and that he interposed a demurrer, and when this was overruled he obtained time to answer; that at the same time he was given 15 days to answer in another case pending between the same parties; that he commenced to draw his answer at once, and was engaged until he left the city to attend trial at another court; that he was engaged there until after default was entered, and supposed that he had 15 days to answer this case,—it is clearly shown that the company and its attorney both intended to contest the case, and the motion should have been granted, when it was affirmatively shown that it would not result in deferring the trial.

MURPHY, J., dissenting.

Appeal from district court, Lander county; A. L. FITZGERALD, Judge.

Action by R. L. Horton against the New Pass Gold & Silver Mining Company et al. Judgment for plaintiff by default. Order denying motion to open default. Defendant company appeals. Reversed.

D. S. Truman, for appellant. Henry Mayenbaum, for respondent.

BIGELOW, J. This is an action brought to recover judgment for \$5,223.37, alleged to be due the plaintiff for goods sold and delivered, for labor performed, and upon other contracts with the defendants. On April 16, 1890, a demurrer previously interposed by the corporation defendant was overruled, and it was given 15 days in which to answer. No answer being filed, and the other defendants having also failed to answer, default and judgment were entered against all of them on May 2, 1890. On May 21, 1890, the corporation, through its attorney, served notice of a motion, supported by affidavit, to set this default and judgment aside, so far as it affected the company, upon the ground, as therein stated, "of surprise, inadvertence, mistake, and excusable neglect to file answer herein, and on the ground that default was taken before the time for answering had expired." There is nothing in the last ground stated, and it will be unnecessary to consider it further. On October 9th the motion was overruled, and from this order the company appeals.

1. From the affidavit upon which the motion was based and the accompanying exhibits, one of which is its proposed answer, it appears, *prima facie*, that this defendant has a good and sufficient defense to the action upon the merits. It is shown that the company, being the owner of certain mining property, entered into a contract with the other defendants, by which it was agreed that, upon their ex-

¹For rehearing, see 27 Pac. Rep. 1018.

pending \$10,000 in developing and improving the property, they were to receive a conveyance of an undivided one-half thereof; but it was expressly stipulated that the company should not become responsible for any debts incurred by them in making such improvements, nor should any partnership be created between them. This agreement was placed on record in the recorder's office of the proper county, and the indebtedness upon which the action was brought appears to have been incurred while the property was being worked under this arrangement.

It is contended by the plaintiff that, as the defendant was in a certain contingency to share some of the profits derived from the working of the mining property, it therefore became a partner with the other defendants in such working, notwithstanding the stipulation to the contrary, and consequently liable for the debts incurred therein. Waiving the question of whether a corporation can form a partnership with an individual, it has been the recognized rule of law in nearly all courts, since the decision in 1860 of the case of *Cox v. Hickman*, 8 H. L. Cas. 268, that mere participation in the profits of a business does not create a partnership. The company had not held itself out as a partner, nor had it, by contract or intention, formed a relation with the other defendants in which the elements of a partnership are to be found. It was therefore not liable as a partner. *Beecher v. Bush*, 45 Mich. 188, 7 N. W. Rep. 785; *Heckert v. Fegely*, 6 Watts & S. 139; *Clifton v. Howard*, 89 Mo. 192, 1 S. W. Rep. 26. Thus it would seem that a heavy judgment has been obtained against the company upon claims for which it is in no wise responsible. The affidavit of merits is sufficient, although made only by the attorney. *State v. Mining Co.*, 13 Nev. 194; *Jean v. Hennessey*, 74 Iowa, 348, 37 N. W. Rep. 771. The defendant being a corporation, it was necessarily made by some agent, and, as the attorney swears he is familiar with all the facts of the case, both of plaintiff's claim and the defendant's defense, no reason is perceived why he could not make it as well as another.

2. Having *prima facie* a good defense to the action, the next inquiry is whether the company has been guilty of such negligence in making its answer that it has been justly refused the opportunity of defending itself. While opening a default is said to be much in the discretion of the lower court, the cases show that this means a legal discretion, which has been unhesitatingly supervised by appellate tribunals wherever it appears to have been so exercised as to result in injustice. In this regard it is said in *Bailey v. Taaffe*, 29 Cal. 426: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. In a plain case this discretion has

no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit *in foro legis*, when examined under these rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other." It is difficult to lay down any general rule for determining when a default should be opened. As said in *State v. Mining Co.*, 13 Nev. 202, each case must necessarily be determined upon its own peculiar facts. It is safe, however, to say that courts should be liberal in such matters, where a meritorious defense is shown to the whole or a substantial part of an action, and it is apparent that the failure to answer is the result of a mistake or of negligence which is not so gross as to be inexcusable, or to indicate trifling with the court; to the end that cases may be determined upon their merits, and not upon some inadvertence, or slip or aberration, of the opposing party or counsel. Such terms can always be imposed as will compensate the plaintiff for any loss occasioned him by the delay, and as will make it unprofitable to a defendant to willfully neglect to answer. Courts are established, not only to arbitrate and settle the legal controversies of men, but also to settle them, so far as the inherent imperfections of human tribunals will permit, upon a just and equitable basis. This can only be arrived at after a full and patient hearing of both sides. Of course there must be rules of procedure for doing this, which must not be trifled with. Still they are but means to an end, and whenever they have so operated, or have been so administered, that the action has been determined with reference to them, instead of the great principles of right and justice, it cannot be denied that therein the tribunal has failed to reach the end for which it was created. Admittedly, this may be the necessary consequence of the operation of rules indispensable to the transaction of business, but the result is the same; the form has triumphed over the substance. All will agree that, wherever this can be avoided with justice to the opposing party, it should be done. In this connection the language of Justice BALDWIN in *Roland v. Kreyenhagen* seems quite appropriate: "The power of the court should be freely and liberally exercised, under this and other sections of the act, to mould and direct its proceedings so as to dispose of cases upon their substantial merits, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right. While formal requirements of pleading and practice cannot be dispensed with by the court, it can usually make such orders or grant such amend-

ments in the progress of the cause as will avoid the effect of petty exceptions, and dispose of the case upon its legal merits. It can also usually prevent unjust or unfair advantages or serious injury arising from casualties or inadvertences. The design of the act was to call into requisition its equitable powers in this respect." 18 Cal. 457. A finding that a defendant has negligently failed to answer in the proper time does not cover the case; the question still remains, is the negligence excusable? Where the circumstances are such as to lead the court to hesitate in answering this query, the doubt should be resolved in favor of the application. *Watson v. Railroad Co.*, 41 Cal. 20. Two cases in this court are relied upon by opposing counsel.—*Howe v. Coldren*, 4 Nev. 171, and *Harper v. Mallory*, Id. 447,—the former as requiring the opening of the default, and the latter as justifying the refusal to do so. Each is perhaps a fair sample of its class,—the one enforcing all the strictness of the common-law system of pleading and practice; and the other recognizing the more liberal principles of the reformed procedure, which has endeavored to wipe away much of the technicality and foolish adherence to form of the former. *Harper v. Mallory* was decided by a divided court, and it seems difficult to say of it, as is said in the prevailing opinion therein concerning the case of *Howe v. Coldren*: "In the decision we concur." On the other hand, the remarks in the opinion in *Howe v. Coldren*, *dicta* though they be, are, to our comprehension, founded in both justice and good sense. The court there says, (page 175:) "Certainly there are strong reasons why an appellate court should interfere in the one case and not in the other. If there is a refusal to set aside a default, a ruinous judgment may be sustained against a party who, upon hearing, might have interposed a perfectly good defense. By sustaining the default, he would forever be debarred the right of a hearing. If, then, a *nisi prius* court refuse to set aside a default when a party shows with reasonable certainty that he has a good defense, and he has only been guilty of carelessness and inattention to his business, but no willful or fraudulent delay, it would be highly proper even for an appellate court to come to his relief if the lower court refused it. But when the default has been set aside the case is far different."

In the case at bar it appears that, after the action was brought, the defendant employed an attorney to defend it, and placed the matter in his hands; certainly this was all the client was called upon to do. The attorney interposed a demurrer to the complaint, and, when this was overruled, obtained time to answer. At the same time, in another action pending between the same parties, he was given 15 days to answer after the service upon him of a bill of items. The showing is that he commenced drawing the answers at once, and in this, and other matters, was quite busily engaged until April 26th, when he left Austin for Belmont, where he was employed in the trial of an action before the district court of Nye county,

and was detained there longer than he expected to be, and until after default was entered. He claims to have been under the impression that he also had 15 days to answer in this case, after the service upon him of the bill of items, but it clearly appears that his failure to file the answer in time was not owing to this. Taken altogether, it sufficiently appears from the affidavit, while not as explicit as it might have been, that the defendant intended, in good faith, to contest its liability in the case; that the attorney, in like good faith, intended to file the answer in time, and had it prepared for this purpose; but he appears to have negligently forgotten when the time for answering would expire, or, believing that he would be able to return from Belmont earlier than he could reasonably hope to, he neglected to file it before leaving Austin, but left it in his office. While at Belmont it occurred to him that the time for answering might be about to expire, and he immediately made arrangements for having it filed, which was done on May 2d, but after the default had been entered. Bearing in mind that the statute provides for relieving a party from a default taken against him through his negligence when the negligence is not inexcusable, does it not appear at once that a judgment for over \$5,000 is a rather heavy penalty to pay for such carelessness as is shown here? While it was negligence, such as is properly punished by the infliction of terms, it does not seem to be of the kind that should be deemed inexcusable, and the defendant, consequently, denied any opportunity of making a defense. It was the severest penalty that could be invoked for the grossest misconduct, and in imposing it in this case we are of the opinion that the court erred in the exercise of its discretion to such an extent as to require a judgment of reversal. As presented, the denials of the answer are insufficient, but are, of course, subject to amendment.

3. An application to open a default should be made immediately. There was apparently an unnecessary delay in making the motion in this case, and, had it resulted in deferring the trial of the action had the motion been granted, it might have justified the ruling of the court; but it is affirmatively shown that it did not, as court was not in session during the time. The order and judgment appealed from are reversed, and cause remanded.

MURPHY, J., (*dissenting*.) While the *nisi prius* court might, under the circumstances of this case, have set aside the default, and permitted the defendant to answer, yet I cannot say there has been such abuse of that discretion with which the court is clothed as would justify a judgment of reversal. The granting or refusal of a motion to set aside defaults has always been held to be a matter within the sound legal discretion of the lower court, and, unless there has been an abuse of that discretion, it has not been the practice in this court to reverse such decisions. *Howe v. Coldren*, 4 Nev. 172; *Harper v. Mallory*, Id. 449; *State v. Mining Co.*, 13 Nev. 194;

Ewing v. Jennings, 15 Nev. 381; *Garner v. Erlanger*, 86 Cal. 60, 24 Pac. Rep. 805; *Underwood v. Underwood*, 87 Cal. 523, 25 Pac. Rep. 1065. The complaint was filed March 1, 1890. On the 5th day of March, 1890, summons was served on the defendant. On the 14th day of April, 1890, a demurrer was filed, and on the 16th day of April, 1890, the question as to the sufficiency of the complaint was argued and submitted to the court for its decision, the demurrer was overruled, and the defendant given 15 days in which to file its answer. On the 2d day of May, 1890, the defendant not having filed its answer, the plaintiff by his attorney had the default of the defendant entered by the clerk and judgment rendered thereon. On the 21st day of May, 1890, the attorney for the defendant filed and served a notice on the plaintiff, setting forth "that he would on the 25th day of June, 1890, move the court to set aside the judgment entered by default, on the ground of surprise, inadvertence, mistake, and excusable neglect to file answer herein, and on the ground that the default was taken before the time for answering had expired. On the 8th day of October, 1890, the motion to open up the default was argued and submitted on the affidavit of the attorney for the defendant, wherein he alleges that the minutes of the court were not in conformity with the order as made by the judge thereof, and that he was called away to Belmont, Nye county, where he was detained in attendance on court longer than he expected to be, and did not return to Austin until after the default of the defendant had been entered." After argument, the court denied the motion. There is no merit whatever in the first point raised by the affidavit, as to the second ground, the absence of the attorney. It appears from the affidavit that he left Austin on the 26th day of April, 1890, to go to Belmont for the purpose of attending court at that place; "that he had prepared the answer in this case, and left it in his office." There is no reason given why he did not file the answer before leaving for Belmont.

If the judgment in this case is set aside, it will be on the sole ground of the neglect, carelessness, or mistake of the attorney, and courts have steadily refused to vacate judgments under such circumstances. In the case of *Smith v. Tunstead*, 56 Cal. 177, the supreme court said: "An examination of the affidavits impresses us with the conviction that the plaintiffs were not negligent. But their attorneys were, and parties in this state have in such cases as this been held not entitled to relief on account of the negligence of their attorneys." Section 68 of our practice act is copied from the California statute. In the case of *People v. Rains*, 23 Cal. 128, the attorney for the defendants had prepared a demurrer to file to the amended complaint, but failed to file it in time, in consequence of a mistake on their part as to the day on which the time for filing would expire. They, by a miscalculation of time, supposed that the time would not expire until the day after it did, default was taken, and the court refused on application to set it aside. The rule as above announced

is supported by the following cases: *Ekel v. Swift*, 47 Cal. 619; *Elliott v. Shaw*, 16 Cal. 377; *Haight v. Green*, 19 Cal. 117; *Mulholland v. Heyneman*, 1d. 605; *Babcock v. Brown*, 25 Vt. 552; *Davidson v. Heffron*, 31 Vt. 688; *Kerby v. Chadwell*, 10 Mo. 393; *Bosbyshell v. Summers*, 40 Mo. 172; *Gehrke v. Jod*, 59 Mo. 522; *Matthis v. Town of Cameron*, 62 Mo. 504; *Foster v. Jones*, 1 McCord, 116; *Burke v. Stokely*, 65 N. C. 569; *Phillips v. Collier*, (Ga.) 13 S. E. Rep. 260; *Merritt v. Putnam*, 7 Minn. 493, (Gil. 399;); *Tarrant Co. v. Lively*, 25 Tex. Supp. 399; *Smith v. Watson*, 28 Iowa, 218; *Jones v. Leech*, 46 Iowa, 186; *Spaulding v. Thompson*, 12 Ind. 477; *Phelps v. Osgood*, 34 Ind. 150; *Brumbaugh v. Stockman*, 83 Ind. 583; *Kreite v. Kreite*, 93 Ind. 583; *Hoag v. Society*, (Ind. App.) 27 N. E. Rep. 438; *Parker v. Bank*, 1d. 650; *Welch v. Challen*, 31 Kan. 696, 3 Pac. Rep. 314; *Green v. Bulkley*, 23 Kan. 130; *Kyle v. Chase*, 14 Neb. 531, 16 N. W. Rep. 821; *White v. Ryan*, 31 Ala. 400; *Holloway v. Holloway*, (Mo.) 11 S. W. Rep. 233; *Fowler v. Colyer*, 2 E. D. Smith, 125; *Mulhern v. Hyde*, 3 E. D. Smith, 177; *Burger v. Baker*, 4 Abb. Pr. 12; *Thielmann v. Burg*, 73 Ill. 293; *Shroer v. Wessell*, 89 Ill. 114; *Gray v. Sabin*, 87 Cal. 211, 25 Pac. Rep. 422; *O'Connor v. Eilmaker*, 83 Cal. 452, 23 Pac. Rep. 531. The reason for the strict enforcement of this rule is that the law regards the neglect of the attorney as the client's own neglect, and will give no relief from the consequences thereof. As said in the case of *Foster v. Jones*, supra: "It is difficult to foresee all the consequences which might result from permitting a party, after judgment and execution, to set aside the proceedings against him on the ground of negligence or ignorance of his attorney. It would very much tend to destroy all the rules of pleadings, and produce endless litigation." In my opinion, the judgment of the district court ought to be affirmed.

HEANEY *et al.* v. BUTTE & MONTANA COMMERCIAL CO.

(Supreme Court of Montana. July 20, 1891.)

ENJOINING TRESPASS—REMEDY AT LAW.

An injunction will not issue to restrain a trespasser from removing trees from a limestone mining claim, upon the owner's averments that he intends to work it, and that the trees are necessary for fuel, and that fuel is very scarce and difficult to obtain by reason of remoteness from a railroad, when the trespasser is solvent, and able to respond in damages; since such removal will not destroy or materially alter the character of the premises, but will only increase the cost of fuel.

Appeal from district court, Cascade county; CHARLES H. BENTON, Judge.

Action by John Heaney and another against the Butte & Montana Commercial Company for damages and an injunction. A preliminary injunction was granted. Defendant appeals. Reversed.

The action is for damages and injunction. The wrong complained of is that defendant entered upon the land of plaintiffs, trespassed upon the same, and cut down the trees upon the land. An injunction was issued upon the complaint. That

pleading sets forth the following facts material to this inquiry: The plaintiffs are the owners, and at the time of the commission of the alleged wrongs were in the possession, of a limestone mining claim, describing the same. The claim was discovered and located December 18, 1890. That it is chiefly valuable for the deposits of limestone thereon, and that the plaintiffs intend presently to mine the same, and extract the limestone, and to erect kilns thereon to burn the limestone, and prepare it for market. That to do so large quantities of fuel will be required, and a large amount of timber and wood will be used in mining the claim and burning the limestone. That before the wrongs complained of there were growing upon said claim about 4,000 trees of the proper size, character, quality, and kind for fuel and use in such business, and were necessary and needful to the plaintiffs in said business. That it was and is the desire and intention of plaintiffs to use said trees for said business. That the claim is remote from a railroad, and there is little timber near by; and to obtain timber or wood for the purposes aforesaid, from lands other than said claim, would necessitate great and excessive expense and outlay, and practically prevent the plaintiffs from engaging in or carrying on said business, or cause the same to result in failure or loss to plaintiffs, and that, owing to the location and situation of said claim, it is difficult to have conveyed or brought thereon any considerable amount or quantity of timber or wood or material for fuel. Then follow allegations that defendant trespassed upon said claim, and cut down about 3,500 of said trees, to the damage of plaintiffs in \$1,500. That defendant threatens to continue said acts, to remove the trees cut, and to fell the remaining trees, and to deprive plaintiffs of the same. That plaintiffs believe that defendant will fell and remove all said trees, unless restrained by the court. That, if the trees are so removed, the same cannot be returned to said claim, and will be forever lost to plaintiffs. That plaintiffs will suffer great and irreparable injury, and are without a complete and speedy remedy at law. A perpetual injunction is prayed, and also an interlocutory order restraining defendant *pendente lite*. Upon this complaint an injunction issued, restraining the defendant as prayed for, until the further order of the court. Defendant moved for the dissolution of the injunction, on the ground, among others, that the facts set forth in the complaint do not justify the issuance of the injunction, as plaintiffs have their remedy at law. The motion was denied. Defendant appeals from the order denying its motion, and also from the order allowing the issuance of the writ.

Thomas E. Brady, for appellant. Cooper & Pigott, for respondents.

DE WITT, J., (after stating the facts as above.) A trespass, as such, is not subject to the control of a court of equity by injunction. *Stevens v. Beekman*, 1 Johns. Ch. 317; *Livingston v. Livingston*, 6 Johns. Ch. 407; *Jerome v. Ross*, 7 Johns.

Ch. 315; *Shipley v. Ritter*, 7 Md. 408; *Cowles v. Shaw*, 2 Iowa, 499; *Kerlin v. West*, 4 N. J. Eq. 449; *Bethune v. Wilkins*, 8 Ga. 118; *Citizens' Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299; *Western, M. & M. Co. v. Virginia C. C. Co.*, 10 W. Va. 296; *McMillan v. Ferrell*, 7 W. Va. 223. But an injunction may issue to prevent a trespass in "cases of great and irreparable mischief, which damages could not compensate, because the mischief reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed." *Jerome v. Ross*, supra. In this case is an expansive review of the decisions by Chancellor KENT, and a clear statement of the principles governing the invocation of the writ of injunction against trespass. See, also, to the same effect, the cases last cited above, and *Davis v. Reed*, 14 Md. 152; *Green v. Keen*, 4 Md. 98; *Weigel v. Walsh*, 45 Mo. 560; *Anderson v. Harvey's Heirs*, 10 Gratt. 398. That equity may restrain trespass, the injury must appear to be irreparable, and that the plaintiff has no adequate remedy at law. In the case at bar, the plaintiffs have a remedy in an action at law. Is that remedy adequate? Is there anything to show that it is not? An important element in demonstrating that the remedy at law is inadequate is a showing that the defendant is insolvent, and that, therefore, a judgment at law would be worthless. *Musselman v. Marquis*, 1 Bush, 463, and *Cowles v. Shaw*, *McMillan v. Ferrell*, *Western, M. & M. Co. v. Virginia C. C. Co.*, *Kerlin v. West*, and *Weigel v. Walsh*, cited above. In the case at bar it does not appear that the defendant is insolvent. Plaintiffs could recover from it, in law, the full amount of the damages they suffered. The law, as we deduce it from the cases, is that, in order to enjoin a trespass, it must appear that the injury is irreparable, and destructive of the estate in the character in which it is enjoyed. Applying the rule to the case at bar, we observe that the estate had not been used at all. The character in which plaintiffs intended to use it was a limestone mine. Cutting the timber from the mine would not destroy or injure the mine. It would result only in rendering fuel and timber at the mine more expensive. Plaintiffs say that they could not get the trees back again. Is there anything about the trees that makes them peculiarly useful as fuel or timber? Chancellor KENT says, in *Jerome v. Ross*, supra: "The plaintiff speaks of the injury as irreparable, because the loads of stone, taken from the mass of rock, cannot be replaced or restored; but he does not state that the rock was of any use to him, as proper or fit for building, fencing, etc., or that it was even desirable as an object of ornament or taste. There was no need of having the same identical fragments of stone replaced, and the injury was not, in the sense of the law, irreparable. It was susceptible of perfect pecuniary compensation. The case, therefore, seems to resolve itself into this single point whether a court of equity ought to interpose, by injunction, to restrain a trespass, when the injury does not appear to be irremediable, and destructive to the es-

tate, and when the ordinary legal remedy in the courts of law can afford adequate satisfaction." It was by no means necessary, in the case at bar, that plaintiffs should have the identical trees for fuel and timber. Plaintiffs say that it is difficult to have conveyed to the ground any considerable amount or quantity of timber or wood or material for fuel, and to so convey would necessitate great and excessive expense and outlay, and cause the working of the mine to result in failure or loss to plaintiffs. But removing the wood, which plaintiffs intended to use as fuel and timber, does not destroy the inheritance, does not ruin the estate, as is said in the decided cases. It is said to cause a loss and damage, for which plaintiffs may recover the full value at law, and, for all that appears in the record, such amount recovered will be collected from defendant. Chancellor KENT says, (*Stevens v. Beekman*, supra:) "This is a case of an ordinary trespass upon land and cutting down the timber. The plaintiff is in possession, and has adequate and complete remedy at law. This is not a case of the usual application of jurisdiction by injunction; and, if the precedent were once set, it would lead to a revolution in practice, for trespasses of this kind are daily and hourly occurring." There is sometimes difficulty in determining whether the trespass is of such a character as will warrant the interposition of an injunction. The cases must stand upon their own facts. The chancellor has, as has also the appellate court, the whole matter under view, and must decide the equity of each case. The case before us does not present difficulty. We observe that the injury to plaintiffs is not of that particular or special nature that goes to the destruction or ruin of the estate in which it is proposed to enjoy it; and the injury is not shown to be irreparable, in that, if the complaint of injury be well founded, plaintiffs have a right to a judgment at law for the whole damage that can be shown, which judgment, as far as the record discloses, is collectible from a solvent defendant. It is therefore ordered that the orders of the district court granting the injunction, and refusing to dissolve the same, be reversed, and the case remanded, with directions to that court to dissolve the injunction.

BLAKE, C. J., and HARWOOD, J., concur.

THORNBURGH v. FISH.

(*Supreme Court of Montana. July 20, 1891.*)

SPECIFIC PERFORMANCE—BOND FOR DEED—ASSIGNMENT OF BOND TO VENDOR'S AGENT.

1. A bond for the payment of a certain sum of money, with a condition that it shall be void if the obligor shall convey to the obligee certain land for a certain price to be paid by him, is a contract to sell land, which the obligee may have specifically enforced, where he has taken possession of the land, and agreed to convey to third persons, to whom he had delivered possession, and who have erected valuable improvements thereon. *Distinguishing Kleinschmidt v. Kleinschmidt*, (Mont.) 24 Pac. Rep. 266.

2. In an action for specific performance, it appeared that the sale was negotiated for the owner by a firm of real-estate agents, and a bond

for a deed given to the purchaser; that afterwards the purchaser assigned the bond to one of the firm, who tendered the balance of the purchase money, and demanded a deed. The jury found that the purchase was not made for the benefit of the agent, and that the purchase price was the value of the land at the time of sale. *Held*, that specific performance was properly decreed.

Appeal from district court, Lewis and Clarke county; HORACE R. BUCK, Judge.

Action by Albert M. Thornburgh against Frederick S. Fish for specific performance of a contract to convey real estate, executed by Fish to M. H. Randall, and assigned to complainant. Trial to a jury. Verdict and decree for complainant, and defendant appeals. Modified and affirmed.

Thomas J. Walsh, for appellant. McConnell & Clayberg and M. S. Gunn, for respondent.

BLAKE, C. J. The complaint alleges that on and before the 23d day of October, 1888, defendant was seised and possessed of a certain tract of land, which is described as lot No. 14, in block L, of the Blake addition to the city of Helena, in this state. That Fish and Marcy H. Randall entered October 23, 1888, into the following written contract respecting said land: "Know all men by these presents that I, Frederick S. Fish, * * * am held and firmly bound unto Marcy H. Randall * * * in the sum of thirteen hundred and fifty dollars, * * * to be paid to the said Marcy H. Randall, his executors, administrators, or assigns, for which payment well and truly to be made I bind myself, my and each of my heirs, executors, and administrators, firmly by these presents. Sealed with my seal and dated the twenty-third day of October, A. D. one thousand eight hundred and eighty-eight. The condition of the above obligation is such that if the above-bounden obligor shall, on or before the twenty-third day of October, A. D. one thousand eight hundred and eighty-nine, make, execute, and deliver unto the said Marcy H. Randall (provided, the said Marcy H. Randall shall, on or before that day, have paid to the said obligor the sum of six hundred and seventy-two dollars, [\$672.00], in installments as follows, to-wit: The sum of three hundred and thirty-six dollars [\$336] cash at the date of execution and delivery of this bond, and the remaining sum of three hundred and thirty-six dollars on or before the twenty-third day of October, A. D. 1889, together with interest on said remaining sum at the rate of ten per cent. [10%] per annum from date until paid, interest payable semi-annually; and together, also, with all taxes that may be levied or assessed against said premises during the term of this bond, the price by the said Marcy H. Randall agreed to be paid therefor) a good and sufficient conveyance in fee-simple, with full covenants of warranty of, [description of lot.] Then this obligation to be void; otherwise to remain in full force and virtue." This instrument was signed, sealed, acknowledged, and delivered by Fish, and recorded December 16, 1889, in the office of the county recorder of the county of Lewis

and Clarke. And it is further alleged that Randall paid upon the execution of this contract to Fish the sum of \$336; that Randall, in consideration of the sum of \$375, sold, transferred, and assigned to Thornburgh, the plaintiff, his interest therein; and that the assignment was indorsed January 3, 1889, upon the contract. The complaint contains similar averments concerning lot No. 13, in the same block, but different amounts of money are named, and also alleges that the plaintiff has owned the contracts since the 3d day of January, 1889; that the plaintiff tendered October 25, 1889, to Fish, the sum of \$728.25, being the amount of the unpaid purchase money of both parcels of land, and interest thereon, together with the taxes and assessments against the premises during the term of the contracts, and demanded from Fish the conveyance of the same; that Fish refused to receive said money and execute any deeds; that the plaintiff tendered January 24, 1890, to Fish the sum of \$750, as such unpaid purchase money and interest, and also a deed, and requested him to execute the same; that Fish refused to receive the money or execute the deed. It is further alleged that Randall received October 23, 1888, from Fish the possession of the lots, and that Randall, immediately after the purchase of said contracts by the plaintiff, surrendered such possession; that the plaintiff sold, in the year 1889, the lot No. 13 to A. H. Nelson, and delivered the possession thereof; and that Nelson has erected thereon a residence and other buildings of the value of \$3,500, and is living in the same, and holds the obligation of the plaintiff for a warranty deed to the land. It is further alleged that plaintiff sold September 12, 1889, to George H. Pew said lot No. 14, and immediately delivered the possession thereof; and that Pew has erected a dwelling-house and other buildings thereon of the value of \$6,500, and holds the obligation of the plaintiff for a warranty deed to the land; and that Pew sold, in the year 1890, the premises to Dr. Baldwin, who is now residing in said house, and in possession of the lot. It is further alleged that Fish has the title in fee-simple to said tracts of land, and is able to make deeds thereto. The prayer of the complaint is for specific performance of said contracts, and that Fish be compelled to sell and convey said parcels of land to the plaintiff by good and sufficient deeds, upon the payment of said purchase money; and also for damages in the sum of \$1,000. Copies of the contracts between Fish and Randall, and the assignments from Randall to Thornburgh, and the deeds which were prepared by the plaintiff for execution by the defendant, are annexed to the complaint as exhibits.

The answer admits that Fish signed the contracts, and that Randall made the written assignments of his interest therein to Thornburgh. It is averred that the plaintiff is a member of the firm of Wallace & Thornburgh, and that the defendant made September 15, 1888, the said Wallace & Thornburgh his agents to sell these parcels of land, with special instructions to-wit: Not less than \$18 per front foot on

Broadway for lot No. 13, and \$17 per front foot on Broadway for lot No. 14; and that this agency was to continue until November 1, 1888. That the consideration in "the bonds for deeds" was below the amount named in the instructions, to-wit: \$17 per front foot on Broadway for lot No. 13, and \$16 per front foot on Broadway for lot No. 14. That the defendant received October 23, 1888, at the city of Ann Arbor, state of Michigan, the contracts, with the following statement by the firm of Wallace & Thornburgh: "We consider this a most excellent sale, as the chances are that the remainder of the money will be paid within a few months, as the purchaser is thinking of building upon one of the lots." That the defendant "was not then in a position to know, and did not know," the value of the lots, "but relied upon the representation of his agents aforesaid, and under a mistake of material facts signed said bonds for deeds." It is further alleged that "the mistake of facts aforesaid were that defendant, relying on said agents' representations, believed the sale of said lots to be a most excellent sale, and defendant at that time believed that the sale was *bona fide* and to the grantee in said bonds, and not for the benefit of his agents; feared that, if he repudiated said agents' action in selling said lots contrary to instructions, the grantee in said bonds would sue his agents aforesaid. * * * That said representations were false, and * * * were knowingly, falsely, and fraudulently made by said Wallace & Thornburgh, and that said Marcy H. Randall knew nothing of the alleged sale of October 23, 1888, aforesaid, at the time it was made. * * * That said assignment was made in violation of the trust and confidence reposed by defendant herein in said firm of Wallace & Thornburgh, and in breach of the fiduciary relations existing between said firm and defendant as principal and agent, and without defendant's knowledge or consent. * * * That said firm of Wallace & Thornburgh, and the plaintiff herein, in violation of the fiduciary relations existing between them as principal and agent, kept said assignment to them secret, and concealed from defendant herein, although frequently interrogated by defendant in reference thereto, until the 24th day of October, A. D. 1889, at about the hour of 2 o'clock in the afternoon of said day, when the defendant for the first time discovered that said assignment had been made, and that the representations made by said firm at the time said bonds were signed were false, and that defendant had signed said bonds under the mistake of facts aforesaid, when defendant immediately rescinded said bonds." The prayer of the answer is that "the bonds for deeds" be declared invalid, and that the cloud upon the title of the defendant caused by the record thereof be removed. The replication denies all the new matter in the answer which is inconsistent with the complaint. At the commencement of the trial the defendant "objected to the introduction of any evidence, on the ground that the complaint did not state facts sufficient to constitute a cause of action." The ob-

jection was overruled, and the appellant contends that the foregoing bonds are identical in terms with the instruments which were construed in *Kleinschmidt v. Kleinschmidt*, 9 Mont. 477, 24 Pac. Rep. 266. While intelligent criticism of the rulings of courts is always proper and desirable, we respectfully remind the counsel for the appellant that his language is unsuitable to the occasion in stating in his brief that he "is even at a loss to advise the court upon what ground the trial judge disregarded the solemn adjudication that 'such relief (a decree of conveyance) could not be granted on the bond.'" When the case at bar is compared with *Kleinschmidt v. Kleinschmidt*, supra, the difference between the acts of the parties in relation to their respective agreements can be readily perceived. It appears in *Kleinschmidt v. Kleinschmidt*, supra, that the plaintiffs were husband and wife, and executed a deed to certain real estate, and delivered the possession thereof to the purchasers thereof, with the intent to hinder and delay the creditors of the husband; and that there was an agreement in writing to reconvey the premises upon the payment of a specified sum. The court below held that the facts which are stated in the report of the case constituted an absolute sale, and not a mortgage; that no legal tender had been made of the amount which was stipulated in the bond; and that the plaintiffs, by reason of their attempt to hinder and delay such creditors, were not entitled to equitable relief. When the case was appealed to this court, our attention was directed by counsel for all the parties to these fundamental propositions, and we concurred therein, and for these reasons the judgment was affirmed. There are, however, observations in the opinion upon the effect of the bond which are not necessary to the decision, and cannot be approved. It is proper to remark that this part has been detached by the appellant, and made the ground-work of his argument. An inspection of the pleadings, which are fully presented, will show that the material issues which were tried in *Kleinschmidt v. Kleinschmidt*, supra, were not raised in this case.

The authorities seem to be harmonious in holding that the respondent, under the facts which are stated in his complaint, is entitled to a decree for the specific performance by the appellant of the contracts of sale or bonds for a deed. In *Plunkett v. Society*, 3 Cush. 561, Mr. Justice METCALF in the opinion said: "It was objected by the defendant's counsel that the bond is not a contract in writing to convey real estate; that the condition neither sets forth an agreement to give a deed of the estate mentioned, nor recites any agreement whatever, but merely is that, if the obligors shall convey when requested, the bond shall be void and therefore that the court have no jurisdiction of the case; that the plaintiffs have an adequate remedy at law; and that the form of the bond showed that Brown relied on its penalty only, if the obligors should refuse to convey the land." The contention of the appellant herein is a repetition of

these positions. What was the reply of the court? "All these objections are answered by the decision in *Ensign v. Kellogg*, 4 Pick. 1, made twenty-three years ago, in this county, after a full argument." The opinion in the last case was delivered in the year 1826; and, while the statement of the facts is incomplete, this defect was cured by the report of *Plunkett v. Society*, supra. The counsel maintained in *Ensign v. Kellogg*, supra, that "this is a case in which the damages are liquidated, and the defendants have an option to pay those damages or convey the land." It was said *per curiam*: "We are satisfied that no subject is more proper for the power of a court of chancery in decreeing specific execution than a contract for the sale of real estate; for what is agreed to be done ought in conscience to be done. * * * Nor is the remedy at law for damages complete or adequate; for the thing contracted for is wanted, and the value in money may often be an unsatisfactory compensation." The doctrine of *Ensign v. Kellogg*, supra, has been repeatedly applied. Equity regards the intention of the parties, and the nature of their acts; and the form of the instrument concerning the sale of lands, which is to be enforced, is immaterial. The right to a rescission or specific performance of such contracts is not absolute, but is a matter of sound judicial discretion, which is controlled by the circumstances of each controversy. *Fitzpatrick v. Beatty*, 1 Gilman, 454; *Dooley v. Watson*, 1 Gray, 414; *Whitney v. Stone*, 23 Cal. 275; *Fisher v. Shaw*, 42 Me. 32; *Barnard v. Lee*, 97 Mass. 92; *Ewins v. Gordon*, 49 N. H. 444; *Stuyvesant v. Mayor*, 11 Paige, 414; *Seymour v. Delancy*, 3 Cow. 445; *Johnson v. Hubbell*, 10 N. J. Eq. 332; *Young v. Daniels*, 2 Iowa, 126; *Brewer v. Herbert*, 30 Md. 301; *Walkerv. Douglas*, 70 Ill. 445; *Brix v. Ott*, 101 Ill. 70; *Hennessey v. Woolworth*, 123 U. S. 438, 9 Sup. Ct. Rep. 109; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. Rep. 498; 1 Story Eq. Jur. §§ 715, 742, 751, and cases cited; 1 Pom. Eq. Jur. § 446, and cases cited; *Baumann v. Pluckney*, 118 N. Y. 604, 23 N. E. Rep. 916.

What excuse is urged by the appellant for his refusal to execute the deeds which were promised upon the payment of the consideration which is specified in the bonds? The jury found "that Wallace & Thornburgh, at the time lots 13 and 14 were sold to Marcy H. Randall, had no understanding or agreement with said Randall, or his brother, W. W. Randall, that the said lots were to be purchased by him [Randall] for Wallace & Thornburgh;" and "that the price paid for lots 13 and 14, at the date of the sale to Marcy H. Randall, was the value of said lots at the time of said sale." The other findings by the court are in favor of the respondent upon the foregoing issues, and all of them are supported by testimony, and should not be disturbed. These facts, which stand in the record, render useless a review of the authorities, and deprive the appellant of every defense alleged in the answer. There are other questions which have been discussed by counsel, and carefully weighed, but, in the light of the is-

ness and findings, they are irrelevant and immaterial.

There is an error in the computation of the amount which is to be paid to the appellant under the decree appealed from. The tender made by the respondent, October 25, 1889, of the sum of \$723.25, on account of the unpaid purchase money, was not kept good, and did not have the effect of stopping interest. *Bissell v. Hayward*, 96 U.S. 580. This objection is not applicable to the subsequent tender to the appellant of the sum of \$750, upon January 24, 1890. It is therefore ordered and adjudged that the judgment be modified so that the defendant, upon the payment of the sum of \$745.18 by the plaintiff, shall be required to execute the deed therein described, and that, when so modified, the judgment be affirmed.

HARWOOD and DE WITT, JJ., concur.

(11 Mont. 63)

WHALEN *et al.* v. HARRISON.

(*Supreme Court of Montana*. July 20, 1891.)

GARNISHMENT—SCHOOL-DISTRICT.

A public school district is not exempt from garnishment. Following *Waterbury v. Commissioners*, (Mont.) 26 Pac. Rep. 1002.

Appeal from district court, Lewis and Clarke county; HORACE R. BUCK, Judge.

Action by Stephen F. Whalen and others against William Harrison upon a money demand. The board of trustees of a school-district was garnished, and a motion to discharge the writ was sustained. Plaintiffs appeal from the order. Reversed.

The plaintiffs in the district court commenced their action against the defendant upon a money demand. They sued a writ of attachment, as allowed by law. In pursuance to said writ the sheriff garnished, in the manner provided by the statute, the board of school trustees of school-district No. 1. The garnishee answered to the writ in the following language: "We are unable to give any definite answer as to the amount due William Harrison on his contract. The work and material of his contract is unfinished. His contract calls for \$22,248, and he has been paid \$15,603.41. The balance is subject to the fulfillment of this contract according to plans and specifications. Thereupon the defendant moved to discharge the garnishment. He files his affidavit upon the motion, in which he says that, when the garnishment was served upon the school-district, the district was owing him, and is still so owing, several hundred dollars for material furnished for a school building which is in process of construction, and was and is due by virtue of a certain contract between the affiant and said district; that, by reason of the garnishment, the district refuses to pay affiant what is due him, and to estimate and compute the amount due upon his contract. The defendant moved for the discharge of the writ on the ground that the debt attached and garnished is a debt owing to defendant from a public municipal corporation, which debt is exempt from the process of garnishment.

The motion was granted, and the writ discharged, and plaintiffs appeal from that order.

Adkinson & Miller, for appellants. *Leslie & Craven*, for respondent.

DE WITT, J., (after stating the facts as above.) The motion to discharge the garnishment was made in the district court solely upon the ground that the garnishee, as a public corporation, was exempt from garnishment. No other ground was set forth in the written motion which is preserved in this record. That the motion, on that ground, should have been denied, is settled. *Waterbury v. Commissioners*, 26 Pac. Rep. 1002, (this term.) Since the decision of the *Waterbury* case, respondent filed his brief, in which he urges in this court that which he did not present below, viz., that it did not appear that any fixed debt was due from the garnishee to the defendant. Whether there were or not is not apparent from this record, and is a matter to be ascertained in the lower court in the manner provided by the law as to garnishment. Section 190, Code Civil Proc. The order discharging the garnishment is reversed, and the case is remanded, with directions to the district court to proceed in accordance with the views herein expressed.

BLAKE, C. J., and HARWOOD, J., concur.

(11 Mont. 90)
BARNEY v. HAYS *et al.*

(*Supreme Court of Montana*. Aug. 3, 1891.)

WILLS—PROBATE AND CONTEST—JURY TRIAL.

1. A will which has been presented for probate, and rejected, may be presented again together with a codicil found afterwards, referring to the will, as such codicil operates as a republication of the will.

2. Under Prob. Prac. Act Mont. §§ 20-22, which provide that in a will contest the petitioner may answer the contestant's grounds, and any issue of fact thus raised must, on request of either party in writing, be tried by a jury, the trial to be conducted in accordance with the provisions of the civil practice act for the trial of issues of fact, it is error to sustain a demurrer to an answer which denies the contestant's grounds.

Appeal from district court, Yellowstone county; GEORGE R. MILBURN, Judge.

Petition by George M. Hays and Henry N. Rowley, to probate the last will and testament of Charles E. Barney, deceased. Petition denied, and they appeal. Reversed.

Cullen, Sanders & Shelton and *O. F. Goddard*, for appellants. *Savage & Day*, for respondent.

BLAKE, C. J. The appellants filed, January 10, 1891, in the district court of Yellowstone county, their petition for the probate of the last will and testament of Charles E. Barney, deceased, and alleged that said Barney died October 3, 1890, in the state of Vermont; that he left real and personal estate in said county of Yellowstone of the value of \$20,000; that he left a will dated June 15, 1889, which was filed October 11, 1890, in the court below, and presented for probate; that the court, by an order made December 1, 1890, refused to probate the same, and the peti-

tioners appealed to this court; that they were informed in January, 1891, that the said Barney had executed a codicil to said will in August, 1890, and thereupon dismissed their appeal without prejudice; and that said will and codicil are the last will and testament of said Barney. The petition complies with the statute, and a full recital of the facts is not necessary at this time. The material part of the will, which was published June 15, 1889, is as follows: "I do give and bequeath to my mother, Mary E. Barney, the sum of one thousand dollars. I give and bequeath to my daughter, Ida L. Barney, the sum of one hundred dollars, which said bequest of one hundred dollars shall be paid to my said daughter, Ida L. Barney, out of my estate, first, before the payment of any other bequest herein made. I give, devise, and bequeath to my three brothers and one sister, namely, Rufus H. Barney, Leonard L. Barney, Ward H. Barney, and Ella Barney, all the rest, remainder, and residue of my estate, all and singular, both real and personal, remaining after payment of my just debts, and the first two bequests above made, which remainder of my estate shall be divided amongst my said three brothers and one sister equally." The appellants were appointed the executors of said will. The deceased person was not married in June, 1889, and had one child, the said Ida L. Barney. Afterwards, in the month of August, 1890, the testator intermarried with Ellen C. Brodie in the state of Vermont, and she is the surviving wife. The codicil above mentioned consists of the following letter, which was written in the state of Vermont in the year 1890, although it purports to be dated in the year 1880: "Keller's Bay, Aug. 18, 1880. Hon. E. N. Harwood, Helena, Mont.: I have not strength to write much, so I will pitch right into my subject, which is somewhat important. I was married nearly two weeks ago. * * * So much explanatory; will enlighten you further on the subject, if you wish, when I see you. Now, what I want is for you to change my will so that she will be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended to as soon as convenient. I don't know what the laws are in Montana. I suppose Babcock & Rowley will have to witness the change or codicil. I don't know what ought to be done, but you do. * * * Let me hear from you soon on this subject, as soon as you can make it convenient. With best wishes, I am, truly yours, CHARLES E. BARNEY."

Said Ida L. Barney filed, February 10, 1891, her written objections to the probate of said will and codicil, and alleged that she is the daughter and only child of the deceased; that, at the time of the execution of the will and codicil, "the said Charles E. Barney was of unsound mind and memory, and not capable of making a will or bequest," and "was acting under duress, menace, and undue influence, and signed the same under such undue influence, duress, and menace;" that the said will was revoked August 9, 1890, by said Charles E. Barney in his life-time, by his marriage

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to Ellen C. Brodie, "who thereafter, and up to the time of the death of said Charles E. Barney, was his wife;" that the deceased made no provision for his said wife "by marriage contract, or otherwise, nor has said surviving wife in any manner been provided for in said will, nor is she mentioned therein so as to show an intention not to provide for her;" that said will was presented December 1, 1890, to the said district court for probate, and by an order the same was refused admission to probate; that said Hays and Rowley appealed to the supreme court of this state, and "on their own motion dismissed said appeal;" that said order made December 1, 1890, "is now in full force, and has never been reversed or modified;" that said district court "has no jurisdiction to hear said petition for the probate of said will a second time, and while its order made as aforesaid is in force, and is not reversed or modified." There is a denial that the said Charles E. Barney ever made or executed any codicil to said will. It is further alleged that said writing, which has been filed as a codicil, "is a positive revocation of said alleged will." Plaintiff further alleges, on her information and belief, that said paper writing was not signed or written by said deceased; * * * that by reason of the said alleged will being made by said deceased before his marriage with said Ellen C. Brodie as aforesaid, and by reason of the foregoing letter written as alleged by said deceased, said alleged will became and is revoked, null, and void;" that said Ida L. Barney and Ellen C. Barney are the only heirs at law of the deceased. Said Hays and Rowley filed February 20, 1891, their answer to the objections of the said Ida L. Barney, and denied that, at the times specified and aforesaid, "the said Charles E. Barney was of unsound mind and memory," or "was not capable of making a will or bequest, or a codicil thereto," or "was acting under duress, menace, and undue influence of any one," or that "he signed the said will or the said codicil thereto under undue influence, duress, or menace." They further denied that the will was revoked by the marriage of said Charles E. Barney with said Ellen C. Brodie, or in any other manner, or that "deceased made no provision for his surviving wife by marriage contract or otherwise," or "that said surviving wife has not been provided for in said will, but the defendants allege affirmatively that the said surviving wife of deceased was expressly provided for in the said codicil to said will." Said Ida L. Barney then filed a demurrer upon the ground that the answer did not state facts sufficient to constitute a defense to said objections, which was sustained by the court. The defendants elected to stand on their answer, and judgment was entered "that the objections of plaintiff to the probate of said alleged will and codicil are well taken, and that said alleged will and codicil are not, nor is either of them, the last will and testament of the said Charles E. Barney, deceased."

A preliminary question has been suggested by the respondent, who contends

that the first decree of the court refusing to admit to probate said will is binding upon all parties until it has been reversed, and that this issue cannot be again litigated. There is no controversy about the correctness of this legal proposition. *Castro v. Richardson*, 18 Cal. 478; *State v. McGlynn*, 20 Cal. 233; *Redmond v. Collins*, 4 Dev. 430; *Schultz v. Schultz*, 10 Grat. 358. "The execution of a codicil referring to a previous will has the effect to republish the will, as modified by the codicil." Prob. Prac. Act, § 448. Chief Justice FIELD in *Payne v. Payne*, 18 Cal. 302, said: "The codicil refers to the will, and operates as its republication, and the two are to be regarded as forming but one instrument, speaking from the date of the codicil." To the same effect is the statute. "Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument." Prob. Prac. Act, § 477. It is evident that the contest, which involved solely the probate of said will in the former proceedings, could not be an adjudication of the matters which are before us.

It will be seen from the foregoing statement that the answer of the appellants to the objections of the contestant raises the following issues of fact: Was the decedent of sound mind and memory, and competent to make said will? Was the decedent at the time of the execution of said will and codicil free from duress, menace, or undue influence? Did the decedent sign or write said codicil? We are not aware of any statute or authority which recognizes the practice of interposing a demurrer to said answer. On the contrary, the duty of the court is declared in definite language in the probate practice act: "The petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving (1) the competency of the decedent to make a last will and testament; (2) the freedom of the decedent, at the time of the execution of the will, from duress, menace, fraud, or undue influence; (3) the due execution and attestation of the will by the decedent or subscribing witnesses; or (4) any other substantial grounds affecting the validity of the will,—must, on request of either party in writing, filed three days prior to the day set for the hearing, be tried by a jury. If no jury is demanded, the court must try and determine the issues joined." Section 20. "When a jury is demanded, * * * the trial must be conducted in accordance with the provisions of the civil practice act for trials of issues of fact. A trial by the court must be conducted as provided in said civil practice act in cases of trials by the court." Section 21. "The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court; upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it." Section 22. These provisions are strictly pursued, and the supreme court of California holds that, "in such a proceeding, the position of the petitioner, and the person who opposes the probate

of the will, is different from that of parties to an ordinary civil action,—the contestant is the plaintiff and the petitioner is the defendant." *Estate of Wooten*, 56 Cal. 325. Upon the trial, the contestant is limited to the matters which are presented in the written grounds of opposition. In *re Kile*, 72 Cal. 131, 13 Pac. Rep. 320. "The jury are to find upon all the issues of fact raised by the contest, and none others." *Estate of Learned*, 70 Cal. 141, 11 Pac. Rep. 587; *Estate of Dalrymple*, 67 Cal. 444, 7 Pac. Rep. 906. A general verdict rendered by the jury in lieu of a special finding will not support a judgment denying the probate of a will. In *re Langan*, 74 Cal. 353, 16 Pac. Rep. 188. The respondent claims in this court that these instruments, when examined and construed, are not of a testamentary character, that the issues which have been commented on are irrelevant and immaterial, and therefore there was no error in denying the probate of said will and codicil. It is obvious that the statute, *supra*, and authorities, preclude such a view of the subject. Why did the contestant deliberately file objections embracing matters of this serious nature, if she had in them no confidence? She assumed voluntarily the statutory burden of proving her allegations, which had been made under the sanctity of an oath. In *Estate of Cobb*, 49 Cal. 604, Chief Justice WALLACE said: "The instrument offered being evidently of a testamentary character, upon application to admit it to probate the inquiry is only as to the mental condition of the testatrix; whether she was acting under duress, menace, fraud, or undue influence; whether the will was duly executed; and the like. The other questions attempted to be raised by the objections filed in the case concern the construction to be placed upon the will, and cannot be considered until it shall have been admitted to probate." The court in *Estate of Sanderson*, 74 Cal. 208, 15 Pac. Rep. 753, said: "In cases of contests of a will, the issues must be such as that the determination of them will leave to the court no office except to enter a judgment admitting the will to probate or rejecting it." The court below disregarded the plain requirements of the statute, *supra*, and deprived the appellants of their right to a trial by the mode which has been pointed out. It would be improper for us to express an opinion upon the interpretation of said will and codicil until the issues of fact have been tried and determined according to law. It is ordered and adjudged that the judgment be reversed, and that the cause be remanded, with instruction to the court to proceed in accordance herewith.

DE WITT, J., concurs. HARWOOD, J., being disqualified, did not participate in this decision.

(11 Mont. 33)

PENDLETON v. COWLING *et al.*¹

(Supreme Court of Montana. July 20, 1891.)

VENDOR AND VENDEE—PURCHASE IN TRUST—LIABILITY FOR PURCHASE MONEY.

Plaintiff conveyed land to one C., who executed notes secured by mortgage for the pur-

¹ Rehearing denied.

chase money. O. then executed a trust-deed, which recited that he, as party of the first part, and two others, parties of the second part, had purchased the land, specified the interest of each, and declared that for their mutual benefit and convenience they had agreed that the conveyance should be made to C. Held, that such trust-deed did not render the parties of the second part therein personally liable for the purchase-money notes.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

Action on certain promissory notes by James Pendleton against Parnell C. Cowling and others. The demurrer of Shober and Adams, two of the defendants, was sustained. Plaintiff appeals. Affirmed.

McConnell & Clayberg, for appellants. *J. H. Shober and Toole & Wallace*, for respondents.

BLAKE, C. J. This action was commenced October 17, 1889, by Pendleton, the plaintiff and appellant, against Cowling, Towner, Shober, and Adams, to recover the amount of the principal and interest of certain promissory notes. The court below sustained, December 30, 1890, the demurrer of Shober and Adams to the second amended complaint, and, upon the election of the plaintiff to abide by his pleadings, entered judgment for said defendants for their costs. We are required to review this ruling, and the material facts should be fully stated. It appears that Pendleton owned, April 7, 1887, a certain tract of land in the county of Jackson, state of Missouri, and then sold it to Cowling for the sum of \$91,000, of which the sum of \$31,000 was paid in cash. Cowling executed to Pendleton three promissory notes, of \$20,000 each, for the remainder of the purchase price, which were due, respectively, in one, two, and three years from such date, with interest at the rate of 8 per cent. per annum, and were signed by T. F. Sneding, as security for Cowling. Pendleton then delivered to Cowling a warranty deed for the land, which was recorded April 7, 1887, in said county of Jackson. At the same time Cowling executed to W. S. Wells a deed of trust upon the premises to secure the payment of the notes, which was likewise recorded. This instrument provided that if Cowling and Sneding should fail to pay the notes, or any part thereof, when any of them became due, the whole should become payable. The first note matured April 10, 1888, and was not paid. Cowling sold, October 17, 1887, this land to Towner, Shober, and Adams for the sum of \$20,501, but the deed was executed to Towner alone, and also recorded in the state of Missouri. It is provided in the deed of Cowling to Towner that the conveyance is subject to the deed of trust from Cowling to Wells, and that "all of said notes, and interest thereon, the grantee assumes and agrees to pay." The complaint alleges that "the payment of said three promissory notes, of \$20,000 each, was a part of the consideration" of this sale. The deed was executed to Towner, who was a resident of the state of Missouri, for the convenience of parties who might wish to buy said land, the said Shober and Adams being residents of this state. On the day of the delivery of the

deed by Cowling, Towner executed a declaration of trust, and one copy thereof was delivered to Shober and Adams, respectively. This instrument, which was signed and acknowledged solely by Towner, contains the following recitals: That Towner, Shober, and Adams have purchased of Cowling the land described in the foregoing deeds, "for the price and sum of \$201,500, all of said consideration being paid save the deferred payment of three notes of \$20,000 each, secured by a deed of trust executed by Parnell C. Cowling to James Pendleton, * * * and subject to the conditions of the deed;" that the interest of purchasers is as follows: Towner, three-fifths; Adams, one-fifth; and Shober, one-fifth; that said parties "have consented and agreed that for their mutual benefit, convenience, and accommodation, and for the purpose of facilitating the sale and management of said real estate, and the transfer thereof in case of sale, the conveyance of said real estate to be made to the said Oscar M. Towner, subject to a deed of trust to secure the aforesaid deferred payments: Now, therefore, in consideration of the premises, the said Oscar M. Towner hereby expressly declares that he holds the above-described real estate in trust for himself, and all the parties hereinbefore named, according to their respective interests hereinbefore stated; and the said Oscar M. Towner hereby promises and agrees and binds himself to sell and convey the real estate in accordance with the direction of said parties in interest, and appropriate the proceeds derived from said sale, in the manner directed by all of said parties in interest, and to hold said real estate as aforesaid, until all of said parties shall direct otherwise. In witness whereof the said Oscar M. Towner has hereunto set his hand and seal the day and year first above written; three original drafts of this declaration being executed for use and benefit of said parties in interest. O. M. TOWNER. [Seal.] Acknowledged, Missouri form, October 20th, 1888." The first paragraph of this instrument is in these words: "This article of agreement, made and entered into this 17th day of October, 1887, by and between Oscar M. Towner, of the county of Jackson, state of Missouri, party of the first part, and I. William Adams and John H. Shober, both of the city of Helena, territory of Montana, parties of the second part, witnesseth." It is not alleged that this agreement was recorded. The complaint sets forth the statutes of the state of Missouri, which require declarations of trust to be in writing, and signed by the party who is legally enabled to declare the same. It is further alleged that Towner, Shober, and Adams jointly assumed the payment of the said notes, and that Shober and Adams accepted the declaration of trust. Wells, as the trustee, sold August 23, 1888, the land for the sum of \$20,131, "under the provisions of the deed of trust," and the amount, after deducting the expenses of the sale, was credited upon the first of said notes.

Does the complaint state facts sufficient to constitute a cause of action? It is

conceded that no other written instruments were executed by the parties than those which are mentioned in the complaint, and the liability of the respondents to pay the foregoing notes depends upon their interpretation. Counsel have treated the case upon this theory, and we have been governed accordingly, in considering the legal propositions which have been discussed. When, therefore, it is alleged that Shober and Adams "jointly assumed with the said Towner the payment of the aforesaid three notes," it must be understood that this language refers to the effect of the deeds and declaration of trust, and not to acts which are not set forth in these documents or the complaint. This action was commenced in the courts of the territory of Montana, and the amount in controversy was sufficient to give to the aggrieved party the right of appeal to the supreme court of the United States. If our judgment can be reviewed, the right of the parties must be settled by the decisions of that tribunal, and our field of inquiry would be limited. The enabling act of congress for the admission of Montana into the American Union, approved February 22, 1889, contains this section: "(22) That all cases of appeal or writ of error heretofore prosecuted, and now pending in the supreme court of the United States, upon any record of the supreme court of any of the territories mentioned in this act, or that may hereafter lawfully be prosecuted upon any record from either of said courts, may be heard and determined by said supreme court of the United States; and the mandate of execution or of further proceedings shall be directed by the supreme court of the United States to the circuit or district court hereby established within the state succeeding the territory from which such record is or may be pending, or to the supreme court of such state, as the nature of the case may require; * * * and each of the circuit, district, and state courts, herein named, shall respectively be the successor of the supreme court of the territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of either of the territories mentioned in this act, in any case arising within the limits of any of the proposed states prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the supreme court of the United States as they shall have had by law prior to the admission of said state into the Union." 25 St. U. S. 682. This is the sole provision which controls the right of appeal in the case at bar, and it is evident that the same is not embraced in the above clauses of the act of congress. Some of these clauses owe their origin to the decisions of the supreme court of the United States in causes that were pending during the change of territories into states. *Hunt v. Palao*, 4 How. 589; *McNulty v. Batty*, 10 How. 72. It is held in *Hemilton v. Kneeland*, 1 Nev. 60, that a

case which was brought in the district court, and appealed to the supreme court of the territory of Nevada, and determined by the supreme court of the state, cannot be taken to the supreme court of the United States upon the ground that the organic act of the territory allowed such appeal when the action was commenced. Chief Justice WAITE, in *Railroad Co. v. Grant*, 98 U. S. 398, said: "It has universally been held that our appellate jurisdiction can only be exercised in cases where authority for that purpose is given by congress. It is equally well settled that, if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law." See cases there cited, and *Gordon v. U. S.*, 117 U. S. 704. It is alleged in the complaint that the respondents accepted the deed from Cowling, and also the declaration of trust by Towner, but it does not appear that Towner or Shober or Adams ever performed any act concerning this land, or enjoyed the possession thereof. The diligent labor of counsel, and an independent examination upon our part, have failed to produce an authority possessing the remarkable features which have been detailed. The conveyances and deed of trust, which are referred to in the complaint, are not pleaded *in hæc verba*, and their effect is not always defined with certainty. It should be borne in mind that this is not an action for the foreclosure of the deed of trust and the recovery of a judgment against Shober and Adams for the deficiency. The property has been disposed of by the trustee in the state of Missouri, and, according to our view, there is only one question for our solution. Did the respondents, by virtue of the foregoing documents, become liable for the payment of such deficiency? This is answered by the conditions of the contracts of the parties. The deed from Cowling to Towner contained this clause: "All of said notes and interest thereon the grantee assumes and agrees to pay." The grantee was Towner, and not Shober or Adams, and his assumption of this obligation cannot be disputed. The bare reasons for this transaction are immaterial, but the pertinent fact is that this agreement was not made by Shober or Adams. Chief Justice SHAW in *Huntington v. Knox*, 7 Cush. 371, said: "When a contract is made by deed under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it; and therefore, if made by an agent or attorney, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it." The supreme court of the state of Missouri in *Worley v. Dryden*, 57 Mo. 226, said: "The deed is always the best evidence, in the first place, of the intention of the parties, and, before it can be altered or changed in its legal import, convincing and satisfactory evidence must be adduced for that purpose." What, then, is the precise language of Towner in the declaration of trust? "All of said consideration being paid save the deferred payment of three notes of \$20,000 each, secured by a deed of trust executed by Par-

nell C. Cowling to James Pendleton;" and that the parties thereto have consented that "the conveyance of said real estate be made to the said Oscar M. Towner, subject to a deed of trust to secure the aforesaid deferred payments." While Towner was the owner of three-fifths of this property, he sustained towards Shober and Adams the relation of a trustee for the remainder. *Seymour v. Freer*, 8 Wall. 202. The declaration of trust "was precisely the instrument which the statute requires to show that the trustee was not the owner of the land by virtue of conveyances to him absolute on their face." *Wright v. Douglass*, 7 N. Y. 564. "It must also be observed that, if a trust is declared in writing," says Mr. Perry in his work on Trusts, "courts never permit parol proof of a trust to contradict an intention expressed upon the face of the instrument itself, for that would be to allow parol evidence to vary, contradict, or annul a written instrument." Volume 1, (2d Ed.) § 76, and cases cited.

The authorities hold that the above words of the declaration of trust, if inserted in a deed, do not make the grantee liable for the payment of such an incumbrance upon the land. Mr. Jones, the learned author of the work on Mortgages, says: "A deed which is merely made subject to a mortgage specified, does not alone render the grantee personally liable for the mortgage debt. To create such liability, there must be such words as will clearly import that the grantee assumed the obligation of paying the debt. It is not necessary that any particular formal words should be used, but that the intention to impose upon the grantee this obligation should clearly appear. A purchaser of land accepting a deed expressly conveying it subject to a mortgage, and excepting it from the covenants, is not himself personally liable to pay it, unless he covenants to do so." Volume 1, (1st Ed.) § 748, and cases cited; *Elliott v. Sackett*, 108 U. S. 132, 2 Sup. Ct. Rep. 375; *Shepherd v. May*, 115 U. S. 605, 6 Sup. Ct. Rep. 119. The litigation in these cases had its origin in the sales of property under a trust-deed. The court held in *Fiske v. Tolman*, 124 Mass. 254, that a promise to pay the mortgage debt cannot be inferred from the acceptance of a deed containing this clause: "Subject, however, to a mortgage * * * of \$7,000, which is part of the above-named consideration." *Id.*, and cases cited; *Wiltse, Mortg.* §§ 608, 610, 613, and cases cited. Mr. Wiltse says: "Whether a personal liability is assumed in any case is always dependent on the intention of the parties; unless the parties have declared this intention in express words, no liability will be incurred. If the deed merely recites that the land is taken subject to a certain mortgage, there will be no personal liability. Neither will the words 'under and subject' to a mortgage, which is specified, import a promise to pay, nor create a personal liability." Section 615. We have consulted numerous cases, and do not hesitate to assert this to be the general rule. These contracts were executed within the state of Missouri, in relation

to land therein, and it should be noticed that her courts have reiterated these principles. In *Hall v. Morgan*, 79 Mo. 47, Mr. Justice SHERWOOD in the opinion said: "Nor is the view entertained that the words 'subject to a mortgage,' contained in the deed last referred to, have any bearing on this controversy, since they were only such words as the law would imply. * * * Unless there was an express agreement to that effect, he (the purchaser) would not be personally liable for the mortgage debt, even though the deed under which he claims had conveyed the property therein mentioned, 'subject to an outstanding mortgage.' 2 Washb. Real Prop. 113. Unless the deed recites words importing on the part of the grantee a personal liability for the debt, such words as are quoted above will be regarded as a merely descriptive clause, or one inserted as restrictive of the covenants of warranty from the grantor. *Id.* 209." The supreme court of that state has also held that, "if a grantee takes a deed containing a recital that the land is subject to a mortgage which the grantee assumes or agrees to pay, a duty is imposed on him by the acceptance, and the law implies a promise to perform it, on which promise, in case of failure, *assumpsit* will lie." *Helm v. Vogel*, 69 Mo. 529; *Fitzgerald v. Barker*, 70 Mo. 685. Whenever a judgment has been entered for a deficiency against the grantee of the mortgagor, the obligation is created by the direct assumption of the debt which has been secured. The terms of the declaration of trust are easily understood, and we must disregard the allegations of the complaint which are inconsistent therewith. The plain inference from this instrument is that the respondents have not undertaken to pay said notes to the appellant. Its recitals are of matters which, under the authorities, cannot serve as the foundation of a personal liability upon the part of Shober and Adams to satisfy the demand of the mortgagee in this action. The complaint fails to show that either of the respondents manifested the intention to assume the payment of the notes to Pendleton, and the action of the court below in sustaining the demurrer was correct. It is therefore ordered and adjudged that the judgment be affirmed.

HARWOOD and DE WITT, JJ., concur.

(10 Mont. 586.)

In re McFARLAND'S ESTATE.

DE LONG et al. v. EMERSON et al.

(*Supreme Court of Montana.* Feb. 18, 1891.)

ADMINISTRATOR—TIME OF DISTRIBUTION—NOTICE—Costs.

Under the probate practice act of Montana, the earliest period at which an estate may be distributed is that provided for by section 284, which allows distribution after four months from the issuance of letters of administration, provided the distributees give bond to secure the estate. Held that where an administrator with the will annexed procures an order construing the will, and ordering distribution within 40 days after the issuance of letters, and immediately distributes accordingly, without requiring bonds, and it appears that no appraisal or

inventory was made, that no notices of the time for distribution were mailed to the heirs at law, and that no other statutory requirement subsequent to the issuance of letters was complied with, all proceedings subsequent to that time will be set aside, and the costs of such proceedings, including the costs of the appeal, will be taxed to the administrator.

Appeal from district court, Deer Lodge county; D. M. DUFFEE, Judge.

Proceeding by an administrator to obtain a construction of a will and distribution of the estate. Order of distribution granted. Hannah De Long and others appeal. Order set aside. For former report, see 26 Pac. Rep. 185.

Forbis & Forbis, for appellants. *Thompson Campbell and Robinson & Stapleton*, for respondents.

HARWOOD, J. The appeal herein is from an order of distribution of the estate of Elizabeth McFarland, deceased. The appeal is prosecuted on behalf of Hannah De Long and others, who claim to be heirs at law of decedent. The record before us is certified by the clerk of the court below to contain all records, files, and proceedings had in that court in reference to the estate of decedent; and from the record it appears that said Elizabeth McFarland died at the county of Deer Lodge, state of Montana, on the 1st day of November, A. D. 1889; that on the 5th day of December, 1889, a petition was filed in the district court within and for said county by Wilbur N. Aylesworth, representing to the court that said Elizabeth died as aforesaid, leaving an estate in Montana, consisting of real and personal property, of the value of about \$15,000; and also that decedent left a last will and testament, which was tendered with said petition, and the probate thereof asked, together with the appointment of Orren Emerson as administrator of said estate with the will annexed; that on December 28, 1889, said petition was heard, and the said last will and testament of decedent was proved and admitted to probate, and letters of administration were issued to said Orren Emerson by order of said court. Nothing further appears to have been done in the matter of said estate until about a month after the probate of said will, and the issuance of such letters of administration with the will annexed, when, on January 23, 1890, said administrator filed in said court his petition praying for a decree construing the will of decedent, and an order of distribution of the estate according to the devises and bequests of the will; and that, if the whole of said estate was not devised by said will, the court determine what portion of said estate be divided among the heirs at law of decedent, and make an order for the distribution of the same. It appears that all the heirs at law of decedent were not known to petitioner when the petition asking for the probate of the will was filed, because it is alleged in that petition that the next of kin to decedent of whom petitioner was advised "is Hannah De Long, of Brooklyn, Ontario, Canada, and John Fisher, of Walkertown, Yorkshire, England;" while in the petition for distribu-

tion of said estate it is alleged that "the next of kin of said Elizabeth McFarland, deceased, are her brothers and sisters, to-wit, John Fisher, brother; Mrs. Hannah De Long, sister; and Samuel H. Fisher, now deceased; that said Samuel H. Fisher left him surviving Isabella Fisher, his widow, and four children, to-wit, Mrs. Kate Gee, Mary Ann Sadler, William Fisher, and John Fisher." It is not shown where such additional heirs at law reside, nor is it shown that their residence was unknown to the administrator. Upon the presentation of the petition for distribution of said estate and the construction of said will, the court made an order setting the same for hearing on February 8, 1890; and ordered that all persons interested in the estate be and appear on that day, and show cause "why said administrator's account should not be allowed, and an order that the residue of said estate remaining in the hands of said administrator be decreed to be the property of the devisees named in the will of said testatrix;" and that a copy of said order "be published in the Silver State, a weekly newspaper published in said county, by two insertions of said order." The next proceeding in said estate was the hearing of the petition for distribution, set down for hearing, as aforesaid, on the 8th of February, 1890; and upon said hearing an order and decree was made, construing the will of decedent, and ordering the estate distributed to Wilbur N. Aylesworth, and to the estate of David H. McFarland, deceased; the said Aylesworth and David H. McFarland being legatees named in the said will of Elizabeth McFarland, decedent. It was further ordered that, upon the said administrator delivering over the estate of decedent as provided by said order, the administration of said estate "shall be declared fully settled and closed, and said administrator and his bondsmen shall be released from any further duties or trusts." No appearance was made at said hearing, nor during any other proceedings in said estate, by any of said heirs at law of decedent.

It is contended on behalf of appellants that the procedure had in this summary administration and distribution of said estate was irregular and unlawful, and therefore that the said decree construing decedent's will, and order of distribution of said estate, should be set aside and vacated, because the same was premature, and because other requirements of the statute in the administration of said estate were not complied with, such as making an inventory and appraisal of said estate, and the giving of due notice to heirs at law by mailing of notices in addition to the publication, and waiting the time required by statute before ordering the distribution of said estate. It is further contended on behalf of appellants that the construction of the will of decedent was erroneous, and that the distribution of the estate thereunder was not in accordance with the provisions of law applicable to the facts before the court when the order was made. The point is made that, as appeared to the court, and as shown by the record here, said David H.

McFarland, one legatee under the will of Elizabeth McFarland, died prior to the death of Elizabeth, and that the bequest to him lapsed, and should not have been distributed to the estate of David H. We shall not at this time discuss, or undertake to determine, the point presented as to the construction of said will. Upon a proper hearing before the court below, with the parties represented, it may be that then, with such light as is brought to the consideration of the court, a satisfactory construction of the will of decedent will be made. It suffices for the disposition of this appeal to find, as we have from a review of the record, that there has been no regular procedure in the administration of said estate subsequent to the issuance of the letters. The irregularities complained of are apparent from the record. There is no law which authorizes such procedure in the administration and disposition of an estate as appears to have been had in this instance. The heirs of decedent, and all legatees, devisees, creditors, guardians, and others who may be in any way interested in an estate, and their counsel, have a right to presume that the requirements of the statute will be fulfilled in the administration of an estate; and they have a right to presume that no final distribution thereof will be made until such intermediate proceedings have been had, and the period fixed by statute for the distribution has arrived; and such interested parties have a right to the time provided by law for the orderly procedure in the administration of an estate, or the execution of a will, to appear and make a showing of their claims and interests. The earliest period at which the law provides for even a partial distribution to "heir, devisee, or legatee" is "after the lapse of four months from the issuing of letters testamentary or of administration," and this distribution is made upon the distributee giving bond as required. Section 284, Prob. Prac. Act. There are provisions for the summary settlement of estates, where the value of the whole estate does not exceed the amount allowed to the widow and minor children for their support; and also for the settlement of the estate "at the end of six months after issuing of letters," where the whole estate does not exceed \$3,000 in value. Section 138, Id. There is a further provision for the settlement of an estate "at the end of six months from the date" of an order for final settlement, which order may be made when it appears from the "inventory and appraisement that the estate of a deceased person does not exceed five hundred dollars." Section 558, Id. These provisions for settlement of small estates require regular proceedings until the return of the inventory and appraisement whereby is shown the value and condition of the estate. But in the case before us, as appears from the record, no inventory and appraisement were ever returned. However, it appeared by the petition for letters, and from evidence on the hearing for the probate of the will of decedent, that she left an estate of the value of \$15,000. The requirements of the Probate Code are so plain and specific we think the irregularities shown in

this case are inexcusable, and that the cost involved thereby, including the costs of this appeal, ought to be taxed against said administrator personally, and it will be so ordered. Ordered that the decree of the court below construing the will of decedent, ordering distribution of the estate, and approving the final account of said administrator, and discharging him and his bondsmen, and declaring said estate closed, be, and the same are hereby, set aside and wholly annulled; and that the administration of said estate be reopened by the court below; and the administration, settlement, and distribution thereof, subsequent to the issuance of letters of administration with the will annexed, be proceeded with in the manner provided by law. And it is further ordered that all costs involved in the irregular proceedings in said estate, subsequent to the issuance of letters of administration with the will annexed, which proceedings are set aside by this order, including the costs of this appeal, be taxed against said Orren Emerson personally, and that such costs be not suffered to stand as a charge against said estate.

BLAKE, C. J., and DE WITT, J., concur.

MCCAULEY v. TYLER et al.

(Supreme Court of Montana. July 20, 1891.)

APPEAL—REVIEW—FINDINGS OF FACT.

The rule that a finding of facts must stand, if there is evidence to support it, does not apply to the trial court; and an order for a new trial will not be disturbed on appeal, where it was granted because the evidence did not justify the judgment based on the findings.

Appeal from district court, Fergus county; CHARLES H. BENTON, Judge.

Action by Nathaniel N. McCauley against Samuel Tyler and others for damages for the unlawful diversion of water. There was a trial to the court, who made findings of fact, and rendered judgment thereon for defendants. Afterwards the court granted plaintiff a new trial, on the ground that the evidence did not sustain the judgment, and defendants appeal. Affirmed.

E. W. Morrison, F. E. Smith, and Wade & Blackford, for appellants. Thos. C. Bach, for respondent.

BLAKE, C. J. This is an appeal from the order of the court below in granting a motion for a new trial. The action was commenced by McCauley to recover damages for the unlawful diversion of water, and obtain a decree enjoining six persons from further interference with his prior rights. The case was tried by the court without a jury, and a judgment for defendants was entered upon the finding of facts. McCauley filed a motion for a new trial, which was granted, and the following memorandum by the judge appears in the transcript: "Judgment was rendered for the defendants, upon the ground that the plaintiff had failed to use due diligence in constructing his ditch, but, upon examination of the evidence, I am of opinion that it is not sufficient to justify such judgment." Three of said defendants

have united in this appeal. No question of law is involved, and the grounds of the motion and order are the insufficiency of the evidence to support the decision of the court. A review of the testimony, which need not be repeated, leads to the conclusion that the learned judge performed his duty in this matter. As early as the year 1863, the supreme court of California, in *Quinn v. Kenyon*, 22 Cal. 82, said: "It is only in rare instances, and upon very strong grounds, that this court will set aside an order granting a new trial." In expressing this view of the evidence, we refrain from making any statement which would have the effect of determining finally the issue respecting the diligence of the respondent in the construction of his ditch. It is maintained by the appellants that the finding of facts from the testimony is like the verdict of a jury, and must stand if there is evidence to support it. Although the verdict and finding are upon the same footing for this purpose, this rule does not apply to the judge of the court below. *Dickey v. Davis*, 39 Cal. 565; *Sherman v. Mitchell*, 46 Cal. 576; *Curtiss v. Starr*, 85 Cal. 376, 24 Pac. Rep. 806. It is said in the last case that "the rule as to conflict of evidence does not apply in the trial court." It is therefore adjudged that the order be affirmed.

HARWOOD and DE WITT, JJ., concur

(11 Mont. 74)

KNIGHT v. RICHTER et al

(*Supreme Court of Montana*. July 27, 1891.)

PARTNERSHIP—EVIDENCE—HARMLESS ERROR.

1. In an action on a promissory note signed by a firm, a bill-head showing the names of the partners, on which the name of one of the defendants did not appear, was competent as evidence that such defendant was not a member of the firm.

2. It was not error, in order to show that a bank, the payee of the note, had notice of the construction of the firm, to ask an alleged officer of the bank if he had seen the bill-heads, where the court struck out such testimony on failure to show notice communicated to the bank by him.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

Action on a promissory note by E. W. Knight, as cashier, against Richter & Co. Judgment for plaintiff, but not against Hermann Richter. Plaintiff appeals. Affirmed.

Toole & Wallace, for appellant. *Henry C. Smith*, for respondents.

DE WITT, J. This action is upon a promissory note dated November 2, 1886, at 60 days, for \$1,021, payable to Edward W. Knight, cashier, or order, at the First National Bank, Helena, Mont., and made by Richter & Co. Judgment was demanded for \$919.55, the balance due, and interest. The defendant Hermann Richter alone filed a separate answer, on which the case was tried, and in which he makes the defense that, at the time of the execution of the note, he was not a member of the firm of Richter & Co. A verdict was rendered for the defendant Hermann Richter. An appeal is taken by plaintiff from

an order denying a motion for a new trial, and from the judgment. The error alleged is presented in a statement on motion for a new trial. It seems from the evidence that Hermann Richter had once been a member of the firm of Richter & Co., and had withdrawn before the making of this note. It would seem that all of the evidence is not in the statement, but only that which appellant deemed sufficient to illustrate the point of his exception. T. H. Kleinschmidt was a witness. It seems that he had some connection with some bank. What the relation was does not appear. The bank is spoken of as "the plaintiff bank," and, in relation to Mr. Kleinschmidt, as "his bank," and he is mentioned as the "representative of the bank." What his office in or relation to the bank was, is not disclosed. What bank it was does not appear in the pleadings or the evidence. A bank is mentioned in the statement as "the plaintiff bank," but neither pleadings nor evidence indicate that any bank was plaintiff. The complaint is by E. W. Knight, cashier. Nothing whatever informs the court of what he was cashier, whether of a bank, or any other institution, or that a bank was plaintiff in interest, except the little light afforded by the face of the note as set out in the complaint, by which it appears that the note was payable to Edward W. Knight, cashier, at the First National Bank, Helena, Mont., and a statement in one portion of the record that "the matter at issue was whether or not the plaintiff bank had received notice, prior to the execution of the note in suit, of the alleged withdrawal of Hermann Richter from the firm of Richter & Co." As deemed pertinent to this issue, the witness Kleinschmidt was asked whether he did any business himself with the firm of Richter & Co., and whether he had been rendered statements of account by Richter & Co., prior to the execution of the note in suit, which statements showed upon their face the names of Henry Richter and Waldemar Stein as members of that firm, and only them, similar to a bill-head handed to witness. The witness stated that he may have seen such a bill-head, and that he may not. He did not state that he had seen them, and explained why he could not so state. Witness Henry Richter, apparently one of the defendants, testified that he thought that none of these bill-heads had been presented to Kleinschmidt. He further said that this bill-head was that of Richter & Co. after January 1, 1886; that Stein had notice of it, and was a full partner. After this evidence, the court admitted the bill-head in evidence, limited to the actual matter of the question of partnership, and refused to admit it for the purpose, as defendants desired it should be, of showing that it was actually presented to Kleinschmidt. Plaintiff's exception is as to the interrogation of Kleinschmidt as to the bill-head, and his knowledge obtained in personal dealings with Richter & Co. It is not at all clear from this record how any notice to Kleinschmidt could be material, when we do not know what relation Kleinschmidt had to the bank, and when it does not appear

that such bank was a party either of record or in interest.

But even if the bank were the actual party in interest, and Kleinschmidt were an officer of the same, to whom official knowledge of the withdrawal of Hermann Richter from the firm of Richter & Co. could properly be charged, we cannot hold that the evidence admitted was error. If Kleinschmidt were such officer, and the bank were the plaintiff, it was proper to ascertain whether official notice had gone to the bank through such officer, and the court might properly hear evidence to ascertain whether such were the facts; and, having done so, and being of the opinion that such notice had not been communicated, the court, in this case, excluded the bill-head for all purposes except as to the actual matter of partnership. This was competent. The partnership question was material as a proposition independent of notice to the bank, and, upon such independent proposition alone, the court properly admitted the bill-head. The judgment and the order denying the new trial are affirmed.

BLAKE, C. J., and HARWOOD, J., concur.

PINCUS v. DOWD.

(*Supreme Court of Montana*. July 27, 1891.)

PLEADING IN JUSTICE COURT — FORCIBLE ENTRY.

Under Code Civil Proc. Mont. § 769, which provides that the pleadings in an action in a justice's court for a forcible entry or unlawful detainer of lands shall be in writing, a defendant who fails to file an answer in the justice's court will not be permitted to file an answer in the district court on appeal from the judgment of the justice, where there is no showing of surprise, inadvertence, etc.

Appeal from district court, Silver Bow county; JOHN J. McHATTON, Judge.

Action of unlawful detainer by Adolph Pincus against John Dowd. Judgment for plaintiff. Defendant appeals. Affirmed.

W. I. Lippincott, for appellant. Francis T. McBride, for respondent.

DE WITT, J. This is an action of unlawful detainer commenced in the justice's court, an action in which it is required that, even in the justice's court, the pleadings shall be in writing, and be verified. Section 769, Code Civil Proc. The action was commenced August 15, 1889, and summons was served on defendant, August 17th. On August 20th, by consent, defendant was given until August 28th to answer. August 28th, by consent, he was given until August 31st. August 31st, by consent, he was given until September 3d. Trial was set for September 5th at 10 A. M. September 5th, 10 A. M., continued until 2 P. M. September 5th continued until September 20th, and defendant to have until September 17th to answer. September 17th, by consent, time to answer continued. October 19th, trial set for October 22d. Defendant had been given until October 15th to file answer. The justice further shows that at the time for answer on the part of John Dowd having expired, and no answer being filed, and said John Dowd having appeared in person, and

stated to the court that he would not further contest said case in that court, the default of defendant was entered, and judgment rendered against him. Defendant then appealed to the district court. The case thus came into the district court without an answer being among the files, and, if the justice's record is correct, without an answer having been filed. In the district court plaintiff moved for judgment on the pleadings, for the want of an answer, which motion was granted, and judgment entered in that court for plaintiff. Defendant moved the court to set aside the judgment, and give him leave to file an answer. But the theory upon which the motion was made and heard seems to be, judging from the affidavits and all the record, that an answer had been filed in the justice's court, and lost, and no record made of it, and defendant desired to substitute an answer for that which he claimed had existed. The motion was denied. On the motion for judgment on the pleadings, and on the motion to set aside the judgment, there were a number of affidavits used. The tenor of the affidavits upon the part of the defendant was that an answer had been prepared, and filed in the justice's court, while plaintiff denied that allegation by affidavits on his part. It is impossible to reconcile the affidavits of the contending parties upon the theory that each stated the facts. The conflict is irreconcilable. The district court weighed them, and declined to open the default or allow defendant to file an answer. In reviewing this action of the district court, it is pertinent to observe that continuance after continuance was granted to defendant in the justice's court, and that time after time the defendant's time to answer had been extended, and that finally, when the case came to trial on October 22d, no answer being yet filed, defendant appeared in person, although he has at various stages of the case indulged in the luxury of five different lawyers, and stated that he would not further contest the case in that court. His words "in that court" had no significance. He was in that court, and that court alone had to do with the proceedings at that time. Judgment was then rendered against defendant, practically for the want of an answer. He then appeals to the district court, and there undertakes to show that he had filed an answer in the justice's court. As before remarked, his effort seems to have been to show that an answer had been filed in the case in the lower court, and he wished to substitute one for the one lost. The affidavit of one of the defendant's multitude of counsel states that he prepared, had verified by defendant, and filed in the justice's court, an answer on August 20th. To this effect also depose defendant and two other affiants. But the significant fact remains that on this very day, August 20th, time to answer was extended to August 28th, and after that extension six more extensions of time to answer were given. Why these seven extensions of time, if the answer had been filed on the date of the first extension? It is apparent that the district court be-

lieved that defendant and his affiants were wrong in their statements that an answer had been filed. There is, to our mind, ample intrinsic evidence in the record, as above recited, to justify our view that the action of the district court in this regard was the exercise of a sound discretion. No showing was made of surprise, inadvertence, or excusable neglect that would justify the district court in allowing an answer to be filed in that court originally, even if it were contended that that court might allow such answer after default and judgment in the justice's court, and no effort having been made in the justice's court to set aside such default, and ask leave to answer therein. The judgment of the district court is affirmed.

BLAKE, C. J., and HARWOOD, J., concur.

LITRELL *et al.* v. WILCOX.

(Supreme Court of Montana. July 27, 1891.)

INTERPRETATION OF CONTRACTS—JURY—SPECIAL VENIRE—DISQUALIFICATION OF JUDGE.

1. An agreement to dig a well does not imply that water other than surface water shall be obtained.

2. The fact that a judge is disqualified to hear a cause does not deprive him of the right to order a special *venire* to issue, where the regular panel has been discharged.

Appeal from district court, Cascade county; J. P. LEWIS, Special Judge.

Action by J. A. LITRELL and others against Frank B. Wilcox to recover for services rendered. Judgment for plaintiffs. Defendant appeals. Affirmed.

The complaint in this action is for work, labor, and services rendered by plaintiffs for defendants, at their request, in drilling a well for defendants to a depth of 230 feet. It is alleged that said services were worth the sum of \$637.50, and that no part of the same has been paid except \$100. The demand for judgment is for \$500; \$37.50, it appearing from the evidence, having been remitted. Margaret Southerland was a defendant, but seems to have dropped out of the controversy. The defendant Wilcox filed a separate answer, in which he makes the defense that whatever labor was performed by plaintiffs was upon a special contract, whereby plaintiffs agreed to sink for defendants a well containing water other than surface water, and that such contract should be completed within a reasonable time. The answer further sets up that, prior to the completion of such special contract, and without reaching water, plaintiffs abandoned the contract without leave from defendants, or any lawful excuse therefor; that plaintiffs did not offer to complete said contract; and that, under the terms thereof, they were to receive no pay until completed. A replication denied the new matter in the answer. The verdict and judgment were for the plaintiffs for \$500. A motion for a new trial was denied. Defendants appeal from that order and from the judgment.

Thomas E. Brady, for appellant. Jere.

B. Leslie and Bowen & Bishop, for respondents.

DE WITT, J., (after stating the facts as above.) The main controversy in this case is that apparent upon the face of the pleadings, the plaintiffs contending for a judgment for work, labor, and services upon a *quantum meruit*, allegation, and proof, and the defendants insisting that there was a special contract, which plaintiffs had failed to perform, and hence they could claim nothing. But other questions are raised, and the best view of the case can be obtained by following appellant's specification of errors, and treating them in their order. Hon. C. H. BENTON, judge of the district, had been counsel in the case before his elevation to the bench. The case was tried before J. P. LEWIS, Esq., special judge, under the provisions of the constitution, (article 8, § 36.)

1. The first error assigned is that the special judge set the case for trial, whereas he had no authority, under the constitution, to do anything but try the case. Who set the case does not appear. If it did, we should not hesitate to say that authority to try a case carried with it the authority to do the necessary and incidental act of setting it for trial, as fully as to adjourn the trial for luncheon.

2. The second assignment of error takes a view of the law opposite to that held in the first. Defendant challenged the entire panel of jurors, on the ground that the *venire* for them was issued by Hon. C. H. BENTON, judge, who, as appears above, had been counsel in the case. The challenge was overruled. It appears that the regular jurors had been discharged. The clerk was ordered to issue a special *venire* for 20 jurors. The writ reads: "To the sheriff," etc. "You are hereby commanded to summon twenty good and lawful men of Cascade county," etc. No names are contained in the writ as persons for the sheriff to summon. The sheriff returns that he had summoned 20 men, giving their names in his return. The record states that defendant, Wilcox, files his written challenge to the entire panel, because the same had been drawn under the direction of Hon. C. H. BENTON, the regular judge of the court, who was disqualified, as above set forth. When we consult defendant's written challenge referred to in the above terms, and which is in the record, we find the following language therein set forth as the ground of the challenge: "Challenges the entire panel of said jury on the ground that the same was improperly drawn, the said jury being drawn under a special *venire* issued by Hon. C. H. BENTON, judge, who is disqualified from acting as judge therein, having been attorney for the plaintiff," etc. So far as the jury having been drawn under the direction of Judge BENTON is concerned, the facts simply are that he ordered an open *venire* to issue. He had nothing whatever to do with the selection of the persons summoned, it being left to the sheriff to select them from the body of the county. Section 15 of the act of March 14, 1889, (page 168, 16th Sess.,) provides: "If during the progress of any

trial of any cause in such court, where a jury has been drawn, as in this section provided, it shall become necessary for any cause to summon additional jurors, such additional jurors shall be drawn and summoned by an open *venire* in accordance with the provisions of section 255 of the first division of the Compiled Laws of Montana and the acts amendatory thereto." Section 255, as amended March 2, 1889, (16th Sess. p. 165,) as to an open *venire*, provides: "If from any cause the names contained in said box * * * shall be exhausted without obtaining a competent jury, the court may order a *venire* to issue, directing the sheriff to summon from the citizens of the body of the county, and not from by-standers, so many qualified persons as may be necessary to complete the jury in the pending trial." As far as we can learn from the record in this case, it was under the provisions of these laws that the jury complained of was summoned. The judge had nothing to do with the selection of the jurors. He did nothing more than the formal act of ordering the *venire* to issue. As to the disqualification of the judge, we find section 547, Code Civil Proc.: "A judge shall not act as such in any of the following cases: * * * When he has been attorney or counsel for either party in the action or proceeding." This disqualification of a judge now generally obtains by statute. But it is held that such disqualification does not extend to formal and non-judicial acts. The court says in *Cock v. State*, 8 Tex. App. 666: "It is urged in a motion in arrest of judgment that the Hon. A. J. Boory, the regular judge of the district court of Panela county, and who was present and presiding, having been of counsel in the case, was disqualified from receiving the indictment or making any order in the case. A district judge is prohibited by the constitution from sitting in any case (among other circumstances) 'when he shall have been of counsel in the case.' What is meant by the phrase 'sit in any case' is, we are of opinion, explained by the provisions of the constitution as to what may be done when a judge is so disqualified. For instance, the parties may by consent appoint a proper person to try the case; or, upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending. Taking these several passages in connection, it would seem that when it is said the judge shall not sit in any case, it is intended he shall not do what the person chosen or appointed may do,—that is, 'try the case.' So that, whilst a judge who had been of counsel for either party could not sit in the trial of the case, or make any ruling which would properly arise on the trial, he would not be incompetent to preside in taking incidental orders; as, for instance, an order granting a change of venue, or entering an order appointing the person agreed upon to try the case. The disqualification of the judge to try the case would not prevent him from receiving the report of the grand jury for the term, although there be embraced in the report the return of an in-

dictment in which he would not be qualified to sit in the trial." See, also, *Heydenfeldt v. Towns*, 27 Ala. 423; *In re Ryers*, 72 N. Y. 15; *Thornton v. Wilson*, 55 Ga. 607; *State v. Collins*, 5 Wis. 339; *Underhill v. Dennis*, 9 Paige, 202. We are of opinion that the function of the regular judge in ordering an open *venire* to issue to the sheriff is one of those formal matters in which he is not disqualified to act, because the case to come before the jury to be summoned on such open *venire* is one in which such judge had been counsel. It is as formal a matter as receiving an indictment, or granting a change of venue, or entering an order appointing the person agreed upon to try the case, (*Cock v. State*, supra;) or executing a special mandate of the supreme court to the court in which the alleged disqualified person is judge, (*State v. Collins*, supra;) or appointing commissioners to audit claims against an estate in which the judge is interested, (*Heydenfeldt v. Towns*, supra;) or issuing a warrant of distress, (*Thornton v. Wilson*, supra.) We are satisfied that defendant's challenge to the panel was properly overruled, upon the ground upon which he made it. He now urges, in his brief, in this court, for the first time, that the jury was incompetent to try the case, because a jury commission had not been appointed in the county of Cascade. *State v. McHatton*, 10 Mont.—, 25 Pac. Rep. 1046. But that objection to the jury was never made in the district court, nor was exception ever taken or saved.

3. It is specified as error that the court allowed plaintiffs' attorney to make certain remarks to the jury upon opening the case alleged to be improper; but no bill of exceptions was made or certified, and the matter is not before this court.

4. It is objected that the court allowed the plaintiff Littrell to testify as to the condition of the well in respect to having water in it, three years after it was dug; but the court allowed that testimony, with the ruling that, if it were not connected with the condition of the well at the time the plaintiffs ceased work upon it, the evidence would be stricken out. It was afterwards, and before the case was submitted to the jury, stricken out.

5. Objections are made to the refusal of the court to give certain instructions requested by the defendant. But the instructions alleged to be refused are not made part of the record, and we do not know that they were requested or refused.

6. It is contended that the court erred in giving the following instruction: "Whether water was to be reached is not expressed in the contract or arrangement that was had between plaintiffs and defendant, and you are to take that into consideration in passing upon it, and with the other part of the evidence in this case." Appellant does not inform us what the objection was to the instruction. It appears that the court stated a portion of the evidence with absolute fidelity, and a portion upon which there was no conflict. There was not a word in the evidence that water was to be reached. The court told the jury that they were to consider that fact

along with the rest of the evidence. It was certainly pertinent to the issue made by the pleadings, and no reason is suggested why it is objectionable.

7. We come now, after clearing the way, to the gist of the action. The plaintiffs seek to recover for services, upon a *quantum meruit*. They proved the services and the value, and the jury found with them. The defendant alleges a special contract to sink a well containing water other than surface water, and that plaintiffs left the contract without reaching water. There is a conflict of evidence as to why plaintiffs quit the work. Plaintiff Littrell testifies that, after he had reached 230 feet, defendant, Wilcox, told him not to prosecute the work further. The jury settled this conflict by their verdict, and the district court refused to disturb their finding. Now, as to the special contract to reach water. It cannot be seriously contended that it appears from the evidence that the plaintiffs ever agreed in terms to sink to water. But defendant founds his argument upon his construction of the word "well;" that plaintiffs agreed to drill a "well;" that a "well" is a hole in the ground, containing water other than surface water; that when plaintiffs agreed to drill a "well" they contracted to furnish an article meeting that definition, and that, if they did not produce a hole in the ground containing water other than surface water, they did not drill a "well," and cannot recover. Let it be observed here that nothing was said about price when the work was commenced and the contract made. The defendant himself selected the site for the proposed well. Nothing was said about plaintiffs undertaking to reach water. All that can be gleaned from the conversations of the parties is that plaintiffs were to dig a well. From this contract, and the circumstances, to construe an undertaking on the part of the plaintiffs to reach water or receive no pay seems to us to do great violence to language, and to the ordinary transactions of sane men. It appears that the services of plaintiffs were worth what they charged. When plaintiffs went to dig a well, when they took a site selected by defendants, when no guaranty of reaching water was made, when no price was fixed for performing the services or reaching water, can a court for a moment regard it as within the contemplation of the parties, as shown from their words or their acts, that they used the word "well" as meaning a hole in the ground, containing water other than surface water? We think not. Bouvier's Law Dictionary defines a "well" as "a hole dug in the ground in order to obtain water." This is, to our mind, the only practical view. The object of a well is to obtain water. The well may be unsuccessful. The object of a mining shaft is to develop a mine that will pay,—an object not always attained. Under the circumstances of the case, we cannot construe the word "well" as defendant insists; and he must depend wholly upon the construction of that word, for he utterly failed to prove any special contract in terms, and the jury so found. We are of opinion that the judgment and the or-

der denying the motion for a new trial should be affirmed, and it is so ordered.

BLAKE, C. J., and HARWOOD, J., concur.

WEAVER V. ENGLISH.

(Supreme Court of Montana. July 27, 1891.)

PLEADING JUDGMENT.

Under Code Civil Proc. Mont. § 103, permitting a judgment of a court, or officer of special jurisdiction, to be pleaded by stating it "to have been duly given or made," an allegation that, in an action before a justice of the peace, defendant "recovered a judgment" against plaintiff, is insufficient. Following *Harmon v. Cattle Co.*, (Mont.) 23 Pac. Rep. 470.

Appeal from district court, Cascade county; CHARLES H. BENTON, Judge.

Action in ejectment by James Weaver against Robert English. Judgment for defendant. Plaintiff appeals. Reversed.

James Donovan and Sterling & Muffy, for appellant. *Geo. W. Taylor and John W. Stanton*, for respondent.

BLAKE, C. J. This action was commenced originally in the justice's court of Cascade county, and appealed to the district court. The complaint alleges that the plaintiff was in the peaceable possession of a parcel of land at a certain time, and that the defendant forcibly entered thereon, and continues in the wrongful occupation thereof. The answer contains as a defense this averment: "That on the 19th day of July, 1890, in an action then pending before John P. Dyas, a then justice of the peace in and for the county of Cascade, state of Montana, between the above-named plaintiff, James Weaver, and this defendant, Robert English, involving the same cause of action and issues, and for the possession of the same land, as is involved in this action, this defendant recovered a judgment in his favor and against the plaintiff, together with his costs, and that at said time this cause of action was adjudicated." At the trial, all the papers on file in the action before said justice of the peace, and oral testimony relating to the same, were admitted in evidence. The plaintiff objected to this ruling of the court, and stated this, among other grounds, that "the defendant has failed to establish and prove the jurisdiction of the justice of the peace." There was no allegation of such jurisdiction in the answer, there was no proof thereof, and the subject was ignored in the instructions. These are the words of the court: "If you believe from the evidence that the case in the justice's court was between the same parties, involving the same land and the same question, as to the adverse possession at that time, and you are satisfied from the evidence that the case was tried and determined, that would end the case right there, and it would be your duty to return a verdict for the defendant. The question as to whether it was adjudicated and tried, and whether it was the same parties and the same land, and all those questions, are entirely for the jury to decide; but, if you decide that such is the fact, that is the end of the case, and you need go no further, but should return

a verdict for the defendant." The allegation of the answer does not follow the language of the Code of Civil Procedure. "In pleading a judgment or other determination of a court, or officer of especial jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made." Section 108. This statute, and matters of like nature, were recently reviewed by this court in *Harmon v. Cattle Co.*, 9 Mont. 243, 23 Pac. Rep. 470. Under this authority, we say that, inasmuch as the answer did not state that the judgment had been "duly given or made," it was necessary for the defendant to allege and prove the facts which conferred jurisdiction upon the justice's court to hear and determine the case, which was pleaded in bar of this action. The court below tried the issues upon an erroneous theory. It is therefore adjudged that the judgment be reversed, and that the cause be remanded, with directions to grant a new trial.

HARWOOD and DE WITT, JJ., concur.

(11 Mont. 91)

HONAKER v. MARTIN *et al.*

(Supreme Court of Montana. July 29, 1891.)

MINES AND MINING — RESUMPTION OF WORK ON CLAIM.

In an action for the possession of a mining claim, it appeared that plaintiff located the claim on January 1, 1888, but did not go on it until May, 1890, when defendants were in possession. On December 20, 1889, plaintiff employed one B. to represent the claim for the year 1889. B. performed work under the contract from December 22, 1889, until January 12, 1890, for which plaintiff paid him \$100. The work done by B. consisted in conveying to the premises slabs and lumber of the value of \$63, which were never used. B. testified that he also "drifted perhaps 5 or 6 feet," but did not haul any dirt from the mine; that he cut "about half a dozen" logs, and put them in the mine; that he carried to the premises a rope, bucket, shovels, and picks, but removed them when he quit work; that there was no windlass on the mine; and that he earned more than \$50 by the work done in January. Defendants relocated the claim on April 25, 1890. *Held*, that plaintiff did not in good faith resume work on the claim for the year 1890, within Rev. St. U. S. § 2324, which provides that unless \$100 worth of work shall be performed or improvements be made each year on a mining claim located before May 10, 1872, until a patent therefor has been issued, such claim shall be open to relocation, provided that the original locators, their heirs, etc., "have not resumed work upon the claim after failure, and before such location."

Appeal from district court, Jefferson county; THOMAS J. GALBRAITH, Judge.

Action to recover possession of a mining claim by C. W. Honaker against John F. Martin and another. Verdict and judgment for plaintiff. Defendants appeal. Reversed.

Charles O'Donnell, for appellants. Corbett & Wellcome, for respondent.

BLAKE, C. J. This action was commenced by Honaker, the respondent, to recover the possession of the Lone Star Lode mining claim. The answer alleges that "no work or improvements were done or performed upon said Lone Star mine or claim in the year 1889, and in con-

sequence thereof said claim was forfeited, if it ever existed." The court instructed the jury that the evidence "shows that the plaintiff, Honaker, did not do the required amount of work on said claim in said year 1889, and that, therefore, said claim: was open to relocation, by any proper person, on the 1st of January, 1890. * * * But to this the plaintiff replies, and says that he resumed work upon said claim after his failure to do said work, and before the time (April 25, 1890) of the location of said claim by the defendants." The jury were further instructed that there was only one question for their consideration, to-wit: "Did the plaintiff, Honaker, in good faith, honestly and in fact, resume proper work upon said claim prior to said location thereof by the defendants?" The following instructions were also given: "If, from all of the evidence in the case, you shall be satisfied that the question * * * should be answered in the affirmative, then you should find for the plaintiff; otherwise for the defendant. * * * In this case the plaintiff affirms and asserts that he did resume work upon the Lone Star claim before the date of the location thereof by the defendants, and therefore the burden of the proof is upon him." The verdict was in favor of Honaker, and the defendants moved for a new trial, which was refused. The issue of law in this case depends upon the construction of the section of the Revised Statutes of the United States: "On all claims located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year; * * * and, upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." Section 2324. The contention is practically limited to the words "resumed work," and most of the authorities furnish definitions which do not satisfy the case at bar. Mr. Justice SAWYER in *North Noonday Min. Co. v. Orient Min. Co.*, 6 Sawy. 314, 1 Fed. Rep. 522, said: "The statute nowhere authorizes a person to trespass upon or to relocate a claim, before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim." The learned judge repeated this doctrine in *Jupiter Min. Co. v. Bodle Con. Min. Co.*, 7 Sawy. 115, 11 Fed. Rep. 666, and *Lakin v. Mining Co.*, 11 Sawy. 241, 25 Fed. Rep. 337. In *Gunu v. Russell*, 3 Mont. 358, it was held that the locator of a lode mining claim "had the right to defeat the forfeiture of his interest in the property by resuming labor thereon before a location thereof had been made by another;" and that "the resumption of labor in good faith," by one who had failed to comply

with the statute, *supra*, and perform the work thereby required, before the completion of a new location which had been commenced, nullified the acts of the second locator. Gou posted his notice, but did not mark out his boundaries until Russell had resumed work. The case of *Pharis v. Muldoon*, 75 Cal. 284, 17 Pac. Rep. 70, is to the same effect, but an additional fact appears: "At one o'clock A. M. of that day (January 1, 1886) plaintiff posted his notice, but did not mark out his boundaries until January 5th. In the mean time,—that is to say, at the usual hour of commencing work of that kind,—on the 1st day of January, 1886, the defendant resumed labor on his claim; did ten dollars' worth of work on it up to the 5th of January, 1886; and afterwards, during that year, performed labor upon it to the amount of two hundred dollars more." See, also, *Lacey v. Woodward*, (N. M.) 25 Pac. Rep. 785; *Belk v. Meagher*, 3 Mont. 65, affirmed 104 U. S. 279. In the last case Chief Justice WAITE said: "As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until January 1, 1875; and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by the law. His rights, after resumption, were precisely what they would have been if no default had occurred." This opinion seems to give a meaning to the amount of labor demanded by the statute, *supra*, and it must be "to the extent required by the law." Mr. Justice HALLETT instructed the jury in the United States circuit court for the district of Colorado, in *Mining Co. v. Kimber*, 1 Morr. Min. Rep. 536, that a party, who fails to work his claim according to the statute, *supra*, has the right, before the new claimant has perfected his location, "to re-enter, and, upon doing the annual work required by law, he "would become reinvested with" his "first estate." We think that the foregoing authorities establish general and consistent principles.

The case of *Mining Co. v. DeFerrari*, 62 Cal. 160, cannot be deemed sound in its construction of the statute, *supra*. The question is so important in its consequences that we quote at length from the opinion of Mr. Justice McKINSTRY: "The court found that in the year 1880 plaintiff expended, in labor on the two claims, one hundred dollars; that in January, 1881, plaintiff resumed work upon the claims, and expended in labor twenty-four dollars. Defendants entered and located in August, 1881. As the plaintiff had resumed work upon the claims 'after failure, and before location,' his rights were not forfeited when defendants entered. Rev. St. U. S. § 2324. It is urged that the resumption of work was not such as is required by the act of congress; that, if so, one may fail to perform the work required by the act during any year, and yet keep alive his right indefinitely by doing any work during the January following. In other words, that, by such construction, while the act requires one hundred dollars' worth of work each year, a party may keep his claim good by doing

one dollar's worth each year, provided he shall succeed in doing it before a relocation can be accomplished. It is not necessary to decide that an attempt to assert a continuous right may be based upon a pretense of work, so plainly a sham as that it will be disregarded. But here the work done was actual and valuable. The letter of the statute upholds the view, as to resumption of work, taken by the court below, and forfeitures and denunciations are not to be favored by basing them upon language which does not plainly and unmistakably provide for them." Of this case Mr. Morrison says: "Such a decision is only trifling with the law, and the rights of parties based on the law." *Mining Rights in Colorado*, (6th Ed.) 61. The proposition relating to forfeitures and denunciations cannot be questioned, but another rule appears to be considered more important by the courts. In *Erhardt v. Boaro*, 113 U. S. 535, 5 Sup. Ct. Rep. 560, Mr. Justice FIELD says: "In all legislation, whether of congress or of the state or territory, and by all mining regulations and rules, discovery and appropriation are recognized as the sources of title to mining claims, and development, by working, as the condition of continued ownership, until a patent is obtained." The learned judge in *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. Rep. 421, says: "It is a rule among miners on the public lands, so often brought to our attention and so often declared that we may speak of it as part of our judicial knowledge, that discovery and appropriation are the source of title to mining claims, and that development by working is the condition of their continued possession. *Jennison v. Kirk*, 98 U. S. 453, 457; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301. This was the rule before congress by its legislation sanctioned it." In *Remington v. Baudit*, 6 Mont. 138, 9 Pac. Rep. 819, Chief Justice WADE said: "The purpose of requiring \$100 worth of work or improvements on a mining claim each year is to so develop the mine as that a patent may issue for the claim. It is not the policy of the government to issue patents for the mineral lands until there has been a discovery, and sufficient work done upon the claim to demonstrate its value. * * * A liberal construction should be given to the mining act of 1872, but it should not be so liberal as to authorize a claim to be held without representation, or a patent to be procured before any work has been done on the claim." The result of the holding in *Mining Co. v. DeFerrari*, *supra*, is to defeat the real objects of the statute, *supra*, which are the exploration and development of mining claims. Every person who continues in the possession of such property upon the public domain of the United States, without performing annually the labor that has been specified, violates the conditions of the grant from the government. The resumption of work by the original locator, whose rights are subject to forfeiture, without the expenditure, with reasonable diligence, during the year of the sum of \$100 for labor or improvements upon the mine, is an evasion of the statute, *supra*.

If we comprehend the language of Chief Justice WAITE, *supra*, and Mr. Justice HALLETT, *supra*, the courts will not legalize such overt acts of omission as are stated in *Mining Co. v. Defarrari*, *supra*. The question, which is embodied in the instructions of the court below, was submitted without any explanation of the words "resumed work," and would have a tendency to mislead the jury. They could reasonably infer that any labor showing the intention of Honaker to reassert his claim to the property was a sufficient compliance with the law. When the testimony is compared, there can be no doubt that this was the effect.

It is shown by the evidence upon the part of Honaker that he did not represent the lode in the year 1887, and relocated it January 1, 1889; that he did not go upon the property from this date until the month of May, 1890, when the defendants were in possession; that about December 20, 1889, he made a contract with Richard Berriman to represent the same for the year 1889; that Berriman labored from December 22, 1889, until January 12, 1890, under the contract, and received from Honaker \$100; that logs, slabs, and lumber of the value of \$63 were conveyed to the premises, and never used; that these materials were for a shaft-house or any necessary purpose on the mine; that Berriman testified he drifted "perhaps five or six feet," and did not haul any dirt from the mine; that he cut in the woods "about half a dozen" logs, and put them in the mine; that he carried there a rope, bucket, and shovels and picks, and removed them when he quit work; that there was no windlass upon the mine; and that he did not know how much he earned in January, 1890, but there was "over fifty dollars of it." The testimony of the defendants tended to prove that no work was done for Honaker upon the property in the years 1889 and 1890; that the logs, slabs, and lumber were hauled there, and not used; that tools, buckets, and wire rope were taken to the premises by Berriman, and carried away; that there were no timbers in the mine; and that the property was examined carefully to see what labor had been done upon it, and located by the defendants, April 25, 1890. It is clear that the respondent has not acted honestly and in good faith, and that, during the years 1887, 1888, 1889, and 1890, when the lode should have been developed by the expenditure of the sum of \$400 for work or improvements, there is a conflict in the testimony upon the point as to whether labor of the value of one cent has been expended thereon. When, therefore, he availed himself of the statutory privilege of resuming work to preserve his estate from forfeiture, we hold that he should have prosecuted the same with reasonable diligence, until the requirement for the annual labor and improvements had been obeyed. The tools, rope, and windlass were taken from the premises about January 12, 1890, and the logs, slabs, and lumber have not been used in any manner, although nearly two-thirds of the money which was paid by Honaker to Berriman have been therein invested.

What is the fair presumption from this conduct? Can it be maintained that it is the intention of the statute, *supra*, that, under these circumstances, the respondent shall be adjudged to have "resumed work?" If it be insisted that the instruction by the clauses, "in good faith, honestly and in fact, resume proper work," was designed to lay down the law in accordance with these views, then the verdict is contrary thereto. It is therefore adjudged that the judgment be reversed, and the case be remanded, with directions to grant the motion for a new trial.

HARWOOD and DE WITT, JJ., concur.

BURT v. C. W. COOK SHEEP CO. *et al.*

(*Supreme Court of Montana. July 27, 1891.*)

ASSIGNMENT OF DOWER—LIMITATION OF ACTIONS.

1. Code Civil Proc. Mont. § 29, which provides that "no action for the recovery of real property * * * can be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action," does not apply to actions for the assignment of dower.

2. Code Civil Proc. Mont. c. 3, providing for the limitation of actions other than for the recovery of real property, which provides (section 47) that "an action for relief not hereinbefore provided for must be commenced within three years after the cause of action shall have accrued," does not apply to actions for the assignment of dower.

Appeal from district court, Meagher county; FRANK HENRY, Judge.

Action for the assignment of dower by L. D. Burt against C. W. Cook Sheep Company and others. Judgment for defendant on demurrer. Plaintiff appeals. Reversed.

Ward & Smith, for appellant. Thomas C. Bach, for respondents.

HARWOOD, J. The sole question brought to this court for determination by this appeal is, what effect has the general statute of limitations of this state upon the right of a widow to maintain the action provided by the dower act for the assignment of dower? It appears from the record in this case that plaintiff filed her complaint setting forth, in effect, that plaintiff intermarried with Henry S. Crittenden, September 13, 1874, and lived with her said husband from that date continuously in Montana until his death, which occurred in the month of October, 1878; that during said coverture her said husband was seised in fee of certain real estate described and situate in Meagher county; that about the month of November, 1877, the said Crittenden sold and conveyed said land without the plaintiff's consent, and without her joining in such conveyance, and that plaintiff has never relinquished her dower right in said land; that defendants are now in possession of said land, and claim to own the same. The court below sustained defendants' demurrer to the complaint, on the ground that it appeared from the facts stated that the statute of limitations barred plaintiff's right to maintain her suit for the assignment of dower. Plaintiff appealed, and the

same point has been argued with great ability and research before this court.

There is considerable variation in the decisions of courts of last resort upon this question, not only as to the conclusions reached, but also as to the reasons assigned therefor. It would be an unnecessary task here to set forth a review of all the decisions which we have examined upon this question, because that work has been thoroughly done by able writers. 2 Scrib. Dower, 423, 443; 4 Kent, Comm. (13th Ed.) 70, and notes; Washb. Real Prop. 276-278; Ang. Lim. § 367; Wood, Lim. 584, 585; Tied. Real Prop. § 131. In setting forth the reasons upon which we arrive at the conclusions herein announced, we shall bring to attention such cases as illustrate the different views heretofore held by the courts, and the different statutes upon which the same were founded. These, together with the *dicta* of able writers, such as cited *supra*, and the collation of authorities by them cited, which we have to a large extent examined, have given us much aid in determining the question before us.

The prototype of the statutes of limitations enacted in the various states of the American Union is undoubtedly the early English statutes on the same subject. Ang. Lim. c. 2; Wood, Lim. c. 1. We observe, as bearing upon the question before us, that it is agreed by the writers that it has been uniformly held by the English courts that the general statutes of limitations of England did not apply to writs for assignment of dower, but in later times special statutes have been passed limiting the period for the assertion of that right. See authorities cited *supra*. In the United States, as before observed, and as will be seen by an examination, the holding is not uniform. But the terms of the statutes of limitation vary greatly in different states, as will be seen by comparison, (Ang. Lim., and Wood, Lim., Appendix) and it is therefore not at all strange that while in some cases the action or suit for the assignment of dower is held to be within the statute, by reason of its terms, in other cases, and under statutes of different terms, the contrary is held. In the case of *Jones v. Powell*, 6 Johns. Ch. 194, decided in 1822, Chancellor KENT uses language tending strongly to indicate that he held the opinion that the general statute of limitations in force in New York at that time, according to its terms, would bar an action for the assignment of dower. However, the decision was not controlled by the general statute commented on, because the dower act there provided that "a widow shall be at liberty, at any time during her life, to make a demand for her dower." In view of that provision the chancellor observes that the court "may, therefore, put out of the consideration of this case the effect of any legal limitation to the action of dower." The comments of the chancellor in that case, although upon statutes which did not control his decision, carry much weight, in view of his eminent abilities, and are justly relied on by counsel for respondent. One provision of the statute commented on is quoted in the opinion as follows:

"No person shall make any entry into lands, but within twenty-one years next after his right of action accrued." This limitation it was thought would bar the possessory action of the widow for dower. Notwithstanding the views of the chancellor, expressed in that case, we observe that when he afterwards wrote the fourth volume of his Commentaries, in treating of the subject of the limitation of the action of dower, he cites other cases where the question had come under consideration in the United States, but makes no mention of the case of *Jones v. Powell*, *supra*, nor does he express the views therein set down. Evidently that case was regarded as containing only a passing comment on a statute which did not control the decision. The author says: In the English law, the wife's remedy by action for her dower is not within the ordinary statutes of limitations, for the widow has no seisin; but a fine levied by the husband, or his alienee or heir, will bar her, by force of the statute of non-claims, unless she brings her action within five years after her title accrues, and her disabilities, if any, be removed. In South Carolina it was held in *Ramsay v. Dozier*, 1 Tread. Const. 112, and again in *Boyle v. Rowand*, 3 Desaus. Eq. 555, that time was a bar to dower as well as to other claims. But in the English law there is no bar, and in New Hampshire, Massachusetts, and Georgia it has been adjudged that the writ of dower was not within the statutes of limitations.

As to the account against the heir for the mesne profits, the widow is entitled to the same from the time her title accrues, and, unless some special cause be shown, courts of equity carry the account back to the death of the husband. The New York Revised Statutes have given a precise period of limitation, and require dower to be demanded within 21 years from the time of the death of the husband, or from the termination of the disabilities therein mentioned. 4 Kent, Comm. (13th Ed.) *70. The Revised Statutes of New York, "giving a precise period of limitation" to the action for dower, mentioned in the text quoted, were passed after the decision of the case of *Jones v. Powell*. After the decision of that case the question of the effect of the general statute of limitations upon the widow's right of action for assignment of dower arose in certain cases which he mentions, and were determined upon the consideration of the General Statutes; notably the cases of *Barnard v. Edwards*, 4 N. H. 107, and *Parker v. Obear*, 7 Metc. (Mass.) 24, wherein it was held that general statutes, very much like that of New York when the case of *Jones v. Powell* was decided, do not apply to the dower right. We shall have occasion to refer to these cases further along in this opinion. In 1847 the supreme court of Michigan, in an elaborate opinion, (*May v. Rumney*, 1 Mich. 1,) reviewing the American and English authorities, arrived at the same conclusion expressed in the Massachusetts and New Hampshire cases, *supra*. So in Missouri, in 1862, under a statute substantially like the present statute of Montana, it was held that the general statute of

limitation did not bar the dower right. *Littleton v. Patterson*, 32 Mo. 357. In Michigan the question came before the supreme court again in 1878, (*Proctor v. Bigelow*, 38 Mich. 282;) and it was held that the statute, as it then stood, barred the widow's action for dower. Some changes, it appears, had been made in the statute since the case of *May v. Rumney* was decided, relating to the action for dower, which are reviewed by Chief Justice CAMPBELL in the opinion, and the conclusion announced was placed upon the ground that the action for the assignment of dower, being by statute made an action of ejectment, was within the general terms of the statute of limitation, which was quoted in the opinion as follows: "No person shall commence an action for the recovery of any lands, nor make any entry thereupon, unless within twenty years after the right to make such entry or bring such action first accrued." The statute just quoted from the Michigan decision, and the statute of Montana, quoted above, furnish an illustration of two quite common forms of statutes on the subject before us. The Michigan statute, and others of that form, provides the limitation from the time the right to make the entry or bring the action "first accrued;" while the statute of Montana, and others of like terms, provide that the action is barred "unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question" within the time prescribed. Now, as applicable to the right of dower, the two forms of statute are vastly different. Dower is a life-estate in the widow, cast by law, in conjunction with certain conditions, which together operate to initiate and consummate the right of dower. The wife has no possession or seisin, nor has she a right thereto, until the estate is consummated and assigned. It cannot, in the nature of this particular estate, be logically maintained that the widow has any ancestor, predecessor, or grantor of the dower right, in the sense in which those terms are used in section 29 of our Code of Civil Procedure. Mr. Angell, in his work on Limitations, says: "Dower is not within the statute of limitation of Henry or of James, but a fine levied by the husband or his alienee or heir will bar her by force of the statute of non-claims, unless she bring her action within five years after the accruing of her title and the removal of her disabilities, if any. In New Hampshire, in Georgia, in North Carolina, and in Tennessee the writ is not within the statute of limitations, and in Maryland it has been held that the statute of limitations is no bar in equity to the claim of dower. The principle of the doctrine is stated clearly by the court in the case in New Hampshire. *Barnard v. Edwards*, supra. The view taken by the court was that the statute applied only to actions, entries, and claims founded upon a previous seisin or possession of the lands demanded, from which seisin or possession the time of limitation may be dated; and that dower cannot have a limitation dated from the seisin of the husband, and that a limitation cannot be dated from the seisin or

possession of the widow, because she cannot have either until dower has been assigned to her. This doctrine was recognized and approved by the supreme court of Massachusetts in a case (*Parker v. Ohear*, supra) wherein it was decided that a writ of dower was not barred by the Revised Statutes of that state; and the court say that, the limitation being thus dated from the seisin, it would be absurd to extend it to actions in which seisin, not being issuable, can never become the subject of evidence on the trial." Ang. Lim. § 367. In a note to the above text appears a quotation from Brooke's Reading upon the statute, 32 Hen. VIII. c. 2, as follows: "A woman brought a writ of dower, of the seisin of her husband sixty-one years past, the action lieth, because that is not of her own seisin, nor of none of her ancestors, nor predecessors, neither is it an action possessory, and it is not prohibited by the statute."

The first section of the dower act of this state provides that "a widow shall be endowed of the third part of all lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form." Now, if it be held that, when she petitions under that act for the assignment of the estate of which the law endows her, she must show that she, or her predecessor or grantor, was seised or possessed of the estate claimed within five years, we are constrained to ask, how will she do this? To whom will she point as predecessor or grantor of the estate in which the law declares she "shall be endowed?" It cannot be said that her husband was her grantor or predecessor. He neither grants to her, nor can he grant away from her, that dower estate. It is true the husband is the person through or under whom the wife, by virtue of law, claims her dower; but our statute of limitation does not contain the terms "through or under whom" the plaintiff claims, as often appears in statutes. If it should be held that the husband is the grantor or predecessor of the wife's dower estate, then the wife would be compelled to show that he was seised or possessed within five years, or her dower would be lost; and in such case he could convey the seisin and possession, and remain out five years, and, if he lived that length of time, the dower would be lost by force of the statutes of limitations before it was consummated, notwithstanding the statute declares she shall be endowed of one-third of the lands whereof her husband was seised "at any time during the marriage, unless relinquished in legal form." If it is held that the husband's ancestor, grantor, or predecessor is also the grantor or predecessor of the wife's dower estate, then the very seisin of the husband for five years prior to the consummation of the dower estate would bar her dower, because she would have to point to her husband's ancestor, grantor, or predecessor as her predecessor, and, of course, they would, under that state of facts, have been out of possession and seisin for the period of five years. These deductions we think would certain-

ly result from holding that the widow must bring her action for the assignment of dower within the provisions of section 29 of the Code. Upon reason and authority, and the unquestioned meaning of the terms used in that section, we think it was never intended to apply as a bar or limitation to the widow's suit for the assignment of dower.

In our investigation of this subject we have nowhere found any authority questioning the force of the reasoning set forth in the New Hampshire and Massachusetts cases cited *supra*. In the well-sustained opinions where it has been held, as in Michigan, (*Proctor v. Bigelow*, *supra*.) that the general statute of limitation barred the action for assignment of dower, the statute provided that the action must be commenced within the stated period "after the right to make such entry or bring such action first accrued;" or, as in Ohio, (*Tuttle v. Willson*, 10 Ohio, 25,) where the statute on which the decision was founded provides "that no person or persons shall hereafter sue, have, or maintain any writ of ejectment, or other action for the recovery of the possession, title, or claim of, to, or for, any land, tenement, or other hereditament, but within twenty-one years next after the right of such action or suit shall have accrued." As remarked by the court in that case: "It will be seen that it is not only the action of ejectment which is barred by this statute, but every other action for the recovery of the possession, title, or claim to any land." It is readily seen that such statutes, or statutes of other terms of like import, may fairly be construed to apply as a bar to the action for dower. It is contended by counsel for respondent that, if section 29 is inapplicable to the action for assignment of dower, section 47 of the Code would apply, and bar the action in three years from the time the right accrued. Title 3, Comp. St., is devoted to the subject of limitation of actions. Chapter 2 of this title prescribes limitations of actions concerning real property. Chapter 3 of said title appears to be intended to apply only to actions concerning other rights of action than those relating to real property; for the first section of chapter 3 provides for "actions other than those for the recovery of real property, as follows," etc. Section 47 of the same chapter provides as follows: "An action for relief, not hereinbefore provided for, must be commenced within three years after the cause of action shall have accrued." We do not think this action was intended by the legislature to apply to actions concerning real property. In the case of *Robinson v. Ware*, 94 Mo. 678, 8 S. W. Rep. 153, wherein the supreme court of Missouri completely reverses the construction of the statute as held in *Littleton v. Patterson*, *supra*, the court considers the bearing of a clause in the Missouri statute like section 47 of our Code, which the court termed a "catch-all clause." In one part of the opinion it is said: "We believe such an action [action for dower] would have been held to be barred in the case of *Littleton v. Patterson*, either by the first section of the act of 1847, or this general

clause of the act of 1849, had the court been called upon to consider the statute as a whole; but the cause there appears to have accrued before the adoption of the act of 1849. Which of the sections would have been applied is not material at this time in this case." Further along in the opinion, referring to the "catch-all clause," it is said the same reads: "Civil actions, 'other than for the recovery of real property,' can only be commenced within the time prescribed in sections which follow. The words just quoted exclude actions for the recovery of real estate, and hence the general clause of section 3229 cannot be held to apply to an action for dower." Under such contradictory views, we cannot see why the court in *Littleton v. Patterson* would have held the case barred "by the general clause in the act of 1849," namely, the "catch-all clause." It appears that the only use made of that clause by the court in the case of *Robinson v. Ware*, *supra*, was to draw therefrom what the court deemed an indication of "legislative policy" to place a limitation on all actions, and hence that the same section, which had in *Littleton v. Patterson* been held not to apply to dower, should be held to apply as a bar thereto. Was not the silence of successive legislatures for 26 years, and the failure to give the courts a statute which would clearly place a different limitation on the action for dower, a tacit approval of the construction given in *Littleton v. Patterson*? Is not that kind of indication of "legislative policy" far more direct and satisfactory than anything suggested in *Robinson v. Ware*, *supra*. There is a limitation on dower; that is, the natural limitation on the life-estate. It may be that the legislature is satisfied with that limitation, and it may in its wisdom fix a different limitation thereon. But at present we find no statute barring the right of the widow to prosecute her action for the assignment of dower.

It is contended by counsel for respondent that every civil action is limited to a certain period by our statute, either by a specific provision, or by the general terms of section 47. We do not think that proposition will hold in all cases. For instance, it could be argued with as much force that the action for divorce, on the ground of desertion or habitual drunkenness, or conviction of an infamous crime, is in all its attributes as much a civil action as is the suit under the statute for assignment of dower. Both actions are given by statute, and the procedure of the Civil Code is made applicable, except as otherwise provided in the respective acts. The action for divorce is not specified in the general statutes of limitation, and, if barred, it would be by the sweeping terms of section 47. But we do not think it is generally held by the bench or profession that an action for divorce, on the ground that one spouse had been convicted of an infamous crime, would be barred by section 47, if the complaining spouse should forbear for three and a half years, for instance, after the conviction, to proceed for divorce, although it could not be said that the right to the relief prayed for did not

accrue at the time of conviction. Of course the court of chancery may refuse to entertain a stale complaint for divorce for some causes, but that bar is not placed on the general statute of limitation. It is ordered that the judgment of the trial court be reversed, at costs of respondent, and remanded for further proceedings.

BLAKE, C. J., and DE WITT, J., concur.

PETER v. STEPHENS.

(*Supreme Court of Montana*, Aug. 8, 1891.)

EJECTMENT—PLEADING—ADVERSE POSSESSION.

Code Civil Proc. Mont. § 29, provides that no action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that plaintiff, his ancestor, etc., was seised or possessed of the property in question within five years before the commencement of the action. Section 32 provides that, in every action for the recovery of real property, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been in subordination to the legal title, unless it appear that the property has been held adversely to such legal title for five years before the commencement of the action. *Held*, that a complaint in ejectment, alleging that plaintiff has been and is lawfully seised and entitled to the possession of certain lands, and that more than five years before, and while he was so seised, defendant unlawfully ousted him therefrom, and has since unlawfully withheld possession of the land, states a ground of action; since the possession, within the statute, which will bar such action, must be under color of title.

Appeal from district court, Missoula county; CHARLES S. MARSHALL, Judge.

Action of ejectment by Lawrence Peter against W. J. Stephens. Judgment for defendant. Plaintiff appeals. Reversed.

Henry C. Stiff and Kenneth M. Nicholls, for appellant. Toole & Wallace, for respondent.

BLAKE, C. J. The appellant filed August 13, 1890, his complaint in the court below, and alleged "that on the 2d day of April, A. D. 1885, the said plaintiff became, and ever since said date has been, and now is, the owner and seised in fee, and entitled to the possession, of all that certain lot of land, [description;] that while the plaintiff was such owner, and so seised and possessed, and entitled to the possession, of said land and premises, the defendant did, on the day and year aforesaid, wrongfully and unlawfully enter into and upon the following part and portion of said lot of land, viz., [description;] and did oust and eject the plaintiff therefrom, and ever since that day wrongfully and unlawfully withheld, and still and now wrongfully and unlawfully does withhold, the possession thereof from the plaintiff, to his wrong, injury, and damage in the sum of one thousand dollars; that the value of the rents and profits of the said land and premises is two hundred dollars per month; and that by reason of the unlawful withholding of the said land by the defendant, as aforesaid, plaintiff has been deprived of said rents during all the time

since the 2d day of April, A. D. 1885, and by the continuance thereof will be deprived of the use and occupation of the same to his loss and damage in the sum of two thousand dollars." The prayer is for "the restitution of said land and premises" and damages. The demurrer of the defendant is as follows: "That the said complaint does not state facts sufficient to constitute a cause of action, in this: That it appears from the face of the complaint that the defendant has been in possession of the property described in the plaintiff's complaint for more than five years prior to the commencement of the plaintiff's action, and that said action is barred by sections 29 and 30, tit. 3, c. 2, Comp. St. Mont., and that the defendant claims the benefit of the same." The demurrer was sustained by the court, and, upon the refusal of the plaintiff to file an amended complaint, judgment was entered for the defendant for his costs. The sections of the Code of Civil Procedure which are mentioned in the demurrer read as follows: "Sec. 29. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action. Sec. 30. No cause of action or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made."

The briefs of counsel restrict our inquiry to one question, does the complaint show upon its face that the defendant enjoyed the adverse possession of the land in controversy more than five years before the commencement of this action? It is alleged that the plaintiff was, at all the times named in the pleading, "the owner and seised in fee" of the premises. This rule has been prescribed by the Code of Civil Procedure: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof, within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for five years before the commencement of the action." Section 32. After quoting the statute in *Lamme v. Dodson*, 4 Mont. 587, 2 Pac. Rep. 298, Mr. Justice GALBRAITH said: "The true principle, therefore, is that he who has the legal title to real property is presumed to have the right to the possession thereof until better right is shown." See, also, *Mining Co. v. Powers*, 3 Mont. 344. By the allegations of the complaint, the defendant is a trespasser,

and there is not a word which indicates that his acts with reference to the property are accompanied with any claim which is inconsistent with the title of the plaintiff. The intention of the party, which is a vital element of an adverse possession to reality, is not shown, and there is nothing to rebut the presumption of the statute, *supra*, from the ownership in fee. *McDonald v. Fox*, 20 Nev. 364, 22 Pac. Rep. 234, and cases cited; *Sharp v. Daugney*, 33 Cal. 505; *Figg v. Mayo*, 39 Cal. 262; *Unger v. Mooney*, 63 Cal. 586; *Roman Catholic Archbishop v. Shipman*, 79 Cal. 288, 21 Pac. Rep. 830; *Harvey v. Tyler*, 2 Wall. 328; *Probst v. Trustees*, 129 U. S. 182, 9 Sup. Ct. Rep. 263. The opinions in the last two cases were delivered by the learned jurist Mr. Justice MILLER, who said in *Harvey v. Tyler*, *supra*: "The third and last instruction given at the instance of plaintiffs had reference to the question of adverse possession, in its relation to the statutes of limitations. Its purport was that if plaintiffs' title was found to be the paramount title, and any of the defendants entered upon and took possession of the land, without title or claim or color of title, that such occupancy was not adverse to the title of plaintiffs, but subservient thereto. We think this law to be too well settled to need argument to sustain it. * * * Where there is no claim of right, the possession cannot be adverse to the true title." In *Probst v. Trustees*, *supra*, the court approved *Harvey v. Tyler*, *supra*, and *Ewing v. Burnet*, 11 Pet. 41, in which this language is used: "An entry by one man on the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done,—if made under claim and color of right, it is an ouster; otherwise it is a mere trespass. In legal language, the intention guides the entry and fixes its character." It is therefore ordered and adjudged that the judgment be reversed, and that the cause be remanded, with a direction to overrule the demurrer.

HARWOOD and DE WITT, JJ., concur.

STEVENSON v. GELSTHORPE.

(*Supreme Court of Montana*. Aug. 3, 1891.)

MALPRACTICE—EVIDENCE.

1. In an action against a physician, to recover damages for malpractice, the evidence showed that plaintiff had sustained a fracture of the wrist, and that defendant, in treating him, had used paste-board splints, and put cotton under them next to the hand. The evidence further showed that the injured limb was normal in proportions, and that the treatment was in accordance with the best known treatment. *Held*, that a verdict for plaintiff could not be sustained.

2. In such case, it is error to admit evidence of the defendant's general reputation for skill and ability as a physician.

Appeal from district court, Cascade county; CHARLES H. BENTON, Judge.

Action by Ole Stevenson against W. H. Gelsthorpe to recover damages for malpractice. Judgment for plaintiff. Defendant appeals. Reversed.

Geo. W. Taylor, for appellant. Baum & Bishop, for respondent.

HARWOOD, J. This is an action for the recovery of damages. Plaintiff averred in his complaint that in the month of October, 1889, while plaintiff was engaged in mining coal at Sand Coulee, in the county of Cascade, this state, he sustained, by accident, a grievous injury to the wrist joint of his left arm; that at said time and place defendant was a physician and surgeon, practicing his profession, and plaintiff called defendant as such physician and surgeon to set, dress, bandage, and medically treat the said broken and injured limb, which defendant undertook and proceeded to do, but that defendant "so negligently and unskillfully conducted himself in setting and attempting to set and heal said arm, wrist, and hand that said wrist became crooked, and the bones therein are out of place, and the fingers upon said hand are stiff and weak, and so remain, and will remain, during the lifetime of plaintiff;" whereby plaintiff alleged that he was damaged in the sum of \$5,000, for which he demands judgment. On the trial of the cause the jury returned a verdict in favor of the plaintiff for the sum of \$500, and judgment was thereupon rendered against defendant for that sum and costs. Defendant sought a new trial, on the ground, among others stated, of insufficiency of evidence to justify the verdict. The court below overruled the motion, and defendant appealed from that order and the judgment, and has brought here for review the evidence, urging upon the attention of this court the one ground upon which he relies for setting aside said verdict and judgment; namely, that the verdict is not supported by evidence. The record before us contains all the evidence given upon the trial, and it appears therefrom that appellant is fully sustained in his assignment of its insufficiency to justify the verdict against him. There is no evidence in this record to support a finding by the jury that defendant had been negligent, unskillful, or careless in his professional treatment of said injury; nor that the result to the injured limb through such treatment was less beneficial than is attained by the most careful and skillful treatment known to the medical profession. On the contrary, the plaintiff introduced testimony of practicing physicians tending to prove, not only that the treatment and appliances used by defendant were approved by medical writers of eminence and authority in that science, but that the benefit resulting from such treatment was all that could be expected in any event, and was extraordinary in its beneficial result, if plaintiff's injuries were as severe as contemplated by the hypothetical question put by plaintiff's counsel. Such was the state of the proof when plaintiff rested his case. Had defendant's counsel, at this juncture, moved the court for a nonsuit, we can see no reason why the court would not have granted such motion. But the defendant did not move therefor. It may be he desired the submission of the case to the jury, expecting exoneration by a verdict at the hands of the jury. On the trial, the plaintiff and some other witnesses called on his behalf first narrated the events relative to the

happening of the injury, the summoning of defendant, and his conduct in regard to setting and dressing the injured limb, and his treatment thereof afterwards. In the narration of those facts, nothing is shown tending to prove whether defendant's conduct in the treatment of the injury was careful, appropriate, and skillful, or the contrary.

It appears from the evidence and argument of plaintiff's counsel that because the doctor, in this age of extraordinary advancement and invention, used simple and common appliances in dressing the wounded arm, they concluded he was wanting in skill and proper care in his treatment of the case. The physician is under an implied obligation, when he undertakes to treat diseases or injuries, to bring to his aid such obtainable remedies and appliances as discovery and experience have found to be the most appropriate and beneficial in aiding recovery. But in some cases the best and most appropriate appliances or remedies may be very simple and commonplace, and it may be the highest type of skill which applies these things to aid nature in its healing processes. The plaintiff, in describing the manner in which defendant dressed his injured arm, said: "He called for pasteboard, and there was a basin full of milk-warm water, and he took the pasteboard and cut it up in two pieces, and put one on each side, and put a lot of cotton under them next to my hand. Then he took a cotton strip and tied that hand up. I cannot just say how close the strips were to my elbow. He waited on me right along. He took the splints off when the time came to take them off; and he took them off once, and looked at the hand, eleven days between, and then put them back." This is a fair sample of the testimony of plaintiff's witnesses as to how the defendant treated the injured arm. It was reserved to those witnesses learned in the science of medicine and surgery, and experienced in the treatment of such cases, to give the necessary evidence as to whether the treatment described was proper and skillful or negligent and unskillful, and whether good or injurious results flowed therefrom. Such experienced witnesses were called by plaintiff. The first was Dr. George Cummings, who testified in effect as follows: "I reside in Great Falls. Have resided here only four months. Have made examination of the plaintiff's left wrist and arm. As far as the forearm is concerned, I cannot say positively that there is anything the matter of it. As far as the wrist is concerned, there is some stiffness and tenderness there. The bones and wrist seem to be in proper place as far as my judgment goes. The bones are in such a good apposition that it is almost impossible in my judgment to tell whether there has been a fracture or not. The treatment recommended for a dislocation of the forearm or wrist would be about as follows: After having reduced the dislocation, I should either put it up in anterior or posterior splints or in a pistol-shaped splint. I let the splints go up as far as the elbow, and to include the hand, leaving the hand at the fingers so

that they could be seen. I should pad the splints well, and put no bandage over the skin underneath the splints; and by 'splints,' I mean splints made out of pasteboards or leather. There are a great many things you can make splints out of; most anything. You can take rye straw, even, or paper maybe. Plaster of Paris is recommended very highly, but there is a good deal of danger in its use from swelling. The main thing is to keep it in a fixed position. I have been practicing since 1888, in Colorado and Great Falls. I came here on the 5th of April. I have not treated any fracture or dislocation since I came here. About two months before I came here I had a Collee's fracture, which is a fracture of the radius of the forearm. I had one Collee's fracture about six months before that. I have had five cases since I graduated. With one of them, especially, I had considerable trouble. A Collee's fracture is considered one of the most difficult ones in all the fields of surgery of fractures or dislocations to cure properly. Whenever there is a Collee's fracture there will probably be a partial dislocation, but not sufficient to cause the escape of the synovial fluid. In this case I doubt if there was either a dislocation or Collee's fracture. I think the wrist was only badly sprained. The plaintiff, when he came to me for examination, said he had dislocated his hand. That he had fallen forward on his hand, and dislocated it; and he also said that the doctor said that there was a fracture of the bone. The only statement that I made of anything else was that it was a great deal better than no wrist at all. I didn't state to him that it was not a good job. Assuming that it was a fracture of his wrist, and a dislocation or Collee's fracture, I think it was a good job. Assuming that the plaintiff in this action had sustained Collee's fracture or dislocation of the wrist or sprain concerning which we have been telling, I will state that there are no indications in the treatment of it as though there had been any negligence on the part of the physician who treated it. I cannot see anything wrong with the treatment. If the plaintiff, within three or four months after his injury, was attacked with inflammatory rheumatism, the conditions of the system which developed rheumatism would most assuredly have an effect in producing stiffness in the injured joint. If the rheumatism mentioned began in the feet, and extended up to the knees, it may affect some other part of the body. It would naturally affect that portion of the body that had lost some vitality. It usually goes to some weaker portion. Rheumatism might affect, without being indicated to the naked eye. Assuming that the injury is such as we have stated, viz., what is called 'Collee's fracture,' I think the result has been very good. I never read of any case of Collee's fracture where the person recovered fully. There have been no perfect recoveries. They can never recover the same as they were formerly, though they can use the arm in time. I cannot recall a case of injury from Collee's fracture that has sufficiently recovered so

that the arm could be used for all practical purposes. There are several treatments of Collee's fracture,—a dozen different kinds of splints. No two physicians use the same kind of splints. They have their particular choice. We may use the anterior or posterior splint, pistol-shaped splint, or we may use most any material. It would be proper to wet the pasteboard strips used for splints if they were not made too wet; just dipped in water once, and placed right on the hand. You would gain the advantage of having them to fit the arm; to become moulded to the arm. The object of placing splints on fracture of this kind is to keep them at rest. In some cases, some eminent physicians have recommended treatment without splints of any kind. You can mould the pasteboard, after having wetted it, to the arm, and hold it there with bandages. The success of the treatment when using pasteboard and cotton would depend upon the manner the cotton was put on. It would have to be put on even. It doesn't make any difference whether the splint is made of pasteboard, wood, tin, or zinc, or what, as long as you accomplish the result. Why, if you were in the harvest-fields, you take straws. It wouldn't make any difference. The desired result would be just the same as though you had used the best splint recommended. There are several authorities that recommend pasteboard splints. They are as good as can be used."

Dr. Gordon, a practicing physician, resident at Great Falls, Cascade county, was also called as a witness on behalf of plaintiff. He testified, in effect, that he was acquainted with plaintiff. Had been called upon by plaintiff for an examination of his injured arm, and he made examinations thereof. From his examination he concluded the injury was the result of a Collee's fracture. He described the proper treatment for such an injury, very much as Dr. Cummings described the same. In answer to the question by plaintiff's counsel, as to whether "ordinary care and treatment would have called for different appliances than those used by defendant, assuming that the plaintiff had suffered a severe Collee's fracture of his wrist," Dr. Gordon replied that, "if it was a very severe fracture, possibly he could not have any splints at all on it." This witness testified that he could not say anything about the treatment of plaintiff's injured arm by defendant, because he did not know what the treatment was. But he said that, at the time he made examination of plaintiff's injured wrist, he found the bones in "perfect apposition;" that plaintiff could freely use his fingers, as far as the witness could remember. In speaking of Collee's fracture, Dr. Gordon said the cases of perfect recovery from such an injury were very few. Neither of the two physicians called by plaintiff gave any testimony tending to show that defendant had treated plaintiff's injury in a careless, negligent, or unskillful manner, nor that the result of the treatment was injurious. The tendency of the testimony of these experienced witnesses for plaintiff was to contradict the allegations of plaintiff's

complaint. But, if this was not sufficient to satisfy the jury, they had the testimony of eight other practicing and experienced physicians called on behalf of defendant, who were fully informed of the treatment of plaintiff's injured arm by defendant, and who had made or witnessed an examination of said injured arm. These doctors agreed in this instance, and testified with one accord, that the treatment and appliances used by defendant in the case in question was such treatment as is recommended by medical writers of authority, and approved as beneficial and proper by the experience of the witnesses in like cases. It was further shown by these witnesses that the bones of plaintiff's injured wrist were in perfect apposition; that the wrist, joint, arm, and hand of the injured limb had been so nearly restored to normal proportions that the eye could detect no difference, and, if by measurement any could be found, it was extremely slight. These doctors testified that, if the plaintiff had sustained a Collee's fracture of the wrist in question, the restoration, so far as it had progressed, was extraordinary.

The plaintiff claimed that his fingers were stiff; that he could not straighten them; that his wrist joint had healed in such a way as to hold his forearm and hand in a crooked position; and that he could not raise the injured arm and hand to his head without lifting it with his right hand. But the doctors who examined the injured limb, and testified on behalf of defendant, said they found that the rotation of the wrist and finger joints was natural; that no result of the injury could have disabled plaintiff's arm so that he could not raise that hand to his head without assistance of the other hand. Several of these doctors testified that they had observed plaintiff while on the witness stand, and while his attention was somewhat distracted under cross-examination, raise the injured hand to his head, without assistance; and also let his stiffened fingers relax to a straight and natural position; and also saw the injured wrist and hand relax to a natural position, and the stiff and injured fingers "fumble" in a natural, yet an unconscious, manner, upon plaintiff's knee. One physician testified that he had observed the plaintiff go down the street in Great Falls, with his injured hand and fingers hanging and swinging in a natural manner; and immediately afterwards had seen the plaintiff pass along holding the injured limb in the stiff manner in which he claimed it had grown. Plaintiff did not deny that these peculiar changes and movements of the injured limb had actually happened as described by witnesses; but he testified in rebuttal that he "was not shamming." The verdict of the jury is entirely unsupported by evidence necessary to sustain it. In the trial of this case the court allowed, over the objection and exception of defendant's counsel, certain witnesses to testify as to defendant's reputation, at Sand Coulee, for skill and ability as a physician. This was clearly improper. Defendant's reputation as a physician was not in issue. It was his

specific acts in the treatment of a certain case, and the facts as to whether his acts were unskillful and negligent in this treatment was the matter in issue. A doctor's reputation for skill and ability will not exonerate him, where gross negligence and want of the application of skill is alleged and proved. Nor can the fact that a doctor is reputed to be negligent or unskillful be allowed as proof to establish negligence or unskillful treatment in a particular case, because he may have treated that case with unusual skill and care. The introduction of that evidence was not only improper from a legal view, but it was of a character which may have unjustly prejudiced defendant's case before the jury upon a point where defendant had made no preparation to defend. It is likely such improper evidence misled two-thirds of the jury who concurred in the verdict. Judgment is reversed, and new trial granted, at the cost of respondent. Judgment reversed.

BLAKE, C. J., and DE WITT, J., concur.

BRAND v. SERVOS.

(Supreme Court of Montana. July 27, 1891.)

PUBLIC LANDS—FILING DECLARATION—INSTRUCTIONS—APPEAL.

1. In an action for forcible entry and unlawful detainer of land, an instruction that "there has been considerable evidence introduced in the way of letters and certificates, applications to file, and other evidence that would ordinarily tend to show right of possession or such title as a man could acquire to unsurveyed land, but the question of right of possession and title is not in this case," is not objectionable as commenting on the weight of the evidence.

2. Under Comp. St. Mont. div. 5, § 1663, which provides that the record of any declaration showing muniment of title shall be received as presumptive evidence of the regularity of the paper itself, it is proper to charge that a declaration filed on unsurveyed land is presumptive evidence of the regularity of the paper itself, though the statute does not require such filing to be made.

3. The supreme court will not consider error assigned on the admission of testimony, unless objection was made to its admission in the trial court.

Appeal from district court, Cascade county; CHARLES H. BENTON, Judge.

Action by John H. Brand against Frank Servos, to recover possession of land. Judgment for defendant. Plaintiff appeals. Affirmed.

James Donovan and Sterling & Muffy, for appellant. *Baum & Bishop*, for respondent.

BLAKE, C. J. This is an appeal from the order of the court overruling the motion for a new trial. The action was commenced to recover the possession of a tract of land under the provisions of the act concerning forcible entry and unlawful detainer. The jury found for the defendant, and the errors complained of, which are supported by argument or authority, will be reviewed. The court overruled the objection of the plaintiff to the following question, which was propounded to the defendant: "At that time, what, if anything, did you do in furtherance of

your possession or claim to the land?" A declaratory statement of Servos, and a letter from the receiver of the United States land-office, and a receipt on account of a survey, were admitted in evidence for the defendant. The brief states that the court erred in these rulings, and that this testimony was not admissible under the pleadings. No objection of this character was made at the trial, and passed upon by the court, and for this reason the exceptions based thereon will not be examined.

It is urged that the comments of the court upon the evidence in this instruction are erroneous: "There has been considerable evidence introduced here in the way of letters and certificates, applications to file, and other evidence that would ordinarily tend to show right of possession or such title as a man could acquire to unsurveyed land. But the question of right of possession and title is not in the case. That evidence was admitted before you for the purpose of throwing such light as it might upon the question of the possession of the plaintiff in this suit; it was not introduced or admitted by the court upon any other theory, except to give you such light as it naturally would give upon the question as to the possession of the property. You will therefore be careful to discriminate in this case, and recollect the fact that it is simply the question of the possession of this property,—the actual, peaceable possession of the plaintiff at that time, September 1st,—and not any right of possession nor any title at law." The learned judge applied the law which has always prevailed in our courts. *Parks v. Barkley*, 1 Mont. 514; *Boardman v. Thompson*, 3 Mont. 387; *Sheehy v. Flaherty*, 8 Mont. 365, 20 Pac. Rep. 687. The appellant does not maintain another position, but contends that "the court had no right to say what any portion of the evidence tended to establish." It is the duty of courts to give a proper construction to statutes, writings, and instruments. In the trial of causes testimony is often adduced which is competent for one purpose, and incompetent for any other, and jurors might reasonably be misled as to its application to the issues. In the instruction, supra, there is no opinion regarding the weight of the evidence, and the jury are properly informed respecting the subject of controversy and the proof.

The last assignment of error is that the court erred in the following instruction: "There has been evidence introduced before you of the fact of a declaration such as is prescribed by section 1663¹ of our statute, and prior sections, having been executed and filed by one of the parties to this suit. So far as that declaration is concerned, it is not necessary that a per-

¹ Comp. St. Mont. div. 5, § 1663: "In all legal or equitable proceedings hereafter instituted in any court in this territory the record of any declaration, deed, or mortgage, or any other muniment of right referred to in sections 1659 and 1661 of this chapter, shall be received, except as against the United States, as presumptive evidence of the regularity of the paper itself. * * *

son in possession of land should make and file such a declaration, but, where a person takes advantage of that statute, the paper is presumptive evidence of the regularity of the paper itself." What is the language of the section, supra? "In all legal or equitable proceedings hereafter instituted in any court in this territory, the record of any declaration * * * shall be received * * * as presumptive evidence of the regularity of the paper itself." Comp. St. div. 5, § 1663. It is the contention of the appellant that this declaration was "presumptive evidence of the peaceable possession of the plaintiff." The statute has proclaimed the effect of this instrument, which was embodied in the instruction, supra. No error appears in the record, and it is ordered that the judgment be affirmed.

HARWOOD and DE WITT, JJ., concur.

(11 Mont. 180)

SWITZER v. ALLEN *et al.*

(*Supreme Court of Montana*. Aug. 31, 1891.)

LEASE—ERRECTIONS BY LESSEE.

Where the lessee of certain land erects a building thereon under an agreement that, at the expiration of the lease, the building shall belong to the lessor on payment of the cost thereof, the lessor to terminate the lease at his option at any time after default in payment of the rent, the building becomes part of the realty, and is not subject to the debts of the lessee to third persons after he has made default in payment of the rent, and the fact that the lessor has not paid the cost of the building is immaterial, when a larger sum is due him from the lessee for rent.

Appeal from district court, Jefferson county; THOMAS J. GALBRAITH, Judge.

Action by Jacob Switzer against R. A. Allen, W. R. Stein, Mrs. Redding, and Mrs. Stein, to recover possession of a building. Motion for nonsuit granted. Plaintiff appeals. Affirmed.

Henry C. Smith and Geo. F. Cowan, for appellant. Shober & Joyes, for respondents.

BLAKE, C. J. This action was commenced by Switzer against R. A. Allen, W. R. Stein, and Mrs. Redding and Mrs. Stein, to recover the possession of "one frame building, formerly used as a dance-hall." The answer denies that Switzer has any interest in the property, and alleges that the said Mrs. Redding and Mrs. Stein are the owners thereof. At the trial the court sustained a motion for a nonsuit, and it is proper to state what the testimony proved, and tended to prove. It is admitted by a stipulation of the parties that said Mrs. Redding and Mrs. Stein "were the owners of the land known as the 'Alhambra Springs Property,' upon which the house sued for stood, and that the legal title to said land was in their names at the time of the erection of the house, and still is." These persons, by a written instrument, leased December 9, 1887, unto W. J. Heber and J. J. Schenck, said property and land for the term from January 1, 1888, to January 1, 1890. It is therein provided that the lessees will quit and deliver up the premises to the lessors "in as good order and condition (reasonable use and wear thereof and damage by the elements

excepted) as the same now are or may be put into." Heber and Schenck were partners, and entered into an agreement in August, 1888, under which they constructed the dance-hall. The lessors were to pay the cost of the materials when the lease was terminated, and the house was to remain upon the land. In October, 1888, Heber sold his interest in the business to Schenck, who abandoned the premises about January 1, 1889, and departed from the territory without settling the affairs of the firm. It was further provided in the lease that, "should default be made in the payment of said rent when due, and for five days thereafter, the said lessors, their agent or attorney, may re-enter and take possession, and, at their option, terminate this lease." The sum of \$150 was payable as rent to the lessors, January 1, 1889, and was not paid, and no part of the cost of said materials was ever received by the lessees. Switzer loaned August 2, 1888, the sum of \$300 to said Heber and Schenck, who made and delivered their promissory note for the same. Afterwards an action was commenced by Switzer, and a judgment was entered April 22, 1889, against Schenck. Such proceedings were had that, under an execution issued in said action, the dance-hall was sold as personal property to Switzer, who thereby asserts his title thereto.

The grounds of a motion for a nonsuit are the following: "(1) There is no evidence of ownership or right of possession to the property sued for in plaintiff. (2) The process by which plaintiff claims title was issued on a void judgment, and he could acquire no title thereunder. (3) None of the defendants were parties to the suit by virtue of which plaintiff claims title. (4) The attachment and execution were not levied as required by law. The evidence shows that defendants Mrs. Stein and Mrs. Redding were in the possession of the property at the time of the attempted levy of attachment and execution, and that no notice of attachment or garnishment of any character was served on any of the defendants, and the sheriff never took actual possession; and the evidence further shows that neither plaintiff, nor sheriff had any possession of the property sued for. (5) The lease shows that the building sued for, being put on the ground during the period of the lease, would be the property of defendants. (6) The evidence shows that the building sued for became and was a part of the real estate, and that it was the expectation and intention of lessors and lessees that the building should remain on the premises, and be a part thereof. (7) There is no evidence of an appropriation in writing of the lessors granting lessees a right to build the house sued for, as required by lease." The motion was sustained upon the second ground, and the court held that the summons in the action wherein Switzer recovered a judgment was insufficient to confer jurisdiction. We do not intend to consider this important question, and will put our decision upon another point, which was also presented in the court below. The intention of the lessors and lessees is clearly shown in the foregoing lease and agree-

ment, and the said building was not to be removed from the Alhambra Springs property. The mere fact that, under the circumstances which have been disclosed, no actual payment for the lumber and materials of the dance-hall was made by Mrs. Redding and Mrs. Stein, does not affect the legal relations of the parties. This omission did not occur through any fault of the respondents. The materials did not cost more than the sum of \$300, and there was due to the lessors from the lessees, at the termination of the lease, the sum of \$1,800 for the rent of the premises. No claim, therefore, can be justly made by Heber and Schenck against Mrs. Redding and Mrs. Stein for any amount by reason of the construction of the dance-hall. This building was erected as a part of the realty, and, under the authorities, became subject to the statutes regulating this species of property. *Van Ness v. Pacard*, 2 Pet. 137, and cases cited; *Kutter v. Smith*, 2 Wall. 491; *Talbot v. Whipple*, 14 Allen, 177; *Marks v. Ryan*, 68 Cal. 107. Assuming that the process invoked by the appellant is valid, the property was not owned by the judgment debtor, Schenck, and no title could be acquired thereto by virtue of the sale under said execution. It is ordered and adjudged that the judgment be affirmed.

HARWOOD and DE WITT, JJ., concur.

Dow v. Ross. (No. 14,312.)

(Supreme Court of California. Aug. 26, 1891.)

COSTS—SERVING MEMORANDUM—EXCUSABLE NEGLIGENCE.

1. Under Code Civil Proc. Cal. § 1033, which provides that "the party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the court, * * * a memorandum of the items of his costs and necessary disbursements in the action or proceeding," etc., where a judgment was rendered for defendant on October 5th, his attorney having actual notice at the time, though no written notice was served on him, and he failed to file his memorandum of costs until the 11th of the same month, such filing was too late, and he was not entitled to costs.

2. An affidavit by the attorney does not show "excusable neglect," under Code Civil Proc. Cal. § 473, when it sets out that he had notice of the judgment on October 5th, but was too busy to make the memorandum; that the 6th was Sunday; that the 7th he was unable to obtain the items; that on the 8th he partly prepared it, and then forgot about it until the 11th, when it came to his attention, and he immediately prepared, served, and filed the same.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by H. G. Dow against A. L. Ross. Order striking out defendant's costs, from which he appeals. Affirmed.

Sprigg & Barber, for appellant. *A. E. Cochran*, for respondent.

BELCHER, C. The judgment in this case was that the plaintiff take nothing, and that defendant recover his costs, "adjusted at the sum of \$50.50." The findings on which the judgment was based were filed October 5, 1889. Six days later, on Octo-

ber 11th, one of the attorneys for defendant prepared, verified, served, and filed a memorandum of defendant's costs, and the amount thereof was afterwards inserted by the clerk in a blank left in the judgment for the purpose. In due time thereafter the plaintiff moved the court to strike out the costs from the judgment, on the ground that the memorandum was not served and filed in time, and hence the insertion thereof in the judgment was inadvertently and illegally made. The court granted the motion, and from that order this appeal is prosecuted. The Code provides: "The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk and serve upon the adverse party, within five days after the verdict or notice of the decision of the court, * * * a memorandum of the items of his costs and necessary disbursements in the action or proceeding," etc. Section 1033, Code Civil Proc. It is claimed for appellant that his memorandum was filed in time, because—*First*, he had received no written notice of the decision of the court, and hence the five-days limitation had not commenced to run; and, *second*, his delay was excusable, under the circumstances shown.

It is a settled rule in this state that, if a party entitled to costs neglects to serve and file his memorandum thereof till more than five days have elapsed after he has knowledge of the decision of the court, though no notice of it has been served upon him, the filing will be too late, and the costs will be stricken out on motion. *O'Neil v. Donahue*, 57 Cal. 226; *Mullally v. Society*, 69 Cal. 559, 11 Pac. Rep. 215. Here it appears from the affidavit of the attorney who served and filed the memorandum that he had actual knowledge of the decision on the day the findings were filed. The case in this respect is therefore brought clearly within the rule above stated. As an excuse for the delay, the attorney states in his affidavit that during the remainder of October 5th he was extremely busy in preparing, serving, and filing papers in another case, and attending to other pressing engagements; that on October 6th he attended to no business, as it was Sunday; that on October 7th he attempted to prepare the bill of costs, and intended to immediately serve and file the same, but was unable to obtain all the items; that on October 8th he prepared a bill of costs, so far as he was able, and laid the same on his desk, in order that it might not escape his attention; that, "in press of business, and some confusion consequent thereon, said bill of costs became covered over with papers in other cases, and neither that nor the subject of said costs again came to affiant's mind until about three or four o'clock in the afternoon of October 11th, when the matter of said costs was brought to his attention by something said as to costs by an attorney in argument, that being motion day, during which affiant was engaged in court; affiant at once examined the Code, got excused from court, consulted defendant, prepared a new bill of costs on another blank, so far as he could, and immediately served and filed the same, with the

admission of service by plaintiff's attorney; * * * that owing to said stress of work, and the constant calls made upon his time during said week, affiant could not give said matter of costs the attention required under the circumstances to insure against errors and lapse of memory. Wherefore affiant prays for an order relieving defendant from said mistake, inadvertence, and neglect, and that said judgment may stand as entered." Conceding, without deciding, that, under the provisions of section 473 of the Code of Civil Procedure, relief in a matter of this kind might be granted by the court upon a proper showing, still we are satisfied that the showing here made was altogether insufficient to authorize the relief asked for. It results, in our opinion, that the order appealed from was proper, and should be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(3 Cal. Unrep. 424)

LORD v. THOMAS. (No. 14,336.)

(Supreme Court of California. Aug. 1, 1891.)

SUPERIOR COURT — JURISDICTION — SEPARATE CAUSES OF ACTION.

In an action by a landlord against his tenant for \$183 rent due under a lease, and, as a second cause of action, for the restitution of the same premises, which were alleged to have been unlawfully detained after the expiration of a subsequent lease thereof, with damages for such unlawful detention, judgment was rendered for the rent demanded, (\$183), but restitution of the premises was denied. *Held*, that the superior court had jurisdiction to render the judgment in question, though it was for less than the jurisdictional amount (\$300) of such court, since the relief demanded in prayer of judgment was within the jurisdiction of the court. Following *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. Rep. 349.

Department 2. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

Action by William J. Lord against Stephen Thomas for unlawful detainer and for rent. Judgment was rendered for plaintiff for \$183, but restitution of the premises was denied. Defendant appeals. Affirmed.

The complaint alleged for a first cause of action that "on or about the 11th day of May, 1887, plaintiff's predecessor of the lands and premises hereinafter described had leased, demised, and let the same unto said defendant at the monthly rental of \$9 per month, for each and every month, to be paid monthly; under which lease said defendant was holding said premises when this plaintiff became the owner of and seised in fee of the same on the 28th day of April, 1888, when said lease, by the mutual consent of plaintiff and defendant, was continued from month to month at the said rental up to the 20th day of January, A. D. 1890. That there is now due plaintiff from defendant, on account of said lease, the sum of one hundred and eighty-three dollars. That defendant has not paid the same. That the land and premises herein referred to are situate in

the county of Stanislaus, state of California, and described as follows, to-wit: Commencing at the N. W. corner of the N. E. quarter of sec. No. 33, T. No. 3 S., R. No. 10 E., Mt. D. M; thence east 417½ feet; thence at right angles south 208½ feet; thence at right angles west 417½ feet; thence at right angles north 208½ feet, to place of beginning,—containing two acres of land." For another and separate cause of action against defendant, and in favor of plaintiff, the complaint alleged that "on or about the 20th day of January, A. D. 1890, the said plaintiff, by written lease made on or about the said day at the said county of Stanislaus, leased, demised, and let to the said Stephen Thomas, of the said county of Stanislaus, the premises situate, lying, and being in the said county of Stanislaus, state of California, and described as follows, to-wit: Commencing at the N. W. corner of the N. E. quarter of section No. 33, township No. 3 south, range No. 10 east, Mt. D. M; thence east 417½ feet; thence at right angles south 208½ feet; thence at right angles west 417½ feet; thence at right angles north 208½ feet, to place of beginning,—containing two acres of land. To have and to hold the said premises to the defendant for the term of three months from the 20th day of January, A. D. 1890, at the monthly rent of ten dollars, payable in equal monthly installments in advance. That by virtue of said lease said defendant Stephen Thomas went into possession of said premises, and still continues to hold and occupy the same. That the term for which said premises were demised as aforesaid terminated on the 20th day of April, 1890, and that the said defendant holds over and continues in possession of said demised premises without the permission of the said plaintiff, and contrary to the terms of said lease. That the said plaintiff since the expiration of the term for which said premises were demised, to-wit, on the 22d day of April, 1890, made demand in writing of the said defendant to deliver up and surrender to him or his agent, Joseph Lord, the possession of said premises. That more than thirty days have elapsed since the making of said demand, and the defendant has refused and neglected for the period of thirty days after said demand to quit the possession of said demanded premises, and still does refuse. That the monthly value of the rents and profits of the said premises is the sum of ten dollars." The prayer of the complaint was as follows: "Wherefore the said plaintiff prays judgment for the sum of \$183 for the restitution of said premises, and for damages for the rents and profits of said premises, and that such damages may be trebled as damages for the occupation and unlawful detention and holding over of the same, amounting to the sum of ten dollars per month, besides costs of suit." Judgment by default for the relief asked was set aside on defendant's motion, with leave to defendant to file an answer, and, after trial by the court, judgment was rendered as above stated.

P. J. Hazen, for appellant. T. A. Caldwell and Stonesifer & Minor, for respondent.

PER CURIAM. This case cannot be distinguished in principle from that of *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. Rep. 349, and on the authority of that case the judgment must be affirmed.

(90 Cal. 559)

CARUTHERS v. HENSLEY et al. (No. 14,176.)

(*Supreme Court of California.* Aug. 25, 1891.)

APPEAL ON JUDGMENT ROLL—PRESUMPTIONS—REPLEVIN.

Code Civil Proc. Cal. § 667, authorizes the jury in an action for the recovery of specific personal property, in case the verdict is for plaintiff, to find the value, "if the property has not been delivered to plaintiff;" and section 667 authorizes a judgment for possession, "or the value thereof in case a delivery cannot be had." *Held* that, when the jury find that plaintiff is entitled to possession, they are not required to find the value of the property if it has been delivered to him; and on appeal from a judgment "that the plaintiff have and recover from the defendant the said property, and the sum of \$280 damages for the detention thereof," where the appeal is on the judgment roll alone, it will be presumed that it appeared at the trial that plaintiff had already obtained possession.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action for the recovery of personal property by Caruthers against Hensley and others. Judgment for plaintiff. Defendant appeals. Affirmed.

Church & Cory and H. H. Welsh, for appellants. *P. Meux*, for respondent.

HARRISON, J. This action, for the recovery of certain personal property, was tried by a jury, which rendered a verdict in favor of the plaintiff for the possession of a portion of the property sued for, and assessed the damages for the detention thereof. Judgment "that the plaintiff have and recover from the defendants the said property, and the sum of \$280 damages for the detention thereof," was thereupon entered by the court. From this judgment the defendants have appealed upon the judgment roll alone, and ask a reversal upon the sole ground that the judgment is not in the alternative, as required by section 667, Code Civil Proc. When an appeal to this court is to be determined upon the judgment roll alone, all intendment will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken. If the error relied on to destroy such presumption consists in matters *dehors* the record, such matters must be brought to this court by bill of exceptions or other appropriate method. If any matters could have been presented to the court below which would have authorized the entry of this judgment, it will be presumed on this appeal, in support of the judgment, that such matters were so presented, and that the judgment was entered in accordance therewith. Section 627, Code Civil Proc., authorizes the jury in an action for the recovery of specific personal property, in case their verdict is in favor of the plaintiff, to find the value of the property, "if the property has not been delivered to the plaintiff;" and section 667, Code Civil

Proc., authorizes a judgment for the plaintiff for the possession, "or the value thereof in case a delivery cannot be had." When the jury find that the plaintiff is entitled to the possession, they are not required to find the value of the property, if it has been delivered to the plaintiff, and, unless the value has been found, there is no basis upon which to render the alternative judgment for its value. For the purpose, therefore, of sustaining a judgment entered in favor of the plaintiff for the possession of personal property, without the alternative for its value "in case delivery cannot be had," it can be presumed, in the absence of any bill of exceptions or other showing of error, that it appeared at the trial that the plaintiff had already obtained the possession of the property sued for. In *Brown v. Johnson*, 45 Cal. 78, judgment was rendered in favor of the plaintiff for the value of the property, and damages for the wrongful taking, but without any judgment for its return. Upon an appeal by the defendant on the judgment roll alone, upon the ground that the judgment was not in the alternative, the court said: "If, at the trial of this action, it had distinctly appeared that the personal property in controversy had been hopelessly lost or had been destroyed, so that a judgment for its delivery would be necessarily unavailing, a failure to render judgment for its possession would, at most, be but a technical error or omission, and one for which we would not reverse the judgment; and in support of such judgment, where, as here, the record discloses nothing on the point, we will intend that the facts actually appearing below were such as to warrant its rendition." In *Claudius v. Aguirre*, (Cal.) 26 Pac. Rep. 1077, it was held that when it appeared, by the findings of the court, that the property had been delivered to the plaintiff prior to the trial of the cause, a judgment for the possession, without the alternative for its value, was not erroneous. Applying the principles of these cases to the present case, as the record shows nothing to the contrary, we will intend, for the purpose of supporting the judgment, that at the trial it was shown to the court below that after the commencement of the action the plaintiff had obtained the possession of the property awarded to her by the judgment. The judgment is affirmed.

We concur: **McFARLAND, J.; DE HAVEN, J.**

(90 Cal. 553)

Ex parte CLANCY. (No. 20,873.)

(*Supreme Court of California.* Aug. 23, 1891.)

CONTEMPT—RIGHT OF APPEAL—APPEAL-BOND—INSOLVENCY.

1. Code Civil Proc. Cal. § 943, provides that, when an order appealed from directs the delivery of personal property, the order cannot be stayed by appeal, unless the thing required to be delivered be placed in the custody of the officer, or unless an undertaking be entered into on the part of appellant, with at least two sureties, and in such amount as the court may direct, to the effect that appellant will obey the order of the appellate court. *Held* that, where one appealed from an order adjudging him guilty of contempt for dis-

obeying an order to turn over to his receiver in insolvency proceedings property value at \$4,000, a bond to the effect that he would pay all damages on appeal or dismissal thereof, not exceeding \$300, will not stay the order of commitment.

2. Insolvent Act Cal. § 64, which provides that an appeal shall be allowed from any order adjudging a person guilty of contempt, being in conflict with Code Civil Proc. Cal. § 1222, which provides that all orders and judgments of the court or judge made in cases of contempt are final and conclusive, the Code must prevail, as a contrary construction would prevent the uniform operation of a general law, contrary to Const. Cal. art. 1, § 11.

In bank. Petition for a writ of *habeas corpus*. Writ denied, and petitioner remanded.

A. D. Splivalo and E. N. Duprey, for petitioner.

SHARPSTEIN, J. The petitioner alleges that he is imprisoned by the sheriff of San Francisco, and that such imprisonment is illegal, for the following reasons: On the 2d day of July, 1891, petitioner, upon the petition of certain of his creditors, was adjudged by the superior court of the city and county of San Francisco an insolvent debtor, and ordered to file and did file his schedules in said matter of insolvency. On the 16th day of July, 1891, petitioner, in compliance with an order of said court, appeared therein, and was examined concerning his property and estate, and thereupon said court ordered petitioner to turn over or pay to the receiver in said insolvency proceeding \$4,000 in assets, to-wit, goods, wares, and merchandise, or its avails. Petitioner did not comply with that order, and was by the court adjudged guilty of a contempt of court for not complying therewith, and committed to the custody of the sheriff, there to remain until he (petitioner) should comply with said order. Petitioner, on the 25th day of July, 1891, duly served and filed a notice of appeal to this court from said order adjudging him guilty of contempt, and within five days thereafter filed an undertaking on appeal with sufficient sureties, to the effect that appellant would pay all damages and costs that might be awarded against him on the appeal, or on the dismissal thereof, not exceeding \$300. No other undertaking has been filed, and the sheriff refuses to release petitioner from imprisonment. The contention of counsel for petitioner is that the appeal from the order adjudging him guilty of a contempt stayed all further proceedings upon said order pending such appeal. Section 64 of the insolvent act of 1880 provides that "all sections of the Code of Civil Procedure of the state of California, relating to contempts, are hereby made applicable to all proceedings under this act. An appeal shall be allowed to the supreme court from any order adjudging any person guilty of a contempt of court." The Code of Civil Procedure makes no provision for an appeal from an order or judgment adjudging any person guilty of a contempt, but does provide that "the judgment and orders of a court or judge, made in cases of contempt, are final and conclusive." Code Civil Proc. § 1222.

Conceding, however, that an appeal does lie from an order or judgment in a case of contempt arising under the insolvent act, we must determine whether the undertaking, on appeal in this case, was sufficient to stay the execution of the judgment or order appealed from. If it be a case not provided for in sections 942-945, Code Civil Proc., the undertaking filed is sufficient to stay execution of the judgment or order appealed from. But we think it is a case provided for by section 943. As we construe it, the judgment or order appealed from does direct the delivery of personal property, by the petitioner to the receiver, and that the execution of such "judgment or order cannot be stayed unless the things required to be delivered be placed in the custody of the officer or receiver appointed by the court, or an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court or judge thereof may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal." We think the undertaking filed in this case was insufficient to stay the execution of the judgment or order appealed from, and therefore the petitioner must be remanded to the custody of the sheriff of the city and county of San Francisco. Petitioner remanded.

McFARLAND, J. I concur.

HARRISON, J. I concur in the judgment. The petitioner, by not questioning, concedes that the order of the superior court directing him to "turn over or pay to the receiver, at its cost, \$4,000 in assets, goods, wares, or merchandise, or its avails," found by the court to have been in his possession or under his control at the date of his adjudication in insolvency, was an order which the court had jurisdiction to make, and that it was made after a hearing upon due notice to him thereof, and on an application therefor. His only attack upon this order is that the finding of the court was not in accordance with the evidence. This, however, was but error, and, no appeal having been taken from the order, it is conclusive upon the petitioner. Being a lawful order of the court, the disobedience thereof by the petitioner was a contempt of the authority of the court, (Code Civil Proc. § 1209, subd. 5;) and the court having, under proper proceedings therefor, determined that he was guilty of the contempt charged, was authorized, under section 1219, to direct him to be imprisoned until he complied with the order. This judgment and order of the court was by section 1222 "final and conclusive," and from it no appeal is permitted. *Tyler v. Connolly*, 65 Cal. 28; ¹ *Ex parte Vance*, (Cal.) 26 Pac. Rep. 118. By the constitution the superior court is vested with original jurisdiction of proceedings in insolvency, but in all matters pertaining to procedure in the exercise of such jurisdiction the court is governed by statutory provisions. The court does not, however, in the exercise of this

jurisdiction, become merely a special tribunal for carrying into effect the provisions of the statute, but the proceedings authorized by the statute are taken in it as the superior court, and when acting thereon it has the functions and powers of the superior court in all matters pertaining to its actions as a court. As such court, it has the power to determine and punish all contempts of its authority, even without the provisions found in the insolvent act giving it such authority. "Contempt" is not only made a special title in the Code of Civil Procedure, wherein specific instances thereof are enumerated, and the mode and limit of punishment therefor are defined, (sections 1209-1222;) but the right of protecting itself against contempts of its authority, and enforcing punishment therefor, is essentially inherent in every court of general jurisdiction; and any definition of acts constituting contempt, or limitation upon the mode or extent of punishment therefor, has its appropriate place in a statute relating to the jurisdiction and procedure of the court. The insolvent act is a special statute adopted for a particular object. Its title is "an act for the relief of insolvent debtors, for the protection of creditors, and for the punishment of fraudulent debtors." It does not purport to prescribe the jurisdiction or limit the power of the superior court, but is merely a system of procedure in that court for accomplishing the objects specified in the title of the act. The incorporation in section 64 of this act of certain provisions concerning the power of the superior court relating to contempts, cannot be construed as any limitation upon the power conferred by the Code of Civil Procedure, or as being a grant of such power to the court for the purpose of exercising its authority under that act. If there be any conflict between the two, the provisions of the Code of Civil Procedure, which professes to define the powers of courts, and the effect of their judgments for contempt, must prevail over the provisions of the insolvent act, and the provisions of that act must be limited to the purposes defined in its title. The contempt consists in the disobedience of a lawful order of the court. It is the dignity of the court, or the majesty of the state as represented by the court, against which the offense is committed. The character of the offense is the same whether it be committed by disobeying an order made in proceedings in insolvency, or one made in probate, or in any civil action. Any law for the punishment of this offense is necessarily of a general nature, and must have a uniform operation. It was not competent for the legislature to provide a different procedure for contempts of the superior court committed while in the exercise of its jurisdiction in proceedings for insolvency from that which is provided for those committed while it is exercising its jurisdiction in any other matter. The clause of section 64 of the insolvent act, which provides, "An appeal shall be allowed to the supreme court from any order adjudging any person guilty of contempt," is in conflict with the provisions of section 1222, Code Civil Proc., which

declares: "The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." To give effect to this provision of the insolvent act is to permit an appeal from judgments of contempt in one class of cases, which, under the general law applicable to contempts, is denied to all other judgments for the same offense. Such construction would except cases arising in insolvency from the uniform operation of this general law, and thereby destroy its uniformity, and violate the provisions of section 11, art. 1, of the constitution. *French v. Tschemaker*, 24 Cal. 544; *Railroad Co. v. Baldwin*, 57 Cal. 160; *Miller v. Klister*, 68 Cal. 142, 8 Pac. Rep. 813; *People v. Henshaw*, 76 Cal. 445, 18 Pac. Rep. 413.

DE HAVEN, J. I concur in the views expressed in the foregoing opinion of Mr. Justice HARRISON.

BEATTY, C. J. I concur in the judgment on both grounds,—that stated by Justice SHARPSTEIN and that stated by Justice HARRISON,—both grounds being, in my opinion, correct, and either a sufficient reason for denying the writ.

(3 Idaho [Habb.] 99)

GOLD HUNTER MINING & SMELTING CO. v. HOLLEMAN, Judge.

(Supreme Court of Idaho. Aug. 31, 1891.)

WRIT OF REVIEW — RIGHTS OF INTERVENOR — APPOINTMENT OF RECEIVER.

Held:

1. That, to entitle a petitioner to writ of review, he must be a party to the suit or matter in controversy.

2. That an intervenor is a party to a suit, and his substantial rights are as sacred as the original parties', and entitled to the same protection.

3. That an intervenor is entitled to a writ of review, equally with the original parties to the suit.

4. A receiver cannot be appointed prior to the commencement of an action.

5. An action is not commenced until a complaint is placed in the hands of the clerk or deposited in his office, with directions to file the same.

6. An action is not pending until it is commenced.

(Syllabus by the Court.)

Application for writ of review to the first judicial district court; JUNIUS HOLLEMAN, Judge.

Woods & Heyburn, for petitioner. *McBride & Allen, Albert Hagan*, and *Charles O'Neil*, for defendant.

MORGAN, J. The record in this case shows that on the 18th day of December, 1890, the complaint of the Spokane National Bank, plaintiff, v. Charles Hussey and David T. Ham, defendants, was presented to the Honorable JUNIUS HOLLEMAN, judge of the district court of the first judicial district of this state, in an action then about to be commenced, for the foreclosure of a mortgage, given by the defendant Charles Hussey to the plaintiff, the Spokane National Bank, upon certain mining property, therein described as three mining claims, a concentrator, and mill-site, together with all water-ditches, flumes, and a quantity of personal property used

in connection with said real estate; that on said date the said judge made an order appointing Peter Porter a receiver, in said action, of said mining claims and other property, with directions to said receiver to take possession of said property, providing also in said order that the same should take effect upon the receiver filing his bond, and the filing the complaint in the action. On the same day the judge of said court appointed the said Porter receiver of certain other property of the defendant Charles Hussey, in the suit of McNab & Livers against Charles Hussey and the Bank of Murray. On the 19th day of December, 1890, the complaint in the case of the Spokane National Bank v. Charles Hussey and David T. Ham, and of McNab & Livers v. Hussey and the Bank of Murray, placed on file with the clerk of said court, and, upon filing bond, the receiver took possession of the property of the said Hussey, and, as directed, proceeded to work the mines. On the 28th day of February, 1891, the Gold Hunter Mining & Smelting Company filed its petition in intervention in the suit of the Spokane National Bank v. Hussey and David T. Ham, was permitted to intervene, and thereby became a party thereto. Upon the return-day W. B. Heyburn appeared for the petitioner, and Messrs. McBride & Allen, Albert Hagan, and Charles O'Neil for the respondent. On the 6th day of May, 1891, the plaintiff herein filed his petition in this court against said district court for writ of review, alleging, among others, the above facts. The writ, being issued, was made returnable June 17, 1891. Respondents jointly filed their motion to quash the writ of review, on the grounds (1) that the petition does not state facts sufficient to constitute a cause of action; (2) that petitioner is not a party beneficially interested; (3) petitioner is not a party to the suit of McNab & Livers v. Charles Hussey and Bank of Murray, and demurs upon the same grounds. The demurrer, motion to quash, and the main question arising upon the return of the writ were heard together by direction of the court. The court has arrived at the following conclusions: That the petition does state facts sufficient to constitute a cause of action; that the plaintiff herein, not being a party to the suit of McNab & Livers v. Hussey and the Bank of Murray, has not the right to ask review of any matters occurring in said cause, and as to said cause the writ is dismissed; that, having been allowed to intervene in the suit of the Spokane National Bank v. Hussey et al., it becomes a party thereto, and its rights are as comprehensive as the rights of the original parties to the suit, so far as any action of the court interferes with its substantial rights, (see section 4111, Rev. St. Idaho; Lacroix v. Menard, 15 Amer. Dec. 161); that plaintiff herein is authorized to bring this writ. The main question, then, is, did the judge of the district court, by his action on the 18th day of December, 1890, exceed his jurisdiction? Section 4329, Rev. St., authorized a receiver to be appointed in certain cases, when an action is pending or has passed to judgment. An action cannot be pend-

ing until it has been commenced. Civil actions in the courts are commenced by filing a complaint. Rev. St. § 4138. Section 4068, Rev. St., is as follows: An action is commenced when the complaint is filed. Section 4139 provides that the clerk must indorse on the complaint the day, month, and year that it is filed. The complaint cannot be said to be filed until it is placed in the hands of the clerk, or in his office, for the purpose of receiving the above indorsement. It then becomes the duty of the clerk to make said indorsement thereon. The action is then commenced, is then pending, and the court or judge, as the case may be, then has jurisdiction of the subject-matter, and may deal therewith according to law. The appointment of the receiver on the 18th day of December, 1890, in the case of Spokane National Bank v. Hussey and Ham, was not within the power of the court, and was therefore void, because there was no suit then pending. Bank v. Kent, 43 Mich. 296, 5 N. W. Rep. 627; Jones v. Schall, 45 Mich. 379, 8 N. W. Rep. 68. We are not permitted to take into consideration the advantages or disadvantages of a discharge of the receiver, or of prosecuting the work upon the mines in question.

SULLIVAN, C. J., and HUSTON, J., concur.

(6 N.M. 87)

TERRITORY V. LAS VEGAS GRANT.

(Supreme Court of New Mexico. Aug. 7, 1891.)

APPEALABLE ORDERS — VACATING DEFAULT JUDGMENT.

An order of the district court setting aside a judgment by default, and allowing defendants to plead, is within the discretion of the court below, and is not reviewable by the supreme court while the suit is still pending there.

Error to district court, San Miguel county; J. O'BRIEN, Judge.

Action by the territory of New Mexico against the unknown owners of the Las Vegas grant. Order vacating a default judgment against defendants. Plaintiff brings error. Writ of error dismissed.

M. Salazar, Sol. Gen., for the Territory.

LEE, J. This is an action on the part of the territory of New Mexico by Miguel Salazar, district attorney for the counties of Mora and San Miguel, against the unknown owners of the Las Vegas grant, in an action of debt, in which a judgment was rendered by default against the defendants in the sum of \$16,242.88, which judgment by default was subsequently, at the same term, vacated and set aside by said district court, and said cause opened up for further proceedings therein. The plaintiff excepted to the ruling of the court thereon, and brings the case by appeal from the order of the court setting aside said default, and vacating said judgment, to be reviewed by this court.

An order of the district court setting aside a judgment rendered on a default, and allowing the defendants to plead to the declaration of the plaintiffs, is a matter within the discretion of the court below, and is not such an order as may be reviewed by the supreme court while the

suit is still pending in the district court. *McCulloch v. Dodge*, 8 Kan. 478. So far as appears from the record, this case is still pending in the district court, and has not reached such final judgment or decision as may be reviewed in this court. The writ of error will have to be dismissed, and it is so ordered.

FREEMAN, McFIE, and SEEDS, JJ., concur.

(6 N. M. 222)

McGARVEY v. FORD.

(*Supreme Court of New Mexico. Aug. 19, 1891.*)

CONTINUANCE—RECORD—REFRESHING MEMORY—EVIDENCE—PRESUMPTION.

1. On appeal from an order refusing a continuance, when the affidavits on which the request was based are not in the record, it will be presumed that there was sufficient reason for refusing it.

2. In an action for a balance due from a contractor to a subcontractor, the latter, as a witness, consulted a copy of an original memorandum to refresh his memory as to the amount due. No effort was made to show that the paper was not a copy of the original, nor was there any dispute as to the amount due, but simply whether defendant was liable on an order given by plaintiff to a third party. *Held*, that defendant was not entitled to cross-examine as to the memorandum.

3. In an action by a subcontractor to recover a balance from the head contractor, it appeared that they had agreed that nothing should be paid on the subestimates until the contractor was paid on the regular estimates. The parties had attempted to settle before suit, and it appeared that the only dispute was as to the contractor's liability on an order given by the subcontractor to a third party, the contractor admitting that the money was due the subcontractor, and never claiming that he himself had not been paid on the regular estimates. Theretofore these estimates had been regularly paid. There was some evidence that the contractor had not fulfilled his contract with his employer. *Held*, that it must be presumed either that he had been paid, or had lost the right to payment by his own fault, and in either case his liability to the subcontractor had accrued.

Error to district court, San Miguel county; **JAMES O'BRIEN, Judge.**

Action in *assumpsit* by attachment by Charles McGarvey against Patrick P. Ford. Judgment for plaintiff. Defendant brings error. Affirmed.

J. D. O'Bryan, for appellant. **Thomas B. Catton**, for appellee.

SEEDS, J. This is an action in *assumpsit* by attachment, wherein the plaintiff seeks to recover, as a subcontractor, from the defendant the sum of about \$4,000. The defendant, Ford, had contracted with the Springer Land Association to do the excavating and banking upon a ditch being built through the Maxwell land grant. He sublet parts of this work, and the plaintiff became one of the subcontractors. He performed his work in a satisfactory manner, and was paid in accordance with his contract, except for the last part of the work finished May 28 or 29, 1889. Not being able to settle amicably for this, he sued Ford. There was a trial to a jury, and evidence was introduced upon both sides. After the defendant had closed his testimony, the judge instructed the jury to find a verdict for the plaintiff, which

was done. Thereupon the defendant perfected his appeal to this court. There are four questions material to be considered, arising under the assignment of errors. They are: (1) Did the judge abuse his discretion in refusing the defendant a continuance? (2) Was it error to refuse the defendant the privilege of cross-examining the plaintiff upon a paper with which he refreshed his memory? (3) Did the judge place the wrong construction upon the contract between the plaintiff and the defendant? (4) Was a portion of the instruction of the court to the jury incorrect?

1. As to this point, it is only necessary to say that by some mistake the alleged affidavits upon which the request for the continuance is based are not in the record. The presumption is that the court found that there was sufficient reason for refusing the continuance.

2. The plaintiff was asked the exact amount due him from the defendant, and, being unable to state, refreshed his memory by consulting a memorandum, which he testified was a copy of an original paper. Upon cross-examination, the defendant sought to question him regarding the paper. It was objected to, and the court sustained the objection. There was no offer or intimation to show that the paper was not a copy of the original. The ground of complaint is simply that the defendant had the right to cross-examine as to the paper used. We think that this memorandum plainly comes under the first class as laid down in *Mr. Greenleaf's* classification, and is not of right a subject of cross-examination. 1 *Greenl. Ev.* § 437. Then, too, the evidence showed that there was no dispute about the amount actually due under the contract, but simply a disagreement as to whether Ford was liable for a sum due to a third party to whom McGarvey had given an order upon Ford. The memorandum was used specifically to refresh his memory as to the amount due under the contract.

3. The contract between the parties, under which the work was done, contained this stipulation: "It is mutually agreed that the amounts of these subestimates will in no case be demanded or paid in the advance of the payments of the regular estimates." Ford was to be paid, upon the general estimates, on or before the 10th of each month. The defendant contends that the part of the contract above quoted is a condition precedent; that under it Ford must first be paid by the land company before McGarvey can demand his pay; and that he (the plaintiff) must allege and prove that Ford has been so paid. Conceding that this is a condition precedent, and yet it does not necessarily follow that the position taken by the defendant is correct, under the evidence in this case. Such conditions are made in contracts to protect rights, and to effectuate fair dealing and honesty, not to be made the means of defrauding men of their just dues. The evidence showed that the parties attempted to settle before suit was instituted. Ford admitted that the work was done satisfactorily, and that the money—less \$380—was due. The only

difference between them was as to the \$380. He at no time objected to paying McGarvey, because he had not as yet been paid for the estimate due him June 10th. On the other hand, he admitted that the money was due McGarvey. Now, legally, under his contention, the money was not due McGarvey until the land company had paid him. Thus it must be assumed from the testimony either that he had been paid in accordance with the contract with the land company, or that he had failed to comply with the terms of that contract by which he was entitled to his pay. If the last alternative be true, then, surely, he cannot set up his own wrong to defeat an innocent man out of his rights. It is true that this evidence was given by the plaintiff, but he was nowhere contradicted, and it is presumed to be true. If it was not a fact, Ford well knew it, and should have been present to deny it. There was some evidence drawn from the defendant's own witness going to show that he had failed to perform his part of the contract in accordance with its terms. If that be so, then he cannot predicate his refusal to pay this plaintiff upon his own wrong. The courts and the law were not brought into being for the purpose of aiding parties under such circumstances. It would be a sad commentary upon the justice of the law if, in such a contract as this, the obligor could say, as Ford undertakes to do here: "I was not to pay you until I received my pay. I have not performed my contract so as to entitle me to any pay, and therefore you must suffer for my wrong." The days for such vicarious offerings have, we trust, gone by. *Blair v. Corby*, 29 Mo. 480; *Craemer v. Wood*, 102 Mass. 441. "One who prevents the performance of a condition, or makes it impossible by his own act, cannot take advantage of his non-performance." *Navigation Co. v. Wilcox*, 7 Jones, (N. C.) 481; *Camp v. Barker*, 21 Vt. 469.

It is further urged, however, that the plaintiff was bound to allege and prove the fulfillment of the condition precedent. The plaintiff made the allegation. Did he prove it? The amount of proof which fairly sustains a proposition depends to a great extent upon the evidence against it. There was no evidence whatever that Ford had not been paid, while there was the evidence that at all times previously he had been promptly paid; that he had not claimed at any time to McGarvey that he had not been paid; that he acknowledged that the money was due the plaintiff. All this, however slight, raised a presumption, in the absence of any opposing evidence, that the defendant had been paid, and fully justified the trial judge in instructing the jury to find a verdict for the plaintiff.

4. The remaining contention is that the court erred in the part of the instruction which it gave the jury, in which it said: "There is a legal presumption that the company paid Mr. Ford the amounts due him at the time stated in the written contract, and there has been no evidence here to show that they have failed in performing that obligation." Appellant insists that this, in substance, told the jury that,

though the plaintiff was bound to allege the fact of payment at the time set out in the contract, still it was proven by a legal presumption, unless the defendant negatived it by affirmative evidence. But this criticism is not substantial for these reasons: *First*. It assumes that the charge was given with no reference to the evidence in the case; that assumption cannot be allowed for a moment. *Second*. Assuming, as we must, that the charge was given with reference to the evidence before the jury, it has been shown that there was some evidence on the question, and none against it; hence the instruction was correct. The legal presumption referred to by the judge in his charge undoubtedly had reference to the presumption raised by the negative evidence. Finding no error in the record, the judgment of the lower court will have to be affirmed.

FREEMAN, LEE, and McFIE, JJ., concur.
O'BRIEN, C. J., did not sit in this case.

(6 N. M. 80)

SLOAN *et al.* v. TERRITORY *ex rel.* READ.

(Supreme Court of New Mexico, Aug. 4, 1891.)

ELECTIONS—MANDAMUS TO CANVASSERS—CERTIFICATE TO POLL-BOOKS—PRESUMPTIONS ON APPEAL.

The board of canvassers refused to count the vote of a certain precinct because there was no certificate to the poll-book, it having been purloined. Thereupon a candidate presented to them a certificate in the exact form of an original, but they refused to recognize it. In a proceeding in *mandamus* to compel them to accept it, and count the vote, this certificate was admitted in evidence over the objection that it was not the original, and was not authenticated as required by Comp. Laws N. M. § 1196. This section requires the judges to "certify the poll-books," to have a copy of the certificate entered in the poll-books, which shall then be signed by themselves and the clerks, and transmitted to the justice of the peace of the precinct, and also to give authenticated copies of the certificate to interested parties applying for them. *Held*, that on appeal, where the transcript did not embody all the evidence, it would be presumed that the court found the certificate to be either a duplicate original, or the copy required to be transmitted to the justice, and hence that it was properly admitted.

Error to district court, Santa Fe county; E. P. SEEDS, Judge.

Petition by Benjamin M. Read for a writ of *mandamus* against John H. Sloan, George L. Wyllys, and Theodore Martinez, constituting the board of county commissioners of Santa Fe county. Judgment for the relator. Defendants bring error. Affirmed.

Francis Downs and N. B. Laughlin, for plaintiffs in error. E. L. Bartlett and J. H. Knaebel, for defendant in error.

O'BRIEN, C. J. On the petition of defendant in error, the judge of the district court of Santa Fe county issued, on the 12th of November, 1890, an alternative writ of *mandamus*, directed to the plaintiffs in error, as the canvassing board of said county, requiring them, among other things, to count and canvass an election certificate from precinct No. 8, or to appear before the court and produce such

returns, and all papers in their custody purporting to be such returns. It further recites that the original returns, including the poll-books, ballot-box, and certificate from precinct No. 8, had been purloined or taken away, and were not before the board when in session to canvass the returns from the county. It then proceeds to direct the board to canvass, as a return from said precinct, a certificate signed by the judges and clerks of election at said precinct, in compliance with the provisions of section 1196, Comp. Laws 1884. Thereafter plaintiffs in error appeared and filed an answer to the writ. The portions thereof pertinent to the returns from the precinct in question are briefly as follows: That they did not know whether an election had been held in said precinct at the general election in November or not; that they had met at the county-seat, as required by law, on November 10, 1890, to canvass all election returns regularly before them; that they had instructed their clerk to have such returns for their official action at such time and place; that the latter had reported to them that he had not in his possession and was unable to find any ballot-box, poll-books, or returns from precinct No. 8; that no such returns from the precinct for the election held on November 4, 1890, had been made to them or to their clerk; and they deny that the same had been taken or purloined from them while sitting as a board of county canvassers. They then allege that on the 11th day of November, 1890, the relator, Benjamin M. Read, filed with their clerk a paper purporting to be a certificate of the result of the election held in precinct No. 8; that such certificate was not, nor was it alleged to be, the original certificate authorized by the provisions of section 1131 of the Compiled Laws, nor was it a copy authenticated in accordance with the requirements of section 1196 of such laws; that, as the same had not been received by or presented to them in the manner prescribed by law, they treated it as a nullity, and declined to accept or canvass the same. On the issues made by the answer to the alternative writ, a trial was had before the court, without a jury, on the 16th day of November, 1890. During the progress of the trial, defendant in error, relator in the court below, offered as evidence, in support of the writ, among other things, the certificate of election from precinct No. 8 hereinbefore referred to; to which offer respondents objected, because such certificate was not the original, and because it was not authenticated as required by sections 1196 and 1197 of the Compiled Laws. The objection was not sustained, the instrument was admitted, and the court, upon hearing the proofs, adjudged that the writ be made peremptory. The cause is here by writ of error, upon a bill of exceptions, for the purpose of having reviewed the ruling of the court admitting the certificate in evidence.

The bill of exceptions does not purport to contain all the evidence received on the trial. On the contrary, it expressly appears that it contains only "all the evidence offered by the plaintiff which was

objected to by the defendants," and the certificate attached to the bill shows that it is only "a true, full, and perfect transcript of such part of the record * * * as said respondent deems necessary for a review of the judgment." We will consider the question presented under two aspects: (1) Did the district court err in admitting as evidence the certificate of election? (2) Is it competent for this court, in view of the character of the record, to modify or reverse the alleged erroneous judgment?

It is admitted that the original certificate, or the one of such originals as should accompany the poll-books, was not before the canvassers, for the reason that it had been purloined. Hence the writ directed the board to proceed with the canvass of the votes from that precinct upon a certificate made in pursuance of the provisions of section 1196, Comp. Laws 1884. That section reads: "The said judges shall close the election at six o'clock in the afternoon, and immediately thereafter shall open the ballot-boxes, and publicly count the votes for each candidate, certifying the poll-books as provided by law: provided, that said judges of election shall order that a copy of the certificate be entered in the poll-books, then to be signed by them and clerks, and transmitted to the justice of the peace of their precinct: provided, further, that the said judges of election be required and obligated to give certified copies to the parties interested that may solicit the same. provided, that these notices shall not exceed four in number." The only grounds upon which the canvassing board objected to the reception of the certificate offered were (1) that it was not the original; (2) that it was not authenticated as required by law. The certificate purported upon its face to be the original, a duplicate thereof, or such copy as is intended by the first proviso of the foregoing section of the statute. We must take notice, from an inspection of the transcript, that the certificate of Clerk Garcia that the instrument offered was a copy of an original in his official custody was not appended thereto when it was offered. The certificate was not made until December 5, and the trial was had November 16, 1890. The certificate of election then did not, when offered, appear to be a copy requiring authentication. The mere charge of such a defect in the language used by the objectors neither made it so, nor was it any evidence that it was such. The genuineness of the signatures thereto was not challenged, and the court may have found upon an examination thereof, or by direct proof, that it was one of the instruments authorized and made competent evidence by sections 1196 and 1197 of the Compiled Laws of the territory. "Hard cases make hard law," and this is peculiarly true in view of the many doubts, difficulties, errors, or frauds incident to popular elections. It appears upon the face of the record that the relator claimed that 150 votes had been cast at the election in precinct No. 8, of which number he had received 104, as a candidate for representative in the general assembly. Are the men who cast these votes to be disfran-

chised on account of the mistakes of public officers or the fraud of unknown parties, who neglected to furnish, concealed, or destroyed the primary evidence of the will of the electors as expressed by their ballots? If negligence, dishonesty, or fraud may thus nullify the right of suffrage, guarantied to the citizen, in one precinct of the county, may not similar agencies be employed with impunity to deprive every elector of the territory of the inestimable right of a "free ballot and an honest count?" It was evidently to meet such cases, and to prevent, as far as practicable, the possibility of such wrongs, that the legislature wisely enacted the various laws providing suitable remedies in case of official negligence, and the substitution and use of copies in case of the loss or destruction of the originals. Hence, it not appearing that any proper objection was raised to the instrument when offered, we cannot say, from an inspection of the bill of exceptions, that any error was committed in receiving it in evidence.

Had we not reached the foregoing conclusion, the judgment would have to be affirmed for other reasons. It is not pretended, as has been already shown, that the record contains all the evidence. In the investigation of a case of this character, it is necessary that the bill of exceptions, to entitle plaintiff in error to a reversal, should show, at least, all the evidence upon which the alleged erroneous judgment is founded. In the absence of such showing, every presumption will be indulged in favor of the validity of the judgment. *Wallace v. Boston*, 10 Mo. 660; *Hamilton v. Moore*, 4 Watts & S. 570; *Pennock v. Dialogue*, 2 Pet. 15. In a case of this kind, wherein the facts and proofs are submitted to the court without a jury, all the evidence ought to be embodied in the record, and, in the absence of such showing in the bill of exceptions, the trial court is entitled to the presumption that other evidence was received of a kind sufficient to warrant the court in admitting the documentary evidence to which objection was made on the trial. This position is rendered the more reasonable because it does not appear from the record that the certificate whose reception is assigned as error was the only evidence received in support of the judgment. *Pullen v. Lane*, 4 Cold. 249; *Insurance Co. v. Holcombe*, 35 Ala. 327; *Ingram v. State*, 7 Mo. 203; *Wolfe v. Hauver*, 1 Gill, 84; *Railway Co. v. Murdock*, 82 Ind. 381.

Admitting that the certificate objected to was incompetent and improperly admitted, such error might or might not be material in the light of other evidence properly received; that is, the materiality of the error must affirmatively appear upon the face of the whole record, before an inference may be drawn that there was no competent evidence received in support of the judgment. In determining the merits of a case of this kind, when two or more inferences are probable or reasonably possible, it is always allowable to adopt the one most favorable to the validity of the judgment assailed, and every reasonable intentment ought to be indulged in its favor, and against the party taking the

exceptions. *Robin v. State*, 40 Ala. 72; *Bingham v. Cabbot*, 3 Dall. 38; *Higgins v. Downs*, 75 Me. 346; *McReynolds v. Jones*, 39 Ala. 101; *Thompson v. Drake*, 32 Ala. 99; *Rogers v. Hall*, 3 Scam. 5. It may not always be necessary to state all the evidence in a bill of exceptions, yet in a case like the one under consideration, wherein the appellate court is called upon to review a ruling admitting evidence against objection, it is essential to set out the evidence involved sufficiently to enable the court of review to determine affirmatively that the evidence received was incompetent, and that such error was incurable. *Hackett v. King*, 8 Allen, 144; *Withington v. Young*, 4 Mo. 564; *Eukman v. Sheaffer*, 48 Pa. St. 176; *King v. Kenny*, 4 Ohio, 79. In other words, it is a settled doctrine that, if a bill of exceptions does not purport to contain all the evidence, the appellate court ought to indulge every reasonable presumption that other evidence was adduced proper to sustain the judgment. *Mitchell v. Byrd*, 7 Ark. 408; *Trustees v. Lefler*, 23 Ill. 90; *Frazier v. Yeatman*, 10 Mo. 501; *Redden v. Covington*, 29 Ind. 118. It follows that the judgment below must be affirmed.

LEE, FREEMAN, and MCFIE, JJ., concur. SEEDS, J., having heard the case below, took no part in this hearing.

PEOPLE V. CLENDENNIN. (No. 20,727.)

(*Supreme Court of California*. Sept. 3, 1891.)

CRIMINAL LAW — INSTRUCTIONS ALREADY GIVEN.

Where a defense of insanity was interposed on a trial for assault with intent to kill, and the court charged that defendant was not responsible unless he was conscious of his act at the time it was committed, it was not error to refuse to charge that, although defendant may have felt an impulse to do the act while conscious, if such consciousness did not exist up to and at the time the act was committed, the jury should acquit.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Indictment of W. S. Clendennin for an assault with intent to commit murder. Verdict of guilty. Defendant appeals. Affirmed.

Alexander Campbell and Hunsaker & Britt, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

TEMPLE, C. The defendant was convicted of an assault with the intent to commit murder, and appeals from the judgment, without a statement or bill of exceptions. He objects to the refusal of the court to give certain instructions. As the evidence is not brought up, it would be enough to say that we cannot see that the instructions refused were applicable to any matter before the jury; but it is not necessary to rest the decision upon that ground, for it is evident that there was no error. The instructions asked read as follows: "While the law does not recognize as a defense an irresistible impulse to do an act of a criminal nature when the party doing the act is conscious of the nature and character of the act, and that it is wrongful and unlawful, yet

though the person accused may have felt an impulse to do the act while such consciousness existed, it is for the jury to determine whether such consciousness existed up to and at the time of the commission of the act, and if it did not so continue, it is their duty to acquit. You are further instructed that insanity, as heretofore defined, is a complete defense to all criminal acts committed while under its influence, whether such insanity be permanent or temporary." Assuming for the purpose of this decision, although we really have no warrant in so doing, that there was evidence tending to show the existence of an irresistible impulse before the commission of the criminal act, it is evident that such circumstance was entirely immaterial unless the jury found that the defendant was conscious at the time of the commission of the act; and having been told, as common sense would have taught them without instruction, that defendant was not responsible unless he was at the time conscious, there was no intelligible purpose to be served by such an instruction. It was confusing rather than instructive. It might impress them with the idea that previous mental states could affect the question of responsibility, the very reverse of what defendant desired. They had been told that it must appear that at the time of the alleged assault the defendant was capable of knowing and did know the nature and character of the act and its wrongfulness, and the very last instruction given was: "You are to determine what the condition of the defendant's mind was at the precise time of the alleged assault. Its condition before or afterwards is only to be considered for the purpose of throwing light upon its state at the time of the commission of the act." If, under these instructions, the jury could misunderstand the point made in the proposed instruction, they were incapable of enlightenment. It would have appeared to them, as it was in fact, utterly immaterial whether there was or was not an irresistible impulse before that time, if they found that he then was not conscious of his act. The same reasoning answers the proposition as to the instruction concerning temporary insanity. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

90 Cal. 622

WIXOM *et al.* v. GOODCELL *et al.* (No. 14,849.)

(Supreme Court of California. Sept. 2, 1891.)

REVOKING PROBATE OF WILL — CROSS-EXAMINATION OF WITNESS.

Where the probate of a will is sought to be revoked on the ground of mental incapacity of the testatrix, and a witness testifies that he was the attending physician of the testatrix during the winter before the will was executed; that during the time he attended her she was in litigation with her sons over property she had conveyed to them; that witness acted as her agent during the litigation; and that he saw no

evidence of failing mind or memory,—the witness may be asked, on cross-examination, whether he had not asked one Mrs. S. to testify, in the controversy between mother and son, that the testatrix was not of sound mind; if he had not said to Mrs. S. at that time that the testatrix was not in her right mind; and if he had not intended to testify in that case that the testatrix was not in her right mind.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Proceeding to revoke the probate of a will by Charles Wixom and others against Henry Goodcell, Jr., and others. Judgment for plaintiffs. Defendants appeal. Reversed.

Rolle & Freeman and *Harris & Gregg*, for appellants. *Paris & Fox* and *Goodsell & Leonard*, for respondents.

FITZGERALD, C. Appeal from an order of the superior court of San Bernardino county denying plaintiffs' motion for a new trial. This proceeding was instituted under section 1327 of the Code of Civil Procedure, to revoke the probate of the will of Betsey E. Cole, deceased, on the ground of incompetency by reason of mental incapacity at the time of its alleged execution. The plaintiffs are the children of the deceased children of testatrix, and as such claim an interest in her estate. The defendants, with the exception of the executors, are the children of testatrix, and legatees and devisees under the will. The only issue submitted by the court to the jury was as to the mental capacity of the testatrix, and the finding of the jury thereon was as follows: "Was the deceased, Mrs. Betsey E. Cole, on the 7th day of May, 1887, the time of the execution of the alleged will, of sound and disposing mind? Answer. Yes." Plaintiffs then moved the court to set aside the verdict, and grant a new trial, on the following grounds: "(1) Insufficiency of the evidence to justify the verdict, and that it is against law. (2) Errors in law occurring at the trial, and excepted to by plaintiffs,"—which motion was denied by the court. This appeal is taken by plaintiffs from the order denying their motion for a new trial. The facts necessary for a proper understanding of the points upon which the order herein must be reversed are as follows: In 1886 the testatrix conveyed to her sons, Wallace and Jasper Wixom, all of her property, with the understanding, says Willard in his deposition read at the trial, "that she would make a will and we would execute it." He further testified "that, when she heard that Jasper was not going to do as agreed, she brought suit to recover it. It was finally arranged during the winter of 1886-87. We deeded her part of the property back, and kept part for our share. I got \$21,000 for the part I had, a short time afterwards." The ground upon which the action was brought for the recovery of this property from her sons is not shown by the record, but it does appear that while that case was pending she employed, as her agent to look after her interests in connection with that litigation, one Dr. A. Thompson, who was then, and for a

long time at and before the making of the will had been, her attending physician. The case was settled by compromise in the winter of 1886-87, and, on the 7th day of May following, she, being then 76 years of age, executed the will in question, by the express terms of which her entire estate was devised to those of her children who are defendants in this action. She intentionally omitted to provide therein for plaintiffs for the reason stated in the will "that each and all of them [meaning her deceased children, of whom plaintiffs are the issue] have received in my life-time all the provision intended for them." On this point one of the attorneys for the defendants testified as follows: "That she [testatrix] came to the office on the 7th day of May, 1887, to have her will drawn; that he told her she must make a just will as between her children; that she told him that was what she wanted to do; that she had given some of them their portions, and she wanted to leave what property she had to those that had had nothing." The will was signed "with her mark." The proof is clear, as we think, that her estate was not disposed of by the will upon the fair and equitable basis indicated by the expressions used by her in this conversation. But, as the order herein must be reversed on other grounds, we do not feel called upon to consider this subject further than is necessary to elucidate the points upon which we have based our decision.

At the trial, the Dr. A. Thompson referred to was sworn as a witness in behalf of defendants, and testified as follows: "That he was a physician of many years' experience; that he was acquainted with Mrs. Betsey E. Cole, formerly Mrs. Wixom; that during the winter of 1886-87, and the spring of 1887, he was her attending physician; that during that time she was in litigation with her sons, Jasper and Willard, over her property, which she had conveyed to them, and witness acted as her agent, having been employed by her, in that litigation; that he saw her a great many times during that winter and spring, and he saw no evidence of failing mind or memory, and, in his opinion, both were good; she was entirely competent to attend to business and make a will; that he frequently conversed with her on business matters, and his opinion was based upon such conversations, and as a physician." Cross-examination: "Question. When Mrs. Cole had her trouble with her two sons, you acted in part for her, did you not? Answer. I did. Q. You were employed for that purpose? A. I will say so; yes, sir. Q. Did you not go to Mrs. Schyffe during that trouble, and ask her to testify that Mrs. Cole was not in her right mind? Mr. Paris: Objected to as irrelevant, immaterial, and not responsive to the direct examination. The Court: Objection sustained. (Plaintiffs except.) Q. During the spring of 1887, did you not, in the employ of Mrs. Cole, go to Mrs. Schyffe, and say to her that Mrs. Cole was not in her right mind? Mr. Paris: Same objection as before. The Court: Sustained. Q. Did you not at that time, and during the time that you have testified

that Mrs. Cole was in her right mind in this case, did you not intend to go upon the stand in the case between herself and her two sons, and testify that she was not in her right mind? Mr. Paris: The same objection as before. The Court: Same ruling." Plaintiffs excepted to each of these rulings, and they are assigned as error.

From this it will be seen that the professional and business relations which this witness sustained towards the testatrix at and for a long time before the pretended execution of the will, and during the existence of the "trouble" with her sons, was of such a close and intimate character as to afford him greater facilities for forming a correct opinion as to her mental condition than was possessed by any other witness in the case. As a witness, he assumed to speak from personal acquaintance, business intercourse, and professional or scientific knowledge, and his opinion as to her mental capacity at the time of the alleged execution of the will was founded thereon. The questions propounded to this witness on his cross-examination were clearly competent. They were strictly responsive to matters testified to in the direct examination, and should have been allowed for the purpose of testing the value of his testimony upon the subject in relation to which he testified in his examination in chief. And it is fair to presume that if he had been permitted to answer these questions, and had answered them in the affirmative, without giving a satisfactory explanation, his credibility as a witness might have been very seriously impaired. The jury was entitled to all the knowledge possessed by the witness on this subject; and if shortly before the making of the will, that is, during the time of her trouble with her sons, he was then of the opinion that she was not of sound and disposing mind, they had a right to know what it was that caused so radical a change in his opinion in so short a period of time as to her mental condition. We are clearly of the opinion that the rulings of the court in sustaining the objection to these questions was a prejudicial error, for which the order should be reversed, and a new trial granted, and we so advise.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is reversed, and a new trial ordered.

(3 Cal. Unrep. 427)

PHELPS v. BROWN *et al.* (No. 13,277.)¹
(Supreme Court of California. Aug. 7, 1891.)

RESCISSION OF CONTRACT—REFUNDING PURCHASE DEPOSIT—MONEY HAD AND RECEIVED.

Plaintiff agreed with one N. and wife to exchange lands, and advanced \$500 of the purchase price. N. gave a receipt for the money, and indorsed thereon: "Trade to be finished within two weeks from this date, or this deposit to be forfeited without recourse. Title to prove good, or no sale, and this deposit to be returned." An attachment against plaintiff's husband had been levied on her property, which she refused to procure discharged. N. abandoned the trade, and returned the money to defendants, who had

¹ Affirmed in banc. See 30 Pac. 774, 93 Cal. 573.

negotiated the exchange of lands for N. Held, that the deposit remained in the hands of defendants as money had and received to plaintiff's use.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county: JOHN REYNOLDS, Judge.

S. G. Phelps sued J. E. Brown and others to recover money had and received for plaintiff's use. Judgment for defendants, and plaintiff appeals. Reversed.

T. H. Laine and Laine & Hatch, for appellant. Crandall & Biddle, for respondents.

BELCHER, C. It appears from the findings in this case that in June, 1887, one Norton and wife owned a tract of land in Santa Clara county, which was incumbered by a mortgage for \$9,000, and the plaintiff, a married woman, owned a house and lot in the city of San José. The Nortons wished to exchange their land for the lot of plaintiff, and to negotiate the exchange they employed the defendants, who were real-estate agents doing business in San José as partners under the firm name of Brown & Ensign, and orally agreed to pay them \$500 as a commission if the exchange should be made. The proposition of the Nortons was that they would convey their land to the plaintiff for \$20,000, and in payment thereof she should assume and pay the mortgage on the land, and should convey her lot to them for \$6,500, and pay to them the balance of \$4,500 in cash when the deeds should be executed. This proposition was put in writing, and given to the defendants, and they delivered it to the plaintiff. She was willing to accept the proposition and make the trade if she could realize \$6,750 for her lot, and not otherwise. The defendants then agreed to pay her \$250 out of their commissions when the trade should be consummated. This arrangement was satisfactory, and she thereupon drew her check on a local bank for \$500 payable to the Nortons, and handed the same to the defendants as a deposit or first payment. The defendants on the same day gave the check to the Nortons, who executed a receipt therefor, closing with the words: "Trade to be finished within two weeks from date, or this deposit to be forfeited, without recourse. Title to prove good, or no sale, and this deposit to be returned." A few days later the defendants handed back to the plaintiff her check, and she thereupon gave to them in place of the check \$500 in money, which they at once paid over to the Nortons. Subsequently it appeared from the abstract of title furnished by the plaintiff that an attachment, issued in an action against her husband, had been levied on her property; and on learning this the Nortons refused to accept her deed, or to carry out the proposed exchange, unless she would have the attachment removed. She offered to give him a warranty deed, but refused to procure the discharge of the attachment. The Nortons were ready and willing to complete the trade, and tendered a deed of their property to the plaintiff, but she never offered to convey to them an unincum-

bered title to her property, and never tendered or offered to pay the balance of the purchase money. Thereupon the Nortons abandoned the trade; and without the knowledge of plaintiff, and without any directions as to the disposition to be made of the money, returned the \$500 to the defendants, and the latter returned to them their receipt, with an indorsement thereon in these words: "Money returned and their receipt is canceled. BROWN & ENSIGN. July 25, 1887. We agree to release the signers of this receipt from any expense, legal or otherwise. BROWN & ENSIGN." There are further findings as follows: "That when the trade was finally abandoned by the Nortons they were no longer entitled to retain the \$500 as part of the purchase money. That the defendants, on receiving the \$500 from the Nortons, took their place as to the money, and assumed all liabilities as to the plaintiff that the Nortons had incurred. That the oral agreement on the part of the plaintiff to forfeit the \$500 paid, on failure to comply with the terms of the oral agreement to purchase of the Nortons, was valid, and she was not entitled to recover it back when she refused to complete the purchase." Judgment was entered that the plaintiff take nothing by her action, and that the defendants recover their costs. From that judgment the plaintiff appeals.

The action was brought to recover the \$500 paid to the defendants, as above stated, as money had and received by them to the plaintiff's use. The respondents contend that the judgment was right and should be affirmed, because, as the plaintiff paid the money as a forfeit, and then failed to complete the trade by offering to convey an unincumbered title to her property, and to pay the balance of the purchase money, she could not have recovered the money back from the Nortons, and hence had no cause of action against them. This contention cannot, in our opinion, be sustained. The plaintiff could have maintained an action against the Nortons to recover the money; and their only defense, if any they had, would have been a counter-claim for damages. *Cleary v. Folger*, 84 Cal. 816, 24 Pac. Rep. 280; *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. Rep. 749. And the liability of the defendants is shown by the finding that, when they received back the \$500, they took the place of the Nortons as to the money, and assumed all their liabilities to the plaintiff. This finding is not questioned, and its correctness seems to be admitted. It follows, therefore, we think, that the plaintiff was entitled to maintain this action against the defendants, and that the judgment was improperly entered against her. We advise that the judgment be reversed, and the cause remanded.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded.

Rehearing granted.

(90 Cal. 565)

GOW v. MARSHALL *et al.* (No. 13,896.)¹
 (Supreme Court of California. Aug. 27, 1891.)

ATTACHMENT OF DEBTS AND CREDITS.

Code Civil Proc. Cal. §§ 542-545, concerning attachments, provides that debts owing to the defendant, or any credits or other personal property belonging to the defendant, under control of a third person, may be attached. Section 546 provides that the sheriff must make a full inventory of the property attached, and he must request, at the time of serving the writ, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each. *Held*, that an attachment of "certain credits belonging to the defendant" does not give the attaching creditor a lien on or right to a debt owing to the defendant by the party served with the writ.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Action by N. W. Gow against H. B. Marshall and the Centinela-Inglewood Land Company to recover credits attached. Judgment for defendants. Plaintiff appeals.

Enoch Pepper and Wells, Guthrie & Lee, for appellant. *Albert M. Stephens*, for respondents.

BEICHER, C. This is an action by an attaching creditor against a garnishee, based on section 720 of the Code of Civil Procedure. It is alleged in the complaint that, on the 13th day of March, 1888, the plaintiff, N. W. Gow, commenced an action against H. B. Marshall to recover the sum of \$1,686.78 for work and labor performed and money paid; that a summons was duly issued and served on the defendant; that a writ of attachment was also duly issued and delivered to the sheriff of the county, and the plaintiff then gave to the sheriff information in writing that the Centinela-Inglewood Land Company, a corporation, "had in its possession, or under its control, certain credits belonging to the defendant;" that the sheriff served the writ upon the said corporation by delivering to its president a copy thereof, "together with a notice that said credits were attached under and in pursuance of said writ," and that no reply to the notice was made; that thereafter such proceedings were had in the action that on the 29th of March, 1888, judgment "was duly rendered and entered" therein, in favor of the plaintiff and against the defendant, for the sum prayed for and costs, making in all the sum of \$1,705.53; that thereafter the corporation, by an order of the court, was required to and did, by its president, attend before the court to be examined, and the president was then and there examined respecting the property in its possession and credits and other personal property belonging to the defendant; that upon such examination the president denied that anything was due from the company to the defendant, and thereupon the court made an order permitting the plaintiff to institute a suit against the corporation garnishee for the recovery of such interest or debt due the defendant Marshall, and in the mean time forbade a transfer or other disposition of such interest or debt until such action could be commenced and prosecuted.

It is then further alleged that the Centinela-Inglewood Land Company was and still is a corporation, duly organized and doing business under the laws of this state, and that, at the time the writ of attachment was served upon it, it was and still is indebted to the defendant Marshall in the sum of \$1,976.70; and that by virtue of the proceedings in attachment the plaintiff had become subrogated to the rights of Marshall against the corporation to the extent of his said judgment. Whereupon judgment was asked against the Centinela-Inglewood Land Company for the sum of \$1,705.53, and costs of suit.

The defendant corporation demurred to the complaint, and its demurrer was overruled. It then answered, denying that it was indebted to Marshall in the sum alleged in the complaint, or in any sum whatever; and denying that, by virtue of the proceedings in attachment set out, the plaintiff became subrogated to the rights of Marshall, or to any rights of any kind or nature, or to any sum of money whatever. The case was tried, and the court found that the defendant corporation was indebted to Marshall in the sum of \$553, and no more, at the time the writ of attachment was served upon it, and was still so indebted. It further found as follows: "That the plaintiff has not, by virtue of the proceedings in attachment set out in the complaint on file herein, or in any other manner, become subrogated to the rights of the defendant Marshall to the extent of the said claim of plaintiff against the said Marshall, to-wit, in the sum of one thousand seven hundred and five and fifty-three one-hundredths dollars, or to any sum or amount whatever, or has become subrogated to the rights of said Marshall to any extent, by virtue of said proceedings or otherwise;" and, as a conclusion of law, that the defendant Centinela-Inglewood Land Company was entitled to judgment for its costs. Judgment was accordingly so entered, and from that judgment the plaintiff appeals on the judgment roll.

It is well settled that proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed or no rights will be acquired thereunder. *Roberts v. Landecker*, 9 Cal. 262; *Hisler v. Carr*, 34 Cal. 641; *Wade*, *Attachm.* § 333. The Code of Civil Procedure provides: "Debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, * * * a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits or other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ." Section 542, subd. 5. "Upon receiving information in writing from the plaintiff or his attorney that any person has in his possession or under his control any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must

¹Rehearing denied.

serve upon such person a copy of the writ, and a notice that such credits or other property, or debts, as the case may be, are attached in pursuance of such writ." Section 543. "All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of the service upon them of a copy of the writ and notice, * * * shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts," etc. Section 544. "Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may be required to attend before the court." Section 545. "The sheriff must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each," etc. Section 546. It is evident that by these provisions debts and credits are treated as separate and distinct things. A debt is money owing by the garnishee to the defendant which may be paid over to the sheriff, while credits are something belonging to the defendant, but in the possession and under the control of the garnishee, like promissory notes or other evidences of indebtedness of third parties, which may be delivered up or transferred to the sheriff. *Robinson v. Tevis*, 38 Cal. 614. It appears from the complaint that the only attachment in this case was of "certain credits belonging to the defendant," which the Centinela-Inglewood Land Company had in its possession or under its control. This was not an attachment of the debt due from the company to the defendant, and the plaintiff, therefore, acquired no lien upon or right to such debt by the service of his writ. This being so, it is clear that the action cannot be maintained. Other points are discussed by counsel, but they need not be considered. In our opinion, the proper judgment was entered in the court below, and we advise that it be affirmed.

WE CONCUR: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

91 Cal. 5

HEWITT v. DEAN *et al.* (No. 14,011.)

(Supreme Court of California. Sept. 2, 1891.)

MORTGAGES—NON-PAYMENT OF INTEREST—WHOLE DEBT DUE—WAIVER OF ELECTION—PAYMENT OF MORTGAGE TAX—NOTICE OF FORECLOSURE.

1. A provision of a mortgage note that, upon default in the payment of interest, the whole sum of principal and interest shall immediately become due and payable, at the holder's election, is an absolute agreement of the makers, depending solely upon such election, and does not re-

quire the giving of notice before suit to foreclose. *Dean v. Applegarth*, 65 Cal. 391, 4 Pac. Rep. 375, distinguished.

2. In foreclosing a mortgage given to secure such a note, it appeared that, a short time before the interest fell due, the mortgagors requested a few days' extension; that about 20 days after the interest fell due they asked the mortgagee if he would accept all of the principal and interest, to which he replied that he wanted the money; and that the mortgagors were several times urged to carry out their proposition. Held not a waiver of the default, or of the mortgagee's right to make election within a reasonable time whether he would consider the principal and interest immediately due.

3. An instrument executed with a note and mortgage, and as part of the transaction, agreeing to credit the mortgagors with a certain per cent. of the interest, if they should produce each year "the proper official receipts showing the payment of all taxes against the property," is not a "contract" on their part, by which they are "obligated" to pay any tax upon the mortgage, but a contract solely of the mortgagee; and, as such, is not in contravention of Const. Cal. art. 18, § 5, providing that every contract by which a debtor is so obligated "shall as to any interest specified therein, and as to such tax or assessment, be null and void."

4. Whether the words "all taxes" in such an instrument include the mortgage tax is to be determined by the court, and not by the testimony of witnesses as to the intention of the parties.

5. A mortgage note providing "for an additional sum of 5 per cent. on principal as attorneys' fees," if suit be brought to enforce payment, limits in amount "the reasonable counsel fee" provided for in the mortgage.

In bank. Appeal from superior court, Los Angeles county; J. W. TOWNER, Judge.

Action by R. E. Hewitt against Cornelia R. Dean and G. L. Dean for the foreclosure of a mortgage upon real property. There was judgment for plaintiff, and defendants appeal. Modified and affirmed. For motion before one department to set aside sale, see 26 Pac. Rep. 1101.

Victor Montgomery, for appellants.
Ray Billingsley, for respondent.

HARRISON, J. This is an action for the foreclosure of a mortgage upon real property, executed by the defendants to the plaintiff. The note to secure which the mortgage was given is as follows: "\$2,500. Santa Ana, Cal., Oct. 29, 1887. Three years after date, for value received, we promise to pay R. E. Hewitt or order, at the Commercial Bank of Santa Ana, the sum of twenty-five hundred dollars, with interest at the rate of 12½ per cent. per annum from date until paid. Interest payable annually, and, if not so paid, to be compounded annually, and bear the same rate of interest as the principal; and, should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable, at the option of the holder of this note. Should suit be commenced to enforce the payment of this note, we agree to pay an additional sum of five per cent. on principal as attorney's fees in such suit. Principal and interest payable in gold coin of the United States. MRS. CORNELIA R. DEAN. G. L. DEAN." The mortgage contained the following clause: "And the mortgagors promise to pay said note according to the terms and conditions there-

of, and, in case of default in payment of the same or of any installment of the interest thereon when due, the mortgagee may foreclose this mortgage, and may include in such foreclosure a reasonable counsel fee, to be fixed by the court." The complaint herein was filed January 18, 1889. It alleges "that no part of the principal sum, nor of the interest mentioned in said note, has been paid," and contains also the following averment: "That because of said interest not having been paid when due, and upon the provision with reference thereto contained in said note, the plaintiff elects to consider and declare the whole sum of principal and interest of said note now due and payable." The plaintiff gave no notice to the defendants prior to the commencement of the action of this election, nor did he make any demand upon them for payment. Judgment was rendered in favor of the plaintiff, and from this judgment, and from an order denying a new trial, the defendants have appealed.

1. It was not necessary that the plaintiff should give to the defendants any notice of his election to consider the whole principal sum due upon their failure to pay the interest when it matured, or to make any demand upon them for payment prior to commencing the action. *Whitcher v. Webb*, 44 Cal. 127; *Leonard v. Tyler*, 60 Cal. 299; *Buchanan v. Insurance Co.*, 96 Ind. 510; *Trust Co. v. Munson*, 60 Ill. 371; *Cundiff v. Brokaw*, 7 Ill. App. 147; *Johnson v. Van Velsor*, 43 Mich. 208, 5 N. W. Rep. 265. The provision of the note that upon such default the whole sum of principal and interest should become immediately due and payable, at the option of the holder thereof, was an absolute agreement on the part of the defendants depending solely upon the option of the plaintiff, and did not require any notice from him that he elected or intended to exercise such option in order to make this agreement binding upon the defendants. The fact of their default was peculiarly within their own knowledge, and they also knew that by the provisions of the note they had agreed that upon such default the plaintiff might, within a reasonable time thereafter, consider the principal sum named in the note as due, and institute proceedings for the foreclosure of the mortgage. It was competent for them to include in their note or mortgage a provision requiring notice of such election as a condition precedent to instituting the suit, but instead thereof they have agreed that upon the mere fact of the default the plaintiff may, at his option, treat the whole amount as due, and foreclose the mortgage. To add to this agreement the requirement that the plaintiff should give notice of his election would be for the court to add to the agreement of the parties a condition which they have not themselves chosen to make. In *Buchanan v. Insurance Co.*, supra, the court said: "Such a notice might have been contracted for and made a condition precedent, but it was not. Appellant was bound to know that by his default the obligee had the right to regard and treat the whole sum as due and collectible, and that nothing

was required of him except the exercise of his own will. Upon making default, it was the duty of appellant to seek the creditor. It clearly was not the duty of the creditor to seek him, and notify him of the results of his own laches." The case of *Dean v. Applegarth*, 65 Cal. 391,¹ differed from the present in the fact that in that case it was provided that, in case of default, the rate of interest upon the note should be increased at the option of the holder, and the court held that this option must have been exercised and manifested in some way by the plaintiff before it could have effect; that the burden of the increased interest could not be imposed upon the defendant by any undisclosed intention of the plaintiff, or by a mere secret unmanifested intention in the mind of the mortgagee or holder of the note. In that case, however, the court held that the notice of the election could be sufficiently given to the maker of the note by merely bringing an action to foreclose the mortgage. The plaintiff was not required to exercise this option immediately upon the failure of the defendants to pay the interest. He could not know in advance that they would make default, and he would therefore be allowed a reasonable time within which thereafter to determine whether he would exercise his right of option. This provision was inserted for his benefit, and he was not compelled to exercise the option immediately upon the default under the penalty of losing all right to exercise it, but was to be allowed a reasonable time for enabling him to determine whether its exercise was necessary for his protection or advantage. "Immediately due at the option of the holder," means immediately upon or after his election, and not immediately upon default, providing he immediately elects." *Manufacturing Co. v. Howard*, 28 Fed. Rep. 741. At the trial certain evidence was presented to the effect that, a "few days" before the interest fell due, one of the defendants, in an interview with the plaintiff, requested of him an extension of a few days within which to pay the interest, and was told by the plaintiff that he could get along for a few days, and under the circumstances he would not push him. The defendants, however, did not pay the interest within the "few days," or take any steps in reference thereto, except that about the 20th of November one of them asked the plaintiff if he would accept all of the principal and interest, to which the plaintiff replied that he wanted the money, and expected it. The defendants, however, did not make any payments to the plaintiff, although several times urged by him to carry out their proposition, and, upon their failure to do so, he commenced this action. These acts and sayings of the plaintiff indicate no act of waiver on his part, or failure to make his election within a reasonable time after the default. Although the plaintiff might have dealt with the defendants in such a way that he would be estopped from asserting his right of option, or by some act of his waive such right, yet mere forbearance or inaction

¹ 4 Pac. Rep. 875.

would not cause such waiver. His leniency towards the defendants by forbearing to make an election within a reasonable time could not impair his right, or be regarded by them as a waiver thereof. Defendants, moreover, do not allege in their answer any waiver by the plaintiff of their default, or any act on his part waiving his right to make the election. Neither do they in their answer, nor did they at the trial, assert any equity in their behalf, or, by offering to pay the plaintiff the interest which they admit had matured, seek to relieve themselves from the consequences of their default.

2. At the same time with the execution of the note and mortgage, and as a part of the same transaction, the plaintiff executed to the defendants the following instrument: "For valuable consideration I hereby promise and agree to give credit for two and one-half (2½) per cent. of the twelve and a-half (12½) per cent. interest on the mortgage note signed 'Mrs. Cornelia R. Dean' and 'G. L. Dean,' in my favor, dated October 29, 1887, provided said Mrs. Cornelia R. Dean and G. L. Dean shall on or before the 15th day of December of any year after the present, during continuance of said note unpaid, present to me proper official receipts showing the payment of all taxes against the property covered by the mortgage securing payment of said note for that year, respectively. R. E. HEWITT."

At the trial the defendants offered to show that the words "all taxes" were intended to cover and include the mortgage tax. The court excluded the evidence, and its ruling in this respect is assigned as error. The court did not err in this ruling. There was no ambiguity in the words themselves. If the "mortgage tax" is a tax "against the property" described in the mortgage, it is clearly included in the term "all taxes," and if it is not a tax against the property, it is quite as clearly excluded from the term. In either case the agreement was to be construed by the court, and not to be determined upon the testimony of witnesses as to the intention of the parties. The defendants contended that this instrument is a contract in violation of section 5, art. 13, of the constitution, and that thereby they are released from all obligation to pay any interest upon the note secured by the mortgage. Section 5 of article 13 of the constitution provides that "every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void." Section 4 of the same article provides that "a mortgage * * * by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. * * * The value of the property affected by such mortgage, * * * less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof. * * * The taxes so levied shall

be a lien upon the property and security, and may be paid by either party to such security. * * * Assuming that the tax upon the mortgage referred to in section 5 is a tax "against the property" by virtue of the provision of section 4 that the mortgage is, for the purposes of taxation, "an interest in the property affected thereby," and that the tax levied thereon is a "lien upon the property," as well as upon the security, the agreement referred to does not contravene the provisions of section 5. The agreement is solely upon the part of the mortgagee, and is in no respect binding upon or enforceable against the mortgagors, and it cannot, under any theory, be said to be a "contract" on their part; nor are they by its terms in any way "obligated" to pay any tax upon the mortgage.

It is well known that, prior to the adoption of the present constitution, it was the universal custom for the mortgagee to incorporate into the mortgage a stipulation binding the mortgagor to pay all taxes that might be levied upon the mortgage, or the debt secured thereby. This provision engendered a vast amount of litigation, and the collection of this tax was stoutly resisted at all points, chiefly upon the ground that a tax imposed upon the land and also upon a mortgage thereon was double taxation, and unconstitutional. As a consequence of various decisions of the supreme court in this litigation, all money loaned upon mortgage security escaped taxation, and the owner of the land mortgaged was compelled to pay more than his share of the expenses of government. It was for the purpose of obviating this consequence that the constitutional convention adopted the foregoing provision of section 5, art. 13, in order that a portion of the taxes might be collected from the mortgagee, and that the burden upon the mortgagor might not at the same time be increased. The provision thus incorporated into the constitution was intended for the benefit of the borrower, but it is unnecessary to say that the results expected therefrom have not been realized. All experience has shown that the rate of interest is governed by the inflexible laws of trade, and is regulated by the same law of supply and demand as that which governs all other articles of commerce; and that legislatures and constitutional conventions are powerless in their attempts to change this law; that, whenever the state imposes a tax upon a commodity, the burden of that tax is borne by him whose necessities require him to purchase, and not by him who holds it for sale. This subject in its relations to a tax upon mortgages is so fully presented in the opinion of Mr. Justice CROCKETT, in the case of *Society v. Austin*, 46 Cal. 416, that it is unnecessary to do more than to state the proposition that whatever burdens in the form of taxation the state imposes upon money which is loaned are in reality borne by the borrower, and not by the lender; that the lender, in fixing the rate of interest for the loan, will invariably add the amount of this tax to the market value of the money, and, under the guise

of interest, collect from the borrower a sufficient amount to reimburse himself for the amount of the tax. Now, if the parties to a loan can, by an arrangement between themselves which shall not violate the requirements of any special provision of the constitution, provide for the payment of the mortgage tax in such a mode that the burden upon the borrower shall not be increased, but may possibly be diminished, such arrangement is not only not in conflict with the letter of the constitution, but is in direct harmony with its spirit and the evident purpose of its framers. Of this character is the instrument under consideration. By it, as we have seen, there is created no obligation upon the borrower to pay any portion of the mortgage tax. He is merely granted by the lender a privilege, of which he may avail himself or not, as he may choose, of reducing the interest upon his loan to the market value of the money, by a liquidation on his part of another obligation of the lender. This privilege is in reality given to the borrower by the constitution itself in that provision which permits him to pay the mortgage tax and have the amount so paid deducted from his debt. Under such arrangement, the lender will always fix the conventional rate of interest at a figure sufficiently high to cover the whole estimated rate of the mortgage tax. If, however, at any time during the existence of the loan, that tax shall be less than this estimated rate, the borrower, instead of the lender, will receive the benefit of such reduction, while, if the rate be at any time increased, he will leave the lender to pay the tax, and himself pay only the conventional rate of interest. Such an agreement is, in our opinion, in entire harmony with the spirit of the constitution, and must be held to be valid.

3. The court erred in allowing to the plaintiff the sum of \$300 for attorneys' fees. The note provided that, "should suit be commenced to enforce the payment of this note, we agree to pay an additional sum of five per cent. on principal as attorneys' fees in such suit." As no action could be brought upon the note except in connection with a suit to foreclose the mortgage, the reasonable counsel fee provided for in the mortgage must be held to be limited in amount by this agreement of the parties. This was evidently deemed by the attorney for the plaintiff to be the correct construction of this clause, inasmuch as in the prayer to his complaint he only asks for judgment "for five per cent. on the said principal sum of \$2,500 for attorneys' fees, as provided in said promissory note, and being such reasonable counsel fee as is provided in said mortgage." The order denying a new trial is affirmed; and the court below is directed to modify the judgment by reducing the amount allowed for attorneys' fees to \$125 as of the date the judgment appealed from was entered, and, as so modified, the judgment shall stand affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.; DE HAVEN, J.

REED *et al.* v. NORTON. (No. 13,843.)

(*Supreme Court of California.* Aug. 31, 1891.)

MECHANICS' LIENS—NOTICE OF CLAIM—LIABILITY OF OWNER.

Where the owner of a building, against which mechanics' liens are filed, fails to retain, after the completion of the work, and pay over to those entitled thereto, one-fourth of the contract price, as provided in his contract, he is responsible to that extent, but may have deducted any lawful credits to which he is entitled, under Code Civil Proc. Cal. § 1200, which provides that, if the contractor fails to perform his work in full or abandons it, the portion of the contract price applicable to mechanics' liens shall be deemed the difference between the value of the work and materials already done and furnished and the payments then due and actually made. BEATTY, C. J., dissenting.

In bank. On rehearing. For former report, see 26 Pac. Rep. 767.

Action by C. H. Reed and others against Thomas Norton, the owner of a building, and Thomas Helm, his contractor, to enforce the liens of mechanics and materialmen. The contractor, Helm, made default. There was judgment for plaintiffs, and Thomas Norton alone appeals. Reversed.

PER CURIAM. This case was first submitted in department 2, and on January 31, 1891, the judgment and order denying a new trial were reversed, the opinion having been prepared by Commissioner FOOTE. A hearing in bank was afterwards ordered, and the cause was again argued and submitted. After a full consideration of the case we are satisfied with the conclusion reached and the opinion filed in department. 26 Pac. Rep. 767. In their brief on rehearing counsel for appellant suggest that the last clause of the said opinion would compel the court below to render judgment against appellant for the full amount of 25 per centum of the contract price, and to exclude any credits which he might lawfully have. We do not think that such is the meaning of the opinion; but, in order to remove any doubt on the subject, we say, in addition, that, if appellant has any lawful credits under section 1200 of the Code of Civil Procedure,¹ or otherwise, he is entitled to the same, to be deducted from said 25 per centum. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

BEATTY, C. J. I dissent.

¹Sec. 1200. In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections eleven hundred and eighty-three and eleven hundred and eighty-four, and the remainder shall be deemed the portion of the contract price applicable to such liens.

WHITE v. MCKIE. (No. 14,240.)*(Supreme Court of California. Aug. 28, 1891.)***REVIEW ON APPEAL—CONFLICTING EVIDENCE.**

Where there is a conflict in the evidence, the findings of the trial court will not be disturbed.

Department 2. Appeal from superior court, San Bernardino county; C. N. C. ROWELL, Judge.

F. F. Oster and Waters & Gird, for appellant. L. M. Sprecher, for respondent.

PER CURIAM. 1. The complaint states a cause of action in favor of plaintiff, and against defendant.

2. Upon the question whether defendant failed and refused to carry out and perform the contract made between plaintiff and the South Rialto Land & Water Company, we cannot disturb the finding of the court below, as it cannot be said that it is without evidence to justify it. The question here, when a finding is assailed as being against evidence, is not as to the preponderance of evidence, but only whether there was a substantial conflict in the evidence, and, if there was, the finding of the lower court is conclusive here. Judgment and order affirmed.

90 Cal. 569

PEOPLE v. LOPEZ. (No. 20,782.)*(Supreme Court of California. Aug. 29, 1891.)***LARCENY—SUFFICIENCY OF INDICTMENT.**

Pen. Code Cal. § 484, defines larceny as "the felonious stealing, taking, carrying, leading, or driving away the personal property of another." Section 487, subd. 8, makes the stealing of a horse grand larceny, which is a felony. Sections 957-960 provide that the words used in an information are to be construed according to their usual meaning; that the information is sufficient if the act charged is clearly set forth in ordinary language, so that a person of common understanding may know what is intended; and that no information is insufficient, by reason of any defect in form, which does not prejudice the substantial rights of the defendant. Section 1258 provides that, on appeal, the court must give judgment without regard to technical defects, which do not affect the substantial rights of the parties. *Held*, that an information charging defendant "with the crime of felony," in "stealing, taking, and driving away" a horse, the property of the person named, is not defective in failing to charge that the offense was feloniously committed, where no such objection was urged in the court below.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Information against Manuel Lopez for larceny of a horse. There was judgment of conviction, and defendant appeals. Affirmed.

John M. Poston and A. Laidlaw, for appellant. W. H. H. Hart, Atty. Gen., for the People.

FITZGERALD, C. The information upon which the defendant was tried and convicted of the larceny of a horse is claimed to be fatally defective, because it fails to charge that the offense was committed feloniously. At common law, simple larceny, whether grand or petit, was a felony, and was defined to be the felonious taking and carrying away of the personal

goods of another. The word "feloniously" was therefore essential to the validity of an indictment for a felony, and it has been uniformly held that this word, when used in a statute or constitution without being defined, should be construed to have the meaning affixed to it by the common law. But our statute has modified the common-law system of pleading and the rule of procedure in many important respects, and prescribed certain simple rules by which alone the sufficiency of such pleading shall be determined. These rules, or such of them as have a direct bearing on the question under consideration, are contained in the following sections of the Penal Code: Section 948 provides that "all the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code." Section 957 provides that "the words used in an indictment or information are construed in their usual acceptance in common language." Section 958 provides that the "words used in a statute to define a public offense need not be strictly pursued in the indictment or information, but other words conveying the same meaning may be used." Section 959, subd. 6, provides that the indictment or information is sufficient if it can be understood therefrom "that the act or omission charged as an offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." Section 960 further provides, "that no * * * information is insufficient, by reason of any defect in matter of form, which does not tend to the prejudice of a substantial right of the defendant upon its merits." And section 1258 provides that "after hearing the appeal the court must give judgment without regard to technical errors or defects * * * which do not affect the substantial rights of the parties." The defendant is accused by the information herein "with the crime of felony," which he is charged with having committed by "stealing, taking, and driving away" a horse, the personal property of the person therein named. No objection was made to the information in the court below, and the question of its sufficiency is raised for the first time by this appeal. "Larceny" is defined by section 484 of the Penal Code to be "the felonious stealing, taking, carrying, leading, or driving away the personal property of another." And subdivision 8 of section 487 of the Penal Code makes the stealing of a horse grand larceny, which is a felony under our statute, and punishable by imprisonment in the state prison. The word "steal," as here used, has, as will be hereafter shown, a fixed and well-defined meaning, and is perhaps, in its common every-day use and general acceptance, as well understood as any word in the English language. Webster defines it, "to take and carry away feloniously, as the personal goods of another," quoting Blackstone. The same definition is substantially given in all the standard law dictionaries, some of them giving "lar-

ceny" as a synonym, and it is used with the same meaning in the following among other sections of the Penal Code: Section 492 relates to how the value of a thing stolen may be ascertained; section 496 to receiving stolen property, knowing the same to be stolen; and section 497 provides that "every person who, in another state or county, steals the property of another, * * * and brings the same into this state, may be convicted and punished in the same manner as if such larceny * * * had been committed in this state." To therefore contend that the defendant, who must be presumed to be a person of common understanding, did not know what was intended when he was charged by the information with stealing another man's horse, is simply preposterous. Testing the sufficiency of this information by the application of the foregoing rules, we are forced to the conclusion that where the word "feloniously" is omitted from, and the word "steal" employed in, the charging part of an information for grand larceny, it will be understood as charging the criminal intent with which the act was committed, and the offense, when so charged in an information or indictment, will be deemed to be substantially charged in the language of the Code. And an indictment or information for larceny which contains both or either of those words will be held valid if found to be sufficient in all other respects. It therefore follows that, as the omission of the word "feloniously" from the information herein did not tend to the prejudice of a substantial right of the defendant, the judgment appealed from should be affirmed, and we so advise.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

90 Cal. 588

HERBERGER v. HUSMAN. (No. 14,012.)

(Supreme Court of California. Aug. 31, 1891.)

VENDOR AND VENDEE — RESCINDING CONTRACT — SURRENDER OF TITLE — SUFFICIENCY OF TENDER.

Land was sold under an agreement that, if the vendee should be dissatisfied with his purchase at the end of a year, and should give the vendor 30 days' notice and a release of the title, the latter would return the price paid with interest. Seventy-eight days before the expiration of the year the vendee gave written notice of his dissatisfaction, demanded the return of the money, and offered a release of the title. Again, at the end of the year, and twice afterwards, similar statements, demands, and offers were made, and each time the vendor promised to return the money and accept the title. Held, that the offer was sufficient, under Code Civil Proc. Cal. § 2074, providing that an offer in writing to deliver a written instrument is, if not accepted, equivalent to the actual production and tender of the instrument; and that the vendor was estopped by his promise to deny the tender.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Herberger against Husman to rescind a contract for the purchase of

real property and recover the amount paid. There was judgment for plaintiff, and defendant appeals. Affirmed.

R. L. Horton, for appellant. Allen & Miller, for respondent.

PATERSON, J. The defendant agreed that if plaintiff should be dissatisfied with the purchase of the lots at the end of one year (at which time—November 30, 1888—the balance of the purchase price was to be paid) he, the defendant, would return the \$1,500 with interest thereon, provided the plaintiff gave him 30 days' notice and a surrender of the title to the lots.

The plaintiff did become dissatisfied with the purchase, and notified defendant of the fact on September 13, 1888, in a written notice, which contained a demand for the return of the \$1,500 with interest, and an offer thereupon to surrender the title to the lots. Again, on November 30, 1888, the agent of plaintiff notified defendant of the plaintiff's dissatisfaction, made an express demand upon him for the return of the \$1,500, and offered to surrender the title. In January and March following, similar statements, demands, and offers were made, and on every occasion, the court finds, upon sufficient evidence, the "defendant promised to return said sum of \$1,500 with interest, as aforesaid, and accept a return of the title conveyed by said agreement to the property herein mentioned." The written notice of dissatisfaction was not premature. The terms of the contract are plain and easily understood. Defendant agreed to return the money upon 30 days' notice if plaintiff was dissatisfied with his purchase at the time the balance of the purchase price became payable. The defendant could not be required to return the money before the end of the year, and not then unless the 30 days' notice was given. The plaintiff's offer in writing was equivalent to the actual production and tender of a written release or quitclaim. Section 2074, Code Civil Proc.¹ But if the appellant's contention that the contract called for notice of dissatisfaction at the end of the year, and at no other time, be taken as the true meaning of the terms of the contract, it is sufficient to say that such notice was given. It is not clear that a written release was necessary to restore the title to defendant. But, be that as it may, defendant is estopped by his conduct from claiming that no release was tendered, or that the contract was not tendered for cancellation. The only claim or objection he made was that he did not have the money at the time. He led the plaintiff to believe that he would return the money as soon as he could raise the amount; and, having induced the defendant to act upon the belief that he would do so, it is too late now to change his position and defeat the plaintiff on the ground that a complete technical tender was not made. 2 Herm. Estop. §§ 820,

¹ Sec. 2074. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

822, 825, 1042; *Ashbaugh v. Murphy*, 90 Ill. 182; *Whelan v. Reilly*, 61 Mo. 568; *Brock v. Hidy*, 13 Ohio St. 306; *Hills v. Bank*, 105 U.S. 319. Other questions presented by appellant have not been overlooked, but we deem it unnecessary to discuss them. They are without merit. The judgment and order are affirmed.

WE CONCUR: BEATTY, C. J.; GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.; DE HAVEN, J.; HARRISON, J.

90 Cal. 487

NEWTON v. HULL *et al.* (No. 14,343.)

(*Supreme Court of California*. Aug. 8, 1891.)

FORECLOSURE OF VENDOR'S LIEN — REFORMATION OF CONTRACT — PLEADING.

1. In an action to foreclose a vendor's lien, it appeared that the contract for the sale of the land provided that defendants should pay a certain amount down, and the balance of the purchase price in two installments, due, respectively, on or before May 1, 1888, and on or before November 1, 1888, with a further provision that, "time being of the essence of this contract," a failure of defendants to comply therewith operates as a forfeiture of all their payments and rights thereunder. February 7, 1889, plaintiff tendered a deed, and demanded payment of the unpaid installments, which was refused. *Held*, that plaintiff was not in default in not tendering a deed November 1, 1888, and was entitled to judgment.

2. An averment in the complaint, in an action to reform a contract to sell land, that the agreement was to sell an undivided two-fifths of the land described in the written memorandum, and "that the parties * * * intended to insert therein a description of the undivided two-fifths, * * * but that by mistake in drawingsaid memorandum * * * the description of said lot or parcel of land was therein set forth incorrectly in the following particulars," definitely setting forth the mistake, and how it occurred, sufficiently alleges that the mistake was a mutual mistake of the parties.

3. A direction in the second paragraph of the order of sale "that the land and premises in the complaint, and hereinafter described," be sold, etc., and which are described in the last paragraph as an entire tract instead of two-fifths, as set forth in the complaint, is a mistake, evidently clerical, creating an uncertainty as to the amount of land to be sold, not a subject for correction by appeal until after a motion for that purpose has been denied by the trial court.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Mary H. Newton against B. J. Hull, W. D. Read, and others to reform an agreement for the sale of land and to foreclose the vendor's lien. Judgment for plaintiff, and defendant Hull appeals. Affirmed.

1. *Hall and Holloway & Kendrick*, for appellant. *Lee, Gardiner & Scott*, for respondent.

VANCLIEF, C. Action to reform an agreement by which the defendants Hull and Read agreed to purchase, and plaintiff to sell, two-fifths of a piece of land situate in Los Angeles county, containing about 17 acres, together with 8 shares of the capital stock of the Lake Vineyard Land & Water Association, a corporation; and also to foreclose the vendor's lien upon the property for the unpaid portion of the purchase money. It is alleged in the com-

plaint that by mistake in drawing the written memorandum of the agreement the words "undivided two-fifths of" were omitted from the description of the land, so that the memorandum purports to be that of an agreement to sell the whole undivided piece of land, but that the parties to said memorandum intended to insert therein a description of only the undivided two-fifths of the piece of land therein described. It is further alleged that, by mistake of the draughtsman, the description of the land in the written memorandum refers to page 812 of Book 118 of Deeds in the recorder's office, instead of page 407 of Book 167. A copy of the written agreement bearing the date of November 1, 1887, is set out in the complaint, and its execution is admitted. The price to be paid for the land and water stock was \$10,000, in the following installments: \$3,333.33 in hand, on the execution of the agreement, which was paid accordingly; \$3,333.33 on or before May 1, 1888; and \$3,333.33 on or before November 1, 1888. Interest on deferred payments at 10 percent. per annum. The other terms of the agreement pertinent to the question to be decided are as follows: "In the event of a failure to comply with the terms hereof by the said parties of the second part, the said party of the first part shall be released from all obligations in law or equity to convey said property, and said parties of the second part shall forfeit all right thereto, and shall also forfeit to said first party all right to any and all moneys theretofore paid thereon, time being of the essence of this contract. And the said party of the first part on receiving such payment, at the time and in the manner above mentioned, agrees to execute and to deliver to the said parties of the second part, or their assigns, a good and sufficient deed conveying the above-described property, and to deliver said water stock." The defendants Hull and Read failed and refused to pay the second and third installments, or any part thereof, up to the time of the commencement of this action, April, 1889. The complaint also contains the following: "That on or about February 7, 1889, plaintiff demanded payment from defendants B. J. Hull and W. D. Read of all the unpaid balance due and owing to plaintiff under and by virtue of the terms of said agreement, to-wit, demanded payment from defendants B. J. Hull and W. D. Read thereunder of the sum of \$6,666%, together with interest thereon at the rate of ten per cent. per annum from November 1, 1887, until date of such payment; that thereupon plaintiff tendered and offered to deliver to defendants B. J. Hull and W. D. Read, on receiving such payment, a good and sufficient deed conveying to defendants the title to said property so as aforesaid agreed to be conveyed, to-wit, said undivided two-fifths of said 17.42 acres of land; that thereupon plaintiff tendered and offered to assign and deliver to defendants B. J. Hull and W. D. Read said eight shares of capital stock of said Lake Vineyard Land & Water Association, a corporation as aforesaid; that thereupon defendants B. J. Hull and W. D. Read declined and refused to accept or

receive either said deed or said waterstock, and declined and refused to pay to plaintiff said \$6,666 $\frac{2}{3}$, or any part thereof; that thereupon defendants B. J. Hull and W. D. Read expressly stated that they would not make any further payments under said contracts." All the defendants except Hull made default or disclaimed any interest in the suit. Hull answered, and also filed a cross-complaint praying for a rescission of the agreement, and a judgment against plaintiff for \$1,886.66, that being the portion of the purchase money alleged to have been paid by him. The court found for the plaintiff on all the issues and rendered judgment accordingly. The defendant Hull alone appeals from the judgment and from an order denying his motion for new trial.

1. It is contended for appellant that because it does not appear that plaintiff tendered to defendants a deed to the land on the 1st day of November, 1888, when the third and last installment of the purchase money became due, she was in default equally with the defendants; that, "time being of the essence of the contract," the deed must have been tendered "at the time agreed upon, and at no other time;" and that by the mutual default of both parties "the contract came to an end, and cannot be enforced by either party." To maintain this position, counsel rely, principally, upon the case of Cleary v. Folger, 84 Cal. 316, 24 Pac. Rep. 280; but I think the opinion of the commissioners in that case, (in which I concurred,) in so far as it sustains the point made here by appellant's counsel, is out of line with the otherwise uninterrupted current of authority in this state. It is not sustained by the cases therein cited. The case of Bohall v. Diller, 41 Cal. 532, therein cited, decides nothing as to the point under consideration here, except that a party who agrees to convey land upon the payment of the purchase money cannot recover the purchase money until he tenders a deed; but does not decide that he will be in default unless he tender a deed on the very day the purchase money becomes due. In Englander v. Rogers, 41 Cal. 421, also cited, the facts were that the party agreeing to purchase paid a part of the purchase money under an agreement that it should be refunded if, upon payment of the balance, the vendor should not convey a good title. He sued the vendor to recover back the sum he had paid without averring that he had tendered payment of the balance of the purchase money. The court said: "The covenants of the vendor and vendee were mutual and dependent, and neither could put the other in default, except by tendering a performance on his own part, unless the other party either waived the tender, or, by his conduct, rendered it unnecessary. To entitle the plaintiff to maintain the action on the contract set out in the complaint, he should have averred a tender of the unpaid portion of the purchase money, or some sufficient excuse for the omission to tender it." This neither implies nor warrants the inference that the vendor might not have recovered the unpaid purchase money after tendering the conveyance of a good title, as was done

in the case at bar, but rather the contrary. The report of the case does not show any express limitation of the time within which either party was to perform, nor does it appear that the time of performance by either party was of the essence of the contract. It follows that the case can have no proper application to the point here under consideration. Nor was the point to which it was cited in Cleary v. Folger (viz., that the defendant in that case "was no longer obliged to make a deed to the premises, * * * as the balance of the purchase money was not tendered") relevant or material in that case, since the defendant (vendor) in that case had not been asked to make a deed. He was only asked to refund that portion of the purchase money which the plaintiff had paid; and, though it may have been true that he "was no longer obliged to make a deed," it did not thence follow that he would not have been entitled to recover from the plaintiff (vendee) the unpaid portion of the purchase money in case he had tendered a deed, as did the vendor in the case at bar. Undoubtedly, time is of the essence of the contract under consideration, so far as it is expressed or implied that it should be so. It is expressly of the essence of the agreement on the part of the defendants to pay the last two installments of the purchase money, and as to which they were put in default by the plaintiff's tender of a deed and demand of payment on the 7th day of February, 1889, three months after the last installment became due; but, as to the agreement on the part of the plaintiff to convey the land "on receiving such payment," there was no default whatever, as there was no tender of payment by the defendants, or either of them. Hill v. Grigsby, 35 Cal. 656, and cases there cited; Englander v. Rogers, 41 Cal. 421; Bohall v. Diller, Id. 532. But the stipulation that time is of the essence of the contract seems to be applicable only to the agreement on the part of the defendants to pay the purchase money, and to be intended for the benefit of the plaintiff alone. Wilcoxson v. Stitt, 65 Cal. 596,¹ and cases there cited; Vorwerk v. Nolte, 87 Cal. 236, 25 Pac. Rep. 412; Smith v. Mohn, 87 Cal. 489, 25 Pac. Rep. 696. It is true that the plaintiff was not obliged to accept payment and convey the land at any time after the defendants had failed to pay the second installment at the time it became due. (May 1, 1888;) and at any time thereafter she might have elected to rescind the agreement, (Grey v. Tubbs, 43 Cal. 359;) but, as above remarked, it does not follow that the defendants could work a rescission of the agreement, or avoid their obligation to pay the purchase money by simply refusing to pay it, or by delaying payment thereof until after it became due. There is no provision in the agreement that the plaintiff should forfeit her right to the purchase money in case the defendants should fail to pay it on or before the day on which it became due, nor in case she failed to tender a deed on that day, or at any time before the defendants ten-

¹ 4 Pac. Rep. 639.

dered payment of the purchase money. Nor was she bound to tender a deed, except upon tender of payment of the purchase money. *Smith v. Mohn, and Wilcoxson v. Stitt*, supra. As we have seen, she could not be put in default, even after the purchase money was overdue, except by her refusal to convey upon tender of the purchase money. She was, therefore, entitled, upon tendering the deed, to demand payment of the purchase money on the 7th day of February, 1889, as she did, and, upon defendants' refusal to pay, to bring this action.

2. Counsel for appellant contend that the complaint does not state facts sufficient to entitle plaintiff to a reformation of the written memorandum of the agreement, the alleged deficiency being that it is not averred that the mistake complained of was a mutual mistake of the parties, nor a mistake of one party which the other at the time knew or suspected. Inasmuch as there was no demurrer to the complaint on any ground, I think it should be held sufficient to show that the mistake was a mutual mistake of the parties. The complaint states that the agreement was to sell an undivided two-fifths of the land described in the written memorandum; that the plaintiff owned only two-fifths thereof; "that the parties to said memorandum of agreement intended to insert therein a description of the undivided two-fifths of the premises; but "that, by mistake in drawing said memorandum of agreement, the description of said lot or parcel of land was therein set forth incorrectly in the following particulars;" and then proceeds to state definitely the mistake, and how it happened to be made. To say that by mistake a description, different from that intended by the parties to the agreement, was inserted therein, is to say, substantially, that the mistake was a mutual mistake of the parties to the agreement.

3. The objection that the findings do not support the judgment is made upon no other ground than those upon which it is claimed that the complaint is insufficient; and, since the findings are quite as full and specific as the complaint as to the mutual mistake of the parties, this objection should be overruled.

4. In their reply brief, for the first time, counsel for appellant call attention to a mistake (evidently merely clerical) in the order of sale, by which that order is made, at least, ambiguous and uncertain as to whether the whole or only two-fifths of the piece of land described is to be sold by the sheriff. In the second paragraph of the decree it is ordered "that the land and premises in the complaint, and hereinafter described," he sold, etc. This evidently refers to the description in the first paragraph of the complaint, which is the same as that in the revised agreement; but the uncertainty is created by what purports to be a description of the land "directed to be sold," in the last paragraph of the decree, where it (the land to be sold) is particularly described by metes and boundaries as an entire piece of land containing 17.42 acres, instead of being described as the undivided two-fifths of that

piece of land, as it should have been described. This error might and should have been corrected on motion in the trial court, as the record contains all the data necessary for that purpose. There was no necessity for an appeal to correct it, at least, until after a motion for that purpose had been denied by the trial court. I think the judgment and order should be affirmed in all respects, except that the court below should be directed to correct the description of the land directed to be sold, as indicated in this opinion, on motion of either party, the costs of this appeal to be borne by the appellant.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed, and the court below is directed to correct the description of the land directed to be sold, indicated in this opinion, on motion of either party; the costs of this appeal to be borne by the appellant.

90 Cal. 574

SAN DIEGO LUMBER CO. v. WOOLDREDGE
et al. (No. 14,188.)

(Supreme Court of California. Aug. 31, 1891.)

MECHANIC'S LIEN — RECORDING CONTRACT — VALIDITY — NOTICE OF CLAIM.

1. Under Code Civil Proc. Cal. § 1183, which provides that material-men may have liens, and that all building contracts shall be in writing when the price exceeds \$1,000, and shall be filed in the office of the county recorder before work is commenced, otherwise the contract to be void, and in such case all material furnished shall be deemed to have been furnished at the instance of the owner, a failure to give a description of the property affected by the contract does not invalidate it, as no description is required by statute.

2. Where a contract was recorded, a notice of lien which states that the lien claimant agreed with the contractor to furnish the lumber and building material to be used in the construction of a building, and delivered the same, for which the contractor agreed to pay \$838.86, as he received payment under his building contract, is sufficient, as the terms of payment could be ascertained from the building contract.

3. Under Code Civil Proc. Cal. § 1184, concerning mechanics liens, which provides that at least 25 per cent. of the whole contract price of a building shall be made payable at least 35 days after the final completion of the work, a contract providing for final payment in 30 days after the completion of the work is not invalid, as the statute requires liens to be filed within 30 days after completion of a building, and no prejudice could arise.

4. A notice of lien was subscribed, "Williams & Whitmore," followed by a form of verification, viz.: "—, being duly sworn, deposes and says that he is one of the persons named as Williams and Whitmore in the foregoing claim of lien. * * * [Signed] A. C. WILLIAMS." Held sufficient to show that Williams, of Williams & Whitmore, was the affiant.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by San Diego Lumber Company against W. D. Wooldredge and others to foreclose a material lien. Judgment for defendants. Plaintiff appeals. Reversed.

Wellborn, Stevens & Wellborn, for appellant. David L. Withington and Geo. W. Hardacre, for respondents.

TEMPLE, C. This action is to foreclose a lien for materials furnished defendant Smith, as contractor, for building a house for defendant Wooldredge. The other defendants were lienors. Williams & Whitmore were the only lien claimants who answered. The contract price for the building was \$1,945, all of which had been paid except \$505. Plaintiff's demand was for \$748.86. Williams & Whitmore recovered judgment for \$145.50, and \$50 as an attorney's fee. On the trial various objections were made to plaintiff's notice of lien, all of which, however, are only modifications of the general one, "that it contains no sufficient statement of the terms, time given, and conditions of the contract" under which the materials were furnished. The objection was sustained, and subsequently a nonsuit was granted as to defendant Wooldredge. Exceptions were duly taken, and the case comes here on an appeal from the judgment and an order refusing a new trial.

The material portion of the notice of lien is as follows: "The said San Diego Lumber Company agrees to furnish said lumber and building material to said Smith, to be used in the construction of said building upon said real property, and deliver the same at Escondido, in said county; and the said Smith agrees to pay therefor the sum of \$833.86, the same to be paid in partial payments, (the amounts of which were not fixed,) at the time when payments become due said Smith, under said contract between him and said Wooldredge, provided that full payment for all materials furnished as aforesaid was to be made when the final payment became due said Smith from said Wooldredge under said contract between them." The trouble is that it refers to the contract between the contractor and Wooldredge for the terms of making payments, and does not repeat the provisions of the contract on that subject. The contract, being for more than \$1,000, was duly filed in the recorder's office of the county, and all parties interested could there readily ascertain what the contract had provided upon the subject. Referring to that contract, we find payments by installments explicitly stipulated. But the notice of lien states that the amount of partial payments was not fixed. Upon this contract the plaintiff could not insist upon any specific sums being paid until the final payment became due upon the completion of the contract, when all became due. This seems a sufficient compliance with the statute, and we think the claim should have been received in evidence.

Plaintiffs contend that their recovery should not be limited to the balance unpaid on the contract, because they say the contract is void—*First*, because it contains no description of the property to be affected thereby, to which it is sufficient answer that the statute contains no such requirement; and, *second*, it makes the final payment of 25 per cent. due 30 days after final completion of the contract, when the Code provides that 25 per cent. of the contract price shall be payable at least 35 days after the final completion of the contract. Section 1183, Code Civil Proc.,

makes the contract void, if the amount exceeds \$1,000, unless it be in writing, subscribed by the parties thereto, and filed in the office of the county recorder of the county. All this was done, and upon no other default does the statute declare the contract void. But the same consequence follows for a material non-conformity of the contract with the statute, under section 1184, Code Civil Proc., so far as to permit material-men and laborers to recover without regard to the amount due upon the contract. After stating what the contract shall contain, it proceeds: "In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and the materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." This section, as amended in 1885, declared all such contracts and alterations void. In 1887 that provision was stricken out; but, although the contract is not rendered void, lienors may recover irrespective of the amount due, and upon a contract which shall be deemed to have been made at the personal instance and request of the person contracting with the contractor, and for the value of the labor or materials. But is there such a substantial non-conformity with the requirements of the Code as will justify a judgment against the owner to pay again a debt which he has already paid in good faith upon his contract? In determining this question it must be kept in mind that this is a penalty, and not a statutory mode of acquiring a right against another, as in the case of a claim of lien. In the latter case, although the rule has been somewhat relaxed in favor of liens under this chapter, very great strictness of performance is generally exacted, but every reasonable intendment is indulged to avoid a penalty. The plaintiff has not been injured, nor can we see how any lienor could be, by the fact that the final payment became due in 30 rather than 35 days. Their liens must be filed within 30 days, and attach before this payment could legally be made under this contract. As they are in as good a position as they would have been had the time been 35 days, I think the penalty has not been incurred.

There being due only about one-half enough to pay the two liens, plaintiff objects to the notice of lien on the part of Williams & Whitmore, on the ground that it was not verified. The objection was sustained, and the ruling is complained of here. The claim of lien is subscribed, "Williams & Whitmore," and immediately following this signature is what is claimed as a verification, as follows: "State of California, county of San Diego—ss.: —, being duly sworn, deposes and says that he is one of the persons named as Williams and Whitmore in the foregoing claim of lien; that he has read the same, and knows the contents thereof; and that the same is true, and that it contains (among other things) a

correct statement of their demand, after deducting all just credits and offsets. A. C. WILLIAMS. Subscribed and sworn to before me this 2d day of February, 1887. W. R. HAWTHORNE, Justice of the Peace." It is contended that this does not show who was sworn, but I cannot subscribe to that view. Evidently some one who in the notice of lien was named Williams or Whitmore was sworn, as appears from the body of the verification, and the signature and certificate of the magistrate fix the matter beyond question. The blank is not more indefinite than the word "affiant" would have been. The verification is sufficient. The judgment against the plaintiff, and also the order denying its motion for a new trial, should be reversed, and a new trial had.

We concur: VANCLIFF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

90 Cal. 581

RAMISH V. KIRSCHBRAUN *et al.* (No. 13,818.)
(*Supreme Court of California.* Aug. 31, 1891.)

BREACH OF CONTRACT—MEASURE OF DAMAGES.

1. Where, in an action for breach of contract, the complaint alleges that defendants agreed to deliver to plaintiff, at A., 12,000 dozen eggs, as soon as they could be transported from O., and that the eggs arrived at A. on July 8th, but were not delivered to plaintiff until July 14th, evidence of the price of eggs on July 18th is inadmissible to show damage.

2. It was error to permit plaintiff to testify that he had contracted to sell the eggs at 21 cents per dozen, but, on account of the failure to deliver them in time, he lost the sale, and was obliged to sell them at 16 cents, as the evidence must be confined to the market value of eggs between July 8th and 14th.

In bank. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Action by Remish against Kirschbraun and others to recover damages for breach of contract. Judgment for plaintiff. Defendants appeal. Reversed.

Gould & Stanford, for appellants. Del Valle & Munday, for respondent.

PATERSON, J. It is alleged in the complaint that on or about June 25, 1888, the defendants agreed to deliver to plaintiff, at Los Angeles, 12,000 dozen of eggs, for the sum of \$1,770, as soon as the same could be transported by rail from Omaha, Neb.; that the eggs arrived at Los Angeles on July 8, 1888, but defendants did not deliver them to plaintiff until July 14th, although he was ready and willing at all times on and after the 8th to receive and pay for them; that by reason of the failure of defendants to deliver the eggs to plaintiff upon their arrival at Los Angeles he sustained damages to the amount of \$600. The defendants filed an answer denying each and every allegation. Judgment was entered on a verdict in favor of plaintiff for \$600, and defendants have appealed.

It will be seen from this statement of plaintiff's cause of action that his claim is based upon the facts that defend-

ants failed to deliver the eggs before July 14th, although they actually arrived at Los Angeles on the 8th, and that between these dates the price of eggs had depreciated, incurring a loss to him of \$600 on the lot. In his testimony plaintiff stated that the market price of eggs was highest on the day and the day after the eggs arrived at Los Angeles. After that several car-loads came into the market, and the price went down. He was permitted by the court to state that he had contracted with Stanley and Henry to sell the eggs to them for 21 cents, but on account of the failure of defendants to deliver them in time he lost the sale, and was obliged to sell the eggs at a fraction over 16 cents per dozen. The court ought to have sustained defendants' objection to the evidence as to what Stanley and Henry had agreed to pay plaintiff for the eggs. The evidence should have been confined to the inquiry, "What was the market value of eggs between July 8th and July 14th?" The price agreed upon between himself and others—in no way connected with defendants—was incompetent to establish the market value of the eggs or the liability of the defendants. The court erred in a more serious particular. It permitted a witness called on behalf of plaintiff to state that about the time the eggs arrived at Los Angeles they were worth 21 cents per dozen, but owing to the arrival of several car-loads the market price of eggs was reduced, and about the 18th they were worth only 17 cents per dozen. Between the 8th and 18th, the witness testified, eggs were worth 21 cents per dozen, but about the 18th the market price was about 17 cents per dozen. The damages claimed by plaintiff were sustained by him, according to the allegations of his complaint, between the 8th and 14th. Any evidence, therefore, showing the market value of eggs subsequent to the 14th, was clearly inadmissible. It is claimed by appellants that there was no contract to deliver the eggs at any particular time, and therefore plaintiff failed to prove any cause of action. On this subject the court fairly instructed the jury, and, as the case must be sent back for a new trial, we will not express any opinion as to the weight of the evidence. Judgment and order reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.; DE HAVEN, J.; HARRISON, J.

90 Cal. 586

PEOPLE V. ELLIOT. (No. 20,808.)
(*Supreme Court of California.* Aug. 31, 1891.)

FORGERY—SIGNING FICTITIOUS NAME.

1. One who, with intent to forge the check of R. & M., signs the name "A. E. R. & Co." thereto, believing it to be the true name of the firm, is not guilty of forgery, but may be prosecuted under Pen. Code Cal. § 476, declaring it a crime to make and pass checks bearing fictitious names, with intent to defraud.

2. In such case the defendant cannot be convicted of forgery, upon his confession alone that he had signed the name "A. E. R. & Co."

In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge. Indictment of H. N. Elliot, for forgery.

Verdict of guilty. Defendant appeals. Reversed.

M. W. Conklin, for appellant. *W. H. Hart*, Atty. Gen., for the People.

GAROUTTE, J. The defendant was convicted of the crime of forgery, and appeals to this court from the judgment and order denying his motion for a new trial. He was charged by the information with forging a certain check signed "A. E. Rice & Co." The evidence in the case was as follows: (1) At the time the defendant procured money upon the check he stated that "Red Rice," who was engaged in the furniture business at the city of Los Angeles, gave him the check as the result of a transaction in furniture. (2) "Red Rice" testified that his name was Edwin A. Rice; that at the time of the alleged forgery he had a partner, and the name of the firm was Rice & McKee; and that he did not sign the check or authorize it to be signed. (3) The confessions of the defendant that he forged the check. It is elementary law that the defendant cannot be convicted upon his confessions alone, and in this case there is no evidence whatever as to the non-existence of such a firm as "A. E. Rice & Co.," and *non constat* but there was such a firm, and the check was genuine. If we assume that there was such a firm in existence, then the judgment must be reversed, and a new trial ordered, by reason of the insufficiency of the evidence in not showing that the check was not signed by such firm. If we assume that there was no such firm in existence then the check was a fictitious check, and the prosecution should have been had under section 476 of the Penal Code, and the case must be reversed upon that ground. From the facts set forth in the information it is apparent that it was filed and conviction had under section 470 of the Penal Code, which section is quite broad in its scope, but not sufficiently broad to include the matters contained in section 476; for that section contemplates that the information must contain allegations, and the evidence be produced to substantiate them, that the check was fictitious, and the defendant knew that fact. *Williams v. State*, 9 Humph. 80; *People v. Dowd*, 4 Pac. Coast Law, L. J. 459.

The court gave the jury the following instruction: "If you find from the evidence beyond a reasonable doubt that at the time and place alleged, with the intent alleged, defendant did feloniously make, utter, and pass as genuine the check in question; that he intended to sign thereto the name of the firm of Rice & McKee, and by mistake signed the name of 'A. E. Rice & Co.,' believing that to be the correct name, and uttered the same as the genuine check of said firm; and that said Southern California National Bank is a corporation as alleged; and that said check is false and unauthorized,—then you should find the defendant guilty, notwithstanding the mistake in the name of said firm." Without going into a technical analysis of this instruction, as to whether or not it fully answers the requirements of the law in other respects, let us see if it be true that in the words of the instruction

the defendant is guilty of forgery, "if, intending to sign the name of the firm of Rice & McKee to the check, by mistake he signed the name of A. E. Rice & Co., believing that to be the correct name." Where a note, bill, check, etc., is the subject of a forgery, it must be proven that the instrument was not signed by the person by whom it purports to be signed, or that such person did not exist at the time; or, in other words, is a fictitious person. In this case, as we have already seen, the proof is lacking in both of these essential respects. Considered in the light of the foregoing instruction of the court, there is no such firm in existence as "A. E. Rice & Co.;" therefore, the check is fictitious, and the prosecution should have been had under section 476, heretofore cited. The law appears to recognize a distinction between forged instruments purporting to have the signature of a person in existence, and those where the signature is purely and entirely fictitious. Indeed, at common law, at one time, it was not forgery to sign the name of a fictitious person to an instrument. Section 470 of the Penal Code is quite broad in its terms, and, in the absence of said section 476, it might probably be construed broad enough to include fictitious instruments as referred to in said section; but, the legislative mind having been directed specially to that class of instruments with reference to the offense of forgery, it would seem the act of making or passing a fictitious check could only be prosecuted when brought within the requirements and conditions of that section. Considered in the light of the instruction, the signature is of a copartnership not in existence, which, *ipso facto*, makes the instrument a fictitious check; and the fact, if it be a fact, that defendant intended to sign the name of an existing firm to the check appears to be entirely immaterial. He is being prosecuted, and necessarily so, for an offense actually committed, and not for an offense he may have intended to commit. The law does not recognize a man's intentions as a crime, however corrupt and criminal those intentions may be. His intentions simply form the light by which we read and weigh his acts. This is in no sense a question of *idem sonans*, but the defendant appears to have been prosecuted upon the theory that the signature of the existing firm "Rice and McKee," for the purposes of this case, was attached to the check. Especially is this apparent when we consider the following instruction: "In order to constitute the crime of forgery, the resemblance of the forged signature to the genuine must be such as might deceive a person of ordinary caution." While we are not called upon to review this instruction, it being given at the request of the defendant, yet in the face of the fact that the signature to this check is fictitious, as the court assumed in the other instruction which we have considered, and that there was no such firm in existence as A. E. Rice & Co., and therefore no such genuine signature in existence, to say the least, the two instructions, when taken together, must have tended to confuse and cloud the minds of the jury. For the foregoing reasons the judgment

and order are reversed, and the cause remanded for a new trial.

We concur: PATERSON, J.; HARRISON, J.; MCFARLAND, J.; DE HAVEN, J.; SHARPSTEIN, J.

(90 Cal. 610)

MANNING v. DEN. (No. 13,821.)

(Supreme Court of California. Aug. 31, 1891.)

STREET IMPROVEMENTS — VALIDITY OF CONTRACTS — ASSESSMENT — EVIDENCE.

1. Act Cal. March 18, 1885, § 5, relating to street improvements, provides that after contracts have been awarded notice thereof shall be posted for 5 days, and that within 10 days from the first posting, if the owners of the major part of the frontage on the street where work is to be done shall elect to take the work at the price awarded, and shall enter into a contract to that effect, they shall have the work; but if they do not so elect, the street superintendent shall contract the work to the one to whom it was awarded. *Held*, that the superintendent had no authority to contract with the one to whom it had been awarded until after 10 days from the first posting of the notice of award.

2. Where the complaint in an action to foreclose the lien of a street assessment alleges a contract with the street superintendent, and the answer denies it, the award, assessments, and diagrams, with the affidavit of demand and non-payment, constitute *prima facie* evidence of such contract.

3. Defendant offered in evidence two documents, one purporting to be a contract between the plaintiff's assignors and the street superintendent, but which was signed by the assignors only; the other was in the form of a bond, which justified in "double the sum in the bond specified as the penalty thereof," without naming the amount of the penalty, or the names of the obligors, or making any reference to any contract for specific work, and was signed by the obligors only. Each document was certified as a "true and correct copy" of the original on file in the street superintendent's office. *Held* that, as they tended to show that no contract for doing the work had ever been made, they should have been admitted in evidence.

4. The objections to the correctness of the proceedings, being jurisdictional, were not waived by defendant's failure to appeal to the city council under Act Cal. March 18, 1885, § 11, which provides, among other things, for appeals to the council by those who have any objection to any act or proceeding of the superintendent of streets; and, after authorizing the council to correct the proceeding, declares that the decision of the council shall be final "as to all errors, informalities, and irregularities which said city council might have remedied and avoided."

5. Nor does the further provision in section 11, that "no assessment shall be held invalid except upon appeal to the city council," etc., apply to a case where the council are powerless to remedy the defect.

6. The judgment was erroneous in providing for a personal judgment against defendant for any deficiency that might remain after the sale of the lot assessed.

In hank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by E. R. Manning against R. S. Den to foreclose the lien of a street assessment. Judgment for plaintiff, and defendant moved for a new trial, which being denied he appeals. Reversed.

M. Whaling, for appellant. Herdon, Cain & Garrison, for respondent.

HARRISON, J. 1. It is alleged in the complaint that on the 15th day of Octo-

ber, 1888, the city council of Los Angeles awarded to the assignors of the plaintiff a contract for doing the work upon which the assessment in question was afterwards issued; that the clerk posted a notice of said award "on the 17th day of October, 1888, and for five days thereafter;" that afterwards, on the 22d day of October, 1888, the street superintendent entered into a contract with the plaintiff's assignors to do said work, and thereafter made the assessment upon which this action is brought. Section 5 of the act of March 18, 1885, authorizing street improvements, provides that after the contract has been awarded "notice of such awards of contracts shall be posted for five days, in the same manner as hereinbefore provided for the publication of proposals for said work. The owners of the major part of the frontage of lots and lands upon the street whereon said work is to be done * * * may within ten days after the first posting of notice of said award elect to take said work, and enter into a written contract to do the whole work at the price at which the same has been awarded. Should the said owners fail to elect to take said work, and to enter into a written contract therefor within said ten days, * * * it shall be the duty of the superintendent of streets to enter into a contract with the original bidder, to whom the contract was awarded, at the prices specified in his bid." The provisions of this section make it clear that the superintendent is not authorized to enter into a contract with the person to whom it has been awarded until after the expiration of 10 days from the first posting of the notice of award. During that period the owners of the land to be assessed are allowed the privilege of electing to take the work, and enter into a written contract to do the same at the price at which it was awarded. The power of the superintendent to enter into a contract with the "original bidder" does not arise or come into existence except upon a failure of the owners to make their election within the statutory period; and any contract entered into by him with the bidder before the time when by the statute he has the power to enter into such contract is without authority and void, and, consequently, cannot be the basis of a valid assessment. *Burke v. Turney*, 54 Cal. 486.

2. One of the issues to be determined by the court was whether the superintendent of streets had entered into a contract with the assignors of the plaintiff. The complaint alleged that such contract had been entered into by him on the 22d day of October, 1888. This allegation was denied by the answer, and it was, therefore, incumbent upon the plaintiff to establish the fact. If the superintendent had not entered into any contract for doing the work, there was no authority for him to make any assessment, and the assessment that had been offered in evidence by the plaintiff would not create any charge upon the property of the defendant. The award, assessment, and diagram, with the affidavit of demand and non-payment, offered by the plaintiff, was *prima facie* evidence that such contract had been en-

tered into, and, in the absence of any other evidence, would have justified the court in so finding. It was, however, competent for the defendant to overcome the effect of this evidence, and establish his denial of the allegation, by any competent and relevant evidence. The documents offered by him were both relevant and material for this purpose, and should have been received in evidence. One of the documents offered purported to be a contract between the superintendent and the plaintiff's assignors for doing the work that had been awarded to them, and bore the same date as the contract alleged in the complaint. It had been prepared for execution by both parties, and was signed by the plaintiff's assignors, but was not signed by the superintendent. The other document was in the form of a bond for the faithful performance of the work, and was signed by the plaintiff's assignors and two sureties, who justified in "double the sum in the bond specified as the penalty thereof;" but the bond itself named no obligors, nor did it specify any sum as the penalty thereof. It was only a blank form, without containing any reference to any contract for any specific work, and was without any date. These two documents were produced from the records of the superintendent of streets, and were each certified to be a "true and correct copy of the original on file in the office of the superintendent of streets." They certainly tended to show that no contract for doing the work had ever been entered into by the superintendent. Being on file in his office, they bore the presumption of an official character and relevancy to an assessment made by him for the work described therein; and, in the absence of proof of any other contract, the court must have found that they were the only contracts in his office for doing that work.

3. Any objections to the correctness of the proceedings by reason of the foregoing defects, were not waived by the defendant by his failure to appeal to the city council. Section 11 of the statute in question provides for an appeal to the city council by those who feel aggrieved, or have any objection to any act, determination, or proceeding of the superintendent of streets; and, after authorizing the city council to remedy and correct any error or informality in the proceedings, declares that the decisions and determinations of said city council upon such appeal shall be final and conclusive "as to all errors, informalities, and irregularities which said city council might have remedied and avoided." It is evident, however, that the foregoing defects in the proceedings could not have been remedied or avoided by the city council upon any appeal from the assessment. At that time the work had been done, and there was no occasion for any contract to be entered into; and any direction from the city council to the superintendent of streets to enter into a contract would have been nugatory as to anything that had taken place prior thereto. A contract entered into by the superintendent at that date would not validate an assessment for work that had been done prior thereto. Unless the superin-

tendent had entered into a contract in pursuance of the award at a time when by the provisions of the statute he was authorized to do so, there was no foundation for any of the subsequent proceedings, and the person who did the work acquired no rights thereby against the owner. "A contract authorized and executed in the mode prescribed by the act, is indispensable to the validity of the assessment. This defect is not cured by the failure of the lot-holders to appeal to the board, because, had an appeal been taken, the defect could not have been remedied by the board." *Dougherty v. Hitchcock*, 35 Cal. 524. "The premature action of the superintendent was one which affected his power or jurisdiction. His action was void, and that which was void does not become valid by reason of a failure to appeal. The property owners were not aggrieved, and the failure of the contractor to appeal did not operate (1) to create a grievance on the part of defendants, and (2) to estop them from complaining of it." *Burke v. Turney*, 54 Cal. 487.

The provision in the latter part of section 11, that no assessment shall be held invalid except upon appeal to the city council, etc., has no application to a case in which an appeal is not authorized, or in which, even if taken, the city council could not have remedied the defect. The legislature did not intend to declare that the owner should be deprived of his defense to any claim upon an assessment, where the assessment was void by reason of incurable defects, because he had failed to invoke the aid of a tribunal which was powerless to grant him any relief. Nor would the owner be estopped from presenting any such defects because he had appealed to the city council, and that body had denied him relief. Their denial of relief may have been based upon the express ground that the matter appealed from was not such as they could remedy, and, therefore, they would decline to take any action. If, however, they had expressly determined that the assessment was valid and the previous steps irregular, their decision would not have any binding force. Being a tribunal of limited jurisdiction, unless the facts conferring such jurisdiction existed, their action would be void, and it would be competent at any time to show that they had no jurisdiction to determine the question.

4. The judgment entered herein is erroneous. It provides for a personal judgment against the defendant for any deficiency that may remain after a sale of the lot assessed. Such judgment is unauthorized. *Taylor v. Palmer*, 81 Cal. 241. The judgment and order denying a new trial are reversed.

We concur: BEATTY, C. J.; MCFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.; SHARPSTEIN, J.

90 Cal. 617

In re CHENEY. (No. 20,854.)

(Supreme Court of California. Sept. 1, 1891.)

CARRYING CONCEALED WEAPONS—CITY ORDINANCE—PENALTY.

1. Const. Cal. art. 11, § 11, providing that any city may make all such local police regula-

tions as are not in conflict with general laws, empowers a city to prohibit by ordinance the carrying of concealed weapons by persons, not public officers or travelers, without a permit from the police commissioners.

2. A city has the right to prescribe any penalty for the violation of its ordinances within the limits designated by its charter; and where St. Cal. 1861, p. 553, fixed the limit at \$1,000, a fine of \$250 for carrying concealed weapons is not excessive.

In bank. Petition by O. F. Cheney for writ of *habeas corpus*. Writ discharged.

Z. T. Cason, for petitioner. Davis Loud-erback and W. S. Barves, Dist. Atty., for respondent.

HARRISON, J. The petitioner was convicted in the police court of the city and county of San Francisco of violating section 22 of ordinance No. 1603 of said city and county, as amended by ordinance No. 2189, and was sentenced "to pay a fine of \$250, and, in default of payment of said fine, to be imprisoned in the county jail of said city and county at the rate of one day for each one dollar of said fine, until said fine is satisfied." The fine not being paid, he was on the 8th day of June, 1891, committed to the custody of the sheriff, by whom, at the issuance of the writ herein, he was detained in the county jail under said commitment. Section 22 of the ordinance named reads as follows: "Sec. 22. It shall be unlawful for any person, not being a public officer or traveler, or not having a permit from the police commissioners of this city and county, to wear or carry concealed in this city and county any pistol, dirk, or other dangerous or deadly weapon. Every person violating any of the provisions of this order shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than \$250 and not exceeding \$500, or by imprisonment not less than three months and not exceeding six months, or by both such fine and imprisonment. Such persons, and no others, shall be termed 'travelers,' within the meaning of this order, as may be actually engaged in making a journey at the time. The police commissioners may grant written permission to any peaceable person, whose profession or occupation may require him to be out at late hours of the night, to carry concealed deadly weapons for his own protection." It is contended by the petitioner that the judgment under which he was convicted is void, and his detention thereunder unlawful, for the reason that by the terms of the ordinance the court has no discretion to fix the penalty for its violation at a less sum than \$250, and the ordinance is therefore "repugnant to, and not in harmony with, the spirit and letter of the laws and constitution of the state of California upon kindred subjects, and in conflict with the kindred statutory provisions thereof;" and also for the reason that under the terms of his sentence he may be confined 250 days, whereas the limit of imprisonment which the court is authorized to impose as a punishment for the violation of the ordinance is 6 months.

Counsel for petitioner has not pointed out to us any specific provisions of the statutes or constitution of this state with

which the ordinance is directly repugnant or in conflict, but in his argument has chiefly relied upon the proposition that the ordinance is void upon the ground that the minimum penalty for its violation is excessive and unreasonable. Article 11, § 11, of the constitution of this state provides that "any county, city, town, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws." This gives to each municipality the right to determine what police regulations it will prescribe; and the only limitation upon the exercise of the power is that such regulations shall not be in conflict with the general laws of this state. There is no general law in this state which forbids the carrying of deadly weapons concealed; so that in the passage of this ordinance there is no violation of the constitutional limitation. It is a well-recognized principle in government that the police requirements of a city are different from those of the state at large, and that stricter regulations are essential to the good order and peace of a crowded metropolis than are required in the sparsely-peopled portions of the country. Hence the organic act of the state has directly conferred upon each city the power to make such rules, in regulating the conduct of those within its jurisdiction, as in the judgment of its legislative body will best preserve their rights. Many police regulations which are demanded by the exigencies of life in a crowded city have reference chiefly to social order, and are directed to the promotion of the comfort and safety of the citizen, as well as to the protection of individual and public property. The mode of using the streets, the manner of conducting business, the times and places at which certain occupations shall be pilled, are instances of this class, and the power granted to the city is limited to their regulation. It is with reference to ordinances of this character that it is said by courts they must be reasonable, and not violate those rights of the individual that are superior to the demands of society. There are other police regulations, however, which are intended for the prevention of crime and the preservation of the public peace, and in reference to which the legislative body of the city is vested with a discretion that is not reviewable by the courts. In the exercise of this power, the municipality, in determining the penalty to be imposed for violating its ordinances, is limited only by the terms of its charter, and the reasonableness of the punishment is not to be questioned elsewhere. It is a well-recognized fact that the unrestricted habit of carrying concealed weapons is the source of much crime, and frequently leads to causeless homicides as well as to breaches of the peace that would not otherwise occur. The majority of citizens have no occasion or inclination to carry such weapons; and it is often the case that the innocent bystander is made to suffer from the unintended act of another, who, in the heat of passion, attempts to instantly resent some fancied insult or trivial injury. It is to protect the law-abiding citizen, as well as

to prevent a breach of the peace or the commission of crime, that the ordinance in question has been passed. By its terms, ample provision is made for those whose necessities of life or of occupation require protection from carrying such weapons; and, as the prohibition does not extend to those who come within the exceptions, there is no invasion of the rights of the citizen.

Having the right to pass the ordinance in question, the city has the right to prescribe any penalty for its violation within the limit designated in its charter. As the legislature has fixed this limit at the sum of \$1,000, (St. 1861, p. 552,) it follows that the penalty prescribed by the ordinance is not illegal. The writ is discharged, and the prisoner remanded to the custody of the sheriff.

We concur: PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.; GAROUTTE, J.

I concur in the judgment: DE HAVEN, J.

(90 Cal. 543)

BATES *et al.* v. SANTA BARBARA COUNTY *et al.* (No. 14,872.)¹

(Supreme Court of California. Aug. 31, 1891.)
MECHANICS' LIENS—NOTICE TO OWNER—COSTS AND COUNSEL FEES.

1. Under Code Civil Proc. Cal. § 1184, providing that a mechanic or material-man may give the owner of the building for which he has furnished material or labor written notice of his claim, and that it thereupon becomes the duty of the owner to retain sufficient funds to pay it, a mechanic employed by a subcontractor, who serves the required notice, acquires a prior right to the fund in the hands of the owner due the contractor, though the latter may not be entitled to a lien, the building being a public one.

2. The right of such mechanic to a deficiency judgment against the subcontractor is not waived by his proceeding to enforce the lien, or to recover from the owner the balance of the contract price unpaid.

3. Where no lien exists, the costs of filing notice thereof and counsel fees for its attempted enforcement cannot be allowed.

Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by Bates and others against Santa Barbara county and others to enforce a mechanic's lien. Judgment for plaintiffs, and defendants appeal. Modified and affirmed.

Jas. G. Garrison, W. C. Stratton, and Del Valle & Munday, for appellants. B. F. Thomas, John J. Boyce, and A. E. Putnam, Dist. Atty., for respondents.

PATERSON, J. On October 2, 1888, the defendants Booty and Holmes entered into an agreement with the defendant the county of Santa Barbara to erect for the latter on a public block in the city of Santa Barbara a brick building, to be used by the county as a hall of records, for the sum of \$19,850. The contract was reduced to writing, but was never signed by any officer of the county. Thereafter, defendant the Star Brick & Supply Company began the construction of the building under a contract with Booty and Holmes, and prosecuted the same until August, 1889, when

Booty and Holmes assumed control of the work, which was completed by them, and turned over to and accepted by the county on September 11, 1889. Plaintiffs and their assignors performed services and furnished materials under contracts made with the Star Brick & Supply Company, while the latter was engaged in constructing the building, and it is for the value of such services and materials that this action was brought. During the progress of the work the county paid to Booty and Holmes on account of the contract price the sum of \$11,991, leaving a balance of \$7,859 due at the time the building was completed. Soon after the completion of the work plaintiffs served upon the proper county officers notices in writing of their respective demands, and thereupon the board of supervisors passed a resolution reserving the balance of the contract price for the satisfaction of all claims and liens. Notices in the form required by section 1187, Code Civil Proc., were filed in due time in the office of the county recorder by the plaintiffs. On January 4, 1890, plaintiffs filed their claims against the county with the clerk of the board, setting forth the facts required by the provisions of the county and township government act, and the board refused to pay the same, or any of them, until the claims were established by the judgment of a court of competent jurisdiction. Thereupon this action was commenced against the county of Santa Barbara for the sums of \$6,551.73, value of the work done and materials furnished by plaintiffs, \$37.40, cost of filing and recording the notices of lien, and \$850, attorneys' fees. Upon the application of the county, the defendants Booty and Holmes, original contractors, and the brick and supply company, subcontractors, were brought in and made parties defendant. The court found as conclusions of law that the several plaintiffs were entitled to recover judgment against the county of Santa Barbara in accordance with the rank of their respective claims, specifying the rank of each, the amount to which they were entitled, together with interest thereon, costs, and an attorney fee of \$30 for each claimant, the same to be paid out of the balance of \$7,859, set aside for that purpose by the board of supervisors; that the claims of Booty and Holmes and the brick and supply company were all subordinate and subject to the claims of the plaintiffs; that, in case the fund was insufficient to pay the amounts found due, plaintiffs would be entitled to judgment against the defendant the brick and supply company for the deficiency; and that plaintiffs were entitled to a lien on the hall of records. Judgment followed in accordance with the conclusions of law, except that no lien was declared therein against the building. The county was satisfied with the judgment, and paid the claims as directed by it. The defendants Booty and Holmes and the brick and supply company appealed, bringing the case before us on the judgment roll alone.

Appellants' contention that a lien cannot be acquired against a public building is sustained by the authorities, (Phil.

¹ Rehearing denied.

Mech. Liens, § 179; Code Civil Proc. § 690, subd. 18; *Ripley v. Gage Co.*, 3 Neb. 397; 2 Dill. Mun. Corp. § 577; *Foster v. Fowler*, 60 Pa. St. 27; *Poillon v. Mayor*, 47 N. Y. 666; *Mayrhofer v. Board*, [Cal.] 26 Pac. Rep. 646;) but it does not follow that the claims of Booty and Holmes are not subordinate and subject to the claims of the plaintiffs, so far as the unpaid portion of the contract price is concerned. Under section 1184, Code Civil Proc., the mechanic or material-man may give the owner of the building upon which he has performed labor, or for which he has furnished material, written notice of his claim, and thereupon it becomes the duty of such owner to retain sufficient funds to answer such claim. Upon receipt of the notice the owner becomes liable as on garnishment or assignment. *McAlpin v. Duncan*, 16 Cal. 128. "It is a form of equitable subrogation regulated by statute." *Loonle v. Hogan*, 9 N. Y. 439, 440; *Frank v. Chosen Freeholders*, 89 N. J. Law, 847; 2 Jones, Liens, § 1285. The rights of plaintiffs do not depend upon the legality of the contract. Whether it was void or valid, the contractor and subcontractor will be held to be the agents of the owner for the purposes of the law, and neither the one nor the other can assert a want of privity between himself and the laborer or material-man. The right of plaintiffs to recover does not depend upon their right to a lien. The equitable garnishment provided for by section 1184, Code Civil Proc., is a cumulative remedy, in ordinary cases; but in this instance it is the only remedy provided by the lien law, because the pursuit of the remedy by foreclosure would involve the taking of buildings which, on the grounds of public policy and public necessity, are exempt from execution and forced sale. And this remedy is one which does not contravene any principle of public policy. It operates merely as an assignment *pro tanto* of the money due by the owner to the contractor, and in no way affects the public buildings. The fund is in the treasury, and the statute justly provides that, instead of paying it to the contractor for the work which he agreed to do, but which the laborer has actually performed, the owner shall pay it to the latter. The true spirit and merit of the statute is lost sight of in the contention that this remedy is a mere substitute for the remedy by lien, and that, when the latter does not exist, the former cannot exist. The right to control and direct the fund remaining in the hands of the owner is as distinct and independent as the right to file and enforce a lien. It is a remedy entirely disconnected from and additional to the remedy by lien upon the building, and as the exceptional element which it is claimed arrests in this case the usual operation of the lien law does not exist, it is a remedy which should be regarded with favor by the court. The brick and supply company was primarily liable to plaintiffs for their respective claims, and cannot be heard to complain of the deficiency judgment. The right to a money judgment against the person who employs the mechanic or purchases the material is not lost or waived by a proceeding to enforce the lien or re-

cover from the owner the balance of the contract price remaining in his hands. *Brennan v. Swasey*, 16 Cal. 140; *Association v. Wagner*, 61 Cal. 349; Code Civil Proc. §§ 1194, 1197. Furthermore, it appears that the funds held by the county are more than sufficient to pay all the demands of the plaintiffs.

The complaint contains all the allegations necessary to show a due presentation of plaintiffs' claims against the county and the rejection thereof; but if it did not, so long as the county does not complain, we do not think appellants should be heard on such an objection.

The court erred in allowing each claimant \$2.20 for filing his notice of lien, and \$30 attorney fee. Inasmuch as no lien could be acquired by any of the claimants, no expense incurred in attempting to secure one should have been allowed. The statute does not in express terms provide for counsel fees, except in cases of lien, (sections 1184, 1195, Code Civil Proc.,) and, of course, such fees cannot be allowed unless expressly authorized by law, (section 1021, Code Civil Proc.) The cause is remanded, with directions to modify the judgment by striking out from the amounts allowed to the several claimants the sum of \$32.20. As thus modified, the judgment will stand affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(90 Cal. 635)

SHEWARD v. CITIZENS' WATER CO. (No. 14,265.)

(*Supreme Court of California*. Sept. 2, 1891.)

CITY ORDINANCES—REGULATION OF WATER-RATES
—APPEAL FROM INJUNCTION.

1. Const. Cal. art. 14, requires cities to regulate water-rates by ordinance. Ordinance Los Angeles Feb. 1890, § 1, fixes certain specific rates for the use of water according to the size of the house, etc. Section 2 provides that, where there is a large consumption or waste of water, the person or corporation furnishing it may apply a meter, and collect a certain amount for certain quantities of water used. Held, that the ordinance was not invalid, in that it fixed different rates for consumers of the same class.

2. Where a preliminary injunction was granted, and afterwards made perpetual on full hearing, an appeal only lies from the final judgment.

Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action by Sheward against the Citizens' Water Company for injunction. Judgment for plaintiff. Defendant appeals. Reversed.

Howard & Balmer, for appellant. Dooner & Burdett, for respondent.

HARRISON, J. The defendant is a corporation supplying a portion of the inhabitants of Los Angeles with water for domestic use by means of its system of water-works in that city; and the plaintiff is the owner of a certain house and premises connected with the water system of the defendant, and dependent upon it for all water necessary for domestic use or consumption. In the month of February, 1890, the city council of Los Angeles, in accordance with the requirements of the constitution, adopted an ordinance "regulating the rates and compensation to be

collected by any person or corporation supplying water for domestic use and private purposes to the inhabitants of that city during the year commencing July 1, 1890, and ending June 30, 1891." By the first section of this ordinance it fixed certain specific rates for the use of water furnished for dwelling-houses, according to the size of the house, and with additional rates for water used for certain specific purposes, such as bath-tubs, water-closets, lawn-sprinklers, etc., commonly called "house-rates." The second section of the ordinance declares: "Any person or corporation furnishing water to the inhabitants of the city of Los Angeles shall have the right, in all cases where there is a large consumption or waste of water, to apply a meter and collect the following meter rates: For quantities of water, 1,000 cubic feet or less, for each 100 cubic feet, 35 cents; * * * for each 100 cubic feet, over 5,000 and less than 10,000, 25 cents. * * * Any person or consumer of water shall have the right to apply a meter at his own expense, but under the supervision of the water company, and pay for his water at meter rates as above, provided that in no case where meters are used shall the bill for water be less than one dollar per month." In the month of May of that year the defendant, with the consent of the plaintiff, had applied a meter to the water service of the plaintiff, and through it supplied him with all water consumed by him during the months of July and August. According to the schedule of house-rates fixed by section 1 of the ordinance, the rates of water for the house and premises of the plaintiff amounted to \$6.20 each month. By the measurements of the meter the defendant was entitled to collect a greater sum of money, and accordingly it demanded of the plaintiff \$12.95 for the water consumed in July, and the sum of \$11.95 for that consumed in August. The plaintiff tendered to the defendant on the last day of each of said months the sum of \$6.20, and demanded therefor a receipt in full payment of the water-rates for the month ending on that day, but the defendant refused to receive the same, or any sum less than the above amounts of \$12.95 and \$11.95, respectively, as a payment of said rates, and, the plaintiff refusing to pay any more than the amounts tendered by him, the defendant threatened to shut off its water supply, and disconnect the house and premises of the plaintiff from its water-works and system. Thereupon the plaintiff brought this action to enjoin the defendant from so doing. Upon the filing of the complaint a restraining order was issued by the judge of the court in which the action was brought, and subsequently, viz., October 20, 1890, upon the application of the plaintiff, and after notice to the defendant, the judge issued a provisional order of injunction in accordance with the prayer of the complaint. Thereafter the defendant filed an amended answer, to which the plaintiff demurred, and, the court having sustained the demurrer, the defendant declined to further amend its answer; whereupon the court rendered its judgment, which was entered

October 25, 1890, "that the portion of the ordinance set out in the complaint which provides for meter rates, at the option of the company furnishing water, is contrary to law and void," and perpetually enjoined the defendant from shutting off the water supplied to the plaintiff, and furnished by it, or from severing or in any wise impairing the connection of the plaintiff's premises with the water system of the defendant. On the 8th of November, 1890, the defendant appealed from the judgment, and on the 19th of November, 1890, from the order of injunction.

The plaintiff has moved to dismiss the latter appeal upon the ground that, the final judgment awarding the plaintiff a perpetual injunction having been entered before such appeal was taken, no appeal could thereafter be taken from the order.

1. The order of injunction made October 20, 1890, was a provisional remedy, which by its terms was limited "until further order in the premises." Upon the entry of the final decree this provisional remedy was merged in the perpetual injunction thereby granted to the plaintiff, and ceased to have any operative effect upon the defendant. Its functions having thus terminated, there was thereafter no existing "order" granting an injunction from which an appeal could be taken. *Webber v. Wilcox*, 45 Cal. 301; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. Rep. 327; *Gardner v. Gardner*, 87 N. Y. 14; *Jackson v. Bunnell*, 113 N. Y. 220, 21 N. E. Rep. 79. It follows that the motion to dismiss the appeal from the provisional order of injunction must be granted.

2. The demurrer to the answer admits not only the facts alleged therein, but, also, for the purpose of determining the sufficiency of the answer, that the facts alleged in the complaint, which are denied in the answer, form no part of the plaintiff's cause of action, and are not to be regarded by the court. It is thus admitted by the plaintiff that the ordinance above named was properly adopted, and that for the year beginning July 1, 1890, the defendant was entitled to collect from the plaintiff for the water consumed by him according to the rates therein specified; that in the month of May, before the said ordinance went into effect, the defendant, for the purpose of ascertaining the exact consumption of water on the premises of the plaintiff, applied a meter to the water service for said premises "with the knowledge and consent of the plaintiff;" that the consumption of water by the plaintiff during the months of July and August of that year "was much in excess of the amount reasonably required," and that the use of water by him on said premises during said months was "large, unusual, and wasteful;" that said meter was so constructed "that it would properly and accurately measure the water consumed by plaintiff on his said premises, and, by said meter measuring the water so used by the plaintiff, it was ascertained that said plaintiff consumed upon said premises during the month of July, 1890, 7,311 cubic feet of water, and during the month of August, 1890, the plaintiff consumed on his said premises 6,652 cubic feet of water;"

that the sums demanded of the plaintiff for water consumed by him during these months were reasonable, and were the ordinary meter charge made by the defendant to its customers, and in no wise discriminative against the plaintiff, and were less than the amount of rates therefor fixed by the ordinance; and that the plaintiff had refused to pay said sums. Upon the facts thus admitted the plaintiff showed no cause of action for compelling the defendant to continue its supply of water, or to enjoin it from cutting off such supply.

The argument presented in support of the judgment is that an ordinance "which fixes two rates, one to be determined by the size of the house and lawn and by certain specific uses, the other by the amount of water consumed, as shown by the meter," is invalid for the reason that it establishes two or more different rates for the same class of consumers, and enables the water company to discriminate between consumers of the same class. The city council of each municipality is by the constitution, art. 14, § 1, made the legislative body upon which is devolved the duty of fixing the rates to be collected for the use of water supplied to the inhabitants of any city. Its act in fixing these rates is a legislative act, and when performed is to receive all the presumptions and sanctions which belong to acts of legislative bodies generally. It must be assumed that the council, in fixing the rates for any year, have adopted such a measure of compensation as will be just towards the rate-payer as well as the company, and that the mode of collection is that which, in the judgment of this legislative body, will best subserve the interest and rights of both parties. The power of the court to disregard the terms of the ordinance has not been discussed by counsel, but, if we should concede that the court, in a controversy between the water company and a rate-payer, has any jurisdiction to inquire into the propriety of the terms of the ordinance, where the ordinance is not void upon its face, we do not think that the facts shown in the present record authorize such inquiry. The ordinance in question does not, upon its face, show that the rates to be collected, where the amount of consumption is ascertained by a meter, are different from those collected from persons who are rated by the use to which they apply the water. It may be assumed that, for the purpose of fixing the rates in any year, the city council would, as a preliminary consideration, determine the gross amount of compensation to be allowed the water company for the estimated quantity of water to be furnished by it, and would fix the rates so that this compensation would be realized. For this purpose it would establish some unit of quantity as the standard by which the rates to be collected should be fixed, and would then, in its rating for specific uses, estimate what portion of this unit would be consumed in the several specific uses for which rates are established. This unit of quantity is found in the second section of the ordinance, and, whenever the supply is determined under the provisions of that

section, the compensation is in strict accordance with the standard so fixed. Recognizing the fact, however, that to furnish and keep in order meters for all its consumers increases the expenses of the company, and indirectly the rates to be borne by the consumers, the city council, in order to avoid this increase of cost, has in the first section adopted a schedule of rates to be collected for certain specific uses of water. As the rates to be collected by the water company are properly in accordance with the amount of water furnished, and not for the use to which it is applied, the council, for the purpose of determining these rates, would ascertain from such sources of information as were available what portion of the unit of quantity fixed in the standard for compensation would, under ordinary circumstances, be supplied for each of these specific uses, and would fix the rates accordingly. Necessarily the same amount of water will not be consumed by each individual, even for the same specific uses, and these rates may not produce the same compensation to the company as it would receive under the second section of the ordinance; and while this provision of the city council for rates in the absence of exact measurement, will only as a general rule be equivalent to the rates charged by measurement, and may result in an inequality of individual rates, it affords only another illustration that in practical legislation absolute perfection is unattainable.

These rates are not, however, permanently conclusive upon either the consumer or the company. If the consumer is of the opinion that they call for greater compensation than is authorized by the amount of water which is actually supplied to him, he has the right to have his exact consumption ascertained and rated; and if, on the other hand, the company is of the opinion that the consumer makes use of a larger amount of water than is justified under the estimate made in fixing the rates for specific uses, it can attach a meter and receive compensation for the exact amount consumed. In either case there is nothing unjust or inequitable to either party, since in each the company receives and the consumer pays for the exact amount of water supplied. Nor can it be said that the ordinance itself furnishes any opportunity for discrimination or distinction between its customers. The objection that the meter may be inaccurate in measurement cannot be considered. A meter is a measurer, and we must assume, upon the facts as alleged, that it correctly measures and determines the water which passes through it. With reference to the proposition of the respondent that the company has not the right or power to shut off the water from its consumer, when the consumer refuses to pay for the water supplied, we merely say, "as it is submitted without argument, it is overruled in like manner." *Sharp v. Dangney*, 33 Cal. 514. The appeal from the order of injunction made October 20, 1890, is dismissed. The judgment appealed from is reversed, and the cause remanded.

We concur: PATERSON, J.; GAROUTTE, J.

(11 Mont. 138)

MALOY v. BERKIN.¹

(Supreme Court of Montana. April 22, 1891.)

RESCISSON OF DEED — FRAUD—CONSPIRACY—APPEAL.

1. In an action to rescind a conveyance of an interest in a mine on the ground of inadequacy of consideration, and fraud, in which it was alleged defendant was assisted by his brother-in-law, L., the answer admitted that defendant, on information sent him by L. that he could purchase the property, went to the place where plaintiff was, and procured L. to bring him and plaintiff together. There was evidence that on the day the deed was executed L. found plaintiff drinking in a saloon, and invited him to his house "to see his folks;" that L. seemed surprised to find defendant there; that defendant, on learning of an arrangement between plaintiff and L. to go prospecting, desired to accompany them; that defendant and L. then retired to another room together; that on their return L. mentioned the mine in question, stating that he had bought one-fourth interest therein from plaintiff, whereupon defendant offered \$1,000 for the interest of each; that L. accepted the offer, and upon his advice plaintiff did the same. *Held*, that these facts showed a conspiracy, and formed a proper predicate for the introduction of evidence that two days previous L. had entered into a partnership with plaintiff to prospect for mines, and had induced him to drink freely of intoxicating liquors, and while drunk had procured from him a one-fourth interest in said mine.

2. Such facts, coupled with evidence that the mine was worth \$40,000, are sufficient to support a finding that the deed was procured by fraud, and for a grossly inadequate consideration.

3. Evidence that the mine was developed, and had produced valuable ores, and that one-eighth thereof had been sold for \$5,300, and one-fourth for \$10,000, and contracts to pay proportionate sums for other interests were made, is sufficient to support a finding that the mine was worth \$40,000.

4. Plaintiff had not been seen in the locality of the mine for 18 months, and knew nothing of its development. Defendant testified that the mine "was in everybody's mouth;" that he, "like a good many others, was excited about the property;" that many were hunting for plaintiff, and that a man offered him \$300 if he could find plaintiff; that plaintiff had been advertised for; and that he (defendant) had heard it rumored that a certain person (of whom he borrowed the purchase money) had sold an eighth interest for four or five thousand dollars. *Held* sufficient to support a finding that a purchase at this time by defendant of a one-fourth interest in the mine for \$1,020 was made with knowledge of its real value, and that defendant had reason to believe plaintiff was ignorant thereof.

5. An action to rescind a deed on the ground of fraud and inadequacy of consideration, brought three days after the execution thereof, is not barred by the fact that plaintiff made no prior offer to return the consideration.

6. Where an error is not specified in the motion for new trial, the supreme court will not consider it.

Appeal from district court, Jefferson county; THOMAS J. GALBRAITH, Judge.

Action by James A. Maloy against John Berkin to rescind a deed. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Cowan & Parker and W. F. Sanders, for appellant. *B. Platt Carpenter and Thos. Joyes*, for respondent.

HARWOOD, J. This case stands for review, upon appeal from the judgment and an order overruling appellant's motion for a new trial. The object of the action was to obtain a decree of cancellation of a

¹ Rehearing denied.

deed of conveyance of an undivided one fourth interest in a certain quartz lode mining claim, situate in Jefferson county, known as the "Ida Mine," for alleged gross inadequacy of consideration paid for said property, and acts of fraud and deceit in the procurement thereof. It appears that the deed of conveyance in question was made and delivered March 22, 1890, in consideration of \$1,020 paid to the grantor, and on the 25th day of that month he commenced this action for cancellation of said deed. In the complaint an offer is made to restore to defendant the sum of money paid plaintiff as such consideration, with interest thereon, or to pay the same into court for the use of defendant, or to make such disposition thereof as the court may direct; but it is not shown by the complaint that plaintiff had, prior to the commencement of the action, tendered or offered to return to defendant said sum of money. Defendant's counsel moved the court for judgment on the pleading, on the ground that an action for cancellation of a contract cannot be lawfully commenced and maintained unless it is shown by plaintiff that he has first tendered back to defendant that which was received as consideration for the execution of the contract, and that the same does not appear in this case. The motion was overruled, and the action of the court in that respect is the first alleged error assigned by appellant.

We do not perceive why, in reason, the doctrine contended for should apply in cases of this nature. The very object and purpose of the action is to compel an undoing of what has been done; to compel a mutual restoration of each party to the position he occupied before the fraudulent transaction was consummated. Neither the relief nor the right to relief is predicated upon the tender back of what was paid in procuring the contract. In this case the relief, if granted, proceeds upon the ground that some circumstances or conditions exist in relation to the parties which in law amounts to constructive fraud, or that actual fraud has been practiced in procuring the execution of the conveyance or contract. Will. Eq. Jur. 802; 1 Story, Eq. Jur. § 694 et seq.; 2 Pom. Eq. Jur. §§ 922-923. As a matter of course, in granting such relief the court requires equity at the hands of the complaining party, as well as from the party guilty of fraud; that is, the restoration of everything of value received in the transaction. The precise point has been under consideration in numerous well-considered cases of this nature, and it has been held that a court of equity will proceed with the action for cancellation without requiring, as a condition precedent to commencing the action, that the complaining party shall have tendered back what he had received; that an offer in his complaint to restore the same is sufficient; and, if a case is made out which moves the court to grant relief, it carries into effect the maxim that he who seeks equity shall do equity. 1 Story, Eq. Jur. § 693; Gould v. Bank, 86 N. Y. 75, 99 N. Y. 337, and 2 N. E. Rep. 16; Allerton v. Allerton, 50 N. Y. 670; Vail v. Reynolds, 118 N. Y. 302, 23 N. E. Rep. 301; Shuee v.

Shuee, 100 Ind. 477; Hopkins v. Snedaker, 71 Ill. 449; Whelan v. Reilly, 61 Mo. 565; Thomas v. Beals, (Mass.) 27 N. E. Rep. 1004.

We think the rule is sustained by the greater weight of authority as applicable in cases like the one at bar. If such were not the rule, fraud might, in its manifold resources, frequently contrive to so shape the conditions and circumstances that the defrauded party could not make an offer to restore, prior to invoking the power of the court for relief; and relief would then be denied by reason of the rule. However, the rule seems not to be applied to all cases where rescission is sought, as will be seen by consulting the cases cited supra. Where a party defrauded is so situated in respect to the subject-matter that he can return to the guilty party that which the latter parted with in the transaction, and nothing more is necessary to effect a rescission, in such case the rule seems to be that the complaining party must first restore, or offer to restore, what he received, before he can maintain his suit or defense; as, where a party has been induced through fraudulent representations to buy chattels, he may rescind the contract by a return or a tender back of such chattels, and resist payment therefor on the ground of fraud in the inducement to purchase, or recover back money or other valuable things given in payment; but it must appear that within a reasonable time after discovery of the fraud restoration or offer thereof was made. The case of Gifford v. Carvill, 29 Cal. 589, and the cases therein cited, are illustrations of that class of cases. It will be observed, however, in the illustrations brought to view, that the action or defense through which relief is sought is an action at law, or a defense to such an action. In the one case the action is to recover back money paid out in the transaction induced by fraud, or, on the other hand, a defense against an action brought to enforce the contract, which was procured through fraudulent representations. Occasionally a case will be found where the true distinction seems to have been lost sight of, and the rule requiring a return or offer to return, as a condition precedent to maintaining the action, is applied to an action in equity for cancellation, rescission, or annulment. This seems to have been done in the case of Herman v. Hattenegger, 54 Cal. 161, cited by appellant. That was an equity case for the rescission of a contract on the ground of fraud in procuring it, and for recovery of property claimed to have been parted with by the complaining party through fraudulent representations. The court denied relief on the ground that it did not appear that the plaintiff had, prior to commencing his action, returned or offered to return what he had received in the transaction. The only authority cited was Gifford v. Carvill, supra, which was not an equity action for rescission or cancellation, but was an action at law in all its attributes. The latter case was brought to enforce payment of certain promissory notes, and the defense set up was fraudulent representations made and

relied upon in the sale of mining stock, for which the notes were given. Fraud, as a defense in such a case, does not belong exclusively to equity jurisdiction. We find no error in the action of the court in overruling defendant's motion for judgment on the pleadings.

This cause was tried by the court, sitting with a jury impaneled to aid in finding the facts. All other specifications of error urged by counsel for appellant relate to the admission of evidence and finding of facts. It was alleged in the complaint that one George La Point, by prearrangement, conspired with defendant to aid him in procuring a conveyance of said property from plaintiff for a grossly inadequate consideration; and that in furtherance of such design said La Point did a series of wrongful acts, and made certain false representations, specifically set out and alleged, calculated to aid, and which did aid, defendant in procuring a conveyance of said property. During the trial the court permitted plaintiff to introduce testimony tending to prove that, two days prior to making the conveyance to defendant, said La Point sought out and introduced himself to plaintiff, and inquired about his present circumstances, means of support, and intentions; and finding that he was without money, and looking for employment, told plaintiff that he (the said La Point) would furnish plaintiff money for his present expenses; told plaintiff he ought not to seek employment; that La Point had been told plaintiff was the best prospector that could be found; and proposed that plaintiff should enter into a partnership arrangement with La Point to go prospecting for mines; and that they agreed upon such partnership arrangement; and that said La Point induced plaintiff to go about the town of Anaconda with La Point to look for, and arrange to purchase, certain supplies to use in such prospecting business; that during this time, and from the first meeting of said parties, plaintiff was encouraged by said La Point to drink extensively of intoxicating liquors furnished by the latter; that plaintiff became intoxicated, and while in that state said La Point procured a deed from plaintiff conveying to La Point one-fourth interest in said Ida mine, in consideration of \$104 in money, and two promissory notes made by said La Point for \$200 each, payable to plaintiff. The introduction of all such evidence, relating to the conduct of said La Point prior to the time of executing the deed of conveyance to defendant, was objected to, and exception reserved to the admission thereof, on the ground that the same was irrelevant and incompetent because defendant, Berkin, was in no way connected with said acts of La Point, and that said acts were not in any way connected with the transaction whereby defendant, Berkin, obtained the deed sought to be canceled by this action. The same objection was also urged in a motion to strike out said testimony, made at the time the plaintiff rested in the proof of his case; which motion was also overruled, and defendant excepted thereto. This testimony related to alleged acts done

in the absence of defendant by one alleged to be a conspirator co-operating with him to accomplish the purpose in question. Such testimony was permissible only on the ground that such prearrangement, conspiracy, or relation of principal and agent between said La Point and defendant had been shown.

What evidence was there before the court tending to prove the existence of such agency, prearrangement, or conspiracy? The answer of the defendant in the action admits that "the defendant went to Anaconda for the purpose of purchasing said interest, and took with him for that purpose the draft referred to, upon information sent him by La Point;" and again admits "that defendant, being a stranger, had La Point find plaintiff, and bring him to defendant, as a matter of convenience to him;" and, again, defendant's answer "averts that this defendant went to Anaconda upon information, received by him from La Point, that he could purchase said property." It is true these admissions are innocent enough in themselves, but they do show some co-operation by said La Point with defendant in reference to the object sought to be consummated. In addition to those admissions in defendant's answer, prior to the admission of the evidence under consideration testimony had been introduced to the effect that on said 22d of March said La Point sought and found plaintiff in a saloon at Anaconda, where he had been engaged at card-playing and drinking intoxicating liquors; that plaintiff was invited by said La Point to go to his house in Anaconda, and La Point accompanied plaintiff there; that plaintiff understood from La Point's invitation that the object of this visit to La Point's house was to see his folks; that, when the two entered said house, defendant, Berkin, was there, and La Point seemed surprised to see defendant, and inquired where he came from, and defendant replied that he had come from Ore Fine mining district, where he had been prospecting, (which mining district is situated at a distance from the section where the Ida mine is located;) that La Point then introduced plaintiff to defendant, Berkin; that La Point then explained to defendant that plaintiff and La Point had entered into an arrangement to go prospecting, and thereupon defendant expressed a desire to enter into such arrangement with them; that defendant and said La Point then went into another room, and held some conversation together; that defendant returned shortly afterwards to the room where plaintiff was, and again said he would like to get into the prospecting business mentioned; that La Point then mentioned the subject of the Ida mine, saying he had a fourth interest therein, and thereupon defendant proposed to La Point to buy the interest which he owned in said mine, and also the fourth interest owned by plaintiff, offering \$1,000 each for said interests; that La Point called plaintiff's attention to said offer, and asked what he thought of it, and that plaintiff replied, saying, "We are partners, and whatever you do is satisfactory to

me;" that La Point thereupon accepted the offer, and defendant immediately paid to La Point and to plaintiff the sum of \$20 each to bind the bargain. The court, having before it evidence of that character, allowed inquiry to be made as to the representations and conduct of La Point in relation to the formation of said partnership arrangement for prospecting, and the acquisition by La Point of said fourth interest in the Ida mine, which occurred two days before the transaction of defendant in question. In view of such testimony before the court, tending to prove the co-operation of La Point with defendant in his effort to procure the deed in question, we cannot hold that the court erred in allowing the introduction of said testimony objected to and urged as error. We think an ample foundation was laid to sustain the introduction thereof. Code Civil Proc. § 642; Whart. Ev. § 1205; *Lincoln v. Claflin*, 7 Wall, 182; *Nudd v. Burrows*, 91 U. S. 438.

Among other matters assigned as ground for a new trial is a specification that the finding of the jury to the effect that defendant and said La Point conspired together to obtain plaintiff's interest in said mine "for a consideration far below its value" is not supported by the evidence. In addition to admissions in the answer of defendant and the evidence above referred to, it was disclosed by the testimony of both La Point and defendant, Berkin, that, about a week before the interest was obtained for defendant, he went to Anaconda in search of plaintiff, and not being able to find him, as defendant testified, he "told La Point to look for Maloy, and let defendant know at once if he could find him, and that if he could buy in, or buy his interest in, the Ida mine for four or five hundred dollars, to do so; he was to buy the interest for me;" and that La Point "said he would do it." And, notwithstanding the fact that La Point first procured a conveyance of one-fourth interest in said mine to himself, it does not appear that he at all relinquished his effort to aid his brother-in-law, Berkin, in obtaining a deed from plaintiff for the remaining fourth interest in said mine; and that it was obtained for a consideration grossly out of proportion to its value does not admit of doubt, if the value of said mine was \$40,000, as found by the jury and court. This brings us to the point raised by the counsel for appellant, that the court erred in admitting certain testimony as to the value of said mine, and that the finding that the value of said mine was \$40,000 is unsupported by evidence. Appellant's counsel have not explained wherein the evidence introduced as to value does not conform to the views expressed in *Railway Co. v. Warren*, 6 Mont. 275, 12 Pac. Rep. 641, and in the opinion of the supreme court of the United States affirming the same case, 137 U. S. 348, 11 Sup. Ct. Rep. 96. Neither is it explained wherein the witnesses were not shown to be fully competent to testify as to the value of said mine. In this case the mine was developed to such an extent as to have produced valuable ore, from which valuable returns had been de-

rived. Not only so, the property appears, at the time, to have had a market value. About the time in question, one-eighth interest in said mine had been sold for \$5,300, and one-fourth interest for \$10,000; and other interests were sought for, and contracts made to pay proportionate sums therefor. So much was shown concerning the market value of the property; and the witnesses who testified of the value were first shown to be fully qualified to speak upon that subject, according to the views expressed in the cases last above cited.

In the brief of counsel for appellant it is urged that the court erred in allowing witness McIntire to testify on behalf of plaintiff that defendant's father, William Berkin, worked a few days in said mine prior to the transaction in question. This point was not specified to the court below as error, on the motion for new trial, as appears by the record, and the same is therefore passed without consideration.

In this case it appears that defendant obtained the interest in question by paying about one-tenth of its market value. From the evidence set forth in the record, there is scarcely room for a reasonable doubt that when defendant undertook to find plaintiff, and obtain a deed for said property, defendant had knowledge of the value of the property which he sought to obtain for so small a consideration, and also had reason to believe that plaintiff was ignorant of the present value of the same. Defendant's testimony convinces us of that, notwithstanding his great effort to conceal the fact that he had such knowledge. He admits that he heard it rumored that Al. Sheed had sold his eighth interest in said mine for four or five thousand dollars. This was the person from whom defendant borrowed the money with which to purchase plaintiff's interest. Defendant says in his testimony that the fact which led him to make an effort to find plaintiff was that he, (defendant,) "like a good many others, was excited about this property." "That is," he says, "my curiosity was excited. A good many were hunting for him, and I thought I had the same right, and that I would do the same. I thought there might be something in it, by reason of the inquiries that were being made about him. There were a good many around here hunting for him, and one man told me he would give me three hundred dollars if I could find him." Defendant further testifies that the subject of this mine "was in everybody's mouth;" that it had been reported to him that the plaintiff was lost; that plaintiff had been advertised for in the local newspapers. It appears without dispute that plaintiff had neither seen nor received any information concerning said mine for about 13 months, and in the mean time the mine had been developed from an unpromising "prospect" to a paying mine, and had a present value in the market, as above set forth; that plaintiff was supposed to have been lost; and that defendant had been consulted about administering on plaintiff's estate.

However, as counsel for appellant correctly argue, inadequacy of consideration

alone is not sufficient cause for cancellation of a conveyance, except, perhaps, in extreme cases. Inadequacy of consideration is one strong element of the cause, and, if accompanied by circumstances which amount to fraud, the cause for relief is made out. Mr. Pomeroy, in his work on Equity Jurisprudence, states forcibly and succinctly the principles applicable to this subject, and accompanies his text with a multitude of authorities, bringing his research down to a recent date. We quote some of his observations. He says: "The rule is well settled that where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price or in the subject-matter, unaccompanied by other inequitable incidents, is never of itself sufficient ground for canceling an executed or executory contract. If the parties, being in the situation and having the ability to do so, have exercised their own independent judgment as to the value of the subject-matter, courts of equity should not, and will not, interfere with such valuation. In some of the earlier decisions, mere inadequacy, either in the price or the value of the subject-matter, was held to be a sufficient hardship, which might defeat the specific performance of an executory contract when set up as a defense. The doctrine, however, is now settled that mere inadequacy—that is, inequality in value between the subject-matter and the price—is not a ground for refusing the remedy of specific performance. In order to be a defense, the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud. In short, inadequacy as a negative defense, and as an affirmative ground for a cancellation, is governed by one and the same rule. Although the actual cases in which a contract or conveyance has been canceled on account of gross inadequacy merely, without other inequitable incidents, are very few, yet the doctrine is settled by a *consensus* of decisions and *dicta* that even in the absence of all other circumstances, when the inadequacy of price is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, it will be a sufficient ground for canceling a conveyance or contract, whether executed or executory. Even then, fraud, and not inadequacy of price, is the true and only cause for the interposition of equity and the granting of relief. If there is nothing but mere inadequacy of price, the case must be extreme to call for the interposition of equity. Where the inadequacy does not thus stand alone, but is accompanied by other inequitable incidents, the relief is much more readily granted. But even here the courts have established clearly-marked limitations upon the exercise of their remedial functions, which should be carefully observed. The fact that a conveyance or other transaction was made without professional advice or consultation with friends, and was improvident, even coupled with an inadequacy of price, is not of itself a sufficient ground for relief, provided the parties

were both able to judge and act independently, and did act upon equal terms, and fully understood the nature of the transaction, and there was no undue influence or circumstances of oppression. When the accompanying incidents are inequitable and show bad faith, such as concealments, misrepresentation, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative. It would not be correct to say that such facts constitute an absolute and necessary ground for equitable interposition. They operate to throw the heavy burden of proof upon the party seeking to enforce the transaction, or claiming the benefits of it, to show that the other acted voluntarily, knowingly, intentionally, and deliberately, with full knowledge of the nature and effect of his acts, and that his consent was not obtained by any oppression, undue influence, or undue advantage taken of his condition, situation, or necessities. If the party upon whom the burden rested should succeed in thus showing the perfect good faith of the transaction, it would be sustained; if he should fail, equity would grant such relief, affirmative or defensive, as might be appropriate." 2 Pom. Eq. Jur. §§ 926-928.

The conclusion which we have reached, after mature consideration of the case, and the points, authorities, and arguments of counsel, is that none of the errors assigned ought to be sustained, and that the findings and decree are fully supported by the evidence. We are satisfied from the evidence that, when defendant set out in his endeavor to obtain said property, he knew full well the value thereof; yet if, with such knowledge, he had sought and obtained a transfer of the property for such small consideration compared to its value, and, to do so, hurried to take advantage of plaintiff's ignorance of the late development of said property and the greatly increased value thereof, still the transaction might not have been set aside had defendant taken care to keep himself free from the use of means and agencies which tended to place the victim of his covetous design at a still greater disadvantage. Having a knowledge of the value of said property, it clearly appears that defendant contemplated and undertook the procurement thereof for a grossly inadequate consideration. Yet with only those facts in view, in a case like this, where no infirmity or weakness of plaintiff is shown, the law is slow to move, and often remains dormant when appealed to for the undoing of the transaction, "provided the parties were both able to judge and act independently, and did act upon equal terms, and fully understood the nature of the transaction, and there was no undue influence or circumstances of oppression." *Pomeroy, supra*. But, when gross inadequacy of consideration is shown, the law requires of the defendant the strict avoidance of all false,

deceitful, or unfair means calculated to advantage his design; and therein the defendant's conduct does not stand the test. When we speak of defendant's conduct, we have in view not only what he personally did, but also what he did through the agency of La Point, whom defendant commissioned to "buy in, or buy the interest" of Maloy in, said property for defendant, and who aided defendant in his transaction. The facts shown to the satisfaction of the court as to the conspiracy, or relation of principal and agent, between defendant and La Point in the consummation of the transaction; as to the intoxication of plaintiff, from the influence of which the court found he was not free, when the conveyance was made to defendant; as to the use made of the partnership scheme to gain the trust and confidence of plaintiff, and distract his attention from the real object to be achieved; and as to the said La Point pretending to sell his fourth interest in said mine, for the same price, and at the same time,—each and all of those facts were potent elements in this case to taint with fraud and vitiate the transaction, when looked at in connection with the fact that defendant commenced his efforts to obtain said property, with the intention to, and did, acquire it for a grossly inadequate consideration. It is therefore ordered that the judgment, and the order overruling appellant's motion for a new trial, be affirmed, with costs.

BLAKE, C. J., and DE WITT, J., concur.

GALLIGHER v. LOCKHART.

(*Supreme Court of Montana*. Feb. 5, 1891.)

PARTNERSHIP—ACCOUNTING—SERVICES OF PARTNER.

1. A person who, on buying the interest of certain members of a mining firm, informs the remaining partner that he will no longer carry on the partnership operations, nor be liable for debts contracted thereafter in its behalf, is not liable to such partner for any subsequent expenses incurred by him in developing the mine.

2. The assignee of certain members of a firm is not liable to the remaining partner for previous services rendered by him for the partnership, where there was no agreement with the other partners that he should receive compensation therefor, and the assignee did not assume such liability.

Appeal from district court, Beaverhead county; THOMAS J. GALBRAITH, Judge.

Action by William L. Galligher against James A. Lockhart to dissolve a partnership. Judgment for plaintiff. Defendant appeals. Reversed and modified.

Forbis & *Forbis*, for appellant. *Toole & Wallace*, for respondent.

HARWOOD, J. The object of this action was to obtain a dissolution of copartnership, an accounting between the copartners, and also a partition of certain mining claims; but the question of partition was abandoned by the consent of all parties, and the action proceeded as to the other purposes. The evidence introduced at the trial, and the findings of fact by the court, are before us for review on appeal—in the judgment, and from an or-

der overruling appellant's motion for new trial.

It appears from the evidence and findings of fact that certain mining claims were owned in equal undivided interests by plaintiff and Chapman and Thompson; that said owners engaged in a copartnership arrangement to do certain development work upon said mining claims, at the expense of said owners in equal proportions. The object of said development work was to put the mining claims in salable condition; but no period of time was agreed upon during which development work was to be prosecuted, nor was it agreed as to what extent such work should be prosecuted. Under said arrangement a large amount of development work was done upon the mining claims in question prior to June 30, 1887. On that date, defendant, Lockhart, succeeded, through conveyances, to the interests in said mining claims theretofore owned by said Chapman and Thompson, and thereby became the owner of an undivided two-thirds interest in said property, and also succeeded to the position theretofore occupied by said Chapman and Thompson in said copartnership arrangement, as to future operations thereunder. Upon the trial the court found that on said 30th day of June, 1887, a full accounting and settlement was made as to the partnership affairs between plaintiff, Galligher, and Chapman and Thompson, and that Galligher paid his proportion of expenses incurred prior to that date, and that defendant, Lockhart, paid for Chapman and Thompson their full share of expenses incurred in developing said mining claims prior to said date, except the compensation claimed by said Galligher for his services. The court further found that on said date plaintiff, Galligher, was notified by defendant, Lockhart, that he would not carry on the partnership operations any longer, and that he would not be liable for any debts or expenses contracted by said Galligher in working upon said mining claims. These findings are fully supported by undisputed evidence, which shows that, at the time said notice was given, defendant had examined said property, and settlement of all prior expenses was made as aforesaid, except the claim of plaintiff for services, and plaintiff was then informed by defendant that he was satisfied the property being developed was not worth anything that defendant advised shutting down work thereon, and declared he would not prosecute the work any further, and would not be responsible for any further expenses. Plaintiff's reply to said notice was that he proposed to continue work on said claims, and that he would endeavor to make defendant pay his proportion of the expense thereof.

Appellant contends that, under said state of facts disclosed by the evidence and findings of the court, it was error for the court to hold, as it did, that defendant was liable, in an accounting between plaintiff and defendant, for two-thirds of the expense involved by plaintiff in work upon said mining claims after the date of said notice. We think appellant's posi-

tion upon this point is fully sustained by principles of law, and we so hold. *Carter v. Whalley*, 11 Morr. Min. Rep. 262; *Slemmer's Appeal*, Id. 441; *Crawshay v. Maule*, Id. 223; *Vice v. Flening*, Id. 241. Respondent's counsel cites no cases which support the converse of appellant's proposition, if, indeed, any cases could be found to support that position. The trial court virtually held as we do, in another conclusion of law, wherein it was held that the partnership was dissolved in January, 1888, by defendant giving "public notice of the repudiation of the said contract and partnership." The public notice could have had no more potency, as affecting the rights and relations of the partners themselves, than a private notice. It follows that the judgment ought to be so modified as to eliminate therefrom all charges against defendant involved in working said mining claims subsequent to June 30, 1887.

Another point insisted upon by appellant is that the court below erred in holding appellant liable for salary to plaintiff for services during a period prior to the time appellant came into said copartnership. This was error for two reasons: *First*. There was no showing that it was ever agreed in reference to said partnership arrangement that plaintiff, one of the copartners, and an owner in common of an interest in said property, should receive compensation for services which he might render in and about said work. This charge could only be sustained against his copartners, Chapman and Thompson, by virtue of a special agreement to that effect. 2 Bates, Partn. § 770; Pars. Partn. (3d Ed.) 250; *Babcock v. Stewart*, 11 Morr. Min. Rep. 447. Upon this point, it appears that the same rules apply to mining as to other partnership compacts. *Duryea v. Burt*, 11 Morr. Min. Rep. 395. *Secondly*. The charge for services of plaintiff rendered prior to the time appellant came into said copartnership could not lawfully be maintained against appellant unless he assumed and agreed to pay the same, which is in no way shown. Respondent's counsel admit in their brief that an incoming member into such a copartnership arrangement would not be personally liable for indebtedness incurred prior to his coming into the copartnership. *Babcock v. Stewart*, supra. As to the claim of plaintiff for services rendered by him about said work after June 30, 1887, that falls with all other expenses involved after that date, under the views above expressed. It follows, therefore, that all charges against defendant for services of plaintiff in and about said work, both before and after June 30, 1887, should be eliminated from the judgment rendered against defendant. We do not find reason for disturbing any other findings of fact or conclusion of law made by the court below, which appellant insists were erroneous.

According to the findings and conclusions of law not disturbed, the account between plaintiff and defendant stands as follows: Defendant should be charged with two-thirds of the \$250 paid by plaintiff, or for which he became personally re-

sponsible, in defending the title to said property, namely, \$166.66; and this is the only item remaining against defendant, according to the findings sustained. According to the findings, defendant should be credited with items as follows: One-third of \$504.50 paid out by defendant on debts of the firm existing prior to the time he became a member, one-third of which, or \$168.16, is rightfully chargeable to plaintiff; also with two-thirds of \$400 worth of goods and provisions of the firm, which plaintiff took and converted to his use in working said claims after June 30, 1887, two-thirds of which was the property of defendant, valued at \$266.66, and for which defendant should be credited in this accounting. Defendant should also be credited with two-thirds of the value of \$311 worth of property of the firm taken under attachment for debts contracted by plaintiff after June 30, 1887, two-thirds of which, or \$207.32, was the property of defendant, and should rightfully be credited to him in this accounting. All these credits in favor of defendant aggregate the sum of \$642.14, from which should be deducted two-thirds of said \$250 expended by plaintiff in defending the title to said property, viz., \$166.66. This deduction leaves a balance of \$475.48 in favor of defendant. In other words, as the findings show, defendant owes plaintiff \$166.66 for moneys properly expended in said partnership matters; and plaintiff owes defendant \$642.14 for moneys which defendant properly paid out for plaintiff's benefit, and for property belonging to defendant, which plaintiff wrongfully took and converted to his use, or caused to be taken by attachment for debts which plaintiff wrongfully contracted against said firm. These accounts being offset against each other, leave a balance of \$475.48 in favor of defendant, for which he is entitled to judgment against plaintiff as a result of said accounting. It is therefore ordered that the judgment rendered by the trial court be reversed, and that judgment be entered in favor of defendant and against plaintiff for the sum of \$475.48, and costs. Judgment reversed.

BLAKE, C. J., and DE WITT, J., concur.

(2 Wash. St. 564)

RATHBUN V. THURSTON COUNTY.¹

(Supreme Court of Washington. July 15, 1891.)

REVIEW ON APPEAL—PRESUMPTIONS.

Where the amount to which plaintiff is entitled depends upon the construction of the words "separate description of real estate" in a contract for printing, on which the suit was brought, and it does not appear what construction the trial court adopted, and the evidence is not in the record, it will be presumed on appeal that the finding of the court was justified by the evidence.

Appeal from superior court, Thurston county; MASON, Judge.

Action by J. C. Rathbun against Thurston county on contract for publishing a tax-list. Trial to the court. Judgment for plaintiff for part of his claim, and he appeals. Affirmed.

¹ Rehearing denied.

J. C. Rathbun, for appellant. W. J. Melroy, for respondent.

ANDERS, C. J. This action was tried in the court below upon a written stipulation of facts, from which it appears that appellant, who was the publisher of a newspaper, advertised the delinquent tax-list of the county for the year 1889 for an agreed compensation of 75 cents for each separate description of real estate for the first insertion, and 25 cents for each subsequent insertion. It is conceded that the advertising was done in accordance with law and the agreement of the parties; but, on settlement with the county commissioners for the work done, a controversy arose over the meaning of the expression "each separate description of real estate." The plaintiff contended that a separate description of real estate is a description of an individual lot, tract, or parcel of land appearing upon the assessment roll, without respect to the number of such individual lots, tracts, or parcels that may have been assessed to a single owner, notwithstanding the tax levied upon all such parcels may have been carried out in total, and placed opposite the last item in the list. On the contrary, the commissioners claimed that such separate description embraces all the lots, tracts, and parcels of land assessed to a single owner, where the valuation thereof is carried out in total, and the tax levied against the whole is placed opposite the last item in the list instead of a separate assessment and valuation being made for each such lot, tract, or parcel of land. According to the contention of plaintiff he is entitled to be paid the contract price for publishing 564 separate descriptions, but according to the view of defendant he is only entitled to compensation for advertising 270 of such descriptions, and for which the county paid him.

The court below found as facts that the delinquent tax list published by plaintiff contained 330 separate descriptions, and that there was still due the plaintiff from defendant the sum of \$90, for which sum judgment was duly rendered for plaintiff. The latter brings the case here, and asks this court to define the abstract meaning of the words "separate description of real estate." These words are of such obvious import that we doubt if any definition we might undertake to give would render their meaning more clear than that suggested by the words themselves. It would seem evident that a separate description of a tract of land is such a description as will sufficiently identify it for the purpose or which the description is required. A description in a deed might or might not be sufficient in an assessment for the purpose of taxation. But, so far as this case is concerned, we have nothing before us whereby we can ascertain how the lands were described in the delinquent tax list as published by appellant, and are therefore unable to determine whether the court below adopted the theory of the plaintiff or that of the defendant. The delinquent list, as published, not having been made a part of the record here, we must conclude that the findings of fact of the court below were

warranted by the evidence, and that the judgment therein rendered is correct. The judgment of the lower court is therefore affirmed.

STILES, DUNBAR, HOYT, and SCOTT, JJ., concur.

(2 Wash. St. 552)

LYBARGER v. STATE.¹

(Supreme Court of Washington. July 14, 1891.)

CONSTITUTIONAL LAW—EX POST FACTO LAW—PROSECUTION BY INFORMATION—MISCONDUCT OF JURY—SEDUCTION.

1. Const. Wash. art. 1, § 25, provides that offenses heretofore required to be prosecuted by indictment may be prosecuted by information or by indictment, as shall be prescribed by law. Section 26 provides that "no grand jury shall be drawn or summoned in any county except the superior judge thereof shall so order." *Held*, that these provisions are not *ex post facto* as to offenses committed prior to their adoption, since indictment by a grand jury is not a substantial right, but merely a method of procedure, and that such offenses may be prosecuted upon information.

2. Code Wash. § 278, provides that misconduct of the jury shall be shown by affidavit on motion for new trial, and where misconduct is not thus shown it will not be considered on appeal. ANDERS, C. J., and SCOTT, J., dissenting.

3. On a trial for seduction, where it appeared that the prosecutrix was of tender years; that she lived with defendant, and was to a certain extent under his protection; and there was also testimony tending to show the commission of the offense by defendant,—the conviction will not be disturbed.

Appeal from superior court, Thurston county.

John G. Lybarger was convicted of the crime of seducing Elsie Patnude and appeals. Affirmed.

Marshall K. Snell, for appellant. W. A. Reynolds, T. N. Allen, and C. H. Ayer, for the State.

DUNBAR, J. The record in this case shows that on the 22d day of July, 1890, the state's attorney, W. A. Reynolds, filed a complaint with John G. Sparks, a justice of the peace for Thurston county, state of Washington, charging appellant with the crime of seduction; whereupon appellant, being brought before the court, waived examination, and entered into a recognizance for his appearance at the superior court. That thereafter, on the 6th day of October, 1890, the said W. A. Reynolds, prosecuting attorney for Thurston county, made and filed with the superior court of Thurston county, state of Washington, an information charging appellant with having on the 10th day of January, 1889, in the county of Thurston, Wash., seduced one Elsie Patnude, etc. That thereafter, and on October 7, 1890, appellant was arraigned and required to plead to said information, and did plead not guilty thereto. That thereafter a trial was had, in which, on October 10, 1890, a verdict was rendered purporting to find appellant guilty of the crime of seduction; and thereafter a motion in arrest of judgment and a motion for a new trial were made, and denied by the court, and on October 24, 1890, a judgment and sentence were rendered by said court, purporting to adjudge appellant guilty of the

crime of seduction, and that he be punished therefor by imprisonment in the state penitentiary at Walla Walla, in said state, at hard labor, for the period of four years, and that he pay the costs of prosecution, and committing him to the custody of the sheriff of Thurston county to carry such judgment into execution; all of which proceedings upon such trial, and up to and including the entry of judgment and sentence, are fully stated and made a part of the record of said superior court in such proceeding by its statement of facts, evidence, and charge of the court, as filed in this court. That at the time of entry of said judgment notice of appeal was given in open court, and a *superse-deas* granted by the court. That thereafter, and on the 13th day of March, appellant served notice of appeal, appealing from said judgment and sentence, and each and every part thereof, which notice of appeal is duly entered of record and filed in this court. The following grounds are relied upon by appellant for the reversal of this judgment: (1) Illegality of proceedings by information for a crime committed prior to the adoption of the constitution of the state, (2) misconduct of the jury; (3) insufficiency of evidence; (4) error of trial court.

As to the first proposition it is urged—*First*, that the proceeding by information was illegal; *second*, that an indictment was necessary to jurisdiction and a valid judgment; *third*, that the court will look into the record to ascertain whether there was jurisdiction. During our territorial existence there was no question but the defendant would have had a right to a presentment by a grand jury, and this crime was alleged to have been committed before the adoption of the constitution and the admission of the state into the Union. Section 25, art. 1, of the constitution of the state of Washington provides that offenses heretofore required to be prosecuted by indictment may be prosecuted by information or by indictment, as shall be prescribed by law. Section 26, art. 1, of the constitution says: "No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order." Some of the questions involved here are exceedingly interesting, and this court has at least undertaken to give them a painstaking examination, and the conclusion reached from that investigation is that the law changing the mode of procedure from an indictment to an information does not contain any of the elements or respond to any of the accepted definitions of an *ex post facto* law; and that it is not in violation of any guaranty by the federal constitution. The dissenting opinion of Justice HARLAN in *Hurtado v. People*, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292, cited by appellant, is a learned and highly interesting dissertation on the origin, history, and benefits of a grand jury; but the reasoning of the learned judge does not appeal to our minds as strongly as does that of the majority opinion, which holds, upon well-sustained reasoning, and by an overwhelming weight of authority, that a conviction upon an information for murder is

¹ Rehearing denied, 37 Pac. Rep. 1029.
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the first degree, and a sentence of death thereon, are not illegal by virtue of the clause in the fourteenth amendment to the constitution of the United States, which prohibits the states from depriving any person of life or property without due process of law. The application of the fifth amendment to the constitution of the United States to this question has been so distinctly settled that it seems to us that an extended discussion would not be justified. In *Barron v. City Council of Baltimore*, 7 Pet. 243, Chief Justice MARSHALL, in discussing the fifth and sixth amendments, after a thorough review of the questions, says: "These amendments contain no expression indicating an intention to apply them to state governments. This court cannot so apply them." And in *Twitchell v. Com.*, 7 Wall. 324, the chief justice of the supreme court of the United States, in an opinion concurred in by the full bench, says: "But the scope and application of these amendments are no longer subjects of discussion;" and, quoting the opinion of Chief Justice MARSHALL, just above cited, says: "And this judgment has been frequently reiterated, and always without dissent." From an investigation of all the cases cited we are compelled to conclude that an indictment by a grand jury is neither a constitutional right, nor a substantial right of any kind, but that it is simply a procedure, and as such it is within the power of the legislature to change or abolish it. No right of defense is taken from the defendant in this action that he had at the time of the commission of the crime. He is entitled now, as he was then, to be tried by a jury of his peers; to be heard by himself or counsel; to meet the witnesses face to face; to have the same length of time to prepare for trial. It takes the same weight of testimony now as it did then to convict. He is entitled to the same presumptions. The penalty for the crime remains the same. No right has been abridged, no avenue of escape closed up, which was open to him before. It was not in the grand-jury room that he could make any defense before. That room presented to him a closed door. The presentation through the grand jury is simply a mode of procedure by which the defendant is brought formally before the trial court. The state can prescribe another mode, as it has, by information filed by the prosecuting attorney. These are questions that cannot substantially concern the defendant. They are preliminary proceedings; mere modes of attainment or forms of procedure. There is no fundamental right of the defendant affected by one of these modes any more than by the other. No one has any vested interest in either of these modes of procedure. Through the instrumentality of either, the defendant is charged with crime, and put upon his defense; and, if these preliminary steps have been taken according to law, and he has had a fair trial in a court of justice according to the modes of proceeding applicable to such a case, he cannot be heard to complain.

As to the question as to whether or not the law now in force in relation to informa-

tions as applied to this crime is an *ex post facto* law we will quote and abide by the classified definition of Chief Justice CHASE in *Calder v. Bull*, 3 Dall. 386, quoted afterwards by the supreme court of the United States with approval, and which has been generally accepted by the courts as a comprehensive and correct definition, which is as follows: "(1) Every law which makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than when it was committed, (3) every law that changes the punishment, and enforces a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender." Measured by this standard, the law in question cannot be said to be *ex post facto* in its effect. If so, under what classification does it fall? We cannot agree with the appellant that either anything decided or any *dictum* in the case of *Kring v. State*, 107 U. S. 221, 2 Sup. Ct. Rep. 443, supports his contention in this case. What was held in that case was that "within the meaning of the constitution any law is *ex post facto* which is enacted after the offense was committed, and which, in relation to it or its consequences, alters the situation of accused to his disadvantage." Kring had been indicted for murder in the first degree. He had been tried four times, and convicted once on a plea of guilty of murder in the second degree, and was sentenced to imprisonment in the penitentiary for 25 years. He took an appeal from the judgment on the ground that he had had an understanding with the prosecuting attorney that if he would plead as he did his sentence should not exceed 10 years' imprisonment. The judgment was reversed by the supreme court, and when the case came on for trial again he refused to withdraw his plea of murder in the second degree, and refused to renew his plea of not guilty, which had been withdrawn when he pleaded murder in the second degree. The court then, against his remonstrance, made an order setting aside his plea of guilty of murder in the second degree, and directing a general plea of not guilty to be entered. On this plea he was tried, found guilty, and sentenced to death, and the judgment was affirmed by the supreme court of the state of Missouri. It was conceded in that case that, at the time of the commission of the crime, in the state of Missouri under the law the acceptance by the prosecuting attorney and the court of the plea of murder in the second degree to an indictment of murder in the first degree, and the conviction and sentence the defendant under it of murder in the second degree, was an acquittal of the charge of murder in the first degree, and that he could not be tried again for that offense; but the state court overruled this defense on the ground that by section 23 of article 2 of the constitution of Missouri, which took effect after the commis-

sion of the crime by Kring, the former law was abrogated, and that he could be tried for murder in the first degree notwithstanding his conviction and sentence for murder in the second degree; and the supreme court of the United States by a divided court held that the article in the new constitution was an *ex post facto* law. But in that case a perfect defense to the crime of murder in the first degree which existed at the time of the commission of the crime was taken away by the new law; a defense, at least, which the defendant could avail himself of by the consent of the court, and a defense which he had availed himself of by such consent at his former trial. And well the court said: "Whatever may be the essential nature of the change, it is one which to the defendant involves the difference between life and death." And again says the court: "The question here is, does it deprive the defendant of any right of defense which the law gave him when the act was committed, so that as to that offense it is *ex post facto*?" "In that case," said the court, "the constitution of Missouri so changes the rule of evidence that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower rate of homicide, is not received in evidence at all, or, if received, is given no weight in behalf of the offender. It also changes the punishment, for, whereas the law as it stood when the homicide was committed was that when convicted of murder in the second degree he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished notwithstanding the former conviction." But it is certainly difficult to see the application of this reasoning to the case at bar. It is true, as urged by appellant, that section 1000 of the Code of Washington provides that "when an indictment indorsed 'Not a true bill' has been presented in court and filed, the effect thereof is to dismiss the defendant, and the same cannot be submitted to or inquired of by the grand jury unless the court so orders." But this section is evidently not intended to confer any right upon the defendant, but simply to expedite the business of the court, subject to the direction of the court. In order to make it avail the defendant it must be presumed—*First*, that the grand jury would have returned "Not a true bill;" and, *second*, that after they had done so the court would not have allowed the charge to be submitted to another grand jury. Such presumptions can hardly be indulged in favor of defendants who seek to escape from a trial upon the merits. No one can or should question the right of the defendant to be tried by the law in force when the crime was committed. This is a principle that is founded in natural justice, that is warranted by the wisdom of ages, and guaranteed by our constitution; but, while the defendant must be protected in every substantial right, the rule must not be so narrowly construed as to defeat the ends of justice, or hamper or retard progress by preventing the enactment of laws govern-

ing questions of procedure which experience teaches us should be enacted; but the limitation must be construed as affecting the rights of parties, as distinguished from such as merely change the remedies by which those rights are to be enforced. In this case we cannot see that the condition of the defendant is changed for the worse. The law complained of makes no new offense. It gives no new definition to the crime he is charged with. It does not increase the punishment for the commission of the crime. It does not change the rules of evidence to make conviction more easy. None of his rights are interfered with. Upon his arraignment he stands in exactly the same position with reference to his trial and the probabilities of his acquittal or conviction that he did when the old law was in force. The state has simply changed its procedure. Of this he cannot be heard to complain, for, as is said by Mr. Cooley in his *Constitutional Limitations*, p. 329: "So far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose." So far as the retroactive or retrospective quality of the law is concerned, it is not retroactive in any sense that can injure the defendant, or in any constitutional sense. In all retroactive laws there must be an element of surprise, by which the persons whose rights are affected are taken unawares, and are called upon to act in a manner different from what they had been led by the previous state of the law to anticipate. *Wade, Retro. Laws*, § 34. It is unnecessary to repeat that the defendant's case does not fall within the scope of this definition. The only limit imposed upon the legislative power of the states in reference to the passage of retroactive laws by the constitution of the United States is that such laws shall not be *ex post facto*, and shall not impair the obligations of a contract. *Railroad Co. v. Nesbit*, 10 How. 395, and cases cited; *Watson v. Mercer*, 8 Pet. 88, and cases cited.

The second contention is that the judgment must be reversed on the ground of misconduct of the jury in separating and each going his own way without the custody of the court at various times during the trial, and in returning a sealed verdict. On this point the record shows that the jury separated, but is silent as to whether such separation was by consent of the parties. A strong and somewhat exhaustive argument was made by appellant's attorney upon this point, urging that, in the absence of an affirmative showing of consent, no presumption of consent would attach; while, on the other hand, it was claimed by the attorney general that, inasmuch as the statute allows the jury to separate with the consent of the parties, and the record shows that the court al-

lowed them to separate, the presumption therefore is that the parties did consent. But it is not necessary for us to discuss this proposition. Section 278 of the Code of Washington provides the manner in which the question of misconduct of the jury shall be raised on motion for new trial, which is by affidavit. As this ground for new trial was not shown in the manner provided by the statute, it will not be considered by this court.

As to the sufficiency of the evidence, we think we would not be justified in interfering with the prerogative of the jury in this case to pass upon the weight of testimony. Competent testimony was introduced tending to show the commission of the crime charged by the defendant. The jury heard the testimony, saw the witnesses on the stand, and noted their manner of testifying. The testimony showed the age and experience of the defendant and the tender age and want of experience of the female; the fact that she was under his own roof, and to a certain extent under his protection; that she was just merging into womanhood; and that she was at that critical age when judgment is weak and passion is strong, and when virtue falls an easy prey to the blandishments of the designing libertine,—artifices and blandishments which, exercised upon a woman of more mature years, would fall harmless. All these things the jury had a right to take into consideration. They probably did take them into consideration, and, considering all the circumstances of the case, under the instructions of the court, they adjudged him guilty, and he must abide by their decision. Our statute of seduction has no reference to the age. All the qualification is that the woman shall be unmarried and of previously chaste character. We find no substantial error in the instructions of the court or the admission of testimony, and the judgment of the lower court is affirmed.

STILES and HOYT, JJ., concur.

ANDERS, C. J., (*dissenting*.) It appears from the certified statement of facts in this case that the jury were told by the court after the testimony was closed and the cause was finally submitted to them that they might, in case they agreed upon a verdict during the night, seal the same, and deliver it to their foreman, and bring it into court on the following morning, which the jury accordingly did. The record fails to show that the defendant consented to this proceeding, and I am of the opinion that without his consent, which should affirmatively appear of record, the jury should not have been permitted thus to separate. The contrary was the practice at common law, and the only change made by our statute is that permitting the jury to separate by consent of the defendant and the prosecuting attorney during the trial. See Code, § 1089. Section 1102 of the Code provides that "when the jury have agreed upon their verdict they must be conducted into court by the officer having them in charge. Their names must then be called, and, if all appear, their verdict must be rendered in open

court; and, if all do not appear, the rest must be discharged without giving a verdict, and the cause must be tried again at the same or the next term." This language, it seems to me, clearly implies that the jury must be kept in charge by the officer, and not be permitted to go at large until after the rendition of their verdict in open court. See *Proff. Jury*, § 451. Upon the other questions involved in the case I concur in the opinion delivered by Mr. Justice DUNBAR.

SCOTT, J., concurs in this dissent.

(2 Wash. St. 662)

STATE *ex rel.* REED *et al.* v. JONES *et al.*
(*Supreme Court of Washington*. Aug. 1, 1891.)
WRIT OF PROHIBITION—WHEN GRANTED—REMEDY BY APPEAL.

The fact that a district court has overruled a motion to dissolve a preliminary injunction against certain state officers, prohibiting them from paying money to certain institutions under an act of the legislature, which motion challenged the jurisdiction of the court over the subject-matter, and is about to hear the cause on its merits, will not authorize a writ of prohibition, as the ruling may be reviewed on appeal.

Petition by state of Washington *ex rel.* T. M. Reed, A. A. Lindsley, George A. Black, S. B. Conover, Andrew H. Smith, J. H. Bellinger, Eugene Fellows, and ——— Hoppe against W. L. Jones, and Fremont Campbell, judge of the superior court of Pierce county, for writ of prohibition. Petition denied.

Turner & Graves, for petitioners. Crowley & Sullivan, for respondents.

ANDERS, C. J. This is an application for a writ of prohibition commanding the judge of the superior court of Pierce county, and the respondent Jones, to refrain from further proceeding in a certain action pending in said court wherein the said W. L. Jones is plaintiff, and the relators are defendants, which action was brought to restrain the relators George A. Black, S. B. Conover, and Andrew H. Smith, as commissioners appointed by the acting governor of the state to locate a site for an agricultural college, from further proceeding in the matter of said location; and the relators S. B. Conover, Andrew H. Smith, ——— Hoppe, J. H. Bellinger, and Eugene Fellows, as the board of regents of said college appointed by the said acting governor from doing any act whatever as such board of regents; the relator T. M. Reed, as state auditor, from issuing any warrant or warrants for the payment of the appropriation made by the legislature for the establishment and maintenance of an agricultural college and school of science; the relator A. A. Lindsley, as state treasurer, from paying such warrant or warrants; and to have the said Black, Conover, and Smith decreed usurpers and intruders as commissioners under the act of the legislature of March 9, 1891, entitled "An act to provide for the location and maintenance of the agricultural college, experiment station, and school of science of the state of Washington, and declaring an emergency;" and their location of said college at Pullman declared null and void, and their

commissions canceled. It is alleged in the petition of relators that the defendant Fremont Campbell, as judge of said superior court, on the 20th day of May, 1891, issued a temporary restraining order as prayed for; and further ordered petitioners to show cause before him on May 29, 1891, at the court-house, in the city of Tacoma, Pierce county, Wash., why such temporary restraining order should not be continued *pendente lite*, and, upon the final hearing of the cause, be made perpetual; that thereafter petitioners appeared before said Fremont Campbell, and moved him, as judge of said court, to vacate and set aside said temporary restraining order, and to vacate said ruling to show cause, upon the grounds (1) that the complaint did not state a cause of action as against petitioners or either of them; (2) that there was no equity in said complaint as against petitioners or either of them; (3) that said court had no jurisdiction of said cause, or of the matters and things alleged in said complaint, or any of them, or of the relief sought by said complaint, or of any part thereof, as against petitioners or any of them; and (4) that said court had no jurisdiction of said cause as against petitioners or any of them; that said motion was by said judge overruled, to which ruling petitioners excepted, and said exception was allowed by the court; that thereafter said petitioners demurred to said complaint upon the same grounds stated and set forth in the above motion; and that thereafter said Fremont Campbell overruled said demurrer, and held that he had jurisdiction of said cause, as against each and every of the defendants, and jurisdiction to grant the said restraining order *pendente lite*, and to hear and determine said cause.

The petition further alleges that the said Fremont Campbell, unless prohibited by this court, will continue to restrain petitioners pending the litigation, and will, upon the final hearing of the cause, grant the relief prayed for in the complaint, and make the said injunction perpetual, unless petitioners show to him, as said judge, some matters of fact other and different from those alleged in said complaint, sufficient, in his opinion, to prevent the granting of such relief. It is also alleged and suggested in the petition that the said superior court is wholly without jurisdiction, under the constitution and laws of the state, to hear, try, and determine the said cause as made by the said complaint, or to grant the restraining order, or to grant the relief prayed for in said complaint, or to perpetually enjoin petitioners, as prayed for in said complaint; and that the said Fremont Campbell, in attempting to grant said restraining order and to hear and determine said cause, is acting wholly in excess of the jurisdiction conferred upon him, as judge of said court, by the constitution and laws of this state; and that petitioners are without any speedy and adequate remedy, other than the writ of prohibition. Interesting and elaborate arguments were made, on the hearing of this petition, by the learned counsel of the respective par-

ties, upon the question of the jurisdiction of this court, and of the superior court, as well as upon the merits of the action sought to be prohibited. But, as we view the case presented for our consideration, it is not necessary for us to determine or discuss the merits of the controversy at this time. Conceding that this court has power to issue the writ of prohibition to the superior court, the next question is, does the petition present a proper case for the exercise of that power? And that depends upon the further question of whether the superior court has jurisdiction in the premises, and whether the relators have any other remedy than that of prohibition, whereby their grievances may be redressed. The superior courts of this state are courts of general jurisdiction. The state constitution provides that the superior courts shall have original jurisdiction of all cases in equity. See Const. art. 4, § 6. Counsel for the relators do not deny the power of the superior court to issue injunctions generally, but contend that the court, in this instance, has exceeded its jurisdiction, for the reason that the relators are public officers, and therefore a court of equity will not assume jurisdiction to control their official acts. Granting this to be true, it follows that the court below should have sustained the motion to dissolve the preliminary restraining order, or should have sustained the demurrer to the complaint for not stating a cause of action; but it does not follow, as matter of right, that the petitioners are entitled to a writ of prohibition.

Prohibition, being an extraordinary remedy, is only to be resorted to in cases where the usual and ordinary forms of remedy are insufficient to afford redress. It will not be allowed to take the place of an appeal or writ of error. High, Extr. Rem. §§ 770, 771. In *Ex parte Greene*, 29 Ala. 58, *Stone, J.*, in speaking of a bill for an injunction, said: "The bill may abound in imperfections, may be fatally wanting in necessary averments, or may be instituted in a district in which the defendants were not liable to be sued. These, if they exist, are proper matters of defense, and cannot be reached by this extraordinary process." And in *Ex parte Roundtree*, 61 Ala. 51, the court says: "If the court is one of established jurisdiction, a plea that the subject-matter of a particular suit lies without its jurisdiction, or that the party is not amenable to its cognizance, will ordinarily afford full relief. But when the question involves the legal existence and construction of a court,—a denial of all jurisdiction, and not of the particular jurisdiction proposed to be exercised,—a prohibition, it seems to us, is the only adequate remedy." This, it appears to us, is a clear and explicit statement of the law, and the language is peculiarly applicable to the case at bar. We are all of the opinion that the relators have a complete remedy by appeal from any final judgment that may be rendered by the superior court, and that there is therefore no necessity for resorting to the extraordinary remedy of prohibition. See *Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. Rep.

143; *Murphy v. Superior Court*. (Cal.) 24 Pac. Rep. 310; *People v. District Court*, (Colo.) 19 Pac. Rep. 541; *Strouse v. Police Court*, (Cal.) 24 Pac. Rep. 747; *Ex parte Braudlacht*, 2 Hill, 367. It was suggested on the argument by the learned counsel for the petitioners that an appeal would be futile in this case, because the same questions would be presented on appeal that the court is now called upon to determine. But the fact that the same questions can be so presented is a sufficient reason for withholding the writ, as the above authorities and many others that might be cited abundantly show. The petition is denied, and the superior court will proceed in the matter in question.

STILES, DUNBAR, HOYT, and SCOTT, JJ., concur.

TACOMA COAL CO. V. BRADLEY *et al.*

(*Supreme Court of Washington*. Aug. 1, 1891.)
BREACH OF WARRANTY—DAMAGES—WAIVER—BURDEN OF PROOF.

1. Where, in an action to recover for fire-brick sold, a counter-claim is filed, alleging a breach of warranty, and the evidence shows that the brick were ordered for the purpose of building coke-ovens, as plaintiffs well knew; that many of them were worthless, and that they soon melted and fell in,—it is error to instruct that, if there was a breach of warranty, the plaintiffs would only be liable for the difference in the price of the brick as represented and their value as they really were, together with such damages as were immediate consequences of such breach; but that if defendant had an opportunity to inspect the brick before use, and did not do so, and if upon inspection it could have discovered the defects claimed, then defendant was not entitled to damages.

2. It was error to instruct that if defendant retained and used the brick after discovering their defects, without notifying plaintiffs of such defects within a reasonable time, it waived its right to recoup for damages.

3. Where defendant relies upon a warranty of the quality of the brick, and a breach thereof, the burden of proving the warranty and breach is upon defendant.

4. Where special damages were claimed by reason of the oven falling in, it was proper to instruct that, if the falling in of the oven was caused by a misconstruction of the same, or any defects in material used therein other than the brick in controversy, then defendant would not be entitled to damages.

Error to superior court, Pierce county.

Action by E. H. Bradley and M. H. Bradley, partners under the firm name of the Keystone Fire-Brick Company, against the Tacoma Coal Company, to recover for fire-brick sold and delivered. Judgment for plaintiffs. Defendant brings error. Reversed.

Sheeks & Goodwin, for appellant. *Snell & Bedford*, for respondents.

ANDERS, C. J. This action was brought by the respondents to recover from the appellant the sum of \$524.91, and interest, for certain fire-brick alleged to have been sold and delivered by the former to the latter between June 23 and August 6, 1888, at the agreed price of \$15 per thousand. The defendant admitted in its answer to the complaint the delivery of the brick as

alleged by plaintiffs, but denied that the same were worth the sum of \$524.91, or any greater sum than \$120; denied that \$15 per thousand was a fair and reasonable price therefor, or that it agreed to pay that price; but admitted that it had not paid for the brick. As a counter-claim against the plaintiffs' demand, the defendant alleged that, at the time it ordered the brick, it specifically informed the plaintiffs that they were to be used in the construction of coke-ovens, and that it only agreed to purchase of plaintiffs such brick as were suitable for that purpose; that the brick shipped by plaintiffs to defendant, except about 8,000 thereof, were utterly worthless, as the plaintiffs well knew, for building such ovens; that the defendant received said brick, relying upon the good faith and representations of plaintiffs, and were unable to discover the worthlessness of said brick until the same had been used in the construction of coke ovens, which defendant constructed properly and of good material, with due skill and care; that all of said ovens constructed of the brick furnished by plaintiffs to defendant, except the 8,000 admitted to be of good quality, did, immediately upon use, and owing solely to the negligence of the plaintiffs in the manufacture of said brick, fuse, melt, and fall in, and were utterly worthless; that, as soon as the defendant discovered said worthlessness of said brick, it notified plaintiffs thereof; that, by reason of the negligence of the plaintiffs in furnishing defendant with brick unsuitable for the construction of coke-ovens, the defendant was damaged on account of freight paid for carriage of said brick \$2,000, for labor in construction of said coke-ovens \$250, and on account of defendant's loss of manufacture and sale of coke in the sum of \$1,500; that it was damaged in all, after deducting \$120 for good brick, in the sum of \$4,630; for which sum it prayed judgment against plaintiffs. Plaintiffs denied each and every allegation of defendant's counter-claim, and upon the issues thus joined a trial by jury was had, resulting in a verdict for plaintiffs for the sum claimed in the complaint.

It appears from the record that the respondents were engaged in the manufacture and sale of fire-brick at Layton Station in the state of Pennsylvania, and that appellant, a corporation, was engaged in the manufacture of coke at Wilkinson, in the territory, now state, of Washington. It also appears that the witness J. M. Kelly was employed by appellant to superintend the construction of its coke-ovens; that he knew the character of brick made by respondents, having formerly resided in Pennsylvania; that he was personally acquainted with respondent E. H. Bradley; and that he ordered, or caused to be ordered, by letter, the brick in controversy. It further appears that, previous to ordering the brick in question, appellant had ordered and received twenty-eight or thirty thousand brick from respondents for the same purpose for which the latter were required, and that they had been used in building or repairing coke-ovens. It was not contended on the trial that respondents did not know

the use to be made of the brick by appellant. Respondent E. H. Bradley, testifying in his own behalf, admitted that he knew the brick were to be used in constructing coke-ovens; and on May 17, 1888, Superintendent J. M. Kelly wrote a letter to Bradley concerning these brick, in which he stated: "I sent an order to Tacoma today for 26,000 more crown bricks, and jambs and arches for nine more ovens, and 1,500 bottom tile. I suppose they will order from you. I want you to be very careful about the quality. Do not send anything but what is A No. 1, and send as quick as possible." And again on May 24, 1888, he wrote: "I sent an order to general office yesterday. I named 26,000 crown brick. When the order reaches you you will see what I want. Make the order 28,000 crown brick. Send me the best. This is a trade you will want to hold, and you can only do it by sending nothing but the best." On the trial the claim for damages on account of loss of sale of coke was abandoned, and no very satisfactory testimony appears respecting other items of damage claimed, although some testimony was adduced tending to show the amount paid for freight, and for constructing ovens claimed to have been worthless.

There can be no doubt that the contract between the parties amounted to a warranty on the part of the respondents of the quality of the brick ordered by appellant, and the respondents seem to have recognized this fact on the trial, and very properly produced testimony tending to show that they had discharged their obligation to appellant by sending the character of brick required by the latter. But counsel for respondents insist that, if the brick were defective in quality, and not such as were ordered, the defect was patent; and that appellant, having inspected them, and having failed to return or offer to return them, can claim no damage on account of such defect. The court below seems to have adopted the view of counsel, and instructed the jury as follows: "(10) You are further instructed that in case you find a warranty of quality by these plaintiffs of the goods in question, and a breach thereof, then, in all events, the plaintiffs would only be responsible for such damage as the difference in the price of said goods as represented and the value of the goods as they really were, together with such other damages as were the direct and immediate consequence of the said breach; but that if the defendant, before using the same, had an opportunity to inspect said goods, and did not do so, and if upon such inspection could have ascertained the defects claimed, then said defendant is not entitled to any damages. (11) You are further instructed that if the defendant retained and used said goods after a knowledge of their defects, without notifying plaintiffs of such within a reasonable time, it waives its right to recoup for damages."

Appellant claims that these instructions do not state the law correctly, and should not have been given to the jury. We think these instructions were erroneous, and that appellant's position must be sus-

tained. Authorities are cited in the brief of counsel, from New York and Wisconsin, to sustain the correctness of these instructions. But the New York authorities simply hold that in cases of executory contracts for the sale and delivery of personal property, in the absence of a warranty and a breach, the vendee's right to recover damages does not survive the acceptance of the property, after an opportunity to discover defects, unless notice has been given to the vendor, or the vendee returns, or offers to return, the property. The rule is there held inapplicable in cases of express warranty of quality. These decisions do not, therefore, support respondent's contention to the extent claimed. See *Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. Rep. 372; *Manufacturing Co. v. Allen*, 53 N. Y. 519. The Wisconsin cases, cited by counsel, declare the doctrine in that state to be that, if chattels sold under warranty, express or implied, are defective or unfit for the use intended, and the defects were not open and palpable, and were unknown to the purchaser when he received the goods, he may, if sued for the price, without returning or offering to return the goods, and without notifying the vendor, recoup such damages as he may have sustained on account of such defects. See *Olson v. Mayer*, 56 Wis. 551, 14 N. W. Rep. 640; *Barb-Wire Co. v. Phillips*, 67 Wis. 129, 30 N. W. Rep. 295. In the case at bar the evidence is conflicting, and does not satisfactorily show that there was any patent and obvious defect in the brick in question. One of the plaintiffs, while claiming that the brick were of the quality ordered, testified that "a man who understands fire-brick can, nine times out of ten, tell whether or not brick are good by looking at them." On the contrary, Kelly, who was a man experienced in building coke-ovens, testified, substantially, that he knew of no method of ascertaining whether the brick were fit for such a purpose other than actual use. But, be that as it may, we are of the opinion that the appellant had a right to assume that the brick were of the quality ordered, and to act accordingly, and that appellant violated no duty it owed to respondents in failing to search for imperfections before using them.

It is undoubtedly true that if the brick were defective, and appellant was silent, and did not give notice or offer to return them within a reasonable time after discovering defects, the right to rescind the sale was thereby waived. But the right to recover damages on account of defective quality was in no wise affected. *Benj. Sales*, (Bennett's Notes, 1888,) § 901. It is also true that in such cases a failure to give notice or to offer to return the goods would have an important bearing upon the question of warranty, and would raise a strong presumption that the goods received were of satisfactory quality. *Babcock v. Trice*, 18 Ill. 420; *Abbott, Tr. Ev.* p. 348. That the vendee may retain the goods without notice, and plead breach of warranty, in an action by the vendor for the purchase price, is shown by numerous authorities. *Dayton v. Hoogland*, 39

Ohio St. 671; Polhemus v. Helman, 45 Cal. 573; Holloway v. Jacoby, 120 Pa. St. 583, 15 Atl. Rep. 487; Benj. Sales, § 993; Id. p. 867, and cases cited, Babcock v. Trice, supra; Bagley v. Rolling-Mill Co., 22 Blatchf. 342, 21 Fed. Rep. 159.

The following instructions to the jury are objected to by the appellant: "(8) Fraud is never presumed, but must be affirmatively proven by the party alleging the same. The law presumes that all men are fair and honest, that their dealings are in good faith, and without intention to disturb, cheat, hinder, delay, or defraud others. Where a transaction, called in question, is equally capable of two constructions, one that is fair and honest, and one that is dishonest, then the law is that the fair and honest construction should prevail, and the transaction called in question should be presumed fair and honest. (9) You are instructed that, in so far as the defendant relies upon a warranty of quality of the property sold and a breach of the same, the burden of proving the warranty is upon the defendant, and, unless it has proved both the warranty and the breach alleged by a preponderance of evidence, it will not be entitled to any benefit therefrom in the suit." "(12) If you believe from the evidence that the falling in of said ovens was caused by a misconstruction of the same, or any defects in said construction or material used therein, other than the goods involved in this controversy, or the misuse of said oven subsequent to said construction, the defendant is not entitled to any damage herein. (13) You are instructed that in no event is plaintiff liable for any damages for expected profits to be obtained from the sale of merchandise produced by said ovens, in which goods in controversy were to be used, unless the contract for the same were specially and specifically made known to plaintiff at the time of the purchasing of said goods, and that he understood that they were for that purpose. (14) You are further instructed that the law is that a known, defined, and described article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually shipped, there is no warranty that it shall answer the particular purpose intended by the buyer. (15) You are further instructed that if you believe from all the evidence that the defendant, after a discovery of the alleged defects, agreed to pay for said goods, and said nothing about damages to the plaintiff, and made no demand therefor, then it will be taken to have waived all right to such damages." The ninth instruction is unobjectionable. The defendant having alleged a warranty, or its equivalent, and a breach thereof, it was incumbent upon it to prove both in order to be entitled to any benefit therefrom. It is contended that there was no evidence to justify either the 8th, 13th, 14th, or 15th instructions, and that each of them was calculated to mislead and confuse the jury. As to the 8th, 13th, and 15th instructions, the point is well taken. The 12th instruction was properly given. The fact that the ovens

fell down was relied on by the appellant as positive proof of the unfitness of the brick. If the falling was caused by unskillful construction or defective material, other than that involved in this controversy, or subsequent misuse of the ovens, then there was practically no proof of poor quality, and there could therefore be no damage. Appellant also claims that it was error for the court to refuse to admit its Exhibit I in evidence. That was a letter written by E. H. Bradley to Superintendent Kelly, concerning prices and quality of brick sold by him, and concerning freight rates to Tacoma. It did not specifically refer to the brick in controversy, but it was a part of the correspondence between the parties concerning the subject of fire-brick, and was the only communication shown specifying the price of the brick. It contained statements as to the quality of the brick which the respondents proposed to sell to appellant, and the mere fact that other brick had been shipped to appellant just previous to the order for those in controversy did not, in our opinion, render the letter irrelevant or immaterial. It should have gone to the jury for what it was worth. The judgment of the court below is reversed, and the cause remanded for a new trial.

STILES, HOYT, SCOTT, and DUNBAR, JJ., concur.

(2 Wash. St. 616)

TOMPKINSON v. MUZZY.¹

(Supreme Court of Washington. Aug. 1, 1891.)
EQUITY—CANCELLATION OF DEED—WANT OF CONSIDERATION—MEASURE OF DAMAGES.

1. In an action by a daughter to set aside a deed executed to her father on the ground of want of consideration and false representations as to the nature of the conveyance, it appeared that she was ignorant and inexperienced in business, accustomed to rely implicitly upon his advice and to obey his instructions; that she had previously executed deeds and mortgages upon her property to third persons by his direction, and that no explanation was made to her of the purport or effect of the instruments, and that he received the proceeds of the sales and loans; that afterwards she conveyed the remainder of her property to him in consideration of his relinquishment of a worthless timber culture claim, which he assumed to control as before. Held, that it was a fraud upon her to procure the instruments without explaining their purpose and effect, and that the deed would be canceled, although the allegation of false representations was not sustained by the evidence.

2. In such case the measure of damages as to a part of the land afterwards conveyed by him was its value at the time of the conveyance, since it did not appear that the conveyance was in bad faith, nor for the purpose of placing it beyond her reach.

Appeal from superior court, Spokane county.

Action by Lucy A. Tompkinson against Hiram N. Muzzy to set aside a deed. Decree for plaintiff, and defendant appeals. Modified and affirmed.

Turner & Graves and G. G. Ames, for appellant. Nash & Wakefield, for respondent.

STILES, J. The parties to this action were father and daughter. The appellant, Muzzy, about 1880, settled himself and fam-

¹ Rehearing denied.

lly on government land on the opposite side of Spokane river from the then village of Spokane Falls. His family consisted of himself, his invalid wife, and five children, all of whom were of mature years. His other children had from time to time either married, or left home for the purpose of maintaining themselves. The respondent was then about 25 years of age, and a single woman. In intelligence she was rather below the average, and had had slight advantages of education, and little or no business experience. It was contended in her behalf at the trial of the cause that she was mentally incompetent, but we think, upon the whole, that it fairly appears from the record that there was no unusual weakness of intellect, but that lack of education was about all that would characterize her as different from ordinary women in her position in life. Her family were then poor, and she had been accustomed to doing the housework of the family. A somewhat unusual corpulency and shyness resulting therefrom seem to have rendered it probable that she would never marry. It is clear that for her entire support she then relied, and always expected to rely, upon her father. In return therefor she was content to remain at home, nursing her sick mother, and doing the household work, leaving all matters of business wherein she had any interest to be attended to by her father. The appellant, soon after arriving in Washington, conceived great confidence in the future of Spokane Falls, and proceeded to acquire a body of land in that neighborhood, by exercising his homestead rights. He also caused the respondent to locate herself as a homesteader upon the land in question, in the fall of 1882. Her sister also located upon an adjoining quarter section. It is agreed by all parties that the lands entered upon consisted of a gravelly plain that was of practically little or no value for any purpose excepting as it might depend upon the future development of the village near the Falls. The nature of the soil rendered it totally unfit for cultivation. The appellant chose to acquire his own tract by residence thereon during the full term of five years; but in the spring of 1883, after having built for his daughter a fence around her tract, and a small house in which she kept up the necessary residence for about six months, he advised her to commute her homestead to a cash entry, and by so doing avoid the further necessity of living on the land. She had no means whatever with which to pay either the office fees, the cost of the improvements made upon her tract, or the sum of \$400, which was the government price for the land. She stated, without contradiction, that in consideration of the improvements her father was to have the "back forty," and when the question of means with which to pay for her land came up her father suggested that she mortgage the place to secure it. At the same time her father was in need of money, and they joined in making a note to one Ollis for the sum of \$1,500, which was secured by her giving a mortgage to Ollis for that amount on her tract. The money being thus procured, \$400 of it was used

to pay the government, and the remainder of it went to appellant's use. This mortgage was made by respondent against the advice of at least one of her brothers, who maintained that she should not thus burden her land for the sake of assisting her father, and that she ought to procure only the actual sum which she needed. She desired, however, to assist her father, and relied entirely upon his promise to see that the loan was repaid, and the mortgage canceled. She made her final proof in December, 1883, and in May, 1884, obtained her patent. This mortgage was satisfied on the 22d day of May, 1886, and on the 24th day of the same month, at the suggestion of her father, she executed another mortgage to one Jennison on the same land, for the sum of \$1,200, the note being signed by herself and her father. On the 8th day of March, 1886, at the instance of her father, she executed a deed to one Turner, by which she conveyed 40 acres of her tract in consideration of \$1,500. And on the 14th day of June following, also at her father's suggestion, she executed a deed to one Abernethy for another 40 acres of her land, for a like consideration of \$1,500. These two sums of \$1,500 were paid to her father in money by her grantees, and the amounts were retained by him. On the 15th day of June, 1886, for the expressed consideration of \$1,000, she executed a deed to her father for the remaining 80 acres of her land. This \$1,000 was not paid to her then, or at any other time, nor did she ever receive any portion of the \$3,000 derived from Turner and Abernethy. From the time of the execution of the last-named deed until this action was commenced on the 16th day of December, 1889, the appellant has, therefore, been the legal owner of the 80 acres conveyed to him, with the exception that on the 10th day of September, 1887, he conveyed to the Spokane College a tract of about 15 acres, for which he received no substantial consideration, the conveyance being in the nature of a donation to that institution. The respondent now brings her suit to set aside the deed executed by her to her father for the 80 acres, with the exception of that portion of it conveyed to the Spokane College, and prays judgment against him for the \$3,000 paid by Turner and Abernethy, and for the value of the 15 acres and upwards conveyed to the college.

The complaint set forth that up to the 15th day of June, 1886, since her patent, respondent was the owner of the tract. She alleged the relationship between herself and her father; that she was at all times since 1882 ignorant and wholly inexperienced in all matters of a business nature, and was accustomed to rely upon her father therein, and that he knew that she was deficient in mental capacity and understanding, and wholly incompetent to transact anything of a business character requiring thought and consideration; that she was induced to settle upon and commute her tract by her father; that at her father's instance she had assisted him in borrowing the sums of money before mentioned, and that he had stated to her that to secure her for the repayment of the sums borrowed for his benefit

he would give her a certain timber culture claim that he then held; and then followed this form of allegation: "(4) That on the 15th day of June, 1886, defendant, fraudulently taking advantage of plaintiff's said incapacity, of which defendant well knew, and of her implicit confidence and reliance in him on account of the close relation existing between them, procured her to sign a certain writing, without paying any consideration therefor, and which writing defendant falsely and fraudulently represented to be a mortgage on said above-described premises, to secure the payment of the aforesaid sum of twenty-six hundred dollars. (5) That plaintiff is informed and believes that the said writing is under seal, and is a deed of said premises, and conveys the same, or some interest therein, to the defendant, and that he intends to use the same for his own benefit, and to the prejudice of plaintiff, and that defendant has continually assured her ever since the making thereof that she had only executed a mortgage; that it was not until about one year thereafter that she was informed that instead of executing a mortgage she had executed a deed of said lands to her father; and plaintiff further avers that when she asked her father, the defendant, about it, he assured her that it was all right, that she should have her property free and unincumbered, and that he would attend to the matter, and see that everything was correct in respect thereof, and that he has repeatedly since that time assured her in most positive terms that her property was in no way incumbered excepting as aforesaid, and that he would see that the matter was all right; that by these false representations and assurances defendant sought to and did lull plaintiff into a sense of security concerning the same, and not until within the past six months has she become convinced that it is his intention to claim the same as his own property, and to swindle and defraud her out of the same, and that he claims said property in fee-simple by virtue of a deed executed by plaintiff, and that thereupon she took steps to examine into the matter," etc., with the result that she ascertained the deed to be of record in the office of the auditor of Spokane county. Then follows an allegation of the existence of the deeds to Turner and Abernethy, after which she alleges: "(7) That said defendant, her father, taking advantage of the confidence reposed in him by her, and of her total incapacity to transact business, and by fraud and misrepresentations, induced her to sign the papers and deeds as aforesaid, and received the considerations arising therefrom, and that she would not have signed and executed the same had she known their true meaning and effect, but that she did not know of the fraud that had been practiced upon her until about ten days ago, and when she was advised by her counsel in regard thereto." There are also proper allegations as to the conveyance of the tract to the Spokane College.

The answer contained a denial of those parts of the complaint which alleged plaintiff to be deficient in mental capacity, and her reliance upon her father, and the

charges of misrepresentation and deceit, and set forth that the actual exchange made between the parties was on the 17th day of March, 1884, in this language: "(2) Defendant further alleges that on the 17th day of March, 1884, he purchased said real estate of plaintiff, and in payment therefor assumed the whole of said Ollis mortgage, and conveyed to her a one hundred and sixty acre timber culture claim in Lincoln county, in said state, of the value of about one thousand dollars. (3) That said property at that time was of the value of not to exceed fifteen hundred dollars, and the consideration thus paid plaintiff by defendant for said real estate was full, fair, and ample. (4) At the time of making said trade plaintiff consulted with her brothers and sisters and others of her friends fully concerning the same, and she knew exactly what she was doing, was as competent as any one to do such business, and was not in any way imposed upon or overreached. (5) That for convenience the title to said property was left at the time in plaintiff, and remained in her until she conveyed the same as hereinafter alleged. (6) That thereafter she conveyed portions of said land, as alleged in said complaint, to Turner and Abernethy and to defendant by good and sufficient deeds, and with full and entire knowledge of what she was doing. Such conveyances were made by her under the provisions of her sale to defendant, as aforesaid, and in furtherance thereof, and not otherwise."

In the trial of the cause the plaintiff introduced witnesses who testified as to her want of capacity to transact business, and as to the relations of trust and confidence which existed between her and her father. Certain of this testimony went so far as to make her appear to be even weak-minded or childish. Other witnesses testified that in 1884, at the time when the defendant claimed the transaction between himself and his daughter to have taken place, the land conveyed to him was worth from \$40 to \$50 an acre. The plaintiff herself then became a witness, and proceeded to make a very poor narration of the transactions of which she complains, in the progress of which it appeared, however, that each step taken by her was under the advice and substantially at the dictation of her father. In almost any other cause she would have been an exceptionally bad witness because of the few particulars she was able to give of the transactions in issue. But she maintained without any subsequent contradiction that she had never received any money from her father as the proceeds of any sale of her lands; and while she did not narrate clearly the circumstances attending the execution of any one of the instruments actually executed by her, she maintained stoutly that each time she was assured by her father that what she was about to do was merely in the way of assisting him, and taking care of the mortgage obligation which she had originally incurred as it was continued from time to time by her subsequent obligations. But although she would ordinarily have been a bad witness, as has been said, perhaps in this kind of a case she

may be accorded justly the praise of having been an exceptionally good witness. She betrayed no intention either to obscure or pervert any of the facts about which she was inquired of, but seemed to be honestly ignorant of substantially the whole matter. This closed the case of the plaintiff. For the defendant numerous witnesses testified that this land, in March, 1884, was of little or no value outside of its dependence upon and connection with Spokane Falls, but was a possible source of great profit in the future, in the minds of those who had faith in the outcome of that town. In 1886, however, when this conveyance was actually made, it was conceded that the value of the property had greatly advanced, so that the prices paid by Turner and Abernethy were no more than the market value of the tracts purchased by them. It was also shown that the plaintiff's mental qualifications were much better than they appeared to be from the testimony on her behalf, it being conceded, however, that her reliance upon her father, even at her then advanced age of upwards of 30 years, was, as it had always been, complete and unreserved. Defendant made no attempt to sustain his allegation that at the time of making his alleged trade with plaintiff she consulted with her brothers and sisters and others of her friends concerning the same; and in fact it appeared that several members of the family knew nothing of it until some time after it had transpired, and that his daughter had absolutely no counsel or advice from any person excepting himself. When a mortgage or deed was to be made by her, all consultation with third persons was by him, and she was not spoken to in regard to the matter until the document had been prepared, and was ready to be placed before her for signature. It did not appear that any of the instruments signed by her were ever read to or by her. In several instances an instrument, having been drawn by her father, was given to her, and she was told to take it down to the notary's for acknowledgment, which she did without any word of objection. Defendant showed by several witnesses that at various times subsequent to the execution of the deed to him his daughter, in conversation with other persons, had alluded to her land, and stated that she had traded it to her father for a timber culture claim; that she was sorry she had done so, as she had made a bad bargain, but that it was all right, as she had got all it was worth at the time. She also seemed to have a great contempt for the "gravel," as she designated her land; did not think Spokane would amount to much, and was glad she had got rid of it.

Concerning the transaction with the timber culture claim, the facts appeared to be these: That appellant had taken up 160 acres in Lincoln county, some distance from Spokane, as a timber culture claim under the United States land laws; that he had plowed 10 acres, and put a wire fence around it; that at the time of his alleged transfer of it to his daughter he had made no other improvements upon it,

and had planted no trees; that it was fairly good land, which, when title had been obtained to it, would have been worth from \$4 to \$6 per acre; that his daughter had never seen it; and that at the time of his alleged transfer to her, in 1884, the time allowed him by law to hold the claim was then about 20 days from expiration, unless he should before that time further improve it in compliance with the law. It seems, however, that he had actually not complied with the law, in that he had not cultivated or cropped any portion of the land as required by the statute, although he had plowed five acres in each of the two preceding years, and had, therefore, a very doubtful right to further hold the land at all. He claimed this right to be worth \$1,000, and insisted that because of his relinquishment of it to his daughter, and the assumption of the \$1,500 mortgage to Ollie, he had actually given her the value of \$1,900 for her land; the items being: For the timber culture, \$1,000; for the improvements put upon her land by him, \$500; and \$400 loaned her for the purchase of her land. At any rate, he relinquished the land to her, and she filed a similar timber culture claim upon it. Her brother plowed five acres for her the first year. Then, at her father's suggestion, she relinquished her claim to this brother; whereupon he filed a like claim upon the same land, and, after holding it for another year, relinquished it again to another sister, who was holding it at the time of the trial. It appeared that this brother and sister acknowledged at all times that they held this land for the benefit of the plaintiff; that is, that whenever anything could be derived from it, or whenever the title to the land should be acquired, as the case might be, the land or the money should go to the plaintiff. But there was a significant fact in that connection, to-wit, that the father never lost control over it. It was even said by some of the witnesses, though denied by him, that he had remarked that "they would hold that timber culture claim as long as there were children in the Muzzy family." Subsequent to plaintiff's marriage, which occurred about 1887, she and her husband, being very poor, desired to realize something from the sale of this timber culture claim. Her father at that time had a cash offer for the same from some one, and they urged him to sell it; that is, respondent urged him to sell what he maintains was her property, so that she could have the proceeds of it. This is what appellant says in regard to that: "Tompkinson and his wife asked me frequently to sell it. Mr. Tompkinson was at my house several times last year, and requested me, and his wife requested me, to sell it, and get the money out of it. I had an offer of seven hundred dollars in cash for the claim, but I would not take that. He said he wanted the money out of it." Certainly nothing more conclusive could appear out of the mouth of witnesses than that, whatever may have been the other facts in connection with this case, appellant had never released or intended to release his practical hold upon that timber

claim, and was simply using his children as a means of acquiring the land, or of holding it for speculative purposes for his own use. At the time of his relinquishment to appellee, even though his rights had been in full preservation, the transfer was in a manner thrust upon plaintiff. She had never seen the land, and she had no ability or means, either present or prospective, to carry on the necessary improvements through the period of eight years during which she would have no title, and nothing else but a speculative chance of sale. The appellant was an able business man, and in the closest possible relations of confidence with his daughter known to the law; yet he gave no word or statement or explanation to her concerning that which he assumed to give her as an equivalent for the perfect title which she possessed. At the most, therefore, all that appellee can be said to have received for her 160 acres of land was the cost of the improvements placed upon it by her father and the money used in paying the government for it. Now, it is undisputed that before she ever had title to it appellant had agreed that one 40-acre tract was to be received by him as an equivalent for his improvements. This shows his own appreciation, even as early as 1882, of the value of the land, and would have left the actual burden on 120 acres of only \$400. We use this as an illustration merely, since it may be argued that any contract or promise of the appellee to give a portion of her land to her father was void under the law under which she acquired it.

We shall go no further in stating the testimony in this case, excepting to remark that from the whole case it appears with a great degree of probability that the appellant, who had conceived a very strong confidence in the future of Spokane, and was eagerly acquiring title to all the land he could get in that vicinity, and who at all times, when remonstrated with by the members of his family for the manner in which he was treating his daughter, answered that "she was indebted to him for getting the land in the first place," really regarded himself as in a manner entitled to the land, as though considering his daughter as only the means by which he had been able to procure the title from the government, forgetting that any such view of the case was utterly inadmissible, especially in consideration of the terms upon which the government parts with its lands, and the prohibition which is laid upon every one against the taking of land for the benefit of another. We are therefore laying out of the question all testimony which was taken on the rebuttal, and all the possible errors which the court below may have made in admitting evidence on the part of the plaintiff, which, if admitted at all, should have been introduced as a part of her case in chief, and upon the admission of which the appellant seriously complains.

We return now to the pleadings and the findings of the court below. It was contended by the appellant with a great deal of force and earnestness that the complaint, stripped of all verbiage, based the

plaintiff's right of action upon actual fraud, accomplished by the false representations made to her, that the instrument which she signed, and which conveyed her property to appellant, was a mortgage, and not a deed; and that, inasmuch as the court below found that allegation to be not sustained, its judgment should have been for appellant instead of respondent. It was not contended that this court is bound in any manner by the findings of a superior court, or that this is a case merely for affirmance or reversal, but it was urged that in the interest of good pleading this court should find the fact to be as found by the court below, that the misrepresentations did not exist, and that we ought thereupon to dismiss the cause, regardless of any other equity shown by the evidence. The respondent concedes the failure to prove the misrepresentation, and lays aside that allegation. Indeed, it seems quite unlikely that the appellant would have resorted to any such means to induce his daughter to part with her title in view of the fact that she appears at no time to have been suspicious of her father; and it is altogether probable that, had he requested her to convey the property to him outright merely upon the assurance that it would be better for her to do so, she would have done so without much persuasion, or any further reason. We do not think that the evidence discloses on the part of the appellant any design at the time the deed was executed to swindle or defraud his daughter, but consider rather, upon the whole case, that he looked upon this land as in a sense property of the family, of which he was the head, which he had the best right to dispose of as he saw fit, without giving his daughter any reason for his actions. On the other hand, we think it equally probable that the statement of respondent that it was only mortgages that were spoken of to her was made in good faith, and to the best of her recollection at the time, since the testimony shows that it was concerning the mortgages, in the first place, that she was consulted with, and that there was advice given to her by other members of the family, and that, when it came to the transfer of her land to Turner, Abernethy, and her father, there was little or no discussion in her presence, no consultation with her, no advice given to her, and that she was a party to no negotiations or any other step in the matter of the transfers excepting the mere execution of the deeds, which she immediately handed to her father. This leaves the case to be decided upon whatever else there is in it of proof responsive to the allegations of the complaint; and we think we are justified in saying that a critical examination of the fourth paragraph of the complaint makes the *gravamen* of the action to depend as much upon the allegation of want of consideration as that of fraudulent representation. Preceding portions of the complaint, by way of inducement, showed the relation of the parties, and the mental and business character of the plaintiff; and in this fourth paragraph the substantial fact is stated that the father,

while the relation of trust and confidence existed between him and his daughter, and with knowledge of plaintiff's inexperience, procured her to sign a certain writing without paying any consideration therefor. Other portions of the complaint showed that this writing was a deed, and that the defendant represented it to be a mortgage, which it was not. It is not stated, only, that the appellant by the misrepresentation procured the deed, or that, without the misrepresentation, the deed would not have been made. The facts are pleaded: (1) The confidential relation; (2) that there was no consideration; (3) that there was misrepresentation. This is what the Code requires, and it was proper to state the facts *seriatim*, as they occurred. In a case of this kind there can be but one cause of action, embracing all the ultimate facts connected with the transaction, and upon them the court of equity grants or refuses relief. If the pleader omits facts which exist to his knowledge, which would entitle him to relief on the ground of constructive fraud, and stands upon other facts which constitute actual fraud only, he is bound by his pleading, both in the reception of evidence and in the disposition of the case, unless he amends in time. But the statement of facts which support actual fraud does not establish the case as one based on that theory alone, if there are other ultimate facts as clearly alleged in the pleading which would support the theory of constructive fraud, whether with or without the additional allegations of actual fraud. The case of *Eyre v. Potter*, 15 How. 42, was relied upon to sustain the appellant's contention on this point. That was a bill in chancery in the United States circuit court of North Carolina, and was framed under the common-law rules of equity pleading. One of the defendants was step-son of the complainant, but the court said: "The defendants in this case were clothed with no special function, no trust which they were bound to guard or to fulfill for the benefit of the complainant. They were not even the depositaries of any peculiar facts or information as to the subject-matter of their transactions, or which were not accessible to all the world, and by an omission or failure in the disclosure of which they could be regarded as perpetrating a fraud." The bill alleged a combination between the defendants to defraud her by attacking her in the midst of her sorrow for her deceased husband, and by false representations as to the condition of her estate, but alleged the existence of no confidential relation, and merely claimed inadequacy of consideration. The court said the bill could not be considered as stating a case of constructive fraud arising out of some peculiar relation of the parties, but as one of actual, positive fraud, which could not be varied by the establishment of facts sufficient to create a case under a totally distinct head of equity. The opinion was, moreover, pronounced in view of evidence which totally failed to disclose any merit in the complainant's cause. We think this case and that of *Eyre v. Potter* have little, if any-

thing, in common which should make the latter an authority on the point in discussion.

The appellant's next point is that no presumption of invalidity in a transaction between parent and child which throws the burden upon a parent of showing that the transaction was fair and just, and that the child was fully advised of its rights and interests, arises merely from proof of the relation of the parties. There can be no objection to that statement as made. Nor can there be as to the next one, viz.: That in the adjudged cases there was always some circumstance of actual undue influence, inadequacy of consideration, or other inequitable incident moving the court to action. A child who has attained majority is not a ward of his father, so that their relation is *per se* fiduciary. Nor is their relation necessarily confidential, though doubtless it usually is so, for some time at least, after the majority. We think it will be found that every such case depends upon its peculiar facts. To merely state some of them at once impresses the mind that wrong has been done; for example, *Miller v. Simonds*, 72 Mo. 669, where a young lady, just of age, and still under parental influence, at the instance of her brother conveyed her whole estate to her father just before her marriage. So in *Taylor v. Taylor*, 8 How. 183; *Jenkins v. Pye*, 12 Pet. 241, is high authority that a deed from a child to a parent is not *prima facie* void as against public policy. The criticisms upon that case scarcely seem to be just when the bare point decided is considered. To have held otherwise in that case would have done rank injustice, since no complaint was made for 20 years, and until both parties to the deed were dead. But, conceding all these positions, what have we here? No intention of the respondent to confer a bounty or gift upon her father, no family settlement, but an alleged sale for an alleged consideration of \$1,900, before the full consummation of which \$3,000 had been received by the grantee for half the property conveyed; \$1,000 of the alleged consideration a worthless "claim," and the balance a pre-existing debt; and all this accomplished without advice from or consultation with any person other than the appellant. In *Jenkins v. Pye* the court said, speaking of some English cases, and of the "ingredient" of undue influence found in them all: "In some cases, although there may be circumstances tending in some small degree to show undue influence, yet, if the agreement appears reasonable, it has been considered enough to outweigh light circumstances, so as not to affect the validity of the deed." If we seek undue influence in this case, it is easily found. It appeared when the first mortgage was given, and was not wanting upon each occasion when the appellant, without previous consultation with his daughter, himself prepared and presented to her for signature conveyances of her property, without so much as an invitation to read the document or hear it read. His request was her law in the matter, and he must have known it, or he would have taken the trouble to explain

it to her. Of reasonableness in this arrangement there was none, unless it be considered reasonable in every case for a father to take from his child her real estate without consideration, she being competent to take care of herself.

The tenth finding of the court below was that the second mortgage and the three deeds above described were executed by plaintiff by the direction of the defendant; that she did not know the purport of the same, and consequently the effect of the same; that the same were executed without any consideration moving to her; that no attempt was made by the defendant, or any one else, to explain to her the purport and effect of the execution of said instruments; and that, considering her defective mental capacity, inexperience in business, the circumstances under which she was living, and the influence of defendant, her father, over her, it was a fraud to procure her to execute said instruments without having their purpose and effect fully explained to her. These findings fairly present the result of our investigation, and justify the judgment of the court below; for, whatever may be said of the complaint, it is certain to our mind that the gist of the action was not that the plaintiff had lost her property by being deceived by defendant, but that she had in her trust and confidence in him, without sufficient reflection upon the effect of her act, conveyed to him everything she had without any valid consideration. In such a case equity pays very little attention to whether the property conveyed was of great or little value, nor does it stop to weigh with great nicety all the possible claims which either party may have by reason of the other party not being able to replace him in the precise position he occupied when the transaction occurred.

The action, we think, was brought in time.

The court below set aside the deed to the appellant as to all the land conveyed to him, with the exception of that part conveyed by him to the Spokane College. For the 15 acres and upwards conveyed to the college the court rendered judgment against appellant for \$5,421.15, being at the rate of \$350 per acre, which was the value agreed upon by the parties as the true value at the date when it was parted with by appellant on the 10th day of December, 1887. Respondent appealed from this part of the judgment, claiming that the correct measure of damages was not the value at the time of the transfer, but at the date when the suit was brought. The rule adopted by the court was the correct one in this case. It was not contended nor proven that the conveyance to the Spokane College was made in bad faith by the appellant, or with any purpose to place it beyond the reach of the appellee. In this it is clearly distinguished from the cases cited on that point by the appellee, all of which had in them some element of *mala fides*. The court also allowed judgment against appellant for \$3,000 received from Turner and Abernethy. The sums thus allowed by the court we think should have been reduced by the sum of \$900, with interest thereon from December 17,

1883. This sum represented the value of the improvements put upon appellee's land by her father, \$500, and the sum of \$400, government price of the land. The cause will be remanded to the court below for modification in accordance with this opinion, and, when so modified, will stand as the final judgment.

HOYT and DUNBAR, JJ., concur.

(2 Wash. St. 576)

BAKER *et al.* v. CITY OF SEATTLE *et al.*

(Supreme Court of Washington. July 17, 1891.)

MUNICIPAL CORPORATIONS—POWER TO ISSUE BONDS—CONSTITUTIONAL LAW—TITLE OF ACT—NOTICE OF ELECTION.

1. Street improvement bonds, issued under Laws Wash. T. 1885-86, p. 241, allowing the city of Seattle to create local assessment districts upon the property within which a special levy could be laid to pay for the entire expense, and in pursuance of an agreement with the contractor that he should be paid "out of a special fund" by warrants showing on their face that they are so payable, create a liability payable out of a particular fund, and not out of the treasury generally.

2. Condemnation awards, made under Laws Wash. T. 1885-86, p. 243, giving the city of Seattle power to widen streets, and condemn such real estate as may be necessary, and levy assessments upon such as may be benefited, are not a part of the general indebtedness of the city, even though it has failed to collect the assessments.

3. Act Wash. Feb. 26, 1890, p. 225, authorizing cities having an existence at the adoption of the constitution to extend and fund their indebtedness, validating indebtedness already contracted, and declaring an emergency, is not open to the constitutional objection of embracing more than one subject.

4. The application of said act to cities and towns existing at the adoption of the constitution is not violative of Const. Wash. art. 11, § 10, requiring the organization and classification of cities according to population, because the legislature at the same session complied with this requirement by various acts conferring the same authority upon cities thereafter to be organized, and because, further, at the date of the act there were no incorporated cities in the state, except such as had been organized under special charters.

5. Act Wash. Feb. 26, 1890, p. 225, § 5, provides, in the first clause, that any indebtedness contracted strictly for municipal purposes, and now owing by any city organized prior to the adoption of the constitution, is hereby validated, and declared a binding obligation upon the city, when the only ground of its invalidity is that it exceeds the amount authorized by the charter; and provides in a further clause that there must be a popular vote, if the excess reached be beyond 1½ per cent. of the taxable property of the city. *Held* that, where a city has done an act beyond its statutory powers, but within the powers which it is competent for the legislature to confer upon it, the act may be validated by a curative statute.

6. Said section is not in conflict with Const. Wash. art. 7, § 9, providing that cities may be vested with authority to assess and collect taxes for all corporate purposes, and article 11, § 13, providing that the legislature shall have no power to impose taxes upon cities for municipal purposes, but may, by general laws, vest in the corporate authorities thereof power to assess and collect taxes for such purposes.

7. Act Wash. March 7, 1891, p. 267, providing that any city now having a corporate existence in this state may validate by popular vote certain warrants issued in excess of legal authority prior to its passage, is not special, but curative, applying to what has been done before

the date of its passage; and, as such, is not violative of Const. Wash. art. 11, § 10, requiring the organization and classification of cities according to population.

8. The constitutional provision, permitting a city to incur indebtedness, at its discretion, up to $1\frac{1}{2}$ per cent. of its taxable property, and, with the assent of the legislature, up to 5 per cent., is not certain to the effect that the legislature must provide for an antecedent vote; and said Act Wash. March 7, 1891, p. 267, is not unconstitutional, therefore, in allowing the vote of validation to follow the indebtedness.

9. The city council of Seattle passed an ordinance calling an election under Act Wash. March 7, 1891, p. 267, to determine the question of the validation of excess indebtedness, and also passed another ordinance calling an election on the same day under another act of March 7, 1891, p. 269, to determine whether bonds should issue to cover such indebtedness. Under the said statutes but one election was provided for, although there were to be separate votes on the separate propositions. *Held*, that only one notice of election was required.

10. Act Wash. March 24, 1890, p. 215, authorizes cities of the first class to borrow money for corporate purposes, and to issue bonds on such conditions and in such manner as shall be prescribed in the charter. Charter Seattle, Oct. 1, 1890, art. 4, § 22, subd. 5, authorizes the city council to borrow money for corporate purposes, and to issue bonds in accordance with the charter and the constitution and laws of the state. Article 4, § 30, provides that when loans shall be created exceeding $1\frac{1}{2}$ per cent. of the taxable property of the city, and bonds are issued therefor, the city council, in authorizing and providing for the same, shall direct the times and manner of payment and rates of interest, but no such bonds shall be issued except as provided by law, nor unless the proposition for creating such indebtedness shall have been previously submitted to the electors of the city, as prescribed by ordinance. *Held*, that a proposition agreeing with persons named to call an election under Act Wash. March 7, 1891, to validate excess indebtedness, and to fund the same by the issuance of bonds to be sold to such persons upon specified terms, was properly submitted to vote at such election.

11. A proposition to issue \$460,000 worth of bonds, or such lesser sum as may be sufficient, when the indebtedness and interest to be funded is but \$419,180, is not objectionable on the ground of indefiniteness, where the city officers have authority to issue bonds only to an amount sufficient to fund such indebtedness and interest.

12. Such proposition need not provide for bonds of the kind prescribed by Act Wash. March 26, 1890, p. 520, since the provisions of that act apply only to bonds for water-works, sewerage, or light plants.

Appeal from superior court, King county.

Action by A. J. Baker, Fred E. Sander, and James A. Moore against the city of Seattle, Harry White, as mayor of said city, H. W. Miller, as clerk of said city, C. W. Ferris, as comptroller of said city, and N. W. Harris & Co., to enjoin the issuance, sale, and delivery of bonds. There was judgment for defendants, and plaintiffs appeal. Affirmed.

A. Battle, for appellants. Orange Jacobs and Burke, Shepard & Woods, for respondents.

STILES, J. On the 1st day of June, 1891, an election was held in the city of Seattle under the act of March 7, 1891, p. 267, entitled "An act to enable cities and towns to validate certain warrants and other obligations and evidences of indebtedness on

the part of such cities and towns, issued by the corporate authorities thereof in excess of their legal authority, and declaring an emergency therefor." The propositions submitted at that election were to validate indebtedness as follows: Class 1: Warrants drawn payable out of the road fund of said city, and dated and issued on sundry days between September 21, 1889, and November 17, 1889, both inclusive, numbered from 3,629 to 4,029, of the year 1889, both inclusive, the face amounts whereof aggregate the sum of \$33,279.92. Class 2: Warrants drawn payable out of the road fund of said city, and dated and issued on sundry days between November 18, 1889, and February 25, 1890, both inclusive, numbered from 4,030 to 4,380, of the year 1889, and from 1 to 620 of the year 1890, both inclusive, the face amounts whereof aggregate the sum of \$91,567.73. Class 3: Warrants drawn payable out of the road fund of said city, and dated and issued on sundry days between February 26, 1890, and August 2, 1890, both inclusive, numbered from 621 to 2,786 of the year 1890, both inclusive, and the face amounts whereof aggregate the sum of \$188,350.20. Class 4: Warrants drawn payable out of the fire fund of the said city, and dated and issued on sundry days between May 3, 1890, and August 16, 1890, both inclusive, numbered from 331 to 598, both inclusive, the face amounts whereof aggregate the sum of \$57,781.59. The vote in favor of the validation was very largely in excess of the three-fifths majority required by the act, and the indebtedness covered by it stands validated, unless there are constitutional reasons against it. At the same election there was also submitted the proposition to fund this indebtedness, when validated, by the issuance of bonds in pursuance of the act of March 7, 1891, p. 269, entitled "An act authorizing cities and towns to submit to the voters therein propositions to fund indebtedness of such cities and towns by the issuing of bonds therefor, at the same election at which the previous attempted incurring of such indebtedness, or any part thereof, may be ratified." This latter proposition was also carried by an equally large vote, and the city of Seattle is preparing to issue bonds; and to prevent their issue appellants brought their action to restrain the municipal authorities from proceeding therein. Paragraph 11 of their complaint states the principal grounds of their objection to the bonds, which are as follows: "(1) That at the date of issue of all the warrants proposed to be validated, from warrant No. 4,251, in class 2, dated December 7, 1889, for the sum of \$32.87, and payable out of the road fund of said city, its absolute indebtedness, excluding these warrants, was \$160,169, which was one per cent. of the taxable property of said city, according to the last previous assessment thereof, August 30, 1889, the assessment having been \$16,016,900. (2) That at the date of issue of all the warrants proposed to be validated, from warrant No. 1,396 in class 3, dated May 3, 1890, for the sum of \$36.81, payable out of the road fund of said city, its absolute indebtedness, ex-

cluding these warrants, was \$240,253.50, which was one and one-half per cent. of the taxable property of said city according to the said assessment. (3) That there were outstanding, and not included in the above-mentioned \$240,253.50 of absolute indebtedness, or in any of the warrants claimed to have been validated, on the 5th day of May, 1890, certain 'street improvement warrants' issued under and by virtue of section 8, c. 3, of the charter of the city of Seattle, granted by the territorial legislature February 4, 1886, amounting in all to \$303,817, and which should be considered as part of the general indebtedness of said city. (4) That prior to May 5, 1890, the city of Seattle had, by virtue of the power conferred upon it by section 5 of chapter 2 of its said charter of 1886, condemned and taken certain lands in said city to widen and extend Front, Second, Commercial, South Second, and South Third streets, and to establish a certain public square at the north-west corner of Front street and Yesler avenue; that, in the course of such condemnation and taking, awards of damages had been allowed against it in the total sum of \$247,000, which sum should be considered as a part of the general indebtedness of said city, for the reason that the said city has taken possession of said lands, but has paid no part of the said awards, and has collected less than one per cent. of the same from the property assessed to pay therefor. (5) That at the dates of the issuance of all the warrants in classes 3 and 4, issued after May 5, 1890,—that is to say, beginning with warrant No. 333, for the sum of \$450, payable out of the fire fund of said city, and including said warrant, and all warrants dated and issued subsequently thereto, and included in classes 3 and 4,—the absolute indebtedness of said city, if said street improvement warrants and said condemnation awards were a part thereof, exceeded five per cent. of the taxable property of said city, as appeared by the assessment of August 30, 1889, to-wit, \$827,833. (6) That there has been no vote of said city to authorize its indebtedness to be increased beyond one and one-half per cent., other than the vote of June 1, 1891." The answer of the city admitted the facts stated in the complaint to be true, but alleged affirmatively: "(1) That by section 5 of the act of February 26, 1890, (Acts 1890, p. 225,) all of the indebtedness of the city of Seattle in excess of one per cent. of the assessment of 1889, and not in excess of one and one-half per cent. thereof, was validated and made legal indebtedness thereof. (2) That on February 26, 1890, the absolute indebtedness of the city of Seattle, including the indebtedness thus legalized, did not reach the limit of one and one-half per cent., nor was that limit reached until April 29, 1890, and after the issuance of warrant No. 1,394, on the road fund, for the sum of \$1,575, included in class 3. (3) That by the terms of the said street improvement warrants, and under the law governing their issuance, they were not primarily a general liability of the city of Seattle, but were chargeable to and payable out of particular funds, to be de-

rived from local assessments. (4) That the said condemnation awards were likewise not a primary or general liability of the city, but were chargeable and payable out of local assessments only." The plaintiff interposed a general demurrer to the answer, upon the argument of which the court sustained it as a demurrer to the complaint, and dismissed the action.

Before proceeding to pass upon the other features of this case we will speak of the two classes of alleged indebtedness which would absorb a very large portion of the city's debt-creating power if they were to be counted as a part of its constitutional liabilities, viz., the street improvement warrants and the condemnation awards.

First. Under the charter of 1886 (Laws Wash. T. 1885-86, p. 241) the city of Seattle had the power to make street improvements either with funds drawn directly from the treasury or by creating local assessment districts upon the property, within which a special levy could be laid to pay for the entire expense. These warrants were the result of proceedings of the latter class. They show upon their face that they are payable out of the " * * * street improvement funds, under ordinance No. —." The agreements with the contractors for the work were to the effect that they should be paid "out of a special fund." It is fair to presume that the special funds have been provided by the city in all these cases, and that in due course the money will be realized to pay off the warrants. What might be the liability of the city in case it should fail, neglect, or refuse to collect special taxes in such cases is not for us to say here. It suffices that there is no present liability on the part of the city to pay out of its treasury. In *Argenti v. San Francisco*, 16 Cal. 256, there was no restriction upon the use of the funds derived from special assessments. It went into the treasury, and its identity was lost, besides which the contract sued upon was general in its terms, obligating the city to pay. The case turned upon a question of agency. In *Atchison v. Byrnes*, 22 Kan. 65, the city failed to make a sufficient assessment, and refused to issue the bonds contracted for. In *Craycraft v. Selva*, 10 Bush, 696, the city was held liable only for that portion of the contract which fronted land not subject to assessment. As to other frontage the contractor was relegated to the land. In *French v. Burlington*, 42 Iowa, 614, there was no intimation that the decision was placed upon any ground other than that the proposed improvement would, under the charter, have to be paid for in part out of the city treasury, the law providing for only a partial assessment upon abutting property. These cases were relied upon by the appellant, but none of them appear to sustain the argument. On the other hand, *Hitchcock v. Galveston*, 96 U.S. 341, seems to uphold the position of the respondent; and the case of *Quill v. City of Indianapolis*, 124 Ind. 292 23 N. E. Rep. 788, clearly does so. If we are correct in our view of what the position of the city of Seattle is in reference to these war-

rants, viz., that whatever liability it is under is not present or absolute, but future and contingent only.

Second. Under its charter of 1886 (Laws Wash. T. 1885-86, p. 243) the city of Seattle had the power to widen streets and to condemn such real estate as might be necessary therefor. This power was given upon the theory that it would be exercised for the special benefit of particular localities, and would be paid for by the property benefited. As required in section 101, the assessment of benefits was a part of the proceedings for condemnation, as necessary as any other part. It is shown by the record here that there was such an assessment in each case of condemnation, but that less than 1 per cent. of the amount assessed has been paid. With this failure to collect we have nothing to do. If the city has taken possession of the condemned lands, it is for the unpaid owners thereof to pursue such plain remedies as the law provides them. We are of the opinion that the neglect of the city does not place their claims in the category of the city's general indebtedness. The orderly progress of the business would have required that they be paid before they surrendered possession; but, if they waived their right to pre-payment, their resort should none the less be to the source provided by law for their reimbursement. The duty laid upon the city was not the payment of the awards, but the levy and collection of assessments; and until it has been fully moved to the performance of that duty and failed therein, there is no liability to pay attaching to it. *McCullough v. Mayor, etc., of Brooklyn*, 23 Wend. 458; *Sage v. Brooklyn*, 89 N. Y. 189. We therefore conclude that the street improvement warrants and the condemnation awards are not a part of the indebtedness of the city of Seattle, to be considered in this case, and this, as we understand the pleadings, relieves the case of any question arising from the claim that the city's debt June 1, 1891, exceeded 5 per cent. of the assessment rolls of 1889 or 1890.

The act of February 1, 1888, (page 75,) permitted cities to incur indebtedness without a popular vote up to 1 per cent. of its taxable property. Therefore, under her assessment for 1889 of \$16,016,900 the city of Seattle could lawfully owe \$160,169, and no more, until the act of February 26, 1890, extended the limit to $1\frac{1}{2}$ per cent., viz., \$240,253.50. But, before going further, we will revert to the indebtedness sought to be validated at the election of June 1. It does not clearly appear by the ordinances that any part of the sums covered by classes 1, 2, 3, and 4 was within the 1 per cent. limit, and therefore valid without a vote, but the complaint does show clearly that all of class 1, and up to and including warrant No. 4,250 of class 2, were warrants within the 1 per cent. limit, and therefore there was no necessity for any vote to render them valid indebtedness; or, in other words, warrant No. 4,251, in class 2, was the first warrant which made the city debt more than \$160,169, which was then the lawful limit. That warrant was issued and dated December 7, 1889. Whatever warrants were issued, then, from

No. 4,251, December 7, 1889, to February 26, 1890, were void, and expressed no liability of the city.

And here are presented three material questions: (1) Was the act of February 26, 1890, p. 225,¹ a void act by reason of its having embraced more than one subject? (2) Was it void because it applied only to cities or towns having a corporate existence at the time of the adoption of the constitution? (3) Was the first clause of section 5 void because it imposed an involuntary debt upon the cities and towns to which it applied?

First. We hold that the act really embraced but one subject, viz., placing cities and towns upon the level of the constitution, as regarded their power to incur indebtedness. Merely incidental to this primary object was the declaration of what should be considered indebtedness within the meaning of the act, and the method of providing for its payment.

Second. The application of the act to cities and towns existing at the adoption of the constitution was not in violation of that instrument. True, section 10 of article 11 required the incorporation, organization, and classification of cities in proportion to population; but at the same session of the legislature, by various acts, this requirement was complied with, and the same authority was conferred upon such municipal corporations as should be thereafter organized. At the date of this act it must be remembered there were no incorporated cities or towns in the state, except such as had been created by special laws or charters, and there had been no law under which one could be created since the adoption of the constitution. The legislation of the session, therefore, taken *in part materia*, was uniform and universal in its operation. That it was not all contained in one act is not a sufficient ground for now making it wholly one-sided and unfair, which would be the result of striking out this act.

Third. The first clause of section 5 provides "that any indebtedness now owing by any such city or town, contracted strictly for municipal purposes, whether the same exceeds the amount which such city or town was authorized to contract under its charter or not, is hereby validated and declared to be a binding obligation upon such city or town when the only ground of the invalidity of such indebtedness is that it exceeds the amount authorized by the charter of such city or town;" and a further clause provided that there must be a popular vote if the excess reached beyond $1\frac{1}{2}$ per cent. Applied to Seattle, which on February 26th had warrants outstanding from No. 4,251 upward, but not beyond $1\frac{1}{2}$ per cent., the effect of this section was to make all these otherwise invalid warrants as good as those within the limit of 1 per cent. Was the attempt to do this a void exercise of legislative power? Section 9 of article

¹Act Wash. Feb. 26, 1890, p. 225, authorizes cities and towns organized prior to the adoption of the state constitution to extend and fund their indebtedness, validates certain indebtedness already existing, and declares an emergency.

7 of the constitution provides: "For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes." And section 12 of article 11 is as follows: "The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." The constitution of the state of Illinois in 1848 contained the clause above quoted from article 7 *in hæc verba*, and in that state there are many well-considered cases which hold that it is incompetent for the legislature to directly lay any burden of taxation for municipal purposes upon the cities of that state. See *People v. Mayor*, etc., 51 Ill. 17. In other states not having such a constitutional provision the power of the legislature over municipal corporations has, in some cases, been held to be well-nigh omnipotent, as in *Sage v. Brooklyn*, supra. We find no case, however, in which such a constitutional expression occurs as is contained in our article 11, above quoted, and, whatever may be thought elsewhere of the Illinois decisions above quoted, they would seem to be cogent authority here. But this is not a case of original compulsion of the city of Seattle. Its municipal authorities, in the strait of an overwhelming public calamity, to rebuild and protect the city, overstepped the line of legalized indebtedness, and for the strictest municipal purposes issued the warrants from December 7, 1889, to February 26, 1890. Value in goods and labor was fully paid for these warrants, and the holders of them have at all times had the strongest moral claim for their liquidation. At all times from December 7, 1889, until the passage of this act, the constitutional limit, without a popular vote, was 1½ per cent., the necessarily tardy action of the legislature alone delaying its extension of the power. Indeed, under the act of 1888 it is altogether likely that a majority vote of the people of the city could have authorized the issuance of every one of the excess warrants. We are therefore constrained to view this case as one within the principle long sustained by the courts, that where a municipal corporation has done an act beyond its statutory powers, but within the powers which it was competent for the legislature to have conferred upon it, the act may be validated by a curative statute. Dill. Mun. Corp. (4th Ed.) §§ 79, 544, and cases cited. We have carefully examined the Illinois cases cited, viz., *Marshall v. Siliman*, 61 Ill. 226, and the series of cases following it in that state; but, especially in view of the grudging approval of them by the supreme court of the United States in *Township of Elmwood v. Marcy*, 92 U. S. 289, we do not think they should be authority here. They were railroad aid cases, in which there were numerous flagrant irregularities, and the purpose was in no case municipal. But, while curative acts of the legislature of Illinois were set aside by the supreme court of that state,

and the rule was upheld by the supreme court of the United States because of its long prevalence there, and in accordance with the decision of the highest court of the state from which the case came, the federal court has generally held the other way, and sustained like curative legislation. See cases cited in *Dillon*, and *New Orleans v. Clark*, 95 U. S. 644. From February 26, 1890, there was a short period when, according to the pleadings, the indebtedness of the city of Seattle did not exceed the 1½ per cent. limit. The warrants covering this period, although they needed no validation, were also included in the classes submitted for validation at the election of June 1st. Then, however, there followed a class of warrants the last of which payable out of the road fund was issued August 2, 1890, and the last of which payable out of the fire fund was issued August 16, 1890, all of which it is agreed were in excess of the 1½ per cent. limit, and were without any legal authority until March 7, 1891, when the act of that date, providing for an election for the validation of such warrants, was passed with an emergency clause. Strictly, the act had no application to any of the warrants included in the propositions to validate, excepting those here spoken of, although some doubt as to the construction of the former acts may have justified the submission of all to the test of a vote. The criticism made to the act of February 26, 1890, that it was not general, but applied only to cities and towns "now having a corporate existence in this state," is renewed to this act; but there is no propriety in the objection. It is a curative act, and only applies to what had been done before the date of its passage. If, instead of the objectionable words, the act had read, "any city or town," the effect would have been just the same.

Far more important is the next objection, that, constitutionally, no municipal corporation can create or in any manner validate a debt in excess of the 1½ per cent. limit, without a vote previously had to authorize it. In treating the other branches of this case we had to examine—*First*, the city's inherent powers, which do not include the creation of any indebtedness; *secondly*, the power of the legislature to compel the assumption of obligations; and now we have to do with the legislature's powers to authorize indebtedness. But for the restriction of the constitution, the legislature could compel the state's municipalities to assume the most onerous burdens or give up their corporate existence. The idea of home rule, however, is strongly pre-eminent in our constitution, and we have seen that, while cities may not become indebted in any sum, for any purpose, beyond their current revenues, without the consent of the legislature, on the other hand the legislature has no power to force upon them any undertaking which will involve the expenditure of money without the consent of the municipal authorities or the people. The legislature has seen fit, however, to commit to the city government the authority to create debts for municipal purposes up to the constitutional limit of 1½ per cent.,

at their own discretion. Section 2 of the act of February 26, 1890, and the other acts of that session, then went further, and permitted a further indebtedness up to the 5 per cent. limit, whenever three-fifths of the voters therein assent thereto. This we conceive to mean that, before any such additional debt shall be lawfully created, an election shall have been had, and the authority voted. But here the vital question appears whether the legislature is bound by the terms of the constitution, so that it can, under no circumstances, permit the vote of assent to be taken after the benefit for which the debt is sought to be undertaken has been received. The state, by its constitution, consented that there be a debt of 5 per cent., the legislature assenting thereto. The language of the constitution is not certain to the effect that the legislature must provide for an antecedent vote. Construction alone can make the language certain. That construction is, under all rules, to be in favor of the freedom of the legislature; the constitution being an instrument containing restrictions upon the legislative power, which would otherwise be universal and unlimited. The legislature has by the act of March 7, 1891, placed its construction upon the constitutional provision; and, unless it has done violence to the necessary construction of the provision, its construction is entitled to stand. What are the facts? The legislature had full power to consent to the authorization of indebtedness beyond 5 per cent. It and the people alone are concerned, and they have agreed that up to the date of the act of March 7th the vote might follow the act of the municipal authorities in accepting service and goods for the use of the city, and that, having been so accepted, they may be paid for. It is not the best policy for a city to pursue. Its obligations beyond the 1½ per cent. were void. The legislature might refuse to exercise its authority, and the people might decline to give their votes of assent. But, having done so, we believe it would be overstepping the bounds of judicial necessity were we to hold their acts to be void and unconstitutional. Circumstances have little weight with judicial decisions, but we cannot fail to remember that our constitution was framed while the smoke of overwhelming and unprecedented calamity yet hovered over some of our most thrifty and promising communities; that the very provisions we are discussing, which make large allowances for municipal indebtedness, were framed with a view to their habilitation and future preservation; and that the legislation which followed was cast in the same mould, through a universal desire that in no portion of her commonwealth should the public credit of the state be tarnished or depreciated. The vote by which the validation in this case was accomplished was not merely three-fifths to two-fifths, but more than ten to one, showing an almost unanimous desire of the people of Seattle to assume and pay their excess liabilities. It would border upon tyranny were the rest of the state to stand in the way of so patriotic a sentiment. We do not find any impediment in

the constitution, and therefore the act of March 7th is conclusive.

There were some minor objections to the issuance of the bonds in question which we shall now notice. The city council passed ordinance No. 1,706, calling the election on June 1st, on the question of the validation of the excess indebtedness; and it also passed ordinance No. 1,707, calling an election upon the same day, under the act of March 7, 1891, p. 269, to determine whether bonds should issue covering the indebtedness sought to be ratified, and other existing indebtedness of the city embraced in the four classes of warrants hereinbefore mentioned. The additional points raised mainly relate to ordinance No. 1,707, and will be treated *seriatim*.

First. There was but one notice of election embracing the two ordinances. Under the statute but one election was provided for, although there were to be separate votes on the separate propositions. We hold that but one notice was required or proper.

Second. Before the election was ordered, the city authorities entered into a contract with N. W. Harris & Co., of Chicago, Ill., the substance of which was that the election should be called, and that, whatever of the warrants in the said four classes should be valid warrants on the 1st day of July, 1891, should be funded by the issuance of city bonds, which should be sold to Harris & Co., they agreeing to take them upon terms specified. The question whether this contract should be carried out was also submitted to vote at the election under ordinance No. 1,707. The act of February 26, 1890, simply provided in general terms for the issuance of bonds to fund indebtedness, leaving the details of issue entirely to the municipal authorities. In *Yesler v. Seattle*, 1 Wash. St. 308,¹ we held, in relation to a similar matter, that it was not proper for the city council to submit these details to the popular vote; and under the act of February 26, 1890, it would seem that it is not necessary that the question of funding ever be submitted. But the act of March 7, 1891, p. 269, seems to imply that in the cases covered by it the question of funding should be submitted, though the details of the funding are here omitted also. Recurring, however, to the act of March 24, 1890, p. 215, which confers the powers of cities of the first class, we find, in the fourth subdivision, this authority: "*Fourth.* To borrow money for corporate purposes, on the credit of the corporation, and to issue negotiable bonds therefor, on such conditions, and in such manner, as shall be prescribed in the charter." The charter of October 1, 1890, of the city of Seattle, in the fifth subdivision of section 22, art. 4, empowers the city council to borrow money for corporate purposes on the credit of the city, and to authorize the issue of negotiable bonds therefor, in accordance with the charter and the constitution and laws of the state. This, under the law, would leave the matter of issuing bonds to the wisdom of the coun-

¹25 Pac. Rep. 1014.

oil, both as to the propriety of the issue and the details. But by section 80, art. 4, there is this further provision: "When loans shall be created exceeding one and a half per centum of the taxable property in the city, and bonds therefor issued by the city under this charter, the city council, in authorizing and providing for the same, shall direct the times and manner of payment and rates of interest; but no such bonds shall be issued except as provided by law, nor unless the proposition for creating such indebtedness shall have been previously submitted to the electors of the city at a regular general or special election, of which thirty days' notice shall have been published in the city official newspapers, and such proposition shall have then received the assent of three-fifths of the voters voting at such election. The mode and manner of submitting such proposition to the voters shall be prescribed by ordinance. And, in case such three-fifths of the voters are in favor of such loan, the city council may, after such election, by ordinance confirm the loan; but no bonds shall be issued therefor until after such confirmation, nor until the city council shall have made specific provision for payment annually of interest on such bonds, and for a fund to pay the interest on such bonds, and a sinking fund to be raised by annual tax at least five years before the bonds are due, sufficient to pay and discharge such bonds at maturity; and the faith and property of the city shall be and is hereby pledged for the final payment of any and all such loans." Inasmuch as a part of the bonds proposed in this instance were to fund indebtedness in excess of $1\frac{1}{2}$ per cent., section 30 made it necessary to submit the entire proposition in substantially the form in which it was submitted, and there was no error.

Third. The amount of bonds proposed to be issued and voted was \$460,000. The face of the warrants to be funded is \$370,979.44, and the interest accrued thereon was estimated in ordinance 1,707 to be \$48,200.56, making a total of \$419,180. Objection is made that the proposition to fund was indefinite as to amount, and for that reason cannot stand. There is no perceptible reason why the sum needed could not have been reached without leaving so wide a margin as the difference between \$460,000 and \$419,180. But the only authority given the city officers is to issue bonds to an amount sufficient to take up the warrants, the face value of which is \$370,979.44, and the legal interest thereon; and until it shall appear that they are about to exceed that authority there would be no just cause of complaint. It is presumed that all officers concerned in the issuance of these bonds will strictly follow their authority in the premises, as any departure therefrom would subject them and their bondsmen to personal liability.

Fourth. Some question was made as to whether the ordinance should not have provided for bonds of the kind prescribed by the act of March 26, 1890, p. 520, but we do not consider any of the provisions of that act as applying to any bonds other than those specially provided for therein,

vis., for those issued to raise money for water, sewer, or light plants. The judgment of the court below is therefore affirmed.

ANDERS, C. J., and HOYT, DUNBAR, and SCOTT, JJ., concur.

(2 Wash. St. 594)

AMERICAN BUILDING & LOAN ASS'N v. HART et al.

(Supreme Court of Washington. July 20, 1891.)

PRINCIPAL AND AGENT—RIGHTS AND LIABILITIES INTER SE—LIABILITIES OF PRINCIPAL—VIOLATION OF CONTRACT—NOMINAL DAMAGES—BUILDING ASSOCIATIONS.

1. Plaintiffs were appointed general agents of a building association, with sole authority to solicit members and collect admission fees in certain territory; and, as compensation, were to receive 100 per cent. of the admissions collected by them, and a certain renewal interest per share. Plaintiffs, in an action for breach of said contract, alleged that the association wrongfully permitted other agents to solicit members, and to collect for the sale of stock and for admission fees the sum of \$3,035. The association, by its answer, admitted the sale of 8,000 shares by other agents, but denied the receipt of any sum for stock or admission fees, and set up affirmatively that said agents had made the sales under a special arrangement with plaintiffs. At the trial the only material showing was that the sales had been made without plaintiffs' knowledge or consent. On the point of actual damage there was no testimony whatever. *Held*, that plaintiffs should have proven the number of shares sold in violation of their contract, and, with reasonable certainty, the damages resulting therefrom; and that, in the absence of such proof, they were entitled only to nominal damages.

2. In order to recover more than nominal damages, plaintiffs must show approximately the profit derivable from admission fees, after deducting the cost of collection, and the number of shares they would have sold if other agents had not sold in violation of their contract, and could not assume that, because other agents sold a certain number of shares, plaintiffs themselves would have sold the same number.

3. For the purpose of showing that more than 8,000 shares of stock had been sold by other agents, one of the plaintiffs, while a witness, was permitted to refresh his memory from a list of stock certificates copied by him from an extract of the records made by an under-clerk of the association. The witness had previously shown the original extract to the president of the association, who said he "did not know specifically about each particular name, but it was correct in the total." The paper, however, showed no total; and there was nothing about the copied list to indicate that any share represented upon it was sold after the date of plaintiffs' contract, in addition to the 8,000 shares already admitted. *Held* competent neither as an admission of the association nor as a "refresher."

Appeal from superior court, King county.

Action by Albert D. Hart and Frank Faxon, as Hart & Co., against the American Building & Loan Association, for damages for violation of contract. There was judgment for plaintiffs, and defendant appeals. Reversed.

Preston, Carr & Preston and *W. S. Rush*, for appellant. *John H. Elder* and *Sidney M. Logan*, for respondents.

STILES, J. Appellees sued for damages for the violation of a contract dated October 1, 1888, and containing the following

provisions: "First. The party of the first part agrees to appoint, and does hereby appoint, said parties of the second part general agents for said first party for the following territory, to-wit: The territory of Washington, with exclusive control of the same: provided that Messrs. Hurd, Beck, and Baker shall be allowed to organize local boards in Ellensburg and North Yakima, and to work in Seattle until October 13, 1888. Said parties of the second part are given authority to solicit members and collect admission fees, organize local boards, and appoint sub-agents in such territory, such agency to terminate upon the termination of this contract." "Third. That said first party agrees to allow said second party, as compensation for such services, one hundred per cent. of the admission fee collected by them on all applications secured by them; also a renewal interest of two cents per share per month on all business done in Washington Territory by themselves or others, except that done by Messrs. Hurd, Beck, and Baker in the town excepted above; also admission fees remitted to the home office of sub-agents of second parties: provided, that on paid-up stock second parties shall be allowed two dollars per share at the time of sale, and fifteen cents per year thereafter." The breach alleged was that the appellant association, after the making of the agreement, and after October 13, 1888, permitted Messrs. Hurd, Beck & Baker, as its agents, to organize local boards of the association, and appoint local agents thereof, in the state of Washington, and that against the protest of the appellees, and with the knowledge and consent of the association; and that as its agents they "did wrongfully solicit members of said association to the number of about 194, and did solicit, take, and receive from said members, for the sale of stock of the defendant association, and for admission fees therein, the sum of \$3,035.00." The complaint also contained a claim for damages for injured credit, which was abandoned; and a further claim for "renewals" amounting to \$485.60, which seems to have been also lost sight of, if not altogether abandoned. The answer admitted the contract, but claimed the actual date of its execution to have been October 13th instead of October 1st. It denied the breach alleged, but set up affirmatively that Hurd, Beck & Baker, under an agreement between them and the appellees, had subsequently to October 13th sold 3,000 shares of stock in Washington.

At the trial a multitude of issues were assumed to be in the case, but we can find but two that were left open by the pleadings, viz.: (1) Were the sales of 3,000 shares of stock by Hurd, Beck & Baker made under any agreement with Hart & Co.? (2) If not, then there having been a breach of the contract, what were the damages to the appellees by reason of the breach? It must be borne in mind that the complaint alleged that stock was sold, without mentioning any number of shares, but also stated that the association had received from the sale of stock and for admission fees \$3,035; while the answer ad-

mitted the sale of 3,000 shares, but denied the receipt of any sum for stock or admission fees. The fact was that Hurd, Beck & Baker had had the same kind of a contract with the association as that given to Hart & Co., and they retained whatever they collected for their own account, claiming to act under a special arrangement with Hart & Co., which extended or continued the right to represent the association on the old terms.

This state of the pleadings left it incumbent upon the appellees to prove to the satisfaction of the jury that shares were sold, whether 3,000 or any other number, in violation of their contract, and, within some reasonable degree of certainty, the actual damage to them resulting therefrom. Definite mathematical certainty would be nearly impossible in such a case, but, to recover more than nominal damages, there must be something like a basis for the jury to estimate from. They cannot be left to a mere guess. At the trial, however, the plaintiffs' case produced nothing material beyond a showing that the stock sales complained of were made without their knowledge or consent. It might have been expected, from the indefiniteness of the complaint and the contract, that some testimony would have been adduced showing what kind of a business this was that the association was conducting, and generally the method of disposing of its stock, for which the appellees engaged their time and labor; also what an "admission fee" was, of which they were to receive 100 per cent; and what was meant by a "renewal interest." But nothing of the kind was attempted even. One of the plaintiffs, while a witness, presumably for the purpose of showing that more than 3,000 shares had been sold, produced a paper which he claimed to have obtained from records in the association's office, containing what may be called a "descriptive list" of certificates of shares issued to divers persons, and was asked this question: "What is the total of that,—the number of shares of stock they sold?" To which he answered, in no way responsively: "Well, the total amount of admission fees was \$3,035. Sold in lots under ten shares, the admission fee was more than one dollar, and the amount of admission fees, total of \$3,035, would be a trifle less than the number of shares,—total number involved." Now, it might be, perhaps, inferred from this irresponsible answer, which was the only remark on the subject in the whole case, that an ordinary admission fee was one dollar, but that in lots of less than ten shares the fee was more than one dollar. But was the fee per member or per share? From the rest of the answer, we might infer it to be per share, were it not for the complaint, which says that \$3,035 was received for "stock" and "admission fees." How much, then, was for stock, in which appellees had no interest, and how much for fees, of which they were entitled to 100 per cent? But these are mere guesses of our own, which a jury has no right to make, or to be required to find a verdict from. But on the point of actual damage there was no testimony at all.

Plaintiffs seemed to proceed upon the theory that, having shown that Hurd, Beck & Baker had received \$3,035 from these sales, that would be the measure of their recovery against the association, as though the suit were for money had and received, forgetting that the action was for breach of the contract. The jury apparently saw the point of the dilemma, for they awarded but \$1,500, though as a deduction from what facts in the case we are unable to discover. The court should have charged the jury that under the evidence, if they found the sales of stock made by Hurd, Beck & Baker, subsequent to October 13, 1888, to have been made without the knowledge or assent of Hart & Co., they should find for the plaintiffs, and assess nominal damages; but otherwise they should find for the defendant. Not having so charged, the judgment must be reversed, and a new trial had. The motion for a nonsuit was properly denied, as the plaintiffs' showing was that the sales had been without their knowledge or consent, and against their protest.

Upon the new trial, in order to recover more than nominal damages, the plaintiffs should show that, if whatever shares of stock were sold in violation of their contract had not been so sold, they would have reaped some advantage therefrom, and approximately what that advantage would have been in money. It will not do to say that because Hurd, Beck & Baker sold, say, 3,000 shares, therefore Hart & Co. would have sold the same shares; nor will it be correct to consider admission fees as net profit, without considering the outlay connected with collecting them. These points must be made as certain as experience in the business and the nature of the case will permit before a jury will be warranted in finding a verdict. The so-called "Subscribers' List," from which the witness Hart was allowed to refresh his memory, was not competent either as a "refresher" or as evidence. Plaintiffs had the admission that 3,000 shares were sold after October 13th, and there was nothing about this list to show that any share represented upon it was sold after that date in addition to the 3,000 admitted. Moreover, it was a mere extract of book memoranda made by an under-clerk at the office of the association, for what purpose does not appear, and could be taken as no admission of the corporation. No, it was not even that; but only what purported to be a copy of such an extract, made by the witness from the original, which was on file with some referee. The witness had shown the original to the president of the association, and asked him if it was correct; to which he replied that he "didn't know specifically about each particular name, but it was correct in the total." But the paper shows no total. There was no materiality in either of the letters offered, under the view we take of the case, though appellant cannot complain of that of April 29, 1889, since the record shows it to have been introduced by that side. We think it not necessary to review the court's instructions, as the proper scope of instruction on the new trial has already been indicated.

ANDERS, C. J., and DUNBAR, J., concur.

HOYT and SCOTT, JJ., did not sit at the hearing.

BAER V. MORAN BROS. CO.

(Supreme Court of Washington. Aug. 1, 1891.)

PUBLIC LANDS—LOCATION OF VALENTINE SCRIP—TIDE-LANDS.

1. Act Cong. 1872, (17 St. at Large, 649,) providing for the relief of one Valentine, authorizes the selection by the holder of the Valentine scrip of unoccupied and unappropriated public lands. Plaintiff, as owner of Valentine scrip E, No. 199, brought ejectment to recover certain lands, being portions of the tide-flats in Elliott bay, which are covered at ordinary high tide, and uncovered at ordinary low tide, over which defendant had erected a foundry and machine-shop. Plaintiff had selected the lands at a time when they were unoccupied. *Held*, that the complaint was properly dismissed, since the premises are "water," and not "land" subject to entry under the statute. Distinguishing *San Francisco Savings Union v. Irwin*, 28 Fed. Rep. 709.

2. The fact that the tract is not covered by water that is navigable, and is uncovered at low tide, is immaterial, as high-water mark is the limit of government grants.

Appeal from superior court, King county.

Action in ejectment by Milton L. Baer against the Moran Bros. Company, a corporation. Judgment for defendant. Plaintiff appeals. Affirmed.

Beriah Brown, Jr., for appellant. J. C. Haines, for respondent.

STILES, J. The appellant brought ejectment for the following described real estate in King county, viz.: "Beginning at a point 688 feet south, and 660 feet west, of the east one-quarter post of section six, township twenty-four north, range four east, W. M.; thence west one hundred and fifty feet; thence south two hundred and ten feet; thence east one hundred and fifty feet; thence north two hundred and ten feet, to place of beginning,—being the premises covered by Moran Brothers Company's foundry and machine-shop." The complaint showed the plaintiff's ownership of Valentine scrip E, No. 199, for 40 acres, and that on the 23d day of September, 1889, "he duly selected the following described tract of unsurveyed land for location thereunder, to-wit: Beginning at a point one hundred and sixty rods south of the north-east corner of section six, township twenty-four north, range four east, W. M.; thence west eighty rods; thence south eighty rods; thence east eighty rods; thence north eighty rods, to the place of beginning,—containing 40 acres,—which said tract of land, when surveyed, will conform to the general system of the United States land surveys, and will be known and designated as the 'north-east quarter of south-east quarter of section six, township twenty-four north, range four east, W. M.'" The complaint then proceeds: "(12) That this plaintiff selected the said tract of land in the manner following, to-wit: On the said 23d day of September, 1889, this plaintiff filed with the register and receiver of the United States land-office at Seattle, Washington, a notification that in pursuance of the act of congress approved April

5, 1872, the said plaintiff had selected the said tract of land, [describing it,] together with an affidavit of this plaintiff to the effect that the said tract of land was not mineral in character, and at the said time and place the said plaintiff filed with the said register and receiver of said United States land-office the said piece of scrip, numbered E, No. 199, for cancellation, and tendered to said receiver the sum of two dollars, being the amount of fees allowed by law to the register and receiver of United States land-offices in the Territory of Washington, on the entry of forty acres of land with Valentine scrip. (13) That the said tract of land so selected by said plaintiff was, at the time of its selection by said plaintiff, unoccupied and unappropriated public land of the United States, not mineral, in this: that the said tract of land was situated in the Territory of Washington, was a portion of the tide-flats, was covered and uncovered by the flow and ebb of the tide,—uncovered at ordinary low tide, and was covered with water at ordinary high tide,—and had never been set apart by the United States for any particular use; that the said tract, or any portion thereof, was not in the possession of any person claiming or intending to claim any title thereto under or in pursuance of any statute or treaty of the United States, and the said tracts were not chiefly or at all valuable for mineral, and that the Indian right of occupancy thereto had been extinguished." A general demurrer to the complaint was sustained in the court below, and, on the plaintiff's refusal to plead further, judgment was rendered for the defendant, dismissing the action. The appellant contends: (1) That the "Act for the relief of Thomas B. Valentine" was a grant upon conditions which have been strictly performed, whereby the title vested; citing *Rutherford v. Greene's Heirs*, 2 Wheat. 198, and other cases involving the construction of congressional donations of public lands. For the purposes of this decision, the proposition may be accepted without discussion. (2) That on the 23d day of September, 1889, the tract in question was public land of the United States, (Washington then being a territory,) and that congress could at all times up to that date dispose of it as it saw fit, citing *Insurance Co. v. Canter*, 1 Pet. 542; *Goodtitle v. Kibbe*, 9 How. 471; *Case v. Toftus*, 39 Fed. Rep. 733. This point, also, may be admitted for the sake of the argument. (3) That said tract, not having been reserved by competent authority, or not occupied in good faith by intending claimants under the United States land laws, was subject to selection by Valentine or his assigns in satisfaction of his grant. Upon this proposition the issue in the case is made, and upon its determination the appeal will succeed or fail.

The act of April 5, 1872, (17 St. at Large, 649,) commonly known as the "Valentine Scrip Act," authorized Thomas B. Valentine, or his legal representatives, in lieu of lands claimed by him in the Rancho Arroyo de San Antonio, in the county of Sonoma, Cal., to select and have patents for an equal quantity of the unoccupied

and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys. The complaint, as above quoted, contains allegations which negative any claim that this tract was occupied or appropriated in pursuance of any statute or treaty of the United States, or was mineral in character, or had been reserved or was subject to an Indian title. These allegations, and the *pro forma* admissions under the first and second points, strip the case of every defense except that the tract in question was not "public lands," within the meaning of the act of 1872. In our view it was not such land, and for the following reasons:

1. The complaint shows that it is a portion of the tide-flats, is covered and uncovered by the flow and ebb of the tide, being uncovered at ordinary low tide, and covered at ordinary high tide; and by reference to the public surveys we find that it is a portion of the bottom of Elliott bay, an arm of the sea, in front of the city of Seattle.

2. Within the meaning of the acts of congress, and the policy thereby clearly established from the earliest times, the decisions of courts, and the general understanding, this is not "land," but "water," to which none of the public or special and private land laws, including the Valentine scrip act, have any application. It may be conceded that congress, by clear and explicit enactment, could have granted the bottom of navigable waters to any person it saw fit before the admission of the state, but it will not be contended that the language of the Valentine scrip act is to receive any construction other than that awarded to the hundreds of other acts which relate to the "public lands" subject to Mr. Valentine's selection, or that the lands therein meant are any lands different from those subject to entry under the pre-emption, homestead, and other laws. Therefore it is but proper that, in construing this act, reference should be had in this manner to the hitherto universally sustained rule that "public land" means upland, and not soil beneath navigable waters. The supreme court of the United States, in the case of *Hardin v. Jordan*, 11 Snp. Ct. Rep. 808, (decided May 11, 1891,) uses the following pointed language: "It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted; no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the federal and state courts, that such meander lines are not intended for the purpose of bounding and abutting the lands granted upon

the waters whose margins are thus meandered, and that the waters themselves constitute the real boundary. *Railroad Co. v. Schurmeir*, 7 Wall. 272, and other cases. * * * It has never been held that the lands under water in front of such grants are reserved by the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of water. With regard to grants of the government for lands bordering on tide-water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state,—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishing, and cannot be retained or granted out to individuals by the United States." In view of such authoritative language, in every event, it would require the most explicit and unmistakable words in an act of congress to cause a court to construe any grant upon tide-water to extend beyond high-water mark, even though its date were within territorial times, and there were no argument to be made upon the theory of a trust imposed upon the general government for the benefit of the future state. Whatever the theory may be, the fact is that the government never intended to have any grant under its public or private land laws construed to include the soil beneath the waters, and all of its grants are fully and justly satisfied by making them apply to the land, and not to the water.

3. We are urged to consider that this tract is not covered by water navigable in fact, because it is uncovered at low tide, though it is conceded that the ordinary high tide does cover it, and that the ordinary high-water mark is between it and the upland. But the rule is a fixed one that high-water mark is the limit of government grants; therefore it can make no difference whether at low tide the area exposed is great or little, or whether the fluctuation of the waters is as great as in the Bay of Fundy, or as slight as at St. Augustine. The high tide is the boundary beyond which there is no land to be granted.

4. Another suggestion is that at various points, some of them within this state, the patents of the government do purport to cover tracts below high-water mark; showing the action of the land department in that particular. It may be that there are such patents. The convenience of surveyors may have led them to show meander lines on their plats which do not exactly accord with the sinuosities of the shore; but they are probably errors coming within the maxim *de minimis non curat lex*. If they are more, the answer is that the practice of the land-officers in

a few cases does not make the law. Such cases are mere mistakes on the part of the government's agents.

5. It is contended that in *Savings Union v. Irwin*, 28 Fed. Rep. 709, 11 Suwy. 667, it was held that the title of the state of California to submerged tide-flats capable of reclamation by embankments was not based upon her sovereignty, but solely upon the act of 1850, (9 St. at Large,) granting swamp and overflowed lands within their borders to the states. But, although the brief asserts that the land in the case of *Savings Union v. Irwin* and that in the case at bar were identical in character, we do not so understand the fact to be. In the former case the controversy was over the possession of "overflowed" lands lying in front of Mare Island, which were sometimes called "tule" or "marsh" lands. They were lands over which the high monthly tides flowed, but not the ordinary daily tides, and between the island and portions of them there were navigable sloughs. They were more or less covered with vegetation, and were in no sense the bottom of the sea or river. Moreover, the real controversy there was whether a Mexican grant, followed by a United States patent, for "Mare Island, bounded by the water's edge," authorized a subsequent grantee to convey the island, "including all the tule or low and marsh land belonging to the same, or which has ever been reputed or claimed to belong to the same," which the court settled in the negative, citing *U. S. v. Pacheco*, 2 Wall. 589. It is currently reported that there are thousands of acres of lands in this state of the general character of the lands in the Mare Island case, much of which has been patented by the United States, and is now under a high state of cultivation. But they are not such lands as the daily tides of Elliott bay cover. They are tide-marsh or prairie lands, composed of alluvial soil, where the interference of the extreme tides or high water caused by wind currents does not prevent a natural growth of vegetation.

6. Lastly, the constitution of this state is appealed to, to show that there is no objection from that source to the appellant's claim. Section 2, art. 17, of the constitution declares that "the state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States; provided, the same is not impeached for fraud." There was no occasion for mentioning swamp and overflowed lands, since they were expressly withheld from the state by the enabling act, § 17. Whether the section amounts to a recognition or confirmation of such patents or not, as claimed by appellant, need not be determined. The language is, "disclaims all title." The state merely asserts nothing. But appellant claims that his attempted location of scrip, a few days before the constitution went into effect, entitles him to share in the disclaimer, since he may get a patent which will relate to the date of his location. This position in some cases might require a decision of what is meant by "patented," in the section quoted, but it is not necessary here. We have

seen from the highest judicial authority that the United States never would, if it could, patent this tract, or recognize appellant's claim to it, unless through the mistake of its officers; and no such impossible case was contemplated by the constitution. The judgment of the superior court is affirmed.

ANDERS, C. J., and SCOTT, DUNBAR, and HOYT, JJ., concur.

BEHMKÉ v. GOODWIN *et al.*

(Supreme Court of Washington. Aug. 10, 1891.)

COUNTIES—ISSUE OF BONDS—CONSTITUTIONAL LIMITATION—ELECTION.

1. Const. Wash. art. 8, § 6, providing that "no county * * * shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, * * * without the assent of three-fifths of the voters therein, * * *" does not authorize the county commissioners to incur an indebtedness up to the $1\frac{1}{2}$ per cent. in addition to any indebtedness which may have been incurred before such provision took effect.

2. Such provision does not authorize the commissioners to submit to the people the question of validating any purported indebtedness they had attempted to incur in excess of the limitation.

3. Under Act Wash. March 21, 1890, which provides that counties, through their commissioners, may contract indebtedness for general county purposes, not exceeding an amount, together with the existing indebtedness, of $1\frac{1}{2}$ per centum of the taxable property in the county, commissioners may issue bonds for indebtedness not exceeding $1\frac{1}{2}$ per cent., without submitting the question to a vote of the people. Following *Murry v. Fay*, (Wash.) 26 Pac. Rep. 538.

Appeal from superior court, Kittitas county; GRAVES, Judge.

Action for injunction by Henry Behmke against J. C. Goodwin, M. Horan, and J. W. Richards, board of county commissioners of Kittitas county. Judgment for defendants on demurrer. Plaintiff appeals. Reversed.

Frost & Warner, for appellant. *D. H. McFalls*, for respondents.

SCOTT, J. In this action appellant seeks to enjoin the respondents, the board of commissioners of Kittitas county, from issuing the coupon bonds of said county in the sum of \$150,000, which bonds said board were attempting to negotiate and issue. The complaint was demurred to, and the demurrer was sustained, and judgment rendered dismissing the action. The purpose for which said bonds were to be issued was to fund the outstanding indebtedness of Kittitas county. The question of the issuance of said bonds was submitted to the voters of said county at the general election held on the 4th day of November, 1890, and more than three-fifths of the votes cast thereat in said county were in favor of such issuance. The injunction was sought mainly upon the grounds that the various proceedings had in submitting the matter to a vote were imperfect and irregular, and that the vote thereon was void in consequence thereof. The complaint does not sufficiently present the points which the parties now desire to have decided, but, to aid the same, it is

conceded by the respondents in their brief, and upon the argument, that the amount of the bonds so proposed to be issued exceeded the amount of $1\frac{1}{2}$ per centum of the total property valuation of said county as ascertained by the last preceding assessment for state and county purposes, and both parties concede that part of said indebtedness was incurred before and a part since the state constitution became operative. In the case of *Murry v. Fay*, 26 Pac. Rep. 538, (decided in April last,) this court, in construing section 8 of the funding bond act, (see page 38, Sess. Laws 1889-90,) held that county commissioners could issue bonds to fund lawful county indebtedness incurred within the limitations of section 1 of said act without submitting the question of issuing to a popular vote. In this case we do not know what per cent. the outstanding indebtedness is of the total property valuation, except that it is greater than $1\frac{1}{2}$ per cent. thereof, and it is also conceded to be less than 5 per cent.; nor do we now what the proportion of the then existing indebtedness to the property valuation was at the time the constitution went into effect that is now outstanding; or whether any of the present indebtedness was incurred prior to January 1, 1888. If any such remains in existence, it could yet be placed in the form of bonds by the commissioners under the provisions of the county bond act passed by the territorial legislative assembly in 1888, (see Sess. Laws 1887-88, p. 10,) even if in excess of the $1\frac{1}{2}$ per cent., but within the amount there limited. We are also satisfied that the whole of the lawfully contracted indebtedness, whenever incurred, not now exceeding $1\frac{1}{2}$ per cent. of the total property valuation, can be converted into bonds by the commissioners under the provisions of the funding bond act aforesaid, approved March 21, 1890,¹ without submitting the question to a vote of the people; in fact, there is no authority for holding any such election. It is evidently within the intention of that act to cover or include all lawful indebtedness, up to the $1\frac{1}{2}$ per cent., without any regard to the time when it was contracted.

The indebtedness of this county, whatever it is, has apparently all been contracted by its commissioners without any vote of the people thereon; at least, it does not appear that any election has at any time been called or held to authorize the incurring of such indebtedness, or any part of it. It is contended by the respondents that the limitation contained in section 6, art. 8, of the state constitution, which provides that "no county * * * shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, * * * without the assent of three-fifths of the voters therein, voting at an election to be held for that purpose, nor in cases requiring such as-

¹Act Wash. March 21, 1890, empowers counties, through their commissioners, to contract indebtedness for general county purposes, not exceeding an amount, together with existing indebtedness, of $1\frac{1}{2}$ per centum of the taxable property in the county.

sent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness," has no reference to indebtedness contracted before the constitution became operative, and that the board of county commissioners had authority to incur indebtedness up to the $1\frac{1}{2}$ per cent. of such valuation in addition to such prior indebtedness, if any existed; but we do not agree with this contention. Of course, the constitution would not affect any prior indebtedness, but, if it amounted to $1\frac{1}{2}$ per cent. of the total property valuation, the commissioners would be powerless to contract any; if less than $1\frac{1}{2}$ per cent., then the commissioners were authorized to incur further indebtedness, not exceeding in amount the $1\frac{1}{2}$ per cent., including that in existence; otherwise the commissioners would be limited in expenditures for county purposes to a sum equal to the current revenue, unless an additional amount was authorized by a vote of the people as by law provided. There was no law authorizing the commissioners to submit to a vote a question of ratifying or validating any purported indebtedness they had attempted to incur in excess of lawful limitation. There were empowered to submit a proposition to incur further indebtedness for county purposes, not exceeding 5 per cent. with the existing indebtedness, to a vote of the people, and, if three-fifths of the voters assented thereto, they could then contract it. In this case the vote was not taken to authorize them to incur further indebtedness, but to empower them to issue bonds for that existing, and also including an additional unauthorized amount which they had attempted to incur in excess of their authority. The vote thereon had no force, and the questions going to the regularity of the proceedings therein are accordingly of no consequence, as the commissioners could have issued the bonds up to the $1\frac{1}{2}$ per cent. without a popular vote, and the vote in question could not validate their illegal acts where-in they had attempted to contract the excess. To have contracted any additional amount, they should have first submitted the matter to a vote, stating the amount required, and the purpose for which it was intended. Upon the facts conceded, the judgment is reversed, and the court below is directed to overrule the demurrer, and proceed with the cause in accordance with this opinion.

ANDERS, C. J., and STILES and DUNBAR, JJ., concur.

(2 Wash. St. 543)

WILSON v. CITY OF SEATTLE et al.

(Supreme Court of Washington. July 9, 1891.)

ASSESSMENTS FOR CITY IMPROVEMENTS—NOTICE—RIGHT OF APPEAL—CERTIORARI.

1. Ordinance City of Seattle 1886, No. 737, § 4, provided that, within 20 days after the council made an order for the improvement of any street, the city surveyor should file with the clerk a plat of the street to be improved, and of the real estate subject to assessment therefor, and within 10 days the city clerk should file in

his office an assessment roll, upon which such property should be listed. Section 5 provided that, within 8 days from the filing of such assessment roll, the clerk should advertise a notice thereof in a daily newspaper. Held, that an assessment made without proof of publication of the notice required by section 5 was invalid.

2. Charter City of Seattle 1886 authorized the city council to provide by ordinance the manner of making street assessments. Ordinance No. 737, passed pursuant thereto, provided that the expense should be assessed upon property in the assessment district according to its value. Charter 1890 provided that the expense of making street improvements should be levied according to the frontage of the property on the improvement. Held, that an assessment made according to value after the charter took effect was invalid, though the improvement was ordered under the charter of 1886.

3. Charter City of Seattle 1890, art. 15, § 8, which provides that no action shall be brought to test the validity of any assessment unless plaintiff shall first tender and pay into court the amount of the assessed tax, is unconstitutional.

4. Where a property owner claims that he has been aggrieved by a street assessment, and there is no provision by statute or ordinance for reviewing the proceedings of the council, *certiorari* is the proper remedy to test the validity of the assessment.

Appeal from superior court, King county; LICHTENBURG, Judge.

Certiorari to quash a street assessment, by John Wilson against the city of Seattle and others. Assessment affirmed. Plaintiff appeals. Reversed.

Tustin, Gearin & Crews, for appellant. O. Jacobs, for respondents.

STILES, J. Appellant seeks by *certiorari* to quash an assessment upon certain real estate fronting upon South Twelfth street, in the city of Seattle, for grading and sidewalks. In the court below, a demurrer to the petition was overruled, and the writ issued; but upon the return the proceedings of the city council, including the levy, were affirmed.

The first point we are required to pass upon is the objection of the respondents that *certiorari* is not the proper remedy in this case. The improvement for which this assessment was laid was undertaken by the city of Seattle in June, 1890, while the charter of 1886 was in force. Under that charter, (section 10, Acts 1886, p. 243,) such assessments were to be collected by an action at law or a suit in equity in the name of the city, or the officer or contractor to whom it might be directed that payment should be made. Had that law continued in force, we should probably have held that the opportunity thus given to the owner of assessed real estate afforded the proper method and time for contesting the assessment to the exclusion of the remedy by *certiorari*. *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. Rep. 826. But under the charter of the city of Seattle adopted October 1, 1890, the act of 1886 was completely superseded, and a new method of collecting such assessments was provided, viz., by sale by the treasurer. Charter 1890, art. 8, § 8; Id. art. 9, § 24. This renders it necessary to examine the law of the case to see whether the appellant is provided any remedy for the wrong he complains of, by appeal or otherwise; and there seems to be none at all. When there is no remedy by appeal, cer-

tiorari is the ordinary method of reviewing such cases. Elliott, Roads & S. p. 279 et seq.

The issuance of the writ was therefore proper; and the next question is, what was the scope of the inquiry to be made upon the return, the superior court having, under the constitution, (article 4, § 6,) jurisdiction to issue writs of *certiorari* in the common-law sense? The common-law writ of *certiorari* is the proper remedy upon which to correct the errors of all inferior tribunals where they have exceeded their jurisdiction or proceeded illegally, and there is no appeal or other mode of reviewing or correcting their proceedings. Wood, Mand. "Certiorari," etc., 207; Camden v. Bloch, 65 Ala. 236; State v. Whitford, 54 Wis. 150, 11 N. W. Rep. 424; People v. Police Board, 72 N. Y. 415. We believe this to be the general rule in this class of cases, though there is some diversity of opinion on the point as to whether the inquiry should extend beyond the question of jurisdiction.

Upon the return to the writ, therefore, it was incumbent upon the court to examine the record to determine—*First*, whether the city had jurisdiction; *second*, whether the proceedings were according to the statutes and ordinances. By her charter of 1886, the city of Seattle had power to order the improvement of streets at the cost of abutting owners, either upon petition of the owners of more than half the property to be affected, or, in the absence of such a petition, by a unanimous vote of all the members of the council present at a regular meeting. The charter left the matter of making regulations for the exercise of this power to the city; and about June 1, 1886, an ordinance (No. 737) for that purpose went into effect. This ordinance provided for assessment districts extending a certain distance on each side of the street to be improved, and that the expense should be assessed upon property in the district according to its value. It appears that after several petitions of property owners for the improvement of different sections of South Twelfth street had been presented to the council, and after some of them had been "granted," the council on the 25th day of June, 1890, passed ordinance No. 1413, providing for the grading, etc., of South Twelfth street from Yesler avenue to Stacey street, by the unanimous vote of seven councilmen, being all the members present at a regular meeting held on that day. The body of the ordinance provided that it should take effect from its passage, approval, and publication, and that the work should be completed within 180 days from the date of the execution of the contract for the improvement. The record is silent as to whether any contract was made, and as to whether the work, or any part of it, has ever been done. It is meager in other particulars also, where, in view of the importance of the proceeding, care and exactness would naturally be expected. But, as but two points are urged on this appeal, we shall confine our remarks to them. Upon the passage of ordinance No. 737 in 1886, it was incumbent upon the municipal authorities to adhere strictly to its

provisions in making assessments. Sections 4-7 of ordinance No. 737 were as follows: "Sec. 4. That, within twenty days after the council shall have made an order for the improvement of any street, highway, or alley, the city surveyor shall prepare and file with the clerk a plat of the street or streets, highway or highways, alley or alleys, so to be improved, and of the real estate subject to assessment therefor, showing the lines of such lot or other smallest subdivision thereof; and within ten days thereafter the city clerk shall prepare and file in his office an assessment roll for each separate assessment district, if several streets, highways, or alleys are to be improved at the same time, upon which assessment roll each lot or other smallest subdivision of real estate in such district shall be listed in the name of the owner thereof, if known, or as 'unknown owner,' and assessed at the actual cash value thereof: provided, that in all cases the valuation to be placed on each lot in such assessment roll shall, as far as practicable, be the same as that placed upon the same property upon the last preceding annual assessment roll and tax-list for the city of Seattle; and such assessment roll shall be open to public inspection at the clerk's office during business hours from the time of filing thereof until the day of the meeting of the council for the equalization thereof, as hereinafter provided. Sec. 5. That within three (3) days from the filing of such assessment roll, the clerk shall advertise a notice in a daily newspaper of the city to the effect that such assessment roll (describing it) has been filed in his office, and that the same is open to inspection, and that any person finding himself aggrieved by such assessment may apply to the common council to have the same corrected at a meeting of the council to be designated in such notice, which meeting shall be the first regular meeting after the last publication of such notice; and such notice shall be published for ten days in each successive issue of said newspaper. Sec. 6. That, at the first regular meeting of the common council after the last publication of such notice, the common council shall equalize such assessment, and shall hear all complaints concerning such assessment roll, and determine the same, and may raise or lower the valuation of any lot or parcel of real estate listed in such assessment roll, so as to make the assessment equal and uniform, as near as may be, upon all property in the district, and shall, if any lot or parcel of real estate within such district be found to have been omitted from such assessment roll, list the same, and place a just valuation thereon: provided, that no lot or parcel of real estate omitted by the clerk shall be listed, nor shall the valuation of any lot or parcel of real estate be raised by the council, without the owner's consent, until at least twenty-four hours after a written notice of such proposed change shall have been served upon the owner or his agent, if such owner or agent can be found within the city, and if not so found, then a notice of such proposed change in the assessment roll must be at first published for at least three days in a

daily newspaper of the city; and the council may adjourn from time to time, if necessary, until the equalization of such assessment roll shall be completed. Sec. 7. That as soon as practicable after such assessment shall be equalized, and the nature and extent of assessment districts shall have been fixed, and the costs of the improvement shall have been ascertained, the council may, by an order, fix the rate of assessment for such district, or for each of such districts, as the case may be, so as to raise the necessary amount to pay for such improvement in accordance with the provisions of this ordinance."

On July 31, 1890, the city clerk, according to the return, commenced the publication in the *Seattle Evening Times* of a notice of the filing of the South Twelfth street improvement assessment roll, and that on Friday evening, August 15th, the council would sit to hear complaints and equalize the assessment; but there is no proof that notice was published for 10 successive days, or that it was published at all, as required by the last clause of section 5. The record does not show that the council sat August 15th, or that the matter of this assessment was considered; nor did anything further transpire in the matter until January 14, 1891, when ordinance No. 1595 was passed, as follows: "Ordinance No. 1595. An ordinance to provide for the levy of the rate per cent. for the improvement of South Twelfth street to Stacey street, in the city of Seattle. Be it ordained by the city of Seattle as follows: Section 1. That a tax of 5.42½ mills per dollar be levied on the real property, excluding improvements, in the district provided for by the ordinance No. 1413, to pay the cost of grading and sidewalk of South Twelfth street from Yesler avenue to Stacey street, in the city of Seattle. Sec. 2. The city comptroller and assessor is hereby empowered, authorized, and directed to extend said rate per cent. on the property within the district fixed by ordinance No. 1413, and to collect the same according to law. Sec. 3. This ordinance shall take effect and be in force from and after its passage, approval, and publication." In the mean time the charter of October 1, 1890, had been adopted, and an entirely new system of street assessments provided, under which the expense of making street improvements was to be levied, not according to the value of the property abutting, but according to its frontage on the improvement. Charter, art. 8, § 7. Under the old charter (section 10) the lien of assessments did not attach until the levy was made. We are therefore clearly of the opinion that the new charter was, from the date of its adoption, (October 1, 1890,) the law of the case, and that the assessment in 1891, according to the value, was unauthorized and void.

Returning, now, to the question of the notice, it was argued that, even if notice was necessary, the recital by the city clerk in his return that the notice was advertised in the *Seattle Evening Times*—"date of first publication, July 31, 1890"—was sufficient basis for the court to presume

that the notice was published for 10 days, and that proof of the fact had been made when the council proceeded to make its levy, as public officers are presumed to proceed according to law. Notice was absolutely necessary; for, although the statute did not require it, it is a general principle of law, too well known for comment, even, that in every proceeding whereby these special assessments are levied it is necessary as a constituent of due process of law; besides which, the ordinance No. 737 did require it in terms. When the council met on the 15th day of August, (if it did meet then,) and the matter of this assessment came up, the first question before it was, had the notice been published for 10 successive days? It could know that fact in no other way than by the certificate or affidavit of the publisher; and until that document lay before it, it had no jurisdiction to proceed. *Gatch v. City of Des Moines*, 63 Iowa, 721, 13 N. W. Rep. 310. Presumptions are not admissible in cases of this kind, where the property of the citizen is taken, and where jurisdiction is acquired only by strict compliance with the law.

But it is urged that the appellant was barred of his right to contest the lien upon his property because he did not pay into the court the amount assessed to him, in accordance with section 8, art. 15, of the new charter. That section reads as follows: "No action shall be brought or maintained in any way to test or question the validity of any assessment, proceeding, certificate, or tax-deed unless the plaintiff shall first tender and pay into court the amount of the assessed tax, together with all interest, penalties, costs, and damages thereon." It occurs in the article devoted to the duties of the corporation counsel and city attorney, without connection with or relation to any other portion of the article. It is a somewhat curious provision, but is not unprecedented in legislation. *Wilson v. McKenna*, 52 Ill. 48; *Reed v. Tyler*, 56 Ill. 292. We can hardly agree that in the city of Seattle there is to be no way of avoiding the payment of an illegal assessment except by paying it, as we do not believe that the constitutional authority delegated to cities of the first class to enact their own charters contemplates such a sweeping deprivation of ordinary legal rights. The property assessed is abundant security for the assessment, if it is a valid one; and, if it is invalid, the owner should be put to no such disadvantageous position. According to these views, the levy and all proceedings in the matter of the South Twelfth street assessment, as far back as, and including, the notice, must be quashed; but, as the improvement was legally ordered, this disposition of the matter will be without prejudice to the city to make a new assessment and levy, if it can be done, under the charter of 1890. Judgment reversed, and cause remanded to the court below for proceedings in accordance herewith.

ANDERS, C. J., and DUNBAR and SCOTT, JJ., concur.

CURRY v. CITY OF SPOKANE FALLS.

(Supreme Court of Washington. July 8, 1891.)

JUDGMENT BY DEFAULT — SERVICE OF COMPLAINT — SETTING ASIDE DEFAULT.

1. Code Wash. 1881, § 289, which provides that judgment may be entered, upon failure to answer, without proof of the plaintiff's demand, where a copy of the complaint and summons has been served on defendant, etc., was not repealed by Act Feb. 2, 1888, which provides a manner of commencing actions, and gives the court jurisdiction over the person, on service of the proper summons; and a judgment entered as of course, without service of a copy of the complaint, is invalid.

2. A motion to set aside a default judgment, which has been regularly entered, is within the discretion of the court.

Appeal from superior court, Spokane county.

Action by A. P. Curry against the city of Spokane Falls to recover for services rendered. Judgment for plaintiff by default. Defendant moved to set aside the judgment. Motion denied. Reversed.

Quinn, Jones & Voorhees, for appellant. Turner & Graves, for respondent.

STILES, J. Respondent obtained a default judgment against the appellant, and subsequently, upon affidavit of its city attorney, the latter sought to have the judgment set aside, and to be permitted to appear and defend. The motion to set aside was denied, and the appeal is here upon two grounds, viz.: (1) Error in refusal to set aside the judgment upon the ground mentioned; and (2) error in entering judgment *pro confesso*, where no copy of the complaint had been served on the defendant. Upon the first ground we cannot interfere, as it was within the discretion of the court entirely whether to grant the motion or not. Besides which, there was little merit in the affidavit, which showed no more than neglect on the part of the city's officers; and the affidavit and proposed answer are not properly here, they not having been made a part of the record by statement or bill of exceptions. *Windt v. Banniza*, (Wash.) 26 Pac. Rep. 189. But upon the second ground we are constrained to hold with the appellant. Section 289, Code 1881, subd. 1, provides for the only instance where judgment can be entered upon failure to answer, as of course, without proof of the plaintiff's demand. The prerequisite is that the summons and complaint shall have been served upon the defendant, and that proof of such service shall have been filed with the clerk. No change in this law has been made. The respondent urges that because the act of February 2, 1888, made it no longer necessary, for the acquirement of jurisdiction over the person of a defendant, that a copy of the complaint be served, we should therefore hold that section 289 was *pro tanto* repealed or modified. But the reason of the matter does not seem to be with that contention. The two things have no relation whatever to each other, and there is no evidence that the legislature intended to make any change in the proceedings upon application for judgment. We cannot presume that there was other service than is shown by the record, for the sake of the general rule that courts

of record proceed regularly. The return of service clearly shows service of the summons only, and the order for judgment shows no testimony to have been taken or considered. The judgment must be reversed, and leave granted to the appellant to apply to the court below to set aside the default, under section 290 of the Code.

ANDERS, C. J., and HOYT, SCOTT, and DUNBAR, JJ., concur.

(6 N.M. 250)

GILDERSLEEVE v. ATKINSON.

(Supreme Court of New Mexico. Aug. 21, 1891.)

WITNESS—TRANSACTIONS WITH DECEDENTS—CORROBORATIVE EVIDENCE—DEPOSITION—DIRECTING VERDICT.

1. In an action against an administrator for a balance alleged to be due plaintiff for land sold to defendant's intestate, plaintiff testified that deceased agreed to pay him, as part of the purchase money, a certain sum in addition to the consideration originally agreed on. A witness testified that deceased told him that plaintiff had an interest in the land, and another witness stated that deceased had said, when told that plaintiff claimed an interest in the profits on a resale of the land, that there would be "mighty little left for" plaintiff. A letter of deceased to plaintiff was introduced, in which deceased promised to allow him reasonable attorney's fees for procuring a patent to the land. Held that, under Comp. Laws N. M. § 2082, providing that no party to a suit against an administrator shall obtain a judgment on his own evidence as to matters occurring before the death of the intestate unless corroborated by other material evidence, the corroborative evidence required was such as of itself would tend to prove the essential facts testified to by plaintiff, and that the evidence adduced was not of that character.

2. Comp. Laws N. M. 1884, § 2095, which provides that where a witness is absent from the territory his deposition may be taken for use in any court in all civil cases, applies to depositions taken for use in the probate court.

3. A verdict may properly be directed where there is no evidence for the jury, or where it is such that a sound discretion would require the court to set the verdict aside, if found for one party rather than another.

Error to district court, Santa Fe county; W. H. WHITEMAN, Judge.

Action by Charles H. Gildersleeve against Ada J. Atkinson, administratrix of H. M. Atkinson, to recover the purchase money for lands sold deceased by plaintiff. The court directed a verdict for defendant, and plaintiff brings error. Affirmed.

H. Burns and G. C. Preston, for plaintiff in error. F. W. Clancy, for defendant in error.

SEEDS, J. This was a suit begun before the probate court in and for Santa Fe county, at the September term, 1887, against the administratrix of the estate of H. M. Atkinson, deceased, in which the plaintiff, Gildersleeve, claimed the sum of \$10,118.60, as due him from the estate "on account of cash loaned," to-wit, \$118.60, "and the sum of 10,000 dollars * * * on account of a balance due your petitioner as a part of the purchase price or consideration of an interest in the Anton Chico grant deeded by your petitioner to said deceased in the early part of the year 1883." The administratrix admitted the claim for \$118.60, but denied that for \$10,000. The probate court found in favor of

Gildersleeve for the whole amount, and gave judgment accordingly. Thereupon the administratrix appealed the case to the district court of Santa Fe county, where it was tried before a jury. When the plaintiff had closed his introduction of evidence, the defendant moved the court to instruct the jury to find a verdict for the plaintiff, Gildersleeve, for \$118.60, the amount admitted to be due, and for no more. The motion was granted, and a verdict and judgment given in accordance therewith. The plaintiff then filed the usual motion for a new trial, which, being duly considered, was denied. The plaintiff then gave notice of and perfected his appeal to this court. By an agreement found in the record, the deposition of one S. S. Burdett, who was living in Washington, D. C., was taken for use in the trial in the probate court upon the part of the plaintiff; but by that agreement the defendant reserved the right to object to the introduction of the same upon the ground, among others, that there was no provision of law in this territory for using a deposition taken outside the territory in a probate court. The deposition in question was taken by a commissioner for this territory in the city of Washington, D. C. The district court took the view advanced by the defendant, and refused to allow the deposition to be read. The plaintiff in error makes the following assignment of errors: *First*, instructing the jury to find a verdict in his favor for only \$118.60; *second*, refusing to submit plaintiff's claim for \$10,000 to the jury; *third*, overruling his motion for a new trial; *fourth*, refusing to allow him to prove the value of his interest in the Anton Chico grant, and the value of the lands conveyed by him to H. M. Atkinson; *fifth*, refusing to allow him to read the deposition of S. S. Burdett to the jury. Under these assignments of error, there are but three questions important to be considered, and they are these: *First*. The plaintiff, under section 2082 of the Compiled Laws of 1884 of this territory, being precluded from obtaining a judgment unless his evidence is "corroborated by some other material evidence," was there such corroboration in this case as the statute requires? *Second*. Is there any provision, under the laws of this territory, for taking the deposition of a witness out of the territory for use in the probate court? And, *third*, was the court justified in this case in instructing the jury to find for the plaintiff for \$118.60, or should it have submitted the whole case to them?

The plaintiff filed his claim before the probate court in the form of a petition. That petition, then, is the pleading upon which his case must rest. It is the same as a declaration in a common-law case in the district court, and limits and controls the evidence which he is allowed to offer. He cannot go outside the fair intendment of its allegations in the introduction of his evidence. His proof, in other words, must respond to his allegations, and tend to prove them. Unless it does thus tend to prove the allegations, and is confined to the point in issue, the evidence is clearly immaterial. This is elementary, and

needs no elaborate citation of authorities to sustain it. 1 Greenl. Ev. (13th Ed.) § 51.

What were the allegations in his petition? We quote from it those portions necessary to a correct understanding of this controversy: "That the estate * * * is justly indebted to your petitioner in the sum of \$10,118.60; that the sum of \$118.60 is due on account of cash loaned, and the sum of \$10,000 is due on account of a balance due your petitioner as a part of the purchase price or consideration of an interest in the Anton Chico grant deeded by your petitioner to said deceased in the early part of the year 1883." He then goes on to state that, at the time of the delivery of the deed for the grant to the deceased, they had an accounting, and the deceased promised to pay the plaintiff the said sum of \$10,000, and that the plaintiff was to be interested with the deceased in said grant, or sale thereof, to the extent of said \$10,000. The defendant confessed the indebtedness of \$118.60, but denied the other allegations of the petition. What, then, was the point at issue? Clearly, as to whether the Atkinson estate owed Gildersleeve \$10,000 as a balance upon the purchase price or consideration for plaintiff's interest in the grant sold. Mr. Gildersleeve was a witness in his own behalf, and testified that he first made a contract in 1882 to sell his interest in the grant to Atkinson for about \$12,000; that when the sale was finally consummated Atkinson agreed to pay him \$10,000 in addition to the \$12,000 when he (Atkinson) should sell the grant. Continuing, he said: "The \$10,000 he was to pay me when he should realize," etc., "was to be regarded as a part of the consideration for the conveyance that I made to him, and payment of attorney's fees rendered by myself," etc. The evidence in regard to the attorney's fees, by his own statement, in no way enters into the consideration or interest in the grant; for he says that the \$10,000 was for "part of the consideration," and for attorney's fees. What allegation is the evidence in regard to the attorney's fees responsive to, or does it in any manner tend to prove the issue here raised? It is certainly not responsive to the allegation set out in the petition, nor does it in any way tend to meet the issue raised. But, conceding that the whole of his evidence proves, at least in part, the issue offered by himself, yet, as he is testifying about transactions with a man whose lips are forever sealed, is his evidence corroborated as required by the statute?

Section 2082, Comp. Laws 1884, provides that no verdict, judgment, or decision shall be obtained on such evidence, unless it "is corroborated by some other material evidence."¹ What, then, is material corroborating evidence? The term "corroborating evidence," as found in the books, is used in two distinct senses,—the one general:

¹ Comp. Laws, § 2082: In a suit by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment, or decision therein on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

the other special or technical. In the general sense, it is used when we say that in any case, and as to any evidence, it was or was not corroborated. In this sense the evidence has no other function than to aid other evidence of a like or different character in giving it additional weight. Such other evidence, so aided, may or may not be sufficient of itself: that is a question solely for the jury. General corroborating evidence may corroborate any material evidence already in, whether that evidence goes directly to the issue or necessary legal elements in the case, or to giving solidity to a link merely in the chain of proof. In the special or technical sense of corroborating evidence, upon the other hand, we are dealing with a substantive quantum of evidence without which the case of the party who is compelled to produce it must inevitably fail. Its materiality goes to the very core of the case. The character of this species of evidence, too, is generally the creation of statute. We find special or technical corroborative evidence necessarily present in, at least, three distinct classes of cases: *First*, in criminal cases where it is sought to convict an accused upon the testimony of an accomplice alone. In such cases the evidence of the accomplice must be corroborated as to its material facts; and the material facts which must be corroborated are not those alone which would tend to sustain the credibility of the accomplice simply, but they must have reference to the *corpus delicti*, or tend to connect the defendant with actual participation in the offense charged. 1 Greenl. Ev. § 381, and note; 1 Bish. Crim. Proc. §§ 1169, 1170. Other facts testified to by the accomplice may be corroborated, but it simply goes in as general corroborative evidence, reaching merely to his credibility, and is not special corroborative proof. *State v. Maney*, (Conn.) 6 Atl. Rep. 401, 403. The law in regard to corroborating accomplices exhibits in its evolution very strikingly the difference between general and special or technical corroboration. At common law, a jury was at liberty to find an accused guilty upon the uncorroborated testimony of an accomplice; though it was the custom of the judges to caution the juries against so doing, and urge upon them the necessity of requiring corroborating evidence, or acquitting. 1 Bish. Crim. Proc. § 1169; *People v. Clough*, 73 Cal. 348, 15 Pac. Rep. 5. The corroborating evidence, as thus used, was of the general class; for without it the jury could convict. But, the character of an accomplice's testimony being so evidently corrupt, many states have by statute provided that it should not be sufficient, of itself and uncorroborated, to base a conviction upon. Hence the corroborating evidence in such jurisdictions becomes special or technical, because without it the accomplice's evidence is a nullity. *Second*, we have the technical corroborating evidence in civil cases where the testimony is given by a witness as to some transaction with a party dead at the time the evidence is required, as against an executor or administrator, or where the executor or administrator is the party plaintiff, and the party testify-

ing is interested in the event of the controversy. In some states in such cases the interested party is not permitted to testify at all. That is the rule in the United States courts. The case before us comes within this class. The witness may be strictly honest, yet his testimony is insufficient, unless corroborated. The corroborating testimony gives vitality to the evidence to be corroborated. The tendency now in the states in this class of cases is to absolutely refuse the interested party the right to testify; hence the character of the corroborating evidence must be in this, as in criminal cases, something other than that which goes to the credibility of the witness solely. The *third* class of cases in which technical corroborating evidence is required is in proving wills, and, in some jurisdictions, in proving the signature to deeds. The wills are usually of no validity whatever, though signed by the testator, and though the signature is abundantly proven by parties who saw it signed, unless those parties signed the will as witnesses. Their evidence then is corroborative of the testator's signature, and gives it validity. There are two other illustrations of this difference in the use of the term "corroborating evidence," which may well be adverted to,—that in reference to an answer in chancery and in cases of perjury. It is laid down that it takes more evidence than one witness to overcome an answer in a chancery case, or to convict in a case of perjury. It need not be two witnesses, but one witness and some other legal evidence. 1 Greenl. Ev. §§ 257, 260; *State v. Raymond*, 20 Iowa, 582. Yet the corroborating evidence in this class of cases is not of the technical kind, but of the general; for in neither case is it called in to give vitality to the principal evidence, but simply to overcome a state of equilibrium in which the case is found. One witness alone, in reply to a chancery answer, leaves the case balanced. Both parties are equally credible; hence any amount, however slight, of general corroborating testimony, will overcome the answer. So, in perjury, it is one oath against another, which in civil cases would fail to make out a case, and, of course, in a criminal case would be fatal. *Bent v. Smith*, 22 N. J. Eq. 566. But the law does not in effect say in perjury cases that the testimony of the witness has no validity unless corroborated, but simply that it has no more validity than the oath it attacks; hence there can be no conviction. It follows that any rule as to the materiality or efficacy of corroborating evidence drawn from cases of answers in chancery suits, and in perjury cases, cannot be the true rule, where we are seeking for a correct guide in cases where the testimony has no vitality of any kind without corroborating evidence. In such cases the testimony must go, not alone to the credibility, but to the proof of some substantive fact, without which the case of the plaintiff must fail. The rule, then, as to corroborating evidence, as applicable to this case, and those similar to it, must be deduced from cases which deal with special or technical corroborative evidence. This

will necessarily exclude those criminal cases in reference to perjury, and those regarding accomplices where the testimony is not regulated by statute, and cases of answers in chancery. The rule, too, will be the same in principle, whether referring to a criminal or civil case; for it goes simply to the introduction of the evidence, not to its weight. The court is first to determine whether there is any corroborating evidence; its weight is then for the jury. Keeping in mind the requirements of the statute above cited, that the evidence must be "some other material evidence," the rule fairly deducible from the adjudged cases may be thus announced: Corroborating evidence is such evidence as tends, in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegation or issue, if unsupported, would be fatal to the case; and such corroborating evidence must of itself, without the aid of any other evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports. And such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or point in issue. *State v. Lawlor*, (Minn.) 9 N. W. Rep. 698; *State v. Buckley*, (Or.) 22 Pac. Rep. 838; *Com. v. Holmes*, 127 Mass. 424; *People v. Melvane*, 39 Cal. 614; *People v. Clough*, 73 Cal. 348, 15 Pac. Rep. 5; *State v. Raymond*, 20 Iowa, 582; 1 Amer. & Eng. Enc. Law, "Accessory," 77, 79, and notes.

What, now, in view of this rule, as applied to the point in issue in this case, is the corroborative evidence relied upon to support Mr. Gildersleeve's testimony?

First. The deed executed by himself and others to Atkinson. The purchase price or consideration mentioned therein, and which is *prima facie* the true consideration, was \$62,500. He testifies that his interest was one-sixth, and that he received from Atkinson about \$12,000. The deed seems to corroborate his testimony that he sold his interest in the grant for about \$12,000, but it does not corroborate the allegation that after the sale he still had an interest in the grant, or that the purchase price was still unpaid. Rather, if it tends to prove anything, as it stands by itself, it is that he had parted entirely with his interest in the grant. Instead of supporting the issue raised, it militates against it.

Second. One witness testified that he at one time sought from Atkinson an option on the grant, and that he (Atkinson) told him that if anything might occur or would occur he should see Mr. Gildersleeve about it, "who was interested with him in the Anton Chico grant." This, it is contended, is corroborative evidence. But in what particular does it, of itself, tend to prove that his interest in the grant was for the purchase price? And yet that is the only issue in the case. May it not have reference simply to the interest which he claims for attorney's fees? But there is no allegation or issue in the case to which that testimony is responsive.

Third. But it is urged that the testimony of Judge Waldo corroborates the plaintiff's evidence. The judge, in substance, says that he was talking with Atkinson about the interest which Gildersleeve claimed in the grant, but not in reference to attorney fees; and stated that Gildersleeve claimed that he had agreed with him (Atkinson) "to divide the profits—share the profits—with him on the sale of the grant," and that Atkinson had said that there would be mighty little left for Mr. Gildersleeve. Now, admit that this evidence tends to prove an interest in the grant belonging to the plaintiff, the question still remains, does it tend of itself to sustain the evidence of the plaintiff as to issue raised? That issue was that the estate of Atkinson owed him \$10,000 as part of the purchase price or consideration for the grant; the amount specifically stated, \$10,000. The evidence claimed as corroborative is simply as to an interest in the grant measured by profits,—it might be something or nothing. It was a contingent interest, and not covered by any allegation of his petition. In no way could it sustain the claim for a specific sum, as "part of the purchase price."

Fourth. The last evidence which is claimed as corroborative is the following letter produced by the plaintiff: "Santa Fe, N. M., May 5th, 1883. C. H. Gildersleeve, Esq.—Dear Sir: In the event of sale of Anton Chico grant by me, as there is now a sale pending, I will from that, or any other sale, allow, to the extent of my power, all reasonable attorney fees in connection with the procuring of a patent. Respectfully, H. M. ATKINSON." This letter was written after the sale to Atkinson of the grant, and refers solely to attorney's fees. It is true that Mr. Gildersleeve testified to an agreement for paying attorney's fees, but it was under objection, and there is no allegation in the petition to which his testimony in this regard is responsive, and therefore the letter cannot be material or corroborative. The holding in this matter is not technical. Under the statutes of the territory, great liberality is allowed in amending of pleadings. The plaintiff made his own case. If he had not, in the first instance, fully alleged all that the state of his facts warranted, he could have had leave to have amended his petition. This he did not ask. The presumption is that he had alleged all that there was in his case. His testimony having no validity without being corroborated, and there being no evidence tending to corroborate it, the conclusion is inevitable that the assignment of error is not well taken.

2. Did the court err in excluding the deposition of S. S. Burdett? Section 2095 of the Compiled Laws of 1884 provides that it shall be lawful to take the depositions of witnesses "to be used in any court in this territory in all civil cases when the witness * * * is absent from the territory." The probate court is one of the four courts provided by the organic act of this territory. That it is an important court goes without saying. Great interests are continually before it. The reasons for taking depositions for use in courts would

seem to be just as pertinent to this class of courts as to any others, and if a general statute allowing the taking and use of depositions in courts would seem to include the probate court, nothing but the peremptory requirements of other statutes forbidding it should justify an appellate court in depriving it of such a necessary adjunct of arriving at the proof in any given case. Section 2096 of the Compiled Laws provides whom the depositions may be taken before, and those persons are all officials of the territory. The contention, then, is that the deposition of a party taken out of the territory cannot be used in the probate court because the person who took it was not one of the parties named in section 2096. Section 2107, however, provides that depositions of witnesses "may be taken in all suits in this territory, according to the above provisions, by any disinterested person." Standing alone, this section would seem to cure whatever defect there might be in the previous sections. And this is the contention of the plaintiff. But the defendant insists that it plainly has reference to "the above provisions," which mean the sections just immediately preceding it, which have reference to depositions taken for use in the district court. But it must be apparent to a casual reader that that clause can, without doing violence to its meaning, have reference to all the preceding sections in regard to taking depositions, including section 2095. If it thus include that section, then, without doubt, the deposition in question could and ought to have been admitted in evidence as against this objection to it. All the sections referring to depositions preceding section 2107 were originally part of chapter 32 of the Compiled Laws of 1865. Section 2107 was passed as section 4 of chapter 4 of the Laws of 1878. When the laws were compiled in 1884, the compilers placed section 4 of that chapter in the Compiled Laws as section 2107, and changed its phraseology in one place to read "according to the above provisions." The words, as originally passed, were, "according to the provisions of chapter 32 of the Compiled Laws of New Mexico." So that, as originally passed, this section could have referred to section 2095. It is true that the law of the legislature of 1878 in question had reference simply to suits in the district court, but as the section, by its very terms, referred to the whole chapter 32, and there was as much reason in principle that it should refer to probate courts as to the district court, we know of no canon of interpretation requiring us to exclude the probate court from the reason of the law when it is within its terms. We therefore hold that depositions could, under the statutes of the territory, be taken out of the territory, to be used in probate courts. It does not follow, however, that the court erred in excluding the deposition, though it was upon a wrong ground. The evidence of the deposition went entirely to the question of paying attorney's fees, an issue not raised by the pleadings, and hence could not have been corroborative. There was no error in refusing it admission.

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8. Was there error in the court instructing the jury to find for the plaintiff for \$118.60, and taking from them the consideration of the claim for \$10,000? We have seen that the defendant admitted the \$118.60, and there was no testimony as to the \$10,000 claim, except that of the plaintiff. By section 2082 of the Compiled Laws of 1884, that evidence, not being corroborated, could not go to the jury. There was nothing for them to pass upon. The law is well settled that, where there is no evidence for the jury to pass upon, or where the evidence is of such a character that the court, in the exercise of its sound judicial discretion, would be called upon to set aside the verdict and grant a new trial, if found in favor of one party rather than the other, "it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its applications to the facts, and promotes the ends of justice." *Bowditch v. Boston*, 101 U. S. 16; *Commissioners v. Clark*, 94 U. S. 278; *Montclair v. Dana*, 107 U. S. 162, 2 Sup. Ct. Rep. 403; *Railroad v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569. Finding no reversible error in the record, the judgment of the lower court will be affirmed.

We concur: O'BRIEN, C. J., and LEK, MCFIE, and FREEMAN, JJ.

(6 N.M. 194)

MINOR et al. v. MARSHALL.

(Supreme Court of New Mexico. Aug. 19, 1891.)

MECHANIC'S LIEN LAWS—STRICT CONSTRUCTION—PLEADING—NOTICES OF CLAIM—VERIFICATION.

1. Statutes authorizing mechanics' liens are in derogation of the common law, and must be strictly construed. *Hobbs v. Spiegelberg*, 3 N. M. 222, 5 Pac. Rep. 529, distinguished.

2. A bill to foreclose a mechanic's lien is demurrable when it sets out a copy of the notice of claim which on its face is insufficient.

3. Under Comp. Laws N. M. 1884, § 1524, which provides that lien-claim notices shall contain the name of the owner "or reputed owner" of the property, a notice is good which alleges that the debtor "was the owner or reputed owner."

4. Comp. Laws N. M. 1884, § 1524, provides, among other things, that notices of claims for mechanics' liens shall contain a statement of the claimant's demand, the name of the owner or reputed owner, the name of the person by whom he was employed or to whom he furnished the material, a statement of the terms, time, and conditions of the contract, and a description of the property to be charged, "which claim must be verified" by the oath of claimant or some other person. *Held*, that a verification to a notice containing all the above statements is insufficient when it declares that the "abstract of indebtedness mentioned and described in the foregoing notice is true and correct," since this applies to only one of the statements.

FREEMAN, J., dissenting.

Appeal from district court, Sierra county; W. F. HENDERSON, Judge.

Suit in equity to foreclose a mechanic's lien by Mitchell A. Minor and others against J. H. Marshall. A demurrer to the bill was sustained, and the suit dismissed. Plaintiffs appeal. Affirmed.

J. Morris Young and E. L. Bartlett, for appellants. Elliott & Pickett, for appellee.

SEEDS, J. This is a suit in equity brought to foreclose a number of liens filed against the "Humming Bird" mine, in the county of Sierra, as allowable under section 1524 of the Compiled Laws of 1884 of this territory. To the bill there was interposed a demurrer, which was sustained by the lower court, and the bill dismissed. The plaintiffs assigned various grounds of error growing out of the sustaining the demurrer. It might be stated here that it would be a better practice for the trial judge, in passing upon a demurrer which is predicated upon various grounds, to specifically state and have it made a matter of record upon which grounds, if less than all, he bases his judgment; for it may be that his judgment was based solely upon one ground, while the record necessarily brings up all the grounds formally alleged in the pleading, and requires a decision upon points which may not be decisive of the case,—being harmless error, and really in accordance with the judge's holding; yet the announcement here, though in fact the same as in the court below, would seem to be against him.

The material points to be considered, under the assignment of errors, are: *First*, were the notices of the claims for the liens, filed by the plaintiffs, insufficient because they alleged that the defendant "was the owner, or reputed owner," of the mine against which the liens were sought to be established? and, *second*, were the notices of the claims invalid because said claims were not properly verified?

The appellants contend, in the first place, that, as the bill sets out the action properly, the demurrer admits the fact thus pleaded to be true, and therefore it was error to sustain the demurrer. But this contention must be based upon the supposition that the facts pleaded were well pleaded, and were not conclusions of law. Now, one of the material facts in the case is, were the legal notices of claim given in accordance with the statute? If they were not, the case must fail. If, too, that fact was so pleaded, as that the notices appear in the bill, and their illegality is seen upon the face of the pleading, then certainly that fact can be reached by demurrer. The notices of claims were all made parts of the bill as exhibits, and as parts of the allegations of the facts required. This being true, the demurrer was the proper pleading by which to raise the question of their sufficiency.

As a predicate for the discussion of the errors raised by this record, it is insisted by the appellants, and denied by the appellee, that the mechanic's lien law should be liberally construed. Each party contends vigorously that his exposition of that issue is supported by the adjudications of this court. It must be conceded that in some way two cases, delivered at the same term of this court, have in their opinions statements which are diametrically opposed to each other. In the case of *Hobbs v. Spiegelberg*, 3 N. M. 222, 5 Pac.

Rep. 529, Judge AXTELL says: "We fail to see how this statute is in derogation of the common law;" and, "Nor do we think that the doctrine of liens is either new, in derogation of the common law, or inequitable." A careful consideration of this case will convince one that these remarks were wholly unnecessary to a determination of the case, and hence could not be enunciating a principle to bind the court unless reversed. The fact is that the doctrine of "in derogation of the common law" is invoked simply to uphold a strict construction in a given case when the facts call for a construction; but Judge AXTELL in this very case, when making the statements above quoted, continuing said: "Nor is it possible for us to see any necessity for construction." This case is, then, no authority upon the question as to how the mechanic's lien law should be construed. In the case of *Finane v. Hotel & Imp. Co.*, 3 N. M. 256, 5 Pac. Rep. 725, however, the court undertook specifically to place a construction upon a portion of the statute in regard to the verification of the claim, and in passing upon the principle to govern in the construction of the whole statute Judge BELL says: "The rights conferred by these statutes are purely statutory, and were utterly unknown to the common law or in chancery. They are in violent derogation of the rights of property at the common law, and must be strictly construed." This enunciation of the principle governing in such cases does not conflict with the holding in the case of *Hobbs v. Spiegelberg*, but only with language not necessary to the case, and hence must be accepted by us, unless we are ready to overrule it. The statement that mechanic's lien laws are in derogation of the common law can hardly be successfully controverted; for they place liens upon property which before and under the common law had been sacredly protected against any but those of a mortgage or a judgment. More, they render it possible to incumber an estate, even against the knowledge, and, in any case, against the wish, of the owner. *Phil. Mech. Liens*, § 9.

But by "strict construction" is not meant an arbitrary, inequitable, or harsh construction,—one which will give the property owner, or even third parties, the opportunity to take advantage of technicalities to deprive an honest laborer of his wages,—but such a construction as will require a substantial compliance with the statute; such a one as, while it protects the honest laborer, cannot be made the means by a loose and uncertain construction of perpetrating fraud, or of holding out inducements thereto. *Hooper v. Flood*, 54 Cal. 218. A strict construction is fully met which simply requires the laborer to bring himself by his notice clearly within the provisions of the statute; and when this is done the construction is the one adopted by the supreme court of the United States. *Davis v. Alvord*, 94 U. S. 545. The terms "strict" and "liberal" are comparative simply, and in most of the cases are used without definition. They are only used in the light of the facts of each specific case. Such an interpretation as will de-

mand a substantial compliance with all the requirements of the law will be sufficient. With this character of a construction we are satisfied that the rights of all parties will be protected.

1. Were, then, the notices of claim of liens insufficient, because they alleged that the defendant "was the owner or reputed owner" of the mine in question? The argument is that the law requires a distinct statement of who the owner or reputed owner is, and that the proof must meet that single specific allegation; that in this case the allegation is in the disjunctive, the allegation being one or the other, and therefore it is erroneous. Does this statement in any way mislead the persons for whom the notices are intended? The object of the statute is to give the laborer a lien for his wages upon the property, as against the owner or reputed owner. It makes no difference which the party is; in either case the laborer is entitled to the lien providing he states, with other things, who the owner or reputed owner is, if he knows. He may be uncertain whether the party is the owner or reputed owner. If, then, in his notice, he says to the world that a certain person is the owner or reputed owner, no one is damaged; and if, upon foreclosure proceedings, he proves either allegation, he certainly substantiates his claim upon that point. In the case of *Arata v. Mining Co.*, 65 Cal. 340, 4 Pac. Rep. 195, the court held the allegation of "owner and reputed owner" a substantial compliance with the law, for the party could have been both. So, in this case, he can be either, and, if so, the requirement of the statute has been met. If, then, the learned judge passed upon this point adversely to the plaintiffs in the court below, as it must be presumed he did, from the form of the record, it was error. But, in any view of the case as here presented, it was a harmless error.

2. Were the notices of claim of liens properly verified? The verification was substantially the same as to each claim. The claims themselves set out fully what the statute requires, and in all but one case were signed by the party asking the lien. To the notices were attached affidavits, also signed by the parties, and sworn to before a notary. Those affidavits necessarily refer to the claims to which they are attached. Do they substantially verify the claim? The following is one of the affidavits: "On this — personally appeared — before me, and who, being by me first duly sworn, on his oath states that the abstract of indebtedness mentioned and described in the foregoing notice is true and correct, and that there is still due and owing and unpaid to him from the said — mine and its owner the sum," etc. Section 1524, Comp. Laws 1884, states what the claim should be, and what should be verified. A part of the section is as follows: "A claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and con-

dition of his contract, and also a description of the property to be charged, which claim must be verified by the oath of himself, or of some other person." It is very evident that the claim contains certain specific statements,—five in number,—any one of which being absent annihilates the claim of lien. Phil. Mech. Liens, § 342. It is also plain that the claim—not any one or more averments of the claim less than all, but the claim itself—must be verified; and, if such claim is not verified, it is no notice, and binds no one; it raises no lien whatever. *Finane v. Hotel & Imp. Co.*, 3 N. M. 256, 5 Pac. Rep. 725. This verification need not be in the exact language of the statute; for, if it substantially meets the requirements of the statute, it is all that is necessary. But substantial compliance is not met when the verification does not cover all the essential elements of the claim; or when, under the guise of substantial compliance, the court must add something to the affidavit or oath by indentment in order that the statute may be complied with. It is not necessary in this territory that there should be an affidavit to the claim. It is sufficient if the claim is signed by the party, and that the notary or other proper officer, under his signature and seal, says that it is sworn to by the person signing it. But the want of a verification, or of a sufficient verification, is a defect which goes to the whole claim, and cannot be amended. Phil. Mech. Liens, § 366. It is fatal, though the party actually swear to the claim, if the notary has neglected to sign the verification or attach his seal. *Finane v. Hotel & Imp. Co.*, supra. While it was not necessary for the claimant to make an affidavit, he has done so, and in it he has specifically stated what he has sworn to, and by that he is bound. He swears "that the abstract of indebtedness mentioned and described in the foregoing notice is true and correct." Can this, in substance, mean the whole claim above set out? It is contended that the words "abstract of indebtedness" are intended to mean the whole claim, and that we should so interpret it. But in the claims themselves there is a specific statement of a moneyed indebtedness, placed in a brief form, as the law requires. To that brief statement of indebtedness the affidavit naturally relates. Are we justified, in order to sustain the lien, to suppose that it means more than it says? We do not hold that the verification should be the language of the statute, or that it should necessarily use the term "claim." Any set of words unmistakably pointing to the whole claim will be sufficient. If the affidavit had said the "above abstract," as it might fully cover the claim without great violence to the language, it might have been sufficient. The claimant was not satisfied with that, but limited its application by the use of the qualifying words, "of indebtedness." The word "abstract," standing alone, would have a general or indefinite meaning, but in this case it is immediately limited when the words "of indebtedness" are added to the single thought of owing money. The statute says he must give a statement "of his demands after deducting all just cred-

its and offsets." That is a statement of the indebtedness; but there are four other essentials of the claim, all of which must be verified, or the lien is not perfected. In this case the indebtedness is all that is verified. The only apparent answer to this line of argument is to contend that there is no indebtedness unless all the five essentials of the notice are present; that indebtedness is only a fact when it grows out of the presence of the five requirements of the statute constituting a good notice. But this is palpably fallacious, for this reason: the indebtedness is a personal claim independent of the lien. Can it be said that this defendant could not have been indebted to these plaintiffs unless he had been the owner or reputed owner of the mine? Certainly not. He might have been a contractor, as in the Las Vegas Hotel Case, in which he would have been indebted to the plaintiffs for working for him in the mine, yet it would not have been necessary to have alleged that he was the owner or reputed owner to sustain the indebtedness. The plaintiffs could have sworn that "the above abstract of indebtedness was just and true," and have had no reference to the ownership or to the terms of the contract, and yet his verification be absolutely truthful. Will it be contended that there could not have been an indebtedness in this case if the claimant had neglected to have described the property or have given the terms of the contract? Certainly not. Yet would not the affidavit have referred in that case specifically to the "abstract of indebtedness," etc.? If it would, how can it be said in this case to cover more than in the case supposed? It should be remembered that the rule of construction, whether strict or liberal, has reference to the language of the statute, not to that used in compliance with the statute. The question here is, not what construction shall be given to the word "abstract of indebtedness," but to the word "verification," as used in the statute. We said that the word "verification" in the statute does not require an affidavit; it does not require the signature of the party to the affidavit; it does not require the word "claim" to be used; but it does require that the officer who certifies to the oath should sign the same, and attach his seal thereto; it does require the use of such plain and unmistakable language that there can be no reasonable doubt but that he is swearing to the whole claim. There can be no injustice to any one in thus holding, while any other holding would be fruitful of unnecessary litigation. If any use of language might meet the requirements of a verification, then there is no possible rule by which to determine what that language should be, except the opinion of the judge in any given case. And no one would ever be certain that the verification was proper unless the case was taken to the court of last resort. Language should be used in every case which, without labored argument or intendment, will cover the whole requirement of a verification; and such language as will the more readily and naturally apply to a part only of the requirements of

the verification ought not to be made by intendment to cover more than in sound logic it is able to do. The verifications to these claims being imperfect, the judgment of the lower court was correct, and will accordingly be affirmed.

O'BRIEN, C. J., and LEE, J., concur. MOFIE, J., did not sit in this case.

FREEMAN, J., (*dissenting*.) I find myself unable to agree with the majority of the court in the conclusions reached in this case. This is an appeal from a decree rendered by the district court of Sierra county, dismissing appellants' bill filed in said court to enforce a lien for work and labor performed on a certain mine of which respondent was the owner or reputed owner. The only question presented for our determination is as to the validity of the verification of the notice of the lien. The verifications in all the cases are substantially identical, so that we give one as illustrating all. It is as follows: "Territory of New Mexico, county of Sierra—ss.: On this the 27th day of February, 1888, personally appeared before me the above-named Mitchell S. Minor, and who, being by me duly sworn, on his oath states that the abstract of indebtedness mentioned and described in the foregoing notice is true and correct, and that there is still due and owing and unpaid to him from said Humming Bird mine and its owner the sum of \$259.00. MITCHELL A. MINOR. Subscribed and sworn to before me this 27th day of February, 1888. [Notarial Seal.] GEORGE A. BEEBE, Notary Public." It is insisted that this verification does not meet the requirement of the statute, which, after prescribing the several statements which shall be embodied in the claim, provides that the "claim must be verified," etc. Much has been written on the subject of the proper construction to be given to statutes providing for mechanic's lien. By some authorities it has been held that the statute gives preference to one creditor over another, and ought therefore to be strictly construed. By others the doctrine announced is that these statutes are remedial in their character; that they are enacted to protect a class of persons not always able to protect themselves,—parties whose labor and toil have contributed materially to the value of the property sought to be charged with the lien; and that, therefore, such statutes should receive a liberal construction. Phil. Mech. Liens, 16. Our own supreme court has held both of these conflicting doctrines. *Hobbs v. Spiegelberg*, 3 N. M. 222, 5 Pac. Rep. 529, and *Finane v. Hotel & Imp. Co.*, 3 N. M. 256, 5 Pac. Rep. 725. I believe the correct doctrine to be that when the controversy arises between the mechanic and the owner of mining property, or one in privity with the owner, a liberal construction should be given to the remedy; that, on the contrary, where the enforcement of the remedy must result in charging the owner of the property with a debt not contracted by him, and with a debt already paid to the contractor, then the remedy should have a strict construction. Phil. Mech. Liens, § 18. This case

falls within the first condition named. The owner of the property, the value of which was enhanced by the labor of the appellants, resists the enforcement of their lien upon the highly technical ground that the verification alleges that the "abstract of indebtedness mentioned and described in the foregoing notice" is true, whereas the statute requires that the "claim must be verified." It is admitted that the claims set out in the notices are substantially in accord with the statute. The notices themselves, if we except that of McCrillis, found on page 44 of the record, seem to be not only a substantial, but a literal, compliance with the statute; and I think the notice of McCrillis, while it does not comply literally with the statute, is sufficiently specific to entitle the complainant, as against the owner of the mine, to the remedy provided by statute. The notice sets out—*First*, the name of the mine; *second*, its location; *third*, the name of the foreman; *fourth*, the time at which the work was done; *fifth*, the number of days, and the price per day, etc.; *sixth*, the name of the owner and manager; *seventh*, the total amount due from the owner of the mine, "upon which nothing has been paid."

The sole purpose of the notice is to advise the owner of the mining property that the mechanic or workman looks to the property as a security for his debt, and that unless his claim is satisfied he will resort to the remedy provided by statute. The statute requires several matters to be set out in the claim, including, among others, a statement of the demand; the name of the owner or reputed owner; the name of the person by whom the claimant was employed; with a statement of the terms, time given, and conditions of his contract; also a description of the property to be charged with the lien; "which claim must be verified by the oath of himself or some other person." It is insisted that the statement in the verification under consideration, that "the abstract of indebtedness mentioned and described in the foregoing notice is true and correct, and there is still due and owing and unpaid," etc., is not a satisfaction of the requirements of the statute; that the words "abstract of indebtedness" are not the equivalent of the word "claim;" that, instead of stating that the "abstract of indebtedness mentioned and described in the foregoing notice" was true, the affiant should have stated that the "foregoing claim" is true, etc.; that the affidavit in this case may be literally true; that is to say, the abstract of indebtedness set out may be correct, and yet, by reason of some defects, the claimant may not be entitled to maintain his lien. I cannot assent to this view. The debt, if it existed, grew out of the special matters set out in the notice. It required all of those to constitute a valid claim, and an affidavit that "the foregoing abstract of indebtedness is true" is the equivalent of the statement that the "foregoing claim" is true. "Claim" itself is equivalent to "abstract of indebtedness." It required every item contained in the notice to make up this abstract. What the claimant means by the abstract is the several matters set out

in the notice, for he follows up this language with a statement as to the amount of money due him. It is insisted, however, that this is a matter of construction; that, if the affiant were on trial for perjury committed in any false statement as to matters set up in his claim, he could not be convicted, inasmuch as he has not sworn that the claim is true, but only that the "abstract of indebtedness" is true. I cannot accept this construction. If any material matter set out in the notice was false, then the statement that the "foregoing abstract of indebtedness is true" was also false; or the validity of it depended upon the truth of the matters set out in the notice. Why is not the expression "the foregoing abstract of indebtedness" as comprehensive as the expression "the foregoing claim?" The statute prescribed no form for the verification. It merely provides that the "claim must be verified." How it is to be verified is left largely to the sound judgment of the claimant. The fact that this law was intended to provide a remedy for laborers and mechanics, a class of men not understood to be skilled in the use of legal forms, and that the legislature failed to provide a form for their use, is to my mind satisfactory evidence that it was not intended that the law receive a strict or technical construction. It requires no liberal use of language to suggest quite a number of forms that might be used as a verification of claims of this character. Take either of the following for example: "The foregoing claim is true;" "The statements made in the foregoing notice are true;" "Affiant is entitled to the lien by virtue of the matters set out in the foregoing notice;" and yet I doubt whether either of the examples given satisfies more fully the requirements of the statute than the language used in the case under consideration. Mr. Jones, in his work on Liens, in section 1452, says: "As to the form of verification, if the statute does not prescribe it, or the general purport of the affidavit, the better practice is to annex a declaration under oath to the effect that the facts stated are true." It has been held, however, in cases similar to this, where the purpose was to verify a claim, that no formal affidavit was necessary. The statement of the claim, followed by the informal certificate "sworn to," was held sufficient. See, also, Mr. Phillips' Work on Mechanic's Liens, (section 366,) wherein, treating of verification of claims, he says that the "signature of the claimant appended to his statement, and the certificate of the clerk of the court that he made oath to the accompanying affidavit, is a substantial compliance with the statute which demands that the statement shall be verified by oath;" citing *Laswell v. Presbyterian Church*, 46 Mo. 279. In the case of *Kezartee v. Marks*, 16 Pac. Rep. 407, decided by the supreme court of Oregon, the verification was as follows: The claimant set out the facts necessary to constitute the notice and signed the paper. Appended to this was the following:

"Subscribed and sworn to before me
..... 25, 1886.

"T. R. SHERIDAN, County Clerk."

In ruling upon the validity of this verification, the court said: "Counsel for appellant also object to these 'claims' for the reason they are not verified. Section 3673, Hill's Code, requires a claim 'to be filed with the county clerk,' 'which claim shall be verified by the oath of himself, or some other person having knowledge of the facts.' This statute does not prescribe any particular form in which such verification shall be made. No doubt the better practice would be in the form of an affidavit, to be annexed to the claim, to the effect that the facts therein stated are true; but, the statute not having prescribed the form, we do not feel disposed to say that a claim signed by the party, and verified by his oath, is invalid. The present lien law was evidently designed to simplify the proceedings thereunder to a greater extent than any preceding statute in this state on that subject, and this form of verification may be all that the legislature designed. We therefore hold that these claims were verified."

The supreme court of Indiana, discussing the subject of mechanics' liens, in the case of *Gilman v. Gard*, 29 Ind. 292, say: "This statute is eminently remedial, intended for the benefit and protection of subcontractors, journeymen, mechanics, and laborers, and the courts should not indulge in such niceties of construction, or such useless requirement in practice, as will tend to defeat its object, without resulting in any good end." In *Tennessee* it was said the lien given to mechanics should not be defeated by a too rigid construction of the statute; so that, although it is given on the condition that a "special contract with the owner of the lot of ground" is made by the mechanic or undertaker, nothing more is required than an employment and undertaking to do the work. *Barnes v. Thompson*, 2 Swan, 313. In the case of *De Witt v. Smith*, 63 Mo 266, the notice of the lien described the house as situate on block 2. It appeared on trial, however, that the building was on lot 20. The lien was maintained on the ground that defendant owned no other property in any other part of the city, and was not, therefore, misled by this description. The statute requires that the notice shall contain "a true description of the property, or so near as to identify the same." The statute (Wag. St. p. 909, § 5) requires that there be given under oath a true description of the property. The affidavit in this case was that "the above is a true description of the building." Here the affidavit is defective, in that it does not refer to the "property," but the "house," and it is further defective, in that it gives to the house a wrong location. In sustaining this lien the court say: "There is great reluctance to set aside a mechanic's claim merely for loose description, as the acts generally contemplate that the claimants prepare their own papers;" and again: "The courts at one time were inclined to hold that enactments for mechanics' liens were in derogation of the common law, and their provisions ought, therefore, to be construed strictly against those who sought to avail themselves of their benefits; but

the better doctrine now is that these statutes are highly remedial in their nature, and should receive a liberal construction, to advance the just and beneficent objects had in view in their passage. Their great aim and purpose is to do substantial justice between the parties, and those should never be lost sight of in giving them a practical construction. * * * Had a third party purchased the property with no other notice of record, he might have been deceived by the misdescription of the block, and so it would not be notice to him. * * * As to Schell, the owner in this case, it could not be pretended that he was misled."

Applying this doctrine to the case under consideration, I ask, how is it possible to suppose that the owner of the mine was misled by this verification? Suppose the verification was defective, who is injured by it? Is it possible to suppose that the owner of the mine did not know that these laboring men were endeavoring to avail themselves of the means offered by the statute to secure a just recompense for their toll? Is he to be allowed to enjoy the fruits of their labor because, forsooth, they used two unnecessary words in their verification? In the opinion of the majority of the court, it is admitted that no particular form is necessary. "Any set of words unmistakably pointing to the whole claim will be sufficient," it is said. It is admitted that the claimant need not even have used the word "claim" in his verification; that the terms "above abstract" might have been sufficient; but it is insisted that the claimant has himself destroyed the force of his verification by the limitation placed upon it by the use of the words "of indebtedness." If he had said, "The foregoing abstract is true," his verification would have been good; but having said, "The foregoing abstract of indebtedness is true," his verification is absolutely void, and he must lose every dollar of the wages due him for labor in the mine. This construction seems to me not only substantially, but literally, inaccurate. Let us turn again for a moment to the verification itself, and see if it bears evidence of an intention on the part of the claimant to limit his verification to the amount due. He swears to two substantive facts: *First*, that "the abstract of indebtedness mentioned and described in the foregoing notice is true and correct;" *second*, that "there is still due and owing and unpaid to him * * * the sum of," etc. It seems to me too clear for argument that the first clause of this verification is intended to embrace and does embrace every material allegation set out in the notice, and that the second clause is intended as a verification, and is a verification of the fact that the indebtedness still exists. The construction given by the majority eliminates entirely from the verification the first clause thereof, for, if it was the intention of the affiant to limit the verification to the "indebtedness," the second paragraph of the verification was all that was necessary. Nor am I able to concur with the majority of the court that the construction which they have given to this statute will have

the effect of preventing litigation. On the contrary, it will result in promoting litigation, unless the legislature shall amend the law. Here is a statute which, without suggesting any form, declares that the claim must be verified, and yet in construing that statute it is held that the verification is fatally defective, because it is limited by the two words "of indebtedness." The statute prescribes no form, nor does the opinion of the majority prescribe any form. The only suggestion as to form is contained in the following language, taken from the opinion of the majority: "Language should be used in every case which, without labored argument or intendment, will cover the whole requirement of a verification." This is precisely what I insist was done in the case at bar. It seems to me that, so far from any argument being necessary to show that these miners intended to verify these claims, it requires the most refined criticism to show that they did not intend to verify their "claims," but meant only to verify the "indebtedness." The decision reached in this case exposes miners and mechanics to the very dangers from which it is assumed they ought to be protected, viz., the peril of having their liens declared void unless verified in such form and manner as will, in the opinion of the court, meet fully all the requirements of the statute. It must not be forgotten that as a rule mechanics and miners are not lawyers, and that this statute was passed, not for the benefit of lawyers, but of mechanics. I submit, therefore, that the opinion in this case, so far from aiding the mechanic, will be found to complicate his difficulties. The liens in the cases at bar are declared void, and the miners made to lose their wages, because they improperly used the two words "of indebtedness." The next attempt may be futile because it does not contain enough. How is the miner to know that he has brought himself within the rule by the "use of such plain and unmistakable language that there can be no reasonable doubt but that he is swearing to the whole claim?" I think the better rule may be stated as follows, to-wit: That where it appears that the miner or mechanic has used words which by plain intendment were designed to operate as a verification, and where it is evident that the miner or mechanic was endeavoring to secure the benefit of the statute provided for such cases, and where such statement is sworn to, it ought to be regarded as a verification, within the meaning of the statute.

For these reasons I am unable to concur in the opinion rendered by a majority of the court; but there is another consideration which, though not raised in the argument, is, in my opinion, entitled to great, if not controlling, weight. The law creating a lien in cases of this character is found in the Compiled Laws, sections 1519 to 1541, inclusive. Section 1519 defines a lien. Then follows section 1520, which declares, in substance, that every person who performs labor on any mining claim, whether such labor be performed at the instance of the owner or other person having charge of any mining, "has a lien up-

on the same." Section 1523 provides that this character of lien shall be referred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the work commenced, and preferred also to prior unrecorded liens. Then follows the section already discussed, which relates to the verification and recording of such liens. Now, it is to be observed that section 1520 creates and fixes this lien in the most unequivocal terms, without reference to any verification on record. The language of the statute is not that any one performing the work and filing and verifying the claim shall have a lien; it does not provide even that any one performing the work may have a lien. The language of the statute is: "Every person * * * who performs labor in any mining claim has a lien upon the same for the work and labor done or materials furnished." Independently, therefore, of the provisions of the statute making these preferred liens from the commencement of the work, independently of what has been said in defense of a liberal construction of the law, I am satisfied that, as between the mechanic and the owner of the property, no registration of the lien is necessary. As between the parties themselves, what is the necessity for recording the lien? I know of no instance in which, as between the parties themselves, it is necessary to the validity of an instrument that it be recorded. What is the purpose, and the only purpose, of recording an instrument? It is, of course, to give notice to strangers. But this is not all; for it is to be observed that, in cases of this character, it is not the contract of the parties, but the statute, that creates the lien. The contract of the parties, which may be oral or written or implied, creates the obligation, but the statute fixes the lien. The whole of section 1524 is devoted to the purpose of prescribing the mode by which such liens may be good as against third parties, and has no reference, as between the parties themselves, to the creation of the lien. The context also shows that the law contemplates unrecorded as well as recorded liens, *i. e.*, shows that it is not necessary to the existence of the lien that it be recorded. To illustrate: Section 1540 provides that "whenever any lien, recorded, has been paid or discharged," etc. So, also, section 1541 provides that "all liens shall take effect as to the different persons who have liens from the time of filing the same for record." If to perfect the lien, as against the owner of the property it is necessary to record it, why use the words I have emphasized? Why not have said, "All liens shall take effect from the time of filing the same?" Under the familiar rule, that *expressio unius est exclusio alterius*, the omission to mention the owner as a party against whom the lien is to take effect only upon registration is itself a legislative construction of the act. I am therefore clearly of the opinion that, in order to entitle themselves to maintain this action, it was not necessary for the appellants to give any public notice or to verify or record the claims. Section 1520 creates the lien, and section 1524 prescribes the

mode by which such lien may become notice to the world, and bind the property, as against a subsequent incumbrance.

(6 N.M. 173)

UNITED STATES V. DE AMADOR.

(*Supreme Court of New Mexico.* Aug. 13, 1891.)

REVIEW ON APPEAL—IMPANELING JURIES—NEW TRIAL—INSTRUCTIONS—EVIDENCE—MARRIAGE.

1. Where an appeal is taken from a court of general jurisdiction, all the details of a trial are presumed to be legal and sufficient to sustain the judgment until the contrary is shown.

2. Laws N. M. 1889, p. 237, provides for the selecting of two different juries,—one to serve on the part of the United States for the district, who are to be paid by the United States, and one to serve on the part of the territory for the county, who are to be paid by the territory. *Held*, that the act regulating the impaneling of grand and petit juries to investigate and try causes on the part of the United States is not special legislation, since it applies to the impaneling of juries in every district in the territory.

3. An objection to an irregularity in the impaneling of grand and petit juries, not taken in the trial court, is not reviewable on appeal.

4. On a trial for perjury, the court was requested to charge that "if the jury believe that the witness * * * testified truly, but that the marriage to which she testified was not a legal marriage, they will find the defendant not guilty of perjury in swearing that she was not married." *Held*, that the instruction was properly refused, as it submitted a question of law.

5. A motion for a new trial is addressed to the discretion of the court, whose action cannot be assigned as error on appeal.

6. Where the instructions fairly present the issues, and more specific instructions are desired by a party, they should be asked for, as it is not the province of a court to cover all possible theories in a case.

7. On a trial for perjury for false swearing in a prosecution for adultery, defendant's admissions of marriage are admissible.

8. Oral testimony is admissible to prove a marriage ceremony performed in the republic of Mexico by persons present at the ceremony.

9. Where a marriage celebration is proven, the contract, capacity of parties, and the validity of the marriage will be presumed.

Appeal from third district court; JOHN R. McFIE, Judge.

Indictment for perjury by the United States of America against Urbana Duran de Amador. The defendant was convicted, and appeals. Affirmed.

A. B. Fall, for appellant. Eugene A. Fiske, U. S. Atty.

LEE, J. This was an action by indictment, returned in September, 1890, by the grand jury of the third judicial district, charging the defendant (appellant) with perjury in having sworn falsely in the case of the United States against Urbana Duran de Amador in said court on a charge of adultery. The case came on for trial on the 23d day of September, 1890, and the defendant was convicted, and the case is brought to this court by appeal. The counsel for the appellant in his brief says that in the record there is manifest error, as shown by the transcript; that the indictment is insufficient, and is an absolute nullity, in that it was not found and presented by a duly-constituted, legal, constitutional, and properly selected and organized grand jury; that the petit jury trying the case was not composed of 12 good

and lawful men, as contemplated by the laws of the United States and of this territory; that the court erred in refusing instructions asked by the defendant, and in overruling her motion for new trial. The record, however, falls to show that there was any exception taken or presented upon either of the assignments made here; nor does the record anywhere show why or by what means the grand jury that found the indictment, and the petit jury that tried the case, were not lawful and properly constituted juries. The recitals in the record show them to have been good men, taken from the body of the district, fully qualified and properly impaneled; and the record does not show any challenge, or objections to the individual members of either of the juries. And this court has decided that in a court of general jurisdiction all the details of a trial are presumed to be legal and sufficient to sustain the judgment, until the contrary is shown. *Territory v. Webb*, 2 N. M. 147, *Territory v. Yarberry* 1d. 458. And it has also been held that error claimed upon the trial, to which no exception was taken in the court below, cannot be reviewed in this court. *Territory v. O'Donnell*, 4 N. M. 68, 12 Pac. Rep. 743; *Territory v. Baker*, 4 N. M. 122, 18 Pac. Rep. 30.

The contention in the brief is that the act of February 26, 1889, (Sess. Laws 1889, p. 227,) is special legislation, and, as such, falls within the provision of the act of congress of July 30, 1888, (24 U. S. St. at Large, 170.) That act provides for the selecting of two different juries,—one to serve on the part of the United States for the district, who are paid by the United States, and one to serve on the part of the territory for the county, who are to be paid by the territory. So far as the consideration of this case is concerned, it is immaterial what construction may be given to the act, so far as it may be attempted to confer jurisdiction upon the grand and petit juries, thus established to investigate and try cases on the part of the United States, to also investigate and try cases on the part of the territory; for, should it be special legislation in that respect, it is not special so far as cases on the part of the United States are concerned, for in that respect it is the same as contemplated by the organic act, and the same as has been in operation since the organization of the territorial government. The power and jurisdiction of the court to impanel a jury was not derived from this act, but it is a proper subject for the legislature to regulate the drawing of juries; and, when legally done, the court will give effect to the act. If the legislature had failed to make legal provisions for impaneling the juries, the court could have impaneled common-law juries, and proceeded with the business of the term. And why the grand jury that returned the indictment, and the petit jury that tried the case, were not good and lawful men, drawn from the body of the district, possessing all the requirements and qualifications of jurors, does not appear in the record; and this court, without such showing, must presume such was

the case. In answer to the argument that the act as to the district was special legislation, it is sufficient answer to say that, when the indictment in question was returned, the law provided the same kind and class of juries for every district court in the territory. And if the provisions of the act authorizing the trial of offenses under the laws of the territory by the juries thus created for the trial of offenses against the general government should be held to be special legislation, and void as to such cases, the provisions for the trial of causes on the part of the United States will stand, under the familiar rules of construction, as perfectly as if such provisions were embodied in a separate act. *Cooley, Const. Lim.* 211; *Coates v. Campbell, (Minn.)* 35 N. W. Rep. 366; *Endl. Interp. St.* § 338, and cases there cited.

Even if there was irregularity in the manner of impaneling the juries, the objection would be untenable, being raised for the first time in this court. There is no reason why the fact of a jury having been improperly impaneled for trial should differ from any other irregularity in selecting a jury. Such, for example, where the law requires specifically that jurors shall be citizens of the United States. In such cases, where jurors have not been citizens of the United States, but aliens, this court has repeatedly held that the alienage of the jurors could not be taken advantage of by objections made after verdict. *Territory v. Abelta*, 1 N. M. 545; *Territory v. Yaberry*, 2 N. M. 451; *Anderson v. Territory*, 4 N. M. 103, 13 Pac. Rep. 21; *Territory v. Baker*, 4 N. M. 122, 13 Pac. Rep. 30.

It is assigned as one of the errors that the court erred in refusing instructions asked by the defendant. The record shows there was but one instruction asked and refused, and that instruction was as follows: "If the jury believe that the witness Margarito Barela testified truly, but that the marriage to which he testified was not a legal marriage, they will find the defendant not guilty of perjury in swearing that she was not married." The jury answers to questions of fact, and the court as to questions of law. The instruction asked the court to submit to the jury a question of law, and was therefore properly refused by the court.

It is urged that the court erred in overruling defendant's motion for new trial. This is a matter in the discretion of the court, and cannot be assigned as error, unless the court has committed reversible error, to which exceptions have been properly taken, and the motion thereby brought up by exception. *Coleman v. Bell*, 4 N. M. 46, 12 Pac. Rep. 657.

It is urged that the court did not instruct the jury as to all the law in the case; or, in other words, that it is the duty of the court, whether asked or not, to cover all possible theories of the case. This question has been before the court before, and construed by the supreme court of the territory as follows: "It is insisted that the court should have given instructions covering the theory of the defense adopted by the defendant. The instructions given present the case fairly to the jury; and if defendant was not satis-

fied with them, and desired any particular point presented to the jury prominently, he should have offered a proper instruction covering the point." *Territory v. O'Donnell*, 4 N. M. 66, 12 Pac. Rep. 743; *Thomp. Char. Jury*, 781, and cases cited; *Express Co. v. Kountze*, 8 Wall. 342. The instructions given fairly presented the case to the jury; and, if more specific instructions were desired on any particular point, they should have been asked, and, not having done so, the defendant has nothing to complain of in that particular.

The record shows some objections in regard to the admission of evidence. There was objection to the evidence of the defendant's admissions of her marriage to Canuto Amador. Such testimony is proper evidence. *Miles v. U. S.*, 103 U. S. 312. Admissions in this as in all other cases may be proven, though they do not constitute the strongest class of evidence, and should always be submitted to the jury with a proper warning by the court.

The defendant moved to take from the jury the testimony of Margarito Barela as to a marriage ceremony performed in the republic of Mexico, as being no evidence of marriage. We think the court properly overruled the motion. Any person present at a marriage may testify thereto. No case can be found which holds that oral proof is not admissible on the question of marriage. *Patterson v. Gaines*, 6 How. 550; *Nixon v. Brown*, 4 Blackf. 157; *State v. Williams*, 20 Iowa, 98. And, the celebration of the marriage being proven, the contract, the capacity of the parties, and in fact the validity of the marriage are presumed. *Winkle v. Collins*, 48 Miss. 496. This covers all the objections occurring in the record, and, finding no error, the judgment below will be affirmed.

O'BRIEN, C. J., and FREEMAN and SEEDS, JJ., concur.

(6 N.M. 179)

UNITED STATES v. DE LUJAN.

(*Supreme Court of New Mexico.* Aug. 13, 1891.)

Appeal from third district court; JOHN R. MC FIE, Judge.

A. B. Fall, for appellant. Eugene A. Fiske, U. S. Atty.

LEE, J. This cause comes here on appeal from the third judicial district. All the errors assigned in this case have been fully considered and passed upon in the case of *U. S. v. De Amador*, 27 Pac. Rep. 488, (decided at the present term of this court.) It is therefore unnecessary to consider the assignments of error in this case in detail. For the reasons set forth in the case referred to, the judgment of the court below in this case will be confirmed.

O'BRIEN, C. J., and SEEDS and FREEMAN, JJ., concur.

(6 N.M. 180)

UNITED STATES v. CHAVES.

(*Supreme Court of New Mexico.* Aug. 13, 1891.)

Appeal from third district court; JOHN R. MC FIE, Judge.

A. B. Fall, for appellant. Eugene A. Fiske, U. S. Atty.

LEE, J. This cause comes here on appeal from the third judicial district. All the errors

assigned in this case have been fully considered and passed upon in the case of *U. S. v. De Amador*, 27 Pac. Rep. 488, (decided at the present term of this court.) It is therefore unnecessary to consider the assignments of error in this case in detail. For the reasons set forth in the case referred to, the judgment of the court below in this case will be confirmed.

O'BRIEN, C. J., and SEEDS and FREEMAN, JJ., concur.

(6 N.M. 181)

ELLIS v. NEWBROUGH *et al.*

(Supreme Court of New Mexico. Aug. 19, 1891.)

DECEIT—SUFFICIENCY OF COMPLAINT—ESTOPPEL.

1. A declaration in trespass on the case fails to state a cause of action when it alleges that defendants, being engaged in organizing a community called "Faithists," fraudulently represented that its property would be held in common, the community be conducted on principles of brotherly love and morality; that plaintiff was thereby induced to join with defendants, and consecrate his life, labor, and all his effects and prospects, together with those of his two children; that defendants well knew at the time of making said statements that the property would not be held in common by the community, but that it was then and would in future be vested in one of the defendants; that one of defendants was guilty of acts of tyranny and of immorality; that plaintiff for 18 months remained in and labored for the good of the community; and that defendants refused to pay him for his work and labor.

2. The plaintiff, being a man of ordinary intelligence and able to read the Oahspe, or Bible, and other writings of the society, by entering into the Holy Covenant, assisting defendants in organizing the community and its inner circle, and remaining with them for more than a year, and joining in their song services, is estopped from claiming damages for loss of time and humiliation.

Appeal from district court, Dona Ana county; W. F. HENDERSON, Judge.

Action of trespass on the case by Jesse M. Ellis against John B. Newbrough and M. Howland. Judgment for plaintiff. Defendants appeal. Reversed.

S. B. Newcombe, for appellants. W. C. Bowman, for appellee.

FREEMAN, J. This is a most extraordinary proceeding. So far as we have been enabled to extend our researches, it is without a precedent. It comes to us by appeal from a judgment of the district court for Dona Ana county, refusing to set aside a verdict of a jury in favor of the appellee. It is an action of trespass on the case. The declaration sets out substantially the following cause of action, viz.: That, at the time of the committing of the grievances that the plaintiff complains of the defendants were engaged "in organizing and establishing a community called 'Faithists,'" and, being so engaged, the defendants heretofore, to-wit, about the years 1882, 1883, and 1884, wrongfully and corruptly contriving and intending to deceive and injure the plaintiff, issued and published certain false, fraudulent, and deceitful writings, falsely and fraudulently and deceitfully pretending in said writings to describe the true nature and objects of said community, and to set forth the true state of facts in connection with said enterprise, and thereby to induce the plaintiff to believe that said objects and

purposes of the defendants, and said facts in connection with said enterprise, were far different from what they really were, and from what said defendants really intended they should be. The declaration then proceeds to set out what it is alleged the defendants held out the enterprise to be, viz.: That the property of the community was to be held in common,—no one individual to have any separate title and property; that said community was to be conducted on principles of brotherly love, without master or leader to exercise control over the members; that all the members were to enjoy equally a permanent place in the community, with no authority on the part of any member or members to exclude another; that said community was laid on principles of sound morality and purity of life; that the plaintiff, misled by these pretenses, was induced to become a member of the community; "that he did then and there enter into said community with defendants; * * * did consecrate his life, his labor, and all his worldly effects and prospects, together with those of his two children, placing all good faith and confidence in said community; whereas, in truth and in fact, said defendants knew at the time of making said false statements and pretenses that the property of the said community home would not be held in common by the members of said community, but that the title thereto was then and would in future be vested by deed in one individual, to-wit, the defendant Andrew M. Howland; and whereas, in truth and in fact, defendants well knew, before and at the time of making said false statements and misrepresentations, that said community would not be conducted on principles of equality and kindness, without a master." The declaration then proceeds to charge defendant Newbrough with acts of tyranny, and also with living a life of immorality, etc.; that, by reason of the false representations aforesaid, the plaintiff was induced to become a member of the community; and that he remained a member of such community from October, 1884, until April, 1886, both he and his two children working for the improvement of the home; "and the plaintiff saith that the defendants refused, and still refuse, to pay plaintiff for his said work and labor, or any part thereof; by reason whereof plaintiff saith that he has sustained great damage in loss of time and labor and opportunity and in the education of his children, and that he has suffered great anguish of mind in consequence of the dishonor and humiliation brought upon himself and his children by reason of his connection with said defendants in said community; to the damage of the plaintiff in the sum of \$10,000."

To this unique and wierd complaint a demurrer was interposed. These second and fourth grounds of demurrer are as follows: "(2) Because there are no sufficient facts alleged in plaintiff's said declaration to charge these defendants, or either of them, with any liability to plaintiff by reason of the matters by plaintiff in his said declaration complained of." "(4) Because the said declaration is duplicitous,

in this: that plaintiff in his said declaration has attempted to plead more than one, and various and distinct and different, causes of action in one and the same count."

We think the court erred in overruling this demurrer. The most that can be gathered from the declaration is that the defendants had conceived some Utopian scheme for the amelioration of all the ills, both temporal and spiritual, to which human flesh and soul are heir; had located their new Arcadia near the shores of the Rio Grande, in the county of Dona Ana, in the valley of the Mesilla; had christened this new-found Vale of Tempe the "Land of Shalam;" had sent forth their siren notes, which, sweeter and more seductive than the music that led the intrepid Odysseus to the Isle of Calypso, reached the ears of the plaintiff at his far-off home in Georgia, and induced him to "consecrate his life and labors, and all his worldly effects," etc., to this new gospel of Oahspe. This much is gathered from the pleadings. The evidence adduced in support of the plaintiff's demand is as startling as the declaration is unique. What the declaration leaves as uncertain, the proof makes incomprehensible. If the court below had been invested with spiritual jurisdiction, it might have been enabled, through an inspired interpreter, to submit to a mortal jury the precise character of plaintiff's demand. We think an examination of the record before us will amply support these conclusions. The first and principal witness offered by plaintiff was himself. He sets out in full the nature of his grievance. He admits, on page 59 of the record, that he made no sacrifice of property to become a member of the organization, but that he "threw up a situation" in which he could make a good living. What induced him to make this sacrifice is set out in his testimony. First in order comes some specimen of literature published by the society, community, order, church, or "Faithists," as they were pleased to call themselves. Over the objections of the defendants, two books were allowed to go to the jury. The first and larger volume is entitled as follows: "Oahspe: A New Bible in the words of Jehovah and his Angel Embassadors. A sacred history of the dominions of the higher and lower heavens on the earth for the past twenty-four thousand years, together with a synopsis of the cosmogony of the universe; the creation of planets; the creation of man; the unseen worlds; the labor and glory of gods and goddesses in the ethereal heavens. With the new commandments of Jehovah to man of the present day. With revelations from the second resurrection, formed in words in the thirty-third year of the Kosmon era." In the preface to the book it is said of it that "it blows nobody's horn; it makes no leader." It is further stated: "When a book gives us information of things we know not of, it should also give us a method of proving that information true. This book covers that ground." The inspired author of this new revelation was doubtless somewhat familiar with the writings of his early predecessors. He had read of

the jealousies that had arisen between Paul and Barnabas, so that he takes occasion in his preface to assure his disciples that these gospels are not intended to establish the fame of any one,—"it blows nobody's horn." And again having seen innumerable sects spring up as a result of a misconstruction, or rather of a diversified construction, of the earlier gospels, we are furnished with the consoling assurance that this book presents the "method of proving that information to be true." With this comfortable and comforting assurance, the witness opens this volume of light, and bids us satisfy the hungry longing of our restless spirits by feasting our eyes on its simple truths. This new gospel, in order to prepare our minds for the acceptance and enjoyment of its simple truths, proceeds to dispel the mists of superstition that for nearly 2,000 years have obscured our spiritual vision. It gives a plain and unvarnished story of the origin of the Christian's Bible. It is this: That once upon a time the world was ruled by a triune composed of Brahma and Budha and one Looeamong; that the devil, entering into the presence of Looeamong, tempted him by showing the great power of Budha and Brahma, and induced him (Looeamong) to take upon himself the name Kriste, so that it came to pass that the followers of Kriste were called Kristeyans; that Looeamong or Kriste, through his commanding general, Gabriel, captured the opposing gods, together with their entire command of 7,600,000 angels, and cast them into hell, where there were already more than 10,000,000, who were in chaos and madness. This Kriste afterwards assembled a number of his men to adopt a Code. At this meeting it is said there were produced "two thousand two hundred and thirty-one books and legendary tales of gods and saviors and great men," etc. This council was in session four years and seven months, "and at the end of that time there had been selected and combined much that was good and great, and worded so as to be well remembered of mortals." Plaintiff's Exhibit A, p. 733, verse 55. The council, or "convention," as it would now be termed, having adopted a platform,—that is, agreed upon a Bible,—then proceeded to ballot for a god. "As yet no god had been selected by the council, and so they balloted in order to determine that matter." Plaintiff's Exhibit A, p. 733, verse 36. On that first ballot the record informs us there were 37 candidates, naming them. This list includes the names of such well-known personages as Vulcan, Jupiter, Minerva. Kriste stood twenty-second on this ballot. "Besides these, there were twenty-two other gods and goddesses who received a small number of votes each." Plaintiff's Exhibit A, p. 733, verse 37. The names of these candidates are not given, and therefore there is nothing in the record to support the contention of the counsel that the list includes the names of Bob Ingersoll and Phœbe Coussins. The record tells us that at the end of seven days' balloting "the number of gods was reduced to twenty-seven." And so the convention or council re-

mained in session "for one year and five months, the balloting lasted, and at the end of that time the ballot rested nearly equal on five gods, namely, Jove, Kriste, Mars, Crite, and Siva;" and thus the balloting stood for seven weeks. At this point Hataus, who was the chief spokesman for Kriste, proposed to leave the matter of a selection to the angels. The convention, worn out with speech-making and balloting, readily accepted this plan. Kriste, who, under his former name of Looeamong, still retained command of the angels, (for he had prudently declined to surrender one position until he had been elected to the other,) together with his hosts, gave a sign in fire of a cross smeared with blood; whereupon he was declared elected, and on motion his selection was made unanimous. Plaintiff's Exhibit A, p. 733. We think this part of the exhibit ought to have been excluded from the jury, because it is an attack in a collateral way on the title of this man Looeamong, who is not a party to this proceeding, showing that he had not only packed the convention (council) with his friends, but had surrounded the place of meeting with his hosts, "a thousand angels deep on every side;" thus violating that principle of our laws which forbids the use of troops at the polls.

After thus endeavoring to demonstrate that Christianity had its origin in fraud, and thus to prepare the minds of its disciples for the new gospel, the Oahspe proceeds to unfold the beauties and the simplicity of the new faith. Passing over many interesting features contained in this exhibit, such as the birth of Confucious, the rise and fall of Mohammedanism, the discovery of America by Columbus, etc., the record brings us to the discovery and settlement of the Land of Shalam, which forms the subject of this controversy. As already seen, the record shows that a tract of land in the county of Dona Ana was selected. This was bought and paid for by the appellant Howland, and conveyed in trust for the use of the society. Among other conditions attached to the trust, one was to the effect that "no meat nor fish nor butter nor eggs nor cheese, nor any animal food save honey, shall ever be used upon any part of the premises, except that milk may be given to children under five years old." Transcript of Record, p. 167. It is admitted that this, among many other conditions of the trust, was violated; so that on the 13th day of March, 1886, the trustees, among whom was the appellee, made a reconveyance of the property to the said Howland. There are many other interesting features presented by this record. Much proof was taken as to the conduct of the society or community which was incorporated under the name and style of the "First Church of the Tae." Record, p. 180. They organized also a general co-operative system; established what they called the "Faithist Country Store," (Record, p. 87,)—an institution, as we are advised, that did well as long as it kept on hand a good stock of faith. There was an outer and an inner council, and contributions were received, to be devoted to

the care and education of orphan children. It was charged in the declaration that the members did not practice that degree of morality which was set forth in their circular, and proof was introduced with a view to show the questionable relations existing between one of the promoters of the scheme and one Miss Vandewater, *alias* Miss Sweet; but as the plaintiff remained on the premises 18 months, and as he assigned no such reason for leaving, (page 88,) and as he made no demand at the time for compensation for work and labor done, nor for his injured sense of morality, we think this is an after-thought. This society of Faithists, while communist in theory, agrarian in habits, and vegetarian in diet, was not altogether void of sentimentality nor indifferent to the Muses. One of the fair members of the society, inspired by the poetic surroundings of this fair Land of Shalam, composed some beautiful lines that are incorporated into the record on page 62. They are as follows:

"For all things are held in common,
Hooray! Hooray!
Thus everything belongs to all,
And peace abounds in Shalam;
Away, away, away out west in Shalam!"

The authoress of these beautiful and touching lines is Nellie Jones, a member of the society. She is not made a party to this action, however, and therefore no judgment can be rendered against her. The lines were, by direction of one of appellants, Dr. Newbrough, sung to the air of Dixie. We cannot give our assent, however, to the views of the able counsel for the appellee that causing these lines to be sung to the air or "tune of Dixie" was of itself such an act of disloyalty as to entitle the plaintiff to a verdict. The writer of this opinion, like the appellee, is himself a native of the land of Dixie, that

"Fair land of flowers,
And flowery land of the fair."

—And, as he reads these lines of Nellie Jones, memory carries him back to the days of his boyhood, and to the land of the "magnolia and the mocking bird."

O, glorious Land of Shalam! O, beautiful Church of Tae! When the appellants, the appellee, Ada Sweet, and Nellie Jones, aforesaid, formed their inner circle, and like the morning stars sang together, it matters not whether they kept step to the martial strains of Dixie, or declined their voices to the softer melody of Little Annie Rooney, the appellee became forever estopped from setting up a claim for work and labor done; nor can he be heard to say that "he has suffered great anguish of mind in consequence of the dishonor and humiliation brought on himself and children by reason of his connection with said defendants' community." His joining in the exercises aforesaid constitutes a clear case of *estoppel in Tue*.

There is another reason, however, why this act of disloyalty on the part of the appellants should not prejudice them; and that is that the plaintiff himself joined in the chorus when the "tune of Dixie" was sung. On page 109 of the record appears the following, the plaintiff himself being upon the witness stand: "Question. You all sang this with a good deal of lustiness?

Answer. No, sir; we sang it to the tune of Dixie. Q. All joined in the chorus? A. Yes, sir; all that could." Pretermittng any expression of opinion as to whether it would, under any circumstances, be competent to allege and prove in this court that the ode to Shalam had been sung to the tune of Dixie, it is in proof, as we have seen, that the parties were *in pari delicto*, and therefore neither can avail himself of the other's wrong.

It is insisted, however, that the appellee was deceived by the appellants; that they did not carry out the purposes set forth in their circular and manifestos; and that they did not live up to the doctrines contained in their Bible. The plaintiff admits that he had read their books thoroughly before he joined them. He belonged to the inner circle; was one of the trustees; joined in the worship; sang in the choir; and listened to the soul-enrapturing voice of Nellie Jones. Moreover, he had entered into the Holy Covenant. That covenant is found in chapter 5 of the Book of Jehovah's Kingdom on Earth. Plaintiff's Exhibit A, p. 833. The twenty-fourth verse of the covenant is as follows: "I covenant unto Thee, Jehovah, that, since all things are thine, I will not own nor possess, exclusively unto myself, anything under the sun, which may be intrusted to me, which any other person or persons may covet or desire, or stand in need of." Under the terms of this covenant, he cannot maintain his suit, for the defendants insist, and the proof is clear, that they "covet or desire or stand in need of" the \$10,000 for which the plaintiff sues. This is a complete answer to so much of plaintiff's cause of action as is laid in *assumpsit*, just as his participation in the church exercises, music, etc., was an estoppel to his right to set up "anguish of mind" and ruined reputation and other matters founded in tort.

It is insisted, however, that the appellee has a right to recover for a deceit practiced upon him; that he was misled by the Oahspe and other writings of the society. On the contrary, the defendants maintain that the appellee is a man who can read, and who has ordinary intelligence, and this the appellee admits. This admission precludes any inquiry as to whether appellee's connection with the Faithists, their inner and outer circles, their music and other mystic ceremonies, their general warehouse and co-operative store, and other communistic theories and practices, gave evidence of such imbecility as would entitle him to maintain this suit. Admitting, therefore, that the appellee was a man of ordinary intelligence, we find nothing in the exhibits which in our opinion was calculated to mislead him. True, the Oahspe, like other inspired writings, such as the Koran, Bunyan's *Pilgrim's Progress*, and other works of like character, deals largely in figures and tropes and allegories. But, read in the light of modern sciences, they are beautiful in their very simplicity. We would be glad to embody the whole of plaintiff's Exhibit A, but must confine ourself to such citations as will, in our opinion, be sufficient to sustain this view. A careful ex-

amination of appellee's Exhibit A, the New Bible of Oahspe, leads us to the inevitable conclusion that its splendid exhibitions of word painting were not confined to the Mesilla valley, although it is in proof, and, indeed, is not denied, that a much larger volume might be written, and yet not exhaust the subject of that valley's many attractions. But, while there are many descriptive features in the record that unquestionably apply to the section in controversy, there are others that bear on their face a very different application. As a specimen of the former, we cite the following, found on page 370 of the Exhibit A: "Next south lay the kingdom of Himalawowoaganapapa, rich in legends of the people who lived here before the flood; a kingdom of seventy cities and six great canals, coursing east and west, and north and south, from the Ghlee mountain in the east, to the West mountain, the Yublahahcolaesavaganawakka, the place of the king of bears, the Eeughehabakax, (grizzly.) And to the south, to the middle kingdom, on the deserts of Geobiathbaganeganehwohwoh, where the rivers empty not into the sea, but sink into the sand, the Sonogallakaxkax, creating prickly Thuazhoogallakhoomma, shaped like a pear." As an illustration of that portion of the exhibit which, in our opinion, was not designed as a description of the Land of Shalam, we cite the following, found on the same page of the exhibit: "In the high north lay the kingdom of Olegalla, the land of giants, the place of yellow rocks and high spouting waters. Olegalla it was who gave away his kingdom, the great city of Powafuchswowitchahavagganeabha, with the four and twenty tributary cities spread along the valley of Anemoosagoochakakfuela. Gave his kingdom to his queen, Minneganewashuka, with the yellow hair, long hanging down." This unquestionably refers to Chicago. The author, after giving a general description of many lands and cities, leads his "deceives" to some high point, most probably Sierra Blanca, (from whose snow-covered summit the summer breezes fall like a gentle cascade over the valley of the Pecos,) and spreads out before them a vast system of irrigation. The following is taken from the record, and will be found commencing on page 369 of appellee's Exhibit A: "Beside the canals mentioned, there were seven other great canals, named after the kings who built them, and they extended across the plains in many directions, but chiefly east and west." Speaking of the vast canals that formed a net-work of the beautiful valley, the record says: "Betwixt the great kings and their great capitals were a thousand canals, crossing the country in every way, from east to west and from north to south, so that the seas of the north were connected with the seas of the south. In kanoos the people traveled, and carried the productions of the land in every way."

We are of the opinion that a proper cause of action was not set out in the declaration, and that there was no evidence to sustain the verdict of the jury awarding the plaintiff \$1,500; that the refusal of

the trial judge to set aside the verdict was error; and therefore the judgment of the district court should be reversed.

O'BRIEN, C. J., and LEE and SEEDS, JJ., concur in the result.

McFIE, J., being of counsel in the case below, took no part in the consideration of this case.

(6 N.M. 227)

BELL *et al.* v. GAYLORD *et al.*

(*Supreme Court of New Mexico.* Aug. 20, 1891.)

ATTACHMENT—SERVICE OF PROCESS—MECHANICS' LIENS—PRIORITY—*LIS PENDENS*.

1. Under Comp. Laws N. M. §§ 1898, 1895, providing that process in attachment shall be served upon a resident defendant, if he be absent, by delivering a copy of the original process to some person over 15 years of age residing at his usual place of abode, service by publication is not necessary. *Spiegelberg v. Sullivan*, 1 N. M. 575, followed.

2. Comp. Laws N. M. § 1853, providing that plaintiff, in all actions in the district court "affecting" title to real estate, may file in the probate court a notice of *lis pendens*, authorizes the filing of such a notice where real estate has been seized under a writ of attachment; and for work done upon the property after that time no mechanic's lien can be obtained, under section 1523, preferring such liens to any lien, mortgage, or other incumbrance of which the lienholder had no notice.

Appeal from district court, Lincoln county; W. F. HENDERSON, Judge.

Action by Larkin F. Bell and others against Minor M. Gaylord and Theodore M. Heman to foreclose mechanics' liens on a mining claim theretofore purchased by Heman under attachment proceedings. There was judgment for plaintiff, and Heman alone appeals. Reversed.

Warren & Fergusson, for appellant. *W. Y. Hewitt*, for appellees.

McFIE, J. The record in this case presents a contest for priority between a lien by attachment and a mechanic's lien. From the facts agreed upon and stipulated, it appears that the appellant, Theodore W. Heman, in the district court for Lincoln county, on the 20th day of February, A. D. 1883, brought suit *in assumpsit* by attachment against Minor M. Gaylord, and on the 23d day of February, 1883, the sheriff of said Lincoln county attached, among other property, the Rockford mining claim, situated in Lincoln county, N. M., and which was at the time the property of said Minor M. Gaylord, and served notice of the suit upon Gaylord, as required by law, upon the same day. On the 28th day of February, 1883, notice of suit pending was filed by appellant, as provided in section 1853, Comp. Laws, 1884. Appellant recovered a judgment in the attachment suit, May 19, 1884, for \$5,325, and the property involved in this suit was sold, the appellant becoming the purchaser, receiving a deed for the premises, and entering into possession of it. There was no appeal from the judgment in the attachment suit, nor were the appellees in this cause parties to the attachment proceeding. The appellees, Larkin F. Bell, Robert Quayle, Alexander Benford, Samuel McLeod, Benjamin F. Wilson, William

Burris, and Abraham S. Warren, joined in a suit in chancery to foreclose liens which they claimed for work alleged to have been done upon the mining claim in controversy, being the same property purchased by appellant under attachment proceedings. It is stipulated in the record "that no part of the labor performed by complainants, or any of them, took place or begun sooner than the beginning of summer in 1883, and that all of the complainants were employed by said Minor M. Gaylord, the owner of said Rockford mine, without the knowledge or consent of the appellant, Theodore W. Heman." Gaylord and appellant were made respondents, and the court below held the service of process and notice of suit pending insufficient, and entered a decree in favor of the appellees, and declaring a lien upon the property. The cause is in this court by the appeal of Theodore W. Heman, the attaching creditor. The record does not disclose all of the proceedings in the court below, either in the attachment proceeding or in the case here, and in determining the case we will consider all of the proceedings in the court below regular that are not disclosed or properly excepted to. The appellant contends that the court below erred in holding the sheriff's return of service of process insufficient, and that the notice of suit pending was insufficient; and indeed it is apparent from an inspection of the record that the court so held, else it could not have entered the decree complained of. If the court below had jurisdiction in the attachment proceeding, the judgment, and the sale and the conveyance under it, were regular and valid; no appeal having been taken by the defendant in that case.

It must be taken as agreed between the parties that, in the court below, the appellant set up his title to the real estate in controversy by virtue of his purchase under the attachment proceeding, and offered necessary proof to sustain it, as the fact of judgment, sale, and purchase by appellant are referred to in the stipulation. The only contention is that relating to service and notice of suit pending; and counsel have so presented the cause in argument in this court. In *Cooper v. Reynolds*, 10 Wall. 308, it was held that, "when a judgment of a court is offered in evidence collaterally in another suit, its validity cannot be questioned for errors which do not affect the jurisdiction of the court that rendered it; and where there is a valid writ and levy, a judgment of the court, an order of sale, and a sale and sheriff's deed, the proceeding cannot be held void when introduced collaterally in another suit." No objection is made to the writ of attachment in the court below nor in this court, and the sheriff's return shows that he levied the writ of attachment upon the property in controversy some months prior to the time the appellees began the work for which they claim a lien; therefore, when the levy was made, an inchoate or conditional lien attached in favor of the appellant, subject to consummation by the rendition of a valid judgment. When the judgment was rendered, it related back to and established the lien ac-

quired by the seizure of the property, February 23, 1883, if the court had jurisdiction. Jurisdiction has reference to the power of the court over the parties, the subject-matter, and over the *res* or property in controversy. Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the *res* in an attachment proceeding relating to real estate is obtained by a seizure of the property by virtue of a valid writ of attachment within the territorial jurisdiction of the court. That the court had jurisdiction of the subject-matter is not questioned, but that the court had jurisdiction of the person in the attachment proceeding is denied.

The first error assigned is: "The court below erred in holding the sheriff's return of service of process insufficient in law." It is competent for each state and territory to prescribe the mode of bringing parties before its courts, and the regulations made for that purpose are binding upon its own resident citizens. It is undoubtedly competent for the legislature to prescribe such modes of judicial proceeding as it may deem proper, to direct the manner of serving process, and the notice which shall be given to defendants. The legislature has prescribed the manner in which process shall be served in this territory, and in attachment cases. Section 1895, Comp. Laws, provides that "the writ or other lawful statement of the cause of action shall be served on the defendant as an ordinary citation." As to the manner of serving ordinary process upon resident defendants, section 1898, Comp. Laws, provides: (1) "By reading the original process to the defendant, and delivering a true copy, if required;" (2) "by delivering a true copy of the original process to the defendant;" (3) "If the defendant be absent, by delivering a copy of the original process to some person residing at the usual place of abode of the defendant, over fifteen years of age." The sheriff's return of service is as follows: "I have served the within writ of attachment by delivering copy of the same, with a copy of the declaration and affidavit, to Minor D. Gaylord, son of the defendant, a person over the age of fifteen years, at the defendant's place of residence in Lincoln county; and I have attached all the right, title, and interest of the defendant in and to the following, mining claims in Nogal district, Lincoln county, New Mexico, viz.: 'Rockford,' 'Clipper,' 'North Home,' 'Cashier,' 'Pennsylvania,' 'White Rose,' 'Roschelle,' 'Black Swan,' 'Twin Brothers,' 'Plymouth,' 'Valley Lode,' 'Gaylord Placer,' and I have served the schedule of the property attached by leaving a list thereof with the said Minor D. Gaylord, and notice thereof at the premises. [Signed] JOHN W. POE, Sheriff, by JAMES R. BRENT, Deputy. Lincoln County, February 23d, 1883." The objection to the service as shown by the returns is that the writ was not served upon defendant, but by leaving copy at defendant's usual place of abode, and that notice by publication was not given. That this service was sufficient is not an

open question in this territory. In the case of *Spiegelberg v. Sullivan*, 1 N. M. 575, it was held that "service of an attachment issued on an affidavit showing that the defendant has absconded and absented himself from his usual place of abode may be made by leaving a true copy thereof at the usual place of abode of the defendant with some free person over the age of fifteen years, and publication is not necessary." The provisions of law as to service in that case were similar to the provisions of sections 1898 and 1935 above set out, except that the word "free" is omitted from section 1898. It is true that the affidavit in that case alleged that the defendant had absconded and was absent from his usual place of abode; but as the affidavit in this case is not before the court, and there is no suggestion that the proper affidavit was not filed, it must be presumed that the proper affidavit was filed as a basis for the service made in a collateral attack upon the attachment proceeding. It follows that the service was sufficient, and that service by publication was not necessary to confer jurisdiction upon the court. The court, having jurisdiction both of the person and subject-matter, properly gave judgment for the appellant, and ordered the sale of the property attached to satisfy the judgment. When the appellant purchased the property at such sale, (as it is agreed he did,) and obtained a deed for the same, he became the owner of it to the full extent of the interest of the defendant Gaylord, at the time of the seizure and attachment, and it is admitted he was the sole owner of the property at that time.

The second assignment of error is: "That the court erred in holding the notice of suit pending insufficient in law." The record is very meager, and does not point out any specific objection made in the court below, but enough is gathered from the record and briefs of counsel to show that, in the court below, the appellees in this court insisted that, although "notice of suit pending" was filed with the probate clerk as required by law, still it was notice to them, as the law did not authorize the filing of his *lis pendens* in an attachment proceeding. Section 1853, Comp. Laws, provides that, "in all actions in the district courts of this territory affecting title to real estate in this territory, plaintiff, at the time of filing his petition or complaint, or at any time thereafter before judgment or decree, may file with the clerk of the probate court in each county in which the property may be situate a notice of the pendency of the suit." The appellees contend that the attachment proceedings did not "affect the title to real estate," within the meaning of the statute. The language of the section above referred to is very plain, and sufficiently comprehensive to embrace "all actions in the district courts" affecting the title to real estate, whether at law or in equity. That notice of suit pending may be properly filed in an attachment proceeding depends upon whether or not specific real estate has been seized on, or is the *res* of the proceeding. In this case real estate was seized under the writ of

attachment, and was rendered subject to the order of the court to the extent of sale and conveyance of the property. The title was, within the meaning of section 1523, Comp. Laws, "affected," and *lis pendens* was properly filed by the appellant. The appellees were chargeable with full notice of the attachment suit, and that it was a lien upon the property attached, from the time when the notice was filed with the probate clerk of Lincoln county, February 24, 1883. Such being the case, appellees had no legal right to a lien upon the property for work done upon it, unless by virtue of the provisions of the mechanic's lien law. Section 1523, Comp. Laws, is as follows: "1523. The liens provided for in this act are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was finished, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other incumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished." It is clear that the appellees are not entitled to a lien under this section, for it is agreed that the attachment suit was commenced and the property seized some months prior to any work being done by appellees for which they claimed the lien; and they had notice of the prior lien before any work was done by them. If it is contended that the *lis pendens* did not charge them with notice because it was unrecorded, a perfect answer to that is that the statute does not require notice of suit pending to be recorded. The "filing" of such notice is sufficient, and complies with the requirements of the law.

The court below permitted the appellees to attack the judgment in attachment collaterally, which could only be done in case of absence of jurisdiction in the court which rendered the judgment. The service and notice alone were questioned, and held insufficient to confer jurisdiction, and the court decreed a lien upon the property in controversy in favor of appellees. We are of opinion that the service of process was sufficient to confer jurisdiction; that the notice of suit pending was valid; and as the appellant had a prior lien, which had ripened into ownership, the property was not subject to the lien of the appellees. The court below erred in holding service of process and notice of suit pending insufficient, and in granting the decree complained of. The decree of the court below is reversed.

O'BRIEN, C. J., and LEE, SEEDS, and FREEMAN, JJ., concur.

(6 N. M. 235)

TERRITORY V. LOWITSKI.

(Supreme Court of New Mexico. Aug. 30. 1891.)

CRIMINAL LAW—APPEAL FROM JUSTICE COURT—TRIAL DE NOVO.

Comp. Laws N. M. 1884, gives the right of appeal in criminal cases from a justice court to the district court, and provides (section 2414)

that when such appeal is taken the cause is then in the district court to be disposed of *de novo*, and is completely within its jurisdiction. *Held*, that section 2395 and district court rule No. 16, providing that in all cases of appeal from a justice court, when the defendant below shall have taken the appeal, and shall fail to appear, plaintiff may have the appeal dismissed, or the judgment below affirmed, at his election, refer merely to civil cases; and the district court has no authority to render judgment upon the sentence of a justice in assault and battery, but must try the case *de novo*.

Error to district court, Santa Fe county; WILLIAM H. WHITEMAN, Judge.

Jennie Lowitski was convicted in a justice court of assault and battery with words. From this judgment she appealed to the district court. When the case was there called on the docket, it was found that defendant was not personally present; and the court, upon motion of the district attorney, affirmed the judgment of the lower court without a trial. Defendant thereupon took this writ. The sentence of the district court is reversed.

N. B. Laughlin, for appellant. The Solicitor General, for the Territory.

SEEDS, J. This was a criminal action, originally brought and tried before a justice of the peace in and for the county of Santa Fe, in accordance with the provisions of section 726 of the Compiled Laws of 1884 of this territory. The accusation was that the defendant had made an assault and battery upon a third party with words. The case was tried before the justice,—but whether or not with the aid of a jury the record fails to show,—and the defendant was found guilty, and fined five dollars. From this judgment she appealed to the district court of Santa Fe county. At the next term of that court, following the perfection of her appeal, she being duly represented by counsel, her case was set for trial. Upon the day thus set for trial, when the case was called, the territory and the appellant, by her attorney, announced themselves ready for trial, but it was then ascertained that the appellant was not personally in court; whereupon the territory had the appellant three times duly called, and, not responding, the district attorney moved the court to affirm the judgment of the lower court. Upon this motion the court made the following order of record: "It is therefore considered and adjudged by the court that the judgment in this cause of the justice of the peace of precinct No. 4 of Santa Fe county be, and the same is hereby, affirmed, and that in accordance therewith said defendant do pay unto the territory of New Mexico the sum of five dollars, the amount of her fine, together with the costs of the prosecution against her, as well in the lower court as in this court, to be taxed, and that execution issue therefor, that said defendant stand committed to the common jail of Santa Fe county until said fine and costs be fully paid and satisfied, and that a warrant of commitment issue against her." Afterwards her attorney moved the court for a new trial and in arrest of judgment, which being overruled, she prosecutes her appeal to this court, and alleges as error the over-

ruling of her motions for a new trial and in arrest of judgment; the sustaining the motion of the appellee's district attorney to affirm the judgment of the lower court; in rendering a judgment against the appellant by default on a criminal charge for misdemeanor; in refusing to hear and determine appellant's case *de novo* in the district court; and in refusing her a trial by jury in said court.

The above statement fairly presents the essential portions of the record. Whether or not the district court committed error depends entirely upon the relation existing between that court and the justice's court in criminal matters. If the district court, as to matters wherein the justice's court has original jurisdiction, is simply a court for the correction of errors, and acts in an appellate character, then, possibly, in case a defendant took an appeal from the decision of a justice court, and failed to appear when his case was called for trial, the court could affirm the judgment of that court. But it is quite evident that the district court is in no sense of the word an appellate court for the purpose, simply, of passing upon errors of law. If it can take cognizance of criminal matters at all which are triable originally in the justice's court, it does so to try them *de novo*. The Compiled Laws of 1884 are very indefinite as to the right of appeal from the justice court to the district court in criminal matters; and while that right probably exists, yet the method of its exercise is only to be arrived at by inference.

It might be contended that section 2395 of the Compiled Laws of 1884, together with rule 16 of rules of district courts, gave the district court authority to rule as it did in this case; and it will have to be conceded that, if that section of the Compiled Laws of 1884 and the rule cited are applicable to criminal cases, the district court was correct in giving the judgment which it did. They provide, in substance, that "in all cases of appeal from a justice's court," "when the defendant below shall have taken the appeal, and shall fail to appear when the cause is regularly called on the docket, the plaintiff may have the appeal dismissed; or, at his election, the plaintiff may have the judgment below affirmed, and judgment rendered for the same, with costs, against the defendant and his sureties." It is quite apparent that the district court in this case founded his decision upon the provisions above set out. We are clearly of the opinion that those provisions have relation solely to civil matters. Sections 2390-2395 of the Compiled Laws of 1884 have reference to civil cases; for whatever is appealed by virtue of them is to be tried in the district court *de novo*, and according to the rules prescribed for the government of justice's courts. It can hardly be contended that the legislature ever intended that in criminal matters in the district court there should be two systems of trial, and that the imperfect and crude methods of justice's court should supersede the full and perfect machinery of the district court. Rule 16 of the district court rules has plainly reference to civil matters. In the

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first place, the terms "plaintiff" and "judgment" are not those usually used in statutes or rules referring to criminal matters; they would be "territory" or "state" and "sentence;" in the second place, the rules purport to be for the common-law side of the docket solely.

Conceding, then, that the right of appeal is given in criminal cases from the justice's court to the district court, by section 2414, Comp. Laws 1884, it is the duty of the appellant, when such appeal is taken, to cause to be filed in the office of the clerk of the district court a transcript of the record of the proceedings had before the justice of the peace, together with the original oath, recognizance, and other original papers in the case. The clerk is required to docket the case for trial. All this has been done in this case. "When this is done, the cause is then in the court to which the appeal is taken, and is to be disposed of precisely like any other criminal case there pending. * * * The appeal stays the proceedings before the justice; and it does more,—it transfers the whole proceeding to the court to which the appeal is taken, to be disposed of there *de novo*. After the appeal the case is completely within the jurisdiction of the circuit [district] court, and * * * that court must dispose of the case as other criminal cases are disposed of." *Wiseheart v. State*, (Ind.) 4 N. E. Rep. 156. The case was then in the district court, to be tried by the same rules as those applicable to cases originating in that forum. The bond given for the appeal from the justice's court stood, as to the case appealed, in the same relation as an appearance bond in the district court upon an indictment found. It gave the district court no authority to affirm the decision of the lower court, but only the right to forfeit the bond for the non-appearance of the defendant. This was not done in this case, but judgment given upon the sentence of the justice. The district court has no authority to sentence a defendant without a trial by jury, unless upon a plea of guilty properly and legally entered of record. The sentence of the district court is therefore reversed.

O'BRIEN, C. J., and LEE, McFIE, and FREEMAN, JJ., concur.

(6 N.M. 286)

CANDELARIA v. ATCHISON, T. & S. F. R. CO.
(*Supreme Court of New Mexico*. Aug. 21, 1891.)

RAILROAD COMPANIES—INJURIES TO TRESPASSER—
CONTRIBUTORY NEGLIGENCE—UNDISPUTED EVIDENCE.

1. In an action against a railroad company by one who was struck by a train while walking along the track, it appeared that plaintiff was familiar with the ground, and knew that engines frequently passed over it at all hours; that he walked along the track for some distance without looking back; and that he could have seen and heard the approaching train if he had looked and listened. *Held*, that he was guilty of contributory negligence, and could not recover.

2. Where plaintiff was injured by a railroad train while walking along the track, it was immaterial that an old public highway had existed, 11 years before the accident, somewhere near the place where it occurred, and that the com-

pany had failed to construct a suitable crossing over it.

3. A railroad company is not liable for injuries to a trespasser on its track, where, after his presence is discovered, the employee in charge of the train use ordinary diligence to stop it.

4. Where the facts as to material issues were practically undisputed, and the court was satisfied that it would be compelled to set aside a verdict for plaintiff, the jury was properly instructed to find for defendant.

Error to district court, Bernalillo county; WILLIAM D. LEE, Judge.

Action by Geronimo Candelaria against the Atchison, Topeka & Santa Fe Railway Company for personal injuries. The court directed a verdict for defendant, and plaintiff brings error. Affirmed.

B. S. Rodey, for plaintiff in error. *H. L. Waldo*, for defendant in error.

McFIE, J. In this action plaintiff seeks to recover damages for personal injuries done him by his being thrown from the railroad track of the defendant company by an engine and train of cars thereon, which he charges to have resulted from the negligent conduct of the servants of the defendant, and without any fault of his own. The declaration consists of three counts. The first count charges that the plaintiff in error was injured at a public crossing of the highway over the track of the defendant in error, while the plaintiff was crossing upon said highway, by the carelessness and negligence of the defendant's employees in the management of its locomotive and train. The second proceeds upon the ground that there was a public road formerly existing, from time immemorial, which the railroad company, in the construction of its road, had not restored, and that the plaintiff was unavoidably upon the track of the defendant, for the reason that the defendant had failed to restore said road, and that while crossing the track he was injured by the carelessness and negligence of its servants. The third count charges that, while the plaintiff was crossing the defendant's railroad track with all due care and diligence, the defendant drove its train up to and across said highway, and in so doing no bell was rung nor whistle blown, as required by an ordinance of the town of Albuquerque, and the plaintiff was injured by the negligence of the defendant's servants, etc. A trial was had in the court below at the May term, 1891, and resulted in a verdict in favor of the defendant, under instructions of the court. To reverse that judgment the plaintiff brings the cause to this court by writ of error.

The testimony in the court below in substance showed that the Atchison, Topeka & Santa Fe Railroad Company runs its line of railroad through the eastern portion of the city of Albuquerque, and that its main line and a number of side tracks and yards are within the limits of the town of Albuquerque; that upon the west side of the tracks of the Atchison, Topeka & Santa Fe Railroad are a number of tracks of the Atlantic & Pacific Railroad Company; that the depot of the defendant company is towards the northern and business portion of the town, and that its yards and side tracks extend for

a long distance south of the depot; that there is a regular crossing both for vehicles and persons over the tracks upon a street called "Coal Avenue," which street has been extended both upon the east and west sides of the tracks of both the Atchison, Topeka & Santa Fe Railroad Company and the Atlantic & Pacific Railroad Company; that the next regular crossing south of Coal avenue is probably a distance of one mile; that the machine-shops of the Atlantic & Pacific Railroad Company are upon the west side of the tracks and about one-fourth of a mile south of Coal avenue; that upon the east side of the tracks, and opposite the machine-shops, is a piece of ground that was, at the time of the accident, under fence; that a number of the employees of the railroad companies lived upon the east side of the tracks, as did also others who were not employees of the companies; that both the employees and other persons were in the habit of crossing over the tracks of the defendant company wherever they saw fit to do so, without any regard to regular crossings, for quite a distance both above and below and in front of the machine-shops of the Atlantic & Pacific Railroad Company; that there was an ordinance of the town of Albuquerque, in force at the time of the alleged injury, reading as follows: "It shall be unlawful for any engineer or conductor or any other person having charge, either permanently or temporarily, of any railway engine or train of cars, to run any such engine, or permit the same to be run, within the town limits, without ringing the engine bell, or at a greater rate of speed while passing street crossings than six miles per hour, except when running north of Tijeras road and south of Iron avenue; and both the engineer and conductor of any train shall be liable for the same offense." The testimony shows further that on the 16th day of June, 1888, the plaintiff approached the tracks of the defendant company from the east side, in the neighborhood of the machine-shops of the Atlantic & Pacific Railroad Company, went upon the side tracks and the main line of the defendant company for a considerable distance, and, while upon the main line walking north, he was struck by an engine and train of 24 cars, knocked from the track, and injured. He admits that he was not an employee of the railroad company, and says that he was going across the railroad on business of his own. There is some conflict in the testimony as to whether the bell upon the engine was rung and the whistle blown, or not. Two or three witnesses testify that they did not hear the whistle or the bell, but the engineer and fireman both swear that the whistle was blown and the bell rung, and that the air-brakes were set upon the train as soon as the fireman notified the engineer that there was a man on the track. The testimony shows that the train was moving at the rate of about five miles an hour at the time the accident occurred. It is also shown that upon the east side of the tracks there is a road, extending from Coal avenue down to the crossing below the machine-shops, the exact distance not

being shown. It is also shown that between the main line and the side tracks of the defendant company there are spaces sufficiently wide for persons to occupy them uninjured while trains are passing.

What is claimed to constitute the negligence of the defendant company in this case is the alleged omission of its servants to have the whistle blown and the bell rung, and use proper diligence to stop the train. The defense is that the plaintiff had no legal right nor license to be upon these tracks, and that therefore he was a trespasser upon the defendant's tracks at the time the accident occurred. The plaintiff admits that he was going across the tracks of the defendant upon his own business; and therefore he had not the license that an employee might have, under certain circumstances, in being upon the tracks of the company. It is clear that there was no regular crossing over the tracks of the defendant at the place where this accident occurred; that persons approaching the tracks there were in the habit of crossing the tracks wherever they pleased, without any regard to any crossing; and it is not pretended that the company had any regular crossing there which invited or licensed persons to cross on their tracks. The testimony of some of the witnesses is that there were cars frequently standing upon the tracks there, and that foot passengers crossed wherever they could get through between the cars. Can it be contended that because persons were in the habit of crossing over the tracks wherever they pleased, without regard to the regular crossings, (and for a long distance up and down the tracks this was done,) this fact would constitute a legal right for them to be upon the tracks of the defendant? We think not. But the plaintiff in this case, while he testifies that he was crossing the tracks, shows by his own evidence that he was not crossing the track, but was walking upon the track of the defendant. Every witness that testifies as to the accident states that at the time it occurred the plaintiff was walking upon the track from south to north. The plaintiff himself, when asked if he was not walking straight up the track, admits that he was. It is also shown by the witness Baca that the plaintiff crossed from a switch to the main track, and had proceeded upon the main track but a few steps when he was struck by the train. The witness Sedillo says that he crossed the track to the west side; sometimes he walked on the track, and sometimes at the side of it; then, at one time, he crossed back. The plaintiff himself admits crossing the track, and walking upon and along the same. There is no contradiction of the evidence upon this point that the plaintiff, at the time he was struck by the train, was walking upon the track of the defendant, and using it for a public highway, and without any legal right or necessity for so doing. There was a public road—an open road—to the east of the side track, and there were open spaces between the tracks which could have been used by the plaintiff, and by using them no injury would have been done him; but he chose to go

upon the tracks of the defendant for his own convenience, and in so doing he assumed the risk of his own conduct, and became a trespasser, in contemplation of law. In the case of *Toomey v. Railroad Co.*, 24 Pac. Rep. 1074, which was a case somewhat similar to the one at bar, the supreme court of California, in a well-considered opinion, says: "The track was not a highway for pedestrians. The law holds a railroad company to a very high degree of responsibility for the safety of its passengers, and public convenience requires rapid transit. Such being the case, regard for the safety of the passengers, and common justice to the company, require that, except at crossings and similar places, the track should be kept clear. In some countries this is regarded as of such importance that it is made a penal offense to trespass upon a railroad track; and even at crossings there are gates and gate-keepers to prevent people from crossing when trains are approaching. In this country there are no such regulations. The matter is left to individual good sense and responsibility; but it is none the less of grave importance that the track should be kept clear. The law does not sanction its use as a path or sidewalk; and, if people persist in using it as such, they must be held to be doing an act which is not lawful. This, which seems clear enough on principle, is fully sustained by authority." In *Railroad Co. v. Hummell*, 44 Pa. St. 378, the court, per STRONG, J., said: "It is time that it should be understood in this state that the use of a railroad track, cutting, or embankment is exclusive of the public everywhere, except where a way crosses it. This has more than once been said, and it must be so held, not only for the protection of property, but, what is far more important, for the preservation of personal security, and even of life. In some other countries it is a penal offense to go upon a railroad. With us, if it is not that, it is a civil wrong of an aggravated nature, for it endangers not only the trespasser, but all who are passing or transporting along the line. As long ago as 1852, it was said by Judge GIBSON, with the concurrence of all the court, that a railway corporation is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the highest attainable rate of speed, with which neither the person nor property of another may interfere." Similar language was used in *Mulherrin v. Railroad Co.*, 81 Pa. St. 375. In *Railroad Co. v. State*, 62 Md. 487, the court, per IRVING, J., said: "A right of way of a railroad company is the exclusive property of such company, upon which no unauthorized person has the right to be; and any one who travels upon such right of way as a footway, and not for any business with the railroad, is a wrong-doer and a trespasser." The plaintiff in this case being upon the track, using it for his own purposes as a public highway, the defendant did not owe him the duty of doing acts to facilitate his trespass or to render it safe. In the case of *Toomey v. Railroad Co.*,

supra, it is further said: "It is to be observed here that we are not saying that the fact that he was a trespasser would justify the infliction of a willful or wanton injury upon him. It is well settled that the commission of a trespass does not justify the infliction of an injury by way of punishment or revenge, or out of mere recklessness. Nor are we saying that the railroad company is not bound to use ordinary care after seeing the dangerous position of a trespasser. What we say is that the company does not owe to a mere trespasser upon its track the duty of doing acts to facilitate his trespass or render it safe. In other words, it is not bound to provide any particular kinds of machinery or appliances for his benefit, or, when not aware of his presence, to give cautionary signals to notify him of the approach of its train."

We think that the law is well settled that a railroad company is only liable, in the case of the trespasser who has been killed or injured by its trains, for the negligence of the defendant's servants after the trespasser's presence upon the track has been discovered. The facts in this case present no such conduct as would constitute negligence on the part of the defendant after plaintiff's presence was discovered. But suppose the defendant's servants to have been guilty of some degree of negligence, still the plaintiff is not entitled to recover, if he was guilty of contributory negligence. What is contributory negligence? "The more approved statement of the doctrine of contributory negligence is that the person cannot recover for an injury to which he contributed by his own want of ordinary care." *Pierce*, R. R. 323, note 4; *Murphy v. Deane*, 101 Mass. 455; *Railroad Co. v. Jones*, 95 U. S. 439; *Beers v. Railroad Co.*, 19 Conn. 566; *Neal v. Gillett*, 23 Conn. 437; *Johnson v. Railroad Co.*, 20 N. Y. 65, 73, 6 Duer, 633; *Wilds v. Railroad Co.*, 24 N. Y. 430, 29 N. Y. 315; *Grippen v. Railroad Co.*, 40 N. Y. 34; *Carroll v. Railroad Co.*, 1 Duer, 571; *Moore v. Railroad Co.*, 24 N. J. Law, 268-284; *Runyon v. Railroad Co.*, 25 N. J. Law, 556; *Railroad Co. v. Terry*, 8 Ohio St. 570; *Railroad Co. v. Stallmann*, 22 Ohio St. 1; *Railroad Co. v. Elliott*, 28 Ohio St. 340, 353, 357; *Railroad Co. v. Whittaker*, 24 Ohio St. 642, 35 Ohio St. 627; *State v. Railroad Co.*, 24 Md. 84-104; *Frech v. Railroad Co.*, 39 Md. 574; *Railroad Co. v. Whittington*, 30 Grat. 805, 815; *Railroad Co. v. Anderson*, 31 Grat. 812; *Reeves v. Railroad Co.*, 30 Pa. St. 454, 464; *Harlan v. Railroad Co.*, 64 Mo. 480, 65 Mo. 22; *Railroad Co. v. Miller*, 25 Mich. 274; *Le Baron v. Joslin*, 41 Mich. 313, 2 N. W. Rep. 36; *Wright v. Telegraph Co.*, 20 Iowa, 195; *Sherman v. Stage Co.*, 24 Iowa, 515; *O'Keefe v. Railroad Co.*, 32 Iowa, 467; *Carlin v. Railroad Co.*, 37 Iowa, 316; *Murphy v. Railroad Co.*, 38 Iowa, 539; *Lang v. Railroad Co.*, 42 Iowa, 677; *Railroad Co. v. Hanlon*, 53 Ala. 70; *Railroad Co. v. Copeland*, 61 Ala. 376; *Railroad Co. v. Whitfield*, 44 Miss. 466-485; *Railroad Co. v. Johnson*, 38 Ga. 409-431; *Railroad Co. v. Carroll*, 6 Heisk. 347; *Railroad Co. v. Goddard*, 25 Ind. 185; *Railroad Co. v. Hunter*, 33 Ind. 335-356; *Needham v. Railroad Co.*, 37 Cal. 409, 419; *Robinson v.*

Railroad Co., 48 Cal. 409; *Flemming v. Railroad Co.*, 49 Cal. 253; *Deville v. Railroad Co.*, 50 Cal. 383; *Hearne v. Railroad Co.*, Id. 482; *Railroad Co. v. Grimes*, 13 Ill. 585; *Knight v. Railroad Co.*, 23 La. Ann. 462; *Davies v. Mann*, 10 Mees. & W. 546; *Bridge v. Railroad Co.*, 3 Mees. & W. 244; *Tuff v. Warman*, 5 C. B. (N.S.) 573; *Radley v. Railroad Co.*, L. R. J App. Cas. 754.

It has been repeatedly held on the highest authority that a person crossing a railroad track at the regular, recognized crossing is compelled to use his senses both of sight and hearing for his own protection; and if he fails to do so, and is injured, he is guilty of negligence that will defeat a recovery by him. A person crossing a railroad track at a regular crossing established by the railroad company is said to have a right or license to do so; but a person walking upon the track of the railroad company without authority, and using it for a public highway, is held to a much higher degree of diligence, and takes a greater risk than he who crosses the track at a regular crossing. In the case of *Railroad Co. v. Houston*, 95 U. S. 697, the court said: "If, then, the positions most advantageous for the plaintiff be assumed as correct, that the train was moving at an unusual rate of speed, its bell not rung, and its whistle not sounded, it is still difficult to see on what ground the accident can be attributed solely to the 'negligence, unskillfulness, or criminal intent' of the defendant's engineer. Had the train been moving at an ordinary rate of speed, it would have been impossible for him to stop the engine when within four feet of the deceased. And she was at the time on the private right of way of the company, where she had no right to be. But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed to hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of this kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure." In the case of *Railroad Co. v. Jones*, 95 U. S. 439, the court says: "He was not an infant nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the for-

mer could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box-car, where he should have been, were uninjured. He would have escaped also had he been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down." In the case of *Railroad Co. v. Campau*, 35 Mich. 468, Chief Justice COOLEY, in rendering the opinion, says: "The intestate does not appear to have looked behind him at all. Had he done so, he would have seen an engine approaching upon him upon the track he had now stepped upon, and with such close proximity that, according to the testimony of the principal witness for the plaintiff, it struck him before he had taken more than five or six steps on the track. The plaintiff claimed that the engine was going at the time at a speed forbidden by law to be run at that point, and his witnesses estimated the speed at from 25 to 35 miles an hour. He also claimed that the persons in charge of the engine were acting recklessly, and were ringing no bell and giving no signals. Upon this part of the case, it must, from the verdict, be assumed that the facts were as the plaintiff alleged. But, admitting this to be the case, the utter want of any foundation for a cause of action on the facts stated is too plain to render extended remarks necessary or profitable. The decedent had voluntarily placed himself in a position of great danger. He was making a highway of a railway track, where he had no lawful right to be, and upon which dangerous vehicles were constantly liable to pass. Under such circumstances he was called upon to exercise more than ordinary care and caution to protect himself against danger which was constantly imminent. Instead of this, he seems not to have availed himself of any precaution whatever. A passing train, which would have been likely to prevent the rumbling or the bell of another being heard, rendered the sense of hearing insufficient for his protection, and added to the necessity of looking about him with vigilance. When, under such circumstances, a person places himself upon a railroad track, with an approaching engine in plain sight, and without even taking the precaution of looking behind him, it is impossible, in speaking of his conduct, to characterize it by anything short of recklessness. If the plaintiff can recover in a case like this, it is plain that the negligence of the injured party must be held immaterial in any conceivable case."

The law as stated in the above decisions is the well-settled law of this country, as declared by the courts of the United States, as well as by the weight of a long line of decisions in the courts of the different states. It is useless to continue the citation of cases wherein it is held that a person crossing a track of a railroad company must use his senses both of sight and hearing and any other reasona-

ble care for his own protection, and if he does not do so he is guilty of contributory negligence, and cannot recover, although there may have been negligence in some degree on the part of the defendant; and also that, in the case of the trespasser upon the track, a much higher degree of care must be used.

Now, what are the facts in this case upon this point? The only evidence that the plaintiff looked either up or down the track to ascertain whether a train was approaching or not is found in answer to a single question by his counsel. The plaintiff was asked: "Did you look up and down the track when you were about to go on it?" The answer was: "Yes, sir." Then the question was asked plaintiff: "And why could you not see a train coming?" Answer: "Because there were cars on both sides, and the whistle did not blow." The plaintiff did not swear that he looked up and down the track after he got upon the track, but it must be drawn from his answer that he looked before he got upon the track, and he could not see the train approaching, because there were cars on both sides of him. Three witnesses, Bowman, Baca, and Sedillo, testified that they did not see any cars standing on the tracks. But, if there were cars standing at each side of him so that he could not see a train coming, he should have looked and listened after going upon the track and walking up the track, where his view would not have been obstructed by the cars. The plaintiff did not testify that he looked back after getting upon the track to see whether the train was coming or not, and the testimony certainly shows that he neither looked nor listened for the train after getting upon the track. The witnesses Bowman and Hatch testify that they came upon the track about 75 yards north of him, that he was coming towards them, and they saw the train behind him. Bowman motioned with his arms to attract his attention, but he seems to have been paying no attention whatever to their efforts to warn him until the train was almost upon him. The plaintiff's counsel insists strenuously that the whistle on the machine shops was blowing at the time the plaintiff was walking upon the track, and consequently he could not hear the rumbling of the train approaching him. If true, it would not relieve the plaintiff from the obligation to look and see whether the train was approaching or not. Had he looked, he certainly would have discovered a train approaching him, and thereby no injury would have been done; but he seems to have been guilty of gross neglect, in that he walked for a considerable distance without looking behind him at all. Some witnesses for plaintiff say that he was upon the track when they came upon it, and the train was 200 yards behind him. Therefore some time elapsed before the train was upon him. Some of the witnesses testify, also, that the whistle upon the machine-shops was not blowing when they first saw the plaintiff walking upon the track. The witness Hatch says that when he and the witness Bowman came up-

on the track they heard the rumbling of the train, and yet they were 75 yards further from the train than was the plaintiff at the time. This clearly shows the testimony of Bowman to be the fact, when he says that the whistle upon the machine-shop was not blowing when he came upon the track, and the plaintiff was upon the track before he came upon it. The witness Baca also says the whistle on the machine-shop did not begin to blow until the train was from 15 to 20 yards from the plaintiff. The testimony shows that the plaintiff, had he been using his sense of hearing, could have heard the train approaching from behind. That he could have seen the train approaching him is undoubted; and the only conclusion to be drawn from such testimony is that he did not either look or listen, or that he recklessly remained on the track after knowing his danger. Either state of facts would prevent a recovery by the plaintiff in this case. The fact that the plaintiff was upon a railroad track at all was a notification of danger. A railroad track is always a dangerous place for a person to be, and they are presumed to know that it is so. Plaintiff was shown to have lived in the neighborhood of the place where the injury occurred for a number of years, and was thoroughly familiar with the situation, and the fact that trains and switch-engines passed back and forth over these tracks at all hours of the day,—which the testimony clearly shows; and the fact that the blowing of the whistle upon the machine-shops was calculated to drown the noise of the whistle of the train or the ringing of the bell would not in any manner relieve the plaintiff from the necessity of the use of ordinary care at the time he was upon the track. He admits that it was so loud that it would drown the whistle or the ringing of the bell, and therefore he was chargeable with greater care and diligence to look for the approaching train, both behind and in front of him, and it was negligence on his part not to do so. The testimony also shows that the train was running at a very low rate of speed, and therefore there could be no negligence charged on that account; but it is insisted that the whistle was not blown nor the bell rung, as required by the ordinance of the town of Albuquerque, which was admitted to have been in force at the time of the accident. The fact that the bell was not rung nor the whistle blown, however, even if true, would not warrant a recovery by the plaintiff in this case, as shown by the evidence and authorities above cited; and many other authorities may be cited in support of the same position. It is incumbent upon the plaintiff to prove his allegations, and to establish the negligence of the defendant, before he can recover under any circumstances; and the negligence complained of is the failure to ring the bell, and blow the whistle, and take the necessary steps to stop the train. Plaintiff himself testifies that the whistle was not blown, but he is not supported by any other witness in the case. The witness Bowman says he did not hear the whistle blown or the bell rung; the wit-

ness Hatch testified that he did not know whether the whistle was blown and the bell rung or not; the witness Baca testified to the same effect; and the witness Sedillo testified that he did not hear the alarms given, but later in his testimony admits that he had stated previously that he did hear the whistle blown and the bell rung. Therefore the testimony for the plaintiff as to the failure to blow the whistle and ring the bell is very slight indeed. But on behalf of the defendant, the engineer testifies that the whistle was blown, and also that the bell was ringing for a long distance before the plaintiff was struck by the engine. The fireman testifies to the same effect, and that he himself rung the bell until the plaintiff was knocked from the track.

Now, what efforts were made to stop the train? The engineer testifies that he did not see the plaintiff upon the track at all; that a very short time before the train struck plaintiff the fireman called to him that there was a man on the track; and the engineer testifies that "the first thing I did was to blow the whistle with my left hand, and grab the throttle-valve with the other, and apply the air. Question. What do you mean by applying the air? Answer. Setting the brakes and stopping the train." Consequently, the witnesses for the defense, being the only witnesses who were in a situation to testify as to what was done to stop the train, show by their testimony that the air-brakes were applied immediately, and that it was impossible, as the engineer further testifies, to blow the whistle and apply the air-brakes and reverse the engine at the same time, but that he did all that he could to stop the train before it reached the plaintiff after his presence was discovered. The engineer further says that the reason he could not see the plaintiff was that he was upon the opposite side of the engine, and that he did not see him at all until he was falling from the front of the engine. The engineer also testifies that he was looking out for a train coming from the other direction, which was due about that time. There is no proof that the engineer did see the plaintiff; and, if it is insisted by the plaintiff that the negligence of the defendant consisted in failing to see him in time to stop the train, it may be replied that the testimony shows that the plaintiff, in walking up the track, was sometimes along the side of the track, sometimes upon a switch near by, and sometimes walking on the main track. The witness Baca, who was a witness for the plaintiff, testified that "the old man crossed from the switch to the main track," upon which the train was coming, and had only proceeded a few steps upon the main track when he was struck by the engine. The witness Sedillo testified that he saw the old man cross the track to the west side, walk up along the side of the track some distance, and then go upon the middle of the track, where he was when he was struck. The law is well settled that the engineer, in case he discovered the plaintiff upon the track, had a right to presume that the plaintiff, who was an adult, would use ordinary care,

and thereby leave the track in time to prevent an injury; and especially is that true under the testimony in this case, when it is shown that the plaintiff was on and off the track at different times; and if the testimony of the witness Baca is true, and he is a witness for plaintiff, the plaintiff had been, as the engine approached near to him, walking upon a switch, and crossed over to the main track just before the train, so as to get but a few steps before the train struck him. If he was seen upon the switch, there was no danger of injury, and the engineer had no reason to believe that he would step to the main track just in front of the train, which he certainly did, without looking whether a train was approaching or not. Therefore we see no room for the contention, under the evidence, that there was negligence on the part of the defendant's servants in that they failed to stop the train. The evidence certainly shows that ordinary diligence was used by them.

We have endeavored to present fully the testimony in this case, and apply the law applicable to it, that the assignments of error may be the more clearly understood. In the court below, after the evidence was all in, a motion was made on behalf of the defense that the court instruct the jury to find for the defendant, which instruction was given. This is one of the errors upon which the plaintiff relies for the reversal of this case, and states, in argument, that the question before the court now is not that the plaintiff was entitled to recover even if the case had gone to the jury, but whether or not the court erred in instructing the jury to find for the defendant. Juries in this territory are the judges of the facts, and in all cases where there is a real conflict of evidence upon material issues in the case, where the material issues are disputed, and the testimony of witnesses must be weighed and their credibility determined, the court certainly would not be authorized to withhold from the jury the determination of the facts in such cases; but where the facts as to material issues are practically undisputed, and are therefore established, the law is that in case the court is satisfied from the facts established that there is no right of recovery in the plaintiff, to the extent that the court would be compelled to set aside the verdict, the court may, without error, instruct the jury to find for the defendant. The former rule that all questions of fact must be submitted to the jury, if there is a "*scintilla*" of evidence, has been materially relaxed, and from the more recent cases a more liberal interpretation of the rule has obtained. In the case of *Railroad Co. v. Houston*, 95 U. S. 697, from which we have already above quoted, the court, upon the state of facts there presented, said: "Upon the facts disclosed by the undisputed evidence in the case, we can see no ground for a recovery by the plaintiff. Not even a plausible pretext for a verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances the court would not have erred

had it instructed the jury, as requested, to render a verdict for the defendant." In the case of *Schofield v. Railroad Co.*, 114 U. S. 619, 5 Sup. Ct. Rep. 1125, the court said: "It is the settled law of this court that when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." *Improvement Co. v. Munson*, 14 Wall. 442; *Pleasants v. Fant*, 22 Wall. 116; *Herbert v. Butler*, 97 U. S. 319; *Bowditch v. Boston*, 101 U. S. 16; *Griggs v. Houston*, 104 U. S. 553; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Commissioners v. Deal*, 113 U. S. 227, 5 Sup. Ct. Rep. 433; *Baylis v. Insurance Co.*, 113 U. S. 316, 5 Sup. Ct. Rep. 494. In *Railroad Co. v. Jones*, 95 U. S. 439, it was held that "the plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to instruct the jury to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse." In the case of *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569, which was a case in which it is stated by the court that there was some conflict in the evidence relating to certain matters, but certain facts were clearly established, the court says: "It is contended that the court erred in not submitting to the jury the issue as to the defendant's negligence. Undoubtedly, questions of negligence in actions like the present are ordinarily for the jury, under proper instructions as to the parts of the law by which they should be controlled. But it is well settled that the court may withdraw a case from that body, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, and is of such a conclusive character that the court, in the exercise of its judicial discretion, would be compelled to set aside the verdict returned in opposition to it." The judicial records of this country show that, while there have been many meritorious cases upon this subject presented to the courts, there have also been many cases without merit which have consumed the time of the courts and juries unnecessarily. It is obvious that the rule as now laid down is intended to place it within the power of the courts to terminate frivolous litigation whenever, as shown by the evidence, such case may be presented. As was said in the case of *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 8 Sup. Ct. Rep. 266: "It would be an idle proceeding to submit the evidence to the jury when they could justly find only in one way." The evidence in this case is practically undisputed. It is clearly established that the plaintiff was not crossing the track, but that he was walking along the track, and it is undisputed that the place where the plaintiff was struck by the engine was not at a public crossing where the plaintiff had a legal right to be. The evidence fa-

the plaintiff alone shows that he was using the track for a public highway at a very dangerous place; that he did not exercise ordinary care and diligence, either by looking or listening for the approach of the train; and these facts are sufficient to constitute negligence under the decisions of our courts, such as would defeat a recovery by the plaintiff in this case. The only question upon which there is any conflict of the evidence at all, if there can be said to be any conflict, is upon the question whether the whistle was blown and the bell rung or not; but, admitting that they were not, it would not justify a recovery by the plaintiff. The evidence as to the blowing of the whistle and the ringing of the bell on the part of the plaintiff is of the most doubtful and uncertain character, and the only positive evidence as to whether the whistle was blown and the bell rung is given by the witnesses for the defendant. Therefore, as the evidence stood at the time the court was asked to instruct the jury, there could be no serious contention that a jury would be justifiable in inferring such negligence on the part of the defendant as would render the defendant liable in the case. So that, upon the whole case as shown by the testimony, a case was presented that the court was authorized to instruct the jury to find for the defendant. Such a case was presented that a jury would not have been justified, from any testimony in the case, in inferring negligence that would render the defendant liable. Negligence is a mixed question of law and fact, but in case the material facts are undisputed it may become a question of law, and in such case the court may properly direct the verdict as the law requires. An examination of the authorities as to what constitutes contributory negligence will show that, where the plaintiff fails to use such ordinary care and diligence as that of looking and listening for the approach of a train, it is held to be negligence in law, and will defeat a recovery. The plaintiff was an old man, but there is nothing to show that either his sight or his hearing was defective. He was thoroughly familiar with the danger incident to his position on the track of the defendant. He was chargeable with knowing that upon this network of tracks in the defendant's yards trains were passing continually back and forth, day and night; and he is not excusable if, by his failure to exercise ordinary care and diligence, he was injured, although the defendant's agents may have also been guilty of some degree of negligence. A railroad company is not required under such circumstances to practically become the insurer of the party injured, but rather he must become his own insurer. Suppose this case had gone to the jury upon the testimony disclosed in this record, and the jury had found for the plaintiff; upon motion to set aside the verdict the court would have been compelled to sustain the motion for want of evidence to support the verdict. That being true, it was not only the prerogative of the court to terminate the litigation at the earliest period after the testimony was all in, but it was the manifest duty of the

court to do so. It is better to terminate such a case before verdict than set it aside after verdict, where the court cannot permit a verdict to stand. Hence we are of the opinion that the court below did not err in instructing the jury to find for the defendant.

The second assignment of error is that the court refused to allow the plaintiff to prove that in the year 1880, when the Atchison, Topeka & Santa Fe Railroad was constructed, the track crossed an old public highway somewhere near the point where the plaintiff was injured, and did not provide a crossing. This cannot avail the plaintiff in this case. He was not crossing the track, but was traveling along the track. If the railroad company failed to provide a crossing where the old road was, that would not justify the plaintiff in walking along the railroad track in a different direction. If there was a road there at all in 1880, it crossed the track from east to west, but the plaintiff in this case was traveling along the track from south to north. In any event it could not constitute a negligence on the part of the defendant company at this time, 11 years later, that would excuse the plaintiff for negligence on his part. The evidence being immaterial, the court did not err in excluding such evidence. *Railroad Co. v. Converse*, 139 U. S. 476, 11 Sup. Ct. Rep. 569. Finding no error in the record, the judgment of the court below is affirmed.

O'BRIEN, C. J., and FREEMAN and SEEDS, JJ., concur. LEE, J., did not sit in this case.

(6 N.M. 214)

CERF et al. v. BADARACO.

(*Supreme Court of New Mexico. Aug. 19, 1891.*)

SALE—RESCISSION—ORDER BY MAIL—ACCEPTANCE OF GOODS—INSTRUCTIONS—EVIDENCE.

1. In an action for the price of goods ordered by mail and burned in the house of the buyer, the disputed question of fact being whether the goods were of the kind ordered, the buyer cannot complain of a charge that, if a buyer receives the goods he has ordered, and does not wish to accept them, he must return them immediately, and, if he retains them without an order to do so from the seller, he is liable for them.

2. The jury having found against him, the buyer could not have been prejudiced by a charge that, if he ordered a specific kind of goods, and the goods sent were not in accordance therewith, he might refuse to accept them, but that if he did so he would have to return them.

3. It being also a disputed question whether the buyer ordered specific kinds of goods, or left the selection to the seller, it was proper to charge that, if a buyer orders goods and permits the seller to select them, the buyer is responsible, whether the goods sent suited him or not; but if he specifies the goods wanted, and the goods sent are not in accordance therewith, and he immediately notifies the seller thereof, and that he will not accept them, and then the seller directs him to hold them, the buyer is not responsible.

4. In *assumpsit* for goods sold, the plaintiffs introduced their verified account of the claim set out in the declaration, and rested. Comp. Laws N. M. 1884, § 1873, provides that such verified accounts are sufficient to establish *prima facie* every material averment thereof. Held that, in the absence of substantial errors of law, the question whether the defendant's evi-

dence failed to overcome the *prima facie* case made out will not be considered on appeal.

Appeal from district court, Bernalillo county; W. D. LEE, Judge.

Action of *assumpsit* by L. Cerf & Co. against G. Badaraco. Verdict and judgment for plaintiffs. Defendant appeals. Affirmed.

W. B. Childers, for appellant. N. C. Collier, for appellees.

O'BRIEN, C. J. This is an action of *assumpsit* brought by L. Cerf & Co., a partnership of St. Louis, Mo., to recover the purchase price of a quantity of cigars and cigarettes sent by the firm to the defendant, Badaraco, Albuquerque, in the month of December, 1887. The defense was *non assumpsit*. The cause was tried to a jury, before LEE, J., presiding, at the fall term, 1889, resulting in a verdict in favor of plaintiffs for \$245, the full amount claimed. Defendant moved for a new trial, on the ground of erroneous instructions given, and of refusing to give certain instructions requested, and because the verdict is against the law and the evidence, which motion the court refused to grant. The cause is here on the appeal of the defendant from the judgment entered on the verdict. The errors assigned for determination are: (1) "Because the court erroneously instructed the jury: 'Now, if a person orders goods, and he receives the goods he has ordered, if he does not wish to accept them, it is his duty to return them immediately to the party from whom he orders them; and, if he retains them without any order direct from the sender to that effect, he would become liable for them, and, if they were burned up while in his possession, he would be responsible for them.' 'If the defendant ordered a certain specific kind of goods, he would not be obliged to receive the goods if they were not in accordance with those that he had ordered, and he might refuse to accept them; but, if he did so, he would have to return them. If a party orders goods, and directs the persons from whom he orders to select goods of a certain kind, and permits him to make the selection, and the goods are sent accordingly, then he would be responsible for them, because he trusted the other party to select the kind of goods that they were to send. In that case, he would be responsible whether the goods suited him or not; but if he directed a certain kind of goods to be sent, and the goods sent were not according to the order, and he immediately notified the parties that they were not the goods that he had ordered, and that he would not accept them, and they directed him to hold them, then he would not be responsible.'" (2) "Because the court erred in overruling defendant's motion for a new trial." (3) "Because the verdict is against the law and the evidence."

Properly to appreciate the nature and scope of the alleged errors, we will state that plaintiffs, in support of their demand, introduced a verified account of the claim set out in the declaration, and rested. This was sufficient, under section 1878,

Comp. Laws 1884,¹ to establish, *prima facie*, every material averment thereof, and entitled plaintiffs to a verdict for the amount claimed. The defendant, being the chief witness in his own behalf, to overcome the case so made by plaintiffs, in his examination in chief and cross-examination testified: "Question. Are you the defendant in this case? Answer. Yes, sir. Q. State the facts to the jury about the shipment of the cigars mentioned in this affidavit which has been read to the jury. A. He sent me before that there thing 8,000 cigars, and after four months I ordered 8,000. I told him, 'Send the same kind of cigars.' He never sent any; he sent some other kind. I went to take them cigars from the depot, and take them out to my store, and after I got them there I opened the case, and found they were not the same kind of cigars. I wrote to him back I never accept them cigars, because it is not the kind I wanted; and then he answered me back to keep the cigars for him until he came. Q. Did you receive that letter from him? A. That letter my book-keeper used to keep, and everything in the place was burned up. Q. You say he wrote to you to keep them until he came? A. Yes, sir; until he came. Q. You mean until one member of the firm came? A. Before when he came my house got a burning, and after he came he wanted to make arrangements with me. If I would give him fifty dollars, he would give me full receipt. Q. What had become of the cigars in the mean time? A. Cigars all burned in the store. Q. Did you sell any of these cigars? A. No, sir; I opened up the case to see, and I put them back in the case and closed up the case, not one cigar being used. Q. You say you told him to send you the same kind of cigars you had ordered before? A. Yes, sir; he never did, he sent other kind. Q. Were they the same brands? A. No; different brands altogether. Q. You ordered these in letter, did you? A. Yes. Q. Who wrote the letter? A. Dr. Sutherland, the one who used to keep the book, and everything, and do all of my business. Q. How long after you wrote to him that you did not take the cigars was it before the house was burned? A. I do not know exactly how many days; I think about 25, 30, or 40 days. I cannot say, exactly, more or less. Q. How long after the house was burned was it before he came here? A. The house was burned in January, and he came in January, the 27th or 28th of January,—something like that. Q. What was the difference in the quality of the cigars which you ordered and the cigars which were sent? A. The difference was at least one-half in value. Q. Were the cigars which they sent you worth what they charged you for them? A. What he charged me? No, sir; that is why I re-

¹ Sec. 1878. Accounts duly verified by the oath of the party claiming the same, or his agent, and promissory notes and other instruments in writing, not barred by the provisions of this act, shall be sufficient evidence in any suit to enable the plaintiff to recover judgment for the amount thereof, unless the defendant or his agent shall deny the same under oath.

fused them. Cross-examination: Q. Well, you only made objection to the cigars, did you not? A. Yes, sir. Q. The cigarettes were all right? A. The cigarettes were all right. I ordered the cigarettes, and he sent them the same as I ordered, and the cigars he never did; and the time I saw the cigars, they were nothing of my sort of fashion. I left the cigarettes and cigars in the same case, and never took them out. Q. Did you not write him in that letter, 'The cigarettes are all right; the cigars I do not want at any price?' A. I do not know that I wrote him that. I wrote to send cigarettes \$2.00 per thousand, and I take them; if he send me more, I never take them. * * * Q. Were the cigars you ordered all one brand, or of different brands? A. They were several different brands. Q. Were they all to be one price or different prices? A. They were to be the same price as I had bought them before. They were ranging from \$15.00 to \$20.00. Q. The names of what brands did you put in your letter? A. I cannot tell you. Q. Did you name any brands at all. A. I believe that I did not state any brands at all; simply told him to send me a good cigar, and to be of the same brands I had before. Q. You said all that in your letter? A. I believe this is what I told them. I cannot tell you every one of the letters. Q. You left it to their judgment to select the cigars, if they did not have the same kind of cigars as you ordered? A. Yes, sir; I left it to their judgment." Dr. Sutherland and Pablo Blase testified also in behalf of defendant, but their testimony is of so indefinite and unsatisfactory a character that we do not deem it entitled to sufficient weight to warrant us in setting out any part of it in this opinion. When defendant rested, plaintiffs offered in evidence deposition of one Oscar Fleisheim, clerk of L. Cerf & Co. Defendant objected to the offer. Plaintiffs contended that portions of it would be clearly proper in chief, but that other portions were admissible in rebuttal, especially in reference to the alleged contents of defendant's letter containing order for the goods. Defendant thereupon, by leave of court, read answer to third interrogatory: "State what you may know about the sale of cigars and cigarettes by plaintiffs to defendant on or about December 6, 1887." Answer, read to court: "On the 6th day of December, we, L. Cerf & Co., received a letter from G. Badaraco, the defendant, dated at Albuquerque, December 1, 1887, in which he requested us to send him 3,000 cigars, at \$20.00 per thousand; 3,000 cigars, at \$25.00 per thousand; 3,000 cigars, at \$30.00 per thousand; and 10,000 Old Rip cigarettes, at \$2.00 per thousand. This order was executed in accordance with Badaraco's letter, and all of the articles above enumerated were shipped to him by us, in one case, directed to defendant at Albuquerque, N. M., on same day that we received his order." Whether this testimony, and other portions of the deposition, were submitted to the jury or not, it is difficult to determine from the record; and it would be as fruitless as improper to attempt to review, with any degree of

intelligence, this and various other offers of proof made by the respective parties during the progress of a trial remarkable as a model of obscurity and confusion. In the present state of the record, we will content ourselves with an examination of the errors assigned by appellant.

Defendant, to overcome the *prima facie* case made by plaintiffs, endeavored to show that the goods sent were not the kind he had ordered, except the cigarettes. This is the substance of the contention between the parties. The exceptions to the three paragraphs of the charge must be examined and their merits determined in view of this issue. Had the goods ordered been delivered, as maintained by plaintiffs, the instruction contained in the first paragraph is clearly against the plaintiffs, and appellant has no cause to complain. The law is, if a person send an order by mail for goods, and such order is strictly complied with by the party on whom the order is made, that the contract is complete, and the party ordering has no right to return the goods without payment. If there be an inaccurate expression found in the second paragraph, it could not mislead, in the light of the testimony and of other portions of the charge, wherein the law is clearly stated. For instance, the statement that, if the goods received were not such as defendant had ordered, he might refuse to accept them, but if he did so he would have to return them, though not strictly correct, could not have injured the defendant. The jury must have found from the evidence, and would have found, whether this part of the charge had been given or not, that the goods sent corresponded with the goods ordered, or they could not have found in favor of the plaintiffs. The exception taken to the third paragraph is equally devoid of merit. Defendant did not refuse to accept and pay for the cigars because they were not suitable, valuable, or merchantable, but because they were not such as he had ordered. The statement of defendant that the cigars were not half so valuable as those ordered is but the expression of an opinion based on the assumption that they were not the goods ordered. We find no material error in the instructions given.

The other two assignments of error, in view of the disposition made of the first one, are not well taken. We cannot say, from the record before us, that there is not sufficient evidence to support the verdict. Had defendant introduced no proof, when plaintiffs rested, the latter would have been entitled under the provisions of the law cited to a verdict for the amount of their claim. If the defendant, in his endeavor to overcome the *prima facie* case thus made, failed to satisfy the jury, by a preponderance of evidence, of the merits of his defense, we are not at liberty, in the absence of any substantial errors of law, to disturb the finding of the jury upon disputed questions of fact. It follows that the motion for a new trial was properly overruled. We may add that, in our opinion, had the cause been more regularly and fully tried in the court below, the evidence in support of the verdict would

have been strengthened rather than impaired. The judgment appealed from will be affirmed.

McFIE, SEEDS, and FREEMAN, JJ., concur. LEE, J., having heard the case below, took no part in this decision.

(6 N.M. 230)

GARCIA Y PEREA v. BARELA.

(*Supreme Court of New Mexico.* Aug. 20, 1891.)

PROBATE AND DISTRICT COURTS—EQUITABLE JURISDICTION—FRAUD—EVIDENCE—CONSTRUCTION OF WILLS.

1. Organic Act N. M. § 10, provides that the judicial power shall be vested in a supreme court, district courts, probate courts, and justices of the peace, and that the jurisdictions of the several courts "shall be as limited by law." *Held*, that the act does not confer chancery jurisdiction on probate courts. Affirming 23 Pac. Rep. 766.

2. Organic Act N. M. (Rev. St. U. S. § 1868) provides that the supreme court and district courts, respectively, of every territory shall possess chancery as well as common-law jurisdiction. Comp. Laws N. M. 1884, § 562, provides that probate courts shall have exclusive original jurisdiction in all cases relative to the probate of wills, and to hear and determine all suits upon demands against the estate: provided, that when the demand exceeds \$100 the claimant may sue either before the probate or in the district court in the first place. *Held*, that a suit by the testator's wife against the administrator for relief from a receipt fraudulently obtained by him, whereby she released her right, valued at \$1,000, in her husband's estate, being an equitable demand, was properly brought in the district court.

3. Comp. Laws N. M. §§ 1446-1449, provide that the probate judge cannot declare a will or codicil invalid by reason of any defects in the execution thereof, but require him, when doubt arises as to whether a will ought to be approved, to note his doubt at the foot of the will, and return it to the person presenting it, who may then present it to the district court for a judicial determination of its validity. *Held*, that a probate judge had no power to approve a codicil to a will attested by two witnesses only, when the statute requires three.

4. Where the evidence was conflicting, but tended to show that plaintiff was an ignorant woman, and that her fears had been aroused that if she did not agree to a settlement proposed she might lose her home, the finding of the court that she had been unduly influenced to execute the receipt will not be reversed on appeal.

5. Where the testator expressed in his will: "I also grant to my wife, already referred to, all articles of goods in my house, personal furniture, household furniture, and all that therein exists,"—this includes money in an iron safe contained in the house.

6. The fact that the testator owed his wife protection and support, and had sufficient means, raises the presumption that he intended to make ample provision for her in his will.

On rehearing.

Bill in equity by Guadalupe S. de Garcia y Perea against Mariano Barela for relief from fraud. Judgment for plaintiff below, which, on appeal by defendant, was affirmed in the supreme court. See 23 Pac. Rep. 766. Defendant now moves for a rehearing. Denied.

LEE, J. This is an application for a rehearing of this case, which was argued and decided at the January term, 1890. 23 Pac. Rep. 766. Upon the hearing of the cause, counsel for appellant contended

that the court below had not jurisdiction to hear and determine the cause, for the reason that section 562, Comp. Laws 1884, vested in the probate court exclusive original jurisdiction to determine all matters of controversy involved in the cause; and this court decided that, if said section 562 was susceptible of the construction claimed for it, said section was in conflict with section 1868 of our organic law, which provides that "the supreme court and the district courts, respectively, of every territory, shall possess chancery as well as common-law jurisdiction." The appellant insists that this court erred in its former opinion, and asks to have the cause reheard upon this and other grounds stated in the petition for a rehearing.

Section 10 of our organic act provides that "the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. * * * The jurisdiction of the several courts herein provided for, both appellate and original, and that of probate courts and of justices of the peace, shall be as limited by law." The supreme court of the United States, in *Ferris v. Higley*, 20 Wall. 375, clearly defined the meaning of the words, "shall be as limited by law," and held that it was inconsistent with the nature and scope of probate courts to confer common-law and chancery jurisdiction upon such courts in the territory of Utah, whose organic law, in this respect, is substantially like ours. To hold that the probate court of Dona Ana county was possessed of powers to give adequate relief in this case would be to decide that such court possessed chancery jurisdiction. The circumstances of the case and the relief sought are of equitable cognizance, and such as could only be relievable in a court possessing chancery jurisdiction. In any view of the case, the jurisdiction of the probate court is only exclusive as to claims against an estate not exceeding \$100. The appellee's claim against the estate under the will was for money devised to her, which amounted to some \$6,000; therefore she could, under section 562, bring her suit in the district court in the first instance. Ordinarily such a suit would be at law, but in this case the appellee had a right to sue on the equity side, in order to get relief from the receipt which she insists the appellant fraudulently obtained from her; and equity, being properly invoked for the one purpose, would retain jurisdiction for all purposes necessary to give her complete relief in respect to that claim. The provision of the act of congress, that "the supreme court and district courts, respectively, of every territory shall possess chancery as well as common-law jurisdiction," excludes the idea that the probate courts shall have exclusive jurisdiction in cases where equities are involved. Nor would a due regard to public policy and the protection of estates of decedents justify the grant of such extensive powers to probate courts as constituted in New Mexico.

The appellee contends that the appellant had an adequate remedy by appeal from the action of the probate court. We do not

think so. The subject of this controversy was some \$6,000, which appellee claims was left her by the will of her deceased husband, and that the appellant took possession of the money, and fraudulently obtained from her a receipt for all claims against the estate; that the appellant made no mention of this money in the inventory filed by him in the probate court, but claimed the same belonged to his mother and himself as residuary legatees named in the will. These facts present a case of purely equitable cognizance. She might have taken steps for the protection of her rights in the probate court; but can it be said that the remedy afforded in that court was as ample and adequate as that of the district court? Even the district court would have been powerless to have given her relief under a common-law proceeding. Sections 1446-1449 limit the power and prescribe the duty of a judge of probate with respect to the probate of the will. Under these sections the probate judge cannot declare a will or codicil invalid because the will was not executed according to the statutes; but if he shall have doubt as to whether the will ought to be approved on account of its not being executed according to the statutes, he should note his doubts at the foot of the will, and return it to the person presenting the same, and such person may then present the will to the district court for a judicial determination of its validity. This is not done by way of an appeal, but may be by an original suit instituted for that purpose in the district court. In this case a codicil of the will was attested by but two witnesses. The statute requires three. The probate judge, however, approved the codicil, notwithstanding its defective execution. If the probate judge has not power to declare a will or codicil invalid because it is not executed under the solemnities prescribed by statute, we think it follows as a necessary corollary of that proposition that such court would not have power to judicially determine that such will or codicil was valid. Could the probate judge, by approving a codicil to the will, which was invalid under our statute, deprive the parties interested of the right to have the validity of the codicil judicially determined by the district court? It was the duty of our probate judge, when the will was presented to him for probate, having the codicil thereto, which codicil was attested by only two witnesses, to have returned the will to the appellant without approval, and to have indorsed thereon his reason for withholding his approval. Then the appellant could have presented the matter to the district court for a judicial determination of the question, as it is provided in section 1449 that any proceedings had by said judge of probate, not in conformity with the provisions of this act, shall be declared null and of no effect by the district court. The statute does not prescribe the proceedings in which this may be done, and, therefore, to give effect to the statute, there is no reason that it may not be done in any case in which the question may be made an issue. We do not mean to say that in no case could the pro-

bate judge admit to probate and approve a will or a codicil of the will. But if the will and codicil presented to the probate judge appeared to that court to have been executed and attested in the manner required by statute, he could give it his approval; but such approval would be in the exercise of an administrative, and not a judicial, function, and, notwithstanding his approval, a party interested in the will could invoke a judicial determination by the district court as to whether the will was or was not executed and attested as required by statute.

It is contended by the appellants in their motion that the organic act confers an exclusive probate jurisdiction on the probate court, which the legislature is authorized to define. The federal supreme court, in the case referred to, does not so construe it. Justice MILLER, in the opinion, says: "Of the probate courts it is only said that a part of the judicial power of the territory shall be vested in them. What part? The answer to this must be sought in the general nature and jurisdiction of such courts as they are known in the history of the English law and in jurisprudence of this country." But it is claimed that, if the organic act had not conferred such exclusive jurisdiction, this legislature could rightfully do so without conflict with the act of congress. This proposition is correct, provided they have not attempted to confer upon it powers not authorized by the organic act, as it is construed by the supreme court, as before referred to. The organic act provides that the district courts shall have and exercise the same jurisdiction under the constitution and the laws of the United States as is vested in the circuit and district courts of the United States. And the supreme court, in construing the act for the territory of Washington, where the same terms are used, held that the jurisdiction thus conferred is the same as that exercised by the circuit and district courts of the United States in all branches. *The City of Panama*, 101 U. S. 453. And the equity jurisdiction conferred on the federal courts is held by that court to be the same "that the high court of chancery in England possesses, and is subject to neither limitation nor restraint by state legislation." The court is bound to exercise the jurisdiction if the bill, according to the received principles of equity, states a case for equity relief. "The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case as disclosed by the pleadings. It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." "It is very evident that an action at common law on the bond of the administrator would not give the complainant a practical and efficient remedy for the wrongs which she has suffered. A proceeding at law is not flexible enough to reach the fraudulent conduct of the administrator, which is the ground-work of this bill, or to furnish proper relief against

it. It is, however, well settled that a court of chancery, as an incident to its power to enforce trusts and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands. The bill under review has this object, and nothing more. It is true, the bill seeks to open the settlement with the probate court as fraudulent, and to cancel the receipts and transfers from the complainant to the administrator because obtained by false representations, but the determination of these questions is necessary to arrive at the proper value of the estate." *Payne v. Hook*, 7 Wall. 425. This case is fully sustained by various other decisions of the supreme court of the United States. It covers every point involved in the question of jurisdiction of the court to entertain the bill and give the relief demanded; and we find that the same rule of equity jurisdiction is fully recognized and exercised under state authority in a number of the states, especially where probate jurisdiction is not exercised by one of the higher courts. Mr. Pomeroy, in the third volume, § 1152, of his admirable work upon Equity Jurisprudence, has carefully reviewed this question, and has collected the decisions of the several states and grouped them into three classes: "In the states of the first class the original equitable jurisdiction over administrations remains unbridged by the statutes concurrent with that possessed by the probate courts. These states are Alabama, Illinois, Iowa, Kentucky, Maryland, Mississippi, New Jersey, North Carolina, Rhode Island, Tennessee. In the states of the second class the jurisdiction of the probate courts over everything pertaining to the regular administration and settlement of decedents' estates is virtually exclusive. These states are Connecticut, Indiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, Oregon, and Pennsylvania. In the states of the third class the equitable jurisdiction is not concurrent, but is simply auxiliary or ancillary and corrective. The probate court takes cognizance originally of all administration, and has powers sufficient for all ordinary purposes. Equity interposes only in special or extraordinary cases, which have either been omitted from the statutory grant of probate jurisdiction, or for which its methods and reliefs are imperfect and inadequate, or where its proceedings have miscarried and require correction. This class includes Arkansas, Missouri, New York, Ohio, California, Georgia, Kansas, South Carolina, Tennessee, Texas, Vermont, and Wisconsin." An examination of the authorities cited by Mr. Pomeroy shows that even in some of the states of the second class, where the jurisdiction of the probate court is exclusive, as well as in all the states of the first and third classes, equity has jurisdiction of matters and relief incidental to the regular course of administration which are distinctively of equitable cognizance, and for which the methods and remedies of the probate court are imperfect or inadequate.

It is claimed in the motion for a rehear-

ing that the court was mistaken in holding that fraud had been practiced upon the appellee, or that she had been unduly influenced to execute a receipt in full for all claims against the estate of her late husband, and that the judgment below should have been reversed for that reason. This is a pure question of fact which the master found from the evidence, and, as a general rule, the appellate court will not reverse upon a question of fact which the court below has found from conflicting evidence, where the record shows substantial evidence sustaining the conclusion. There is evidence tending to show that the appellee was an ignorant woman; that her fears had been aroused that if she did not agree to the settlement proposed she might lose the place upon which she was living. And, taking all the evidence together, we are not prepared to say that the finding of the facts upon which the decree was based was not correct.

Counsel for appellant also contend that the translation of the fourth clause of the will, upon which the court predicated its construction of said clause, is incorrect. This translation was the one adopted, or at least acquiesced in, by counsel on both sides. The record (page 293) shows this admission: "It is hereby admitted that Exhibit 8 is the sworn translation of the will of Pedro Garcia y Perea, by Pinito Pino, and that the same may be introduced as such." No objection was made to the introduction of the translation, nor was any other evidence offered to show that such translation was not correct. Pedro Lassaigue, parish priest, a witness for appellee, upon this point testified as follows: "Question. You understand the Spanish language well? Answer. Yes. Q. What do you infer from the word in the fourth clause from the last six words in the clause, namely, '*y todo lo que allí existi?*' A. I construe those words to mean 'Everything in the house at that time.'" And on cross-examination: "Q. You will look at the translation which I hand you [Exhibit No. 8] of the fourth clause of Pedro Garcia y Perea's will. State whether it is a correct translation or not. A. I think it is correct; strictly so. Q. You have been called upon to translate certain portions of this will from Spanish into English by Judge Newcomb. Is it not a fact that your knowledge of English is very imperfect, and that you have repeatedly found it necessary during your examination here to deliver your testimony through an interpreter? A. Certainly." Appellant now contends that the proper translation of the phrase is, "and all which there exists," and that "there" refers to "in my house," and nothing more; and that appellee, under the words, "and all which there exists," would only be entitled to take such things as were *ejusdem generis* with "all articles of goods, personal furniture, and household furniture," which were particularly mentioned. But, conceding that the translation now contended for is the correct one, can we assent to the proposition that the testator intended to leave the money in the safe to his residuary legatees, and not to his wife? We do not think the rule

ejusdem generis applies to the case. That rule is defined by the supreme court as follows: "It is doubtless true that in the construction of wills as well as of statutes, where certain things are enumerated, and a more general description is complied with, the enumerated description is commonly understood to cover only things *ejusdem generis* with the particular things mentioned." Given v. Hilton, 95 U. S. 598. The rule is not an arbitrary one, and is only to be invoked to give effect to the intention of the testator when the language used is uncertain. If he had said, "the safe and all therein," it would hardly be contended that it did not include the money in the safe. How much less specific are the words used: "I also grant to my wife, already referred to, all articles or goods in my house, personal furniture, household furniture, and all that therein exists." The iron box or safe was in the house. The money was in the safe. It therein existed. Therefore, according to the plainest acceptance of the terms, or according to the strictest rules of logic, it was included in the bequest. The technical rule invoked could not change plain language, or give a different meaning to words from that which they clearly import. The testator was an ignorant man, that could neither read nor write. The draughtsman of the will was not a lawyer, or a man learned in the use of technical words. He testifies that he wrote it down as the testator directed him to do. In order to determine the intention of the testator we must consider the language under the circumstances in which it was used, the relation and the condition of the parties. Where a testator has sufficient means, in making a will, the presumption is that he will make ample provision for his wife. This presumption arises from the fact that he owes her protection and support as well as affection. The presumption may be overcome by proof that he was actuated by motives of a different character. But there was no evidence in this case of that character, though the master received oral testimony as to the intention of the testator, and finds from that evidence as a matter of fact that he intended leaving the money in the safe to his wife. We think the result of the conclusion before reached is correct. The motion for rehearing will therefore be overruled.

O'BRIEN, C. J., and SEEDS and FREEMAN, JJ., concur.

(6 N.M. 75)

BROOKS V. UNITED STATES.

(Supreme Court of New Mexico. July 31, 1891.)
APPEALS IN CRIMINAL CASES—STAY OF SENTENCE
—REPEAL OF STATUTES.

Comp. Laws N. M. 1884, §§ 2469-2472, provide that appeals shall be allowed from all judgments upon indictments; that a stay may be allowed if the court deem it expedient; that, when stayed, the sheriff shall keep the prisoner without executing the sentence; and that, if the prisoner's appeal is from a judgment where the sentence is not death or imprisonment for life, he may be admitted to bail upon a recognizance conditioned that he will appear in the supreme court and abide the judgment on appeal. *Held*, that these statutes are not repealed by Act N. M.

1862, (Comp. Laws, §§ 2482, 2483,) which provides for appeals in case of conviction for murder where the sentence is death or imprisonment for one or more years, and that the appellant shall be entitled to a suspension of the sentence by filing a bond in a sum fixed by the court.

On rehearing.

Action by the United States against George L. Brooks upon a recognizance given by Ernest L. Lapham as principal, and said Brooks and others as sureties. Judgment below for plaintiff, which, on a writ of error by said Brooks, was reversed in the supreme court. See 27 Pac. Rep. 311. Plaintiff now moves for a rehearing. Denied.

LEE, J. The United States attorney moves for a rehearing in this case on the grounds alleged that the court has overlooked the distinction between a recognizance and statutory bail-bond; and that the laws compiled as sections 2470, 2471, and 2472 of the Compiled Laws, by which provision is made for a recognizance upon criminal appeals in certain cases, have been impliedly repealed by "An act relative to appeals in criminal cases," approved January 17, 1862, and compiled as sections 2482 and 2483 of the Compiled Laws, which, among other things, provide that in certain cases of criminal appeals "the party taking the appeal shall be entitled to a suspension (stay of execution of the sentence) by filing a bond in a sum to be fixed by the court," etc.; the contention apparently being that the "bond" so provided for is not a recognizance, and does not need to be forfeited as a condition precedent to a suit upon it, and, further, that the instrument in question here must be deemed merely a "bond" taken pursuant to such statutory authority.

In our view of this case, it is not necessary for us now to determine whether or not the bail-bond intended by the statutory provision just cited is of the nature of a recognizance; for we are of the opinion that the recognizance upon which the judgment below proceeded was not taken under that provision. Under sections 2469-2472 of the Compiled Laws,¹ if then unrepealed, the convict Lapham was entitled to his appeal, and to the exercise of the discretion of the district court upon the question of awarding him a stay of execution. He applied to that court for such stay, and it was granted pursuant to the provisions now compiled as section

¹Sec. 2469. In all cases of final judgment rendered upon any indictment, an appeal to the supreme court shall be allowed, if applied for during the term at which said judgment is rendered. Sec. 2470. No such appeal shall stay the execution of such judgment unless the * * * court shall be of opinion that there is probable cause for such appeal, or so much doubt as to render it expedient to take the judgment of the supreme court, * * * and shall make an order * * * that such appeal shall operate as a stay of proceedings. Sec. 2471. If the defendant in the judgment so ordered to be stayed shall be in custody, it shall be the duty of the sheriff to keep the defendant in custody, without executing the sentence which may have been passed, to abide such judgment as may be rendered upon the appeal."

2470. In addition to such application for a stay, he applied to be admitted to bail under the provisions now compiled as section 2472, which reads as follows: "In all cases where an appeal is prosecuted from a judgment in a criminal case, except where the defendant is under sentence of death or imprisonment for life, the court, which is authorized to order a stay of proceedings under the preceding provision, may admit the defendant to bail upon a recognizance, with sufficient sureties, to be approved by the court, conditioned that the defendant shall appear in the supreme court at the next term thereof to receive the judgment on the appeal, and abide its decision, render himself in execution, and obey every order and judgment which may be made in the premises." The recognizance in question so closely conforms to these statutory requirements that it must have been framed upon the theory that it had not been repealed. Still, it must be admitted the phraseology of the recognizance, no matter whence derived, might be sufficient if employed in a bail-bond or *supersedeas* bond executed under the provisions of section 2483, assuming the appellee to be correct in the contention that those provisions have supplanted the earlier law. But what ground is there for such a contention? The act of 1862, most of which is compiled in sections 2482 and 2483, reads as follows: "Section 1. That in future, in all cases of conviction for murder either in the first or any other degree, it shall be, and it is hereby made, the duty of the judge before whom such conviction be had to grant an appeal to the supreme court of the territory: provided, that the party asking said appeal shall make affidavit as now required by law. Sec. 2. Be it further enacted, that all such appeals shall have the effect of a stay of execution of the sentence of the court until the decision of the supreme court upon said appeal; and whenever the sentence of the district court shall be that of death, or imprisonment for one or more years, the party convicted shall remain in close confinement until the decision of the supreme court shall be pronounced upon the appeal; and in all cases of appeals the party taking the appeal shall be entitled to a suspension (*prohibicion de la ejecucion*) of the sentence by filing a bond in the sum to be fixed by the court, sufficient to secure the due execution of the sentence of the court in case the judgment of the court below should be affirmed by the supreme court." This act, although entitled "An act relative to appeals in criminal cases," does not, in our opinion, operate upon any cases whatever except such as involve the crime of murder. At the time of its passage, and until several years after the compilation of 1884, there were five degrees of homicide in this territory; and upon conviction of that crime in the fifth degree the jury was authorized to assess the punishment at a period of imprisonment of not more than ten years nor less than one year, or at a fine not exceeding \$10,000, etc. The imprisonment for homicide, then, could not be less than the period of one year. The act under

consideration provides, expressly and exclusively, in its first section, for appeals in murder cases. The next section provides for a stay of execution as of course in all murder cases so appealed; but as to convicted murderers sentenced to death, or to imprisonment for one or more years,—that is, to death, or imprisonment for any term, as it could not be for less than one year,—it provides that the convict shall remain in close confinement during the pendency of the appeal. The act, however, was intended to be complete in relation to all convictions for murder; and hence in the latter clause of the second section it refers to the only remaining class of convicts for murder, namely, those sentenced, not to death or imprisonment, but merely to pay a pecuniary fine. Manifestly, a good appeal-bond, with sufficient security, would be "sufficient" to secure the execution of a mere pecuniary judgment. See *Clawson v. U. S.*, 113 U. S. 143, 5 Sup. Ct. Rep. 393. Any other construction would deprive the district court of the wise discretion conferred by the older law, and give to every felon convicted of any felony, however atrocious, provided it be other than homicide, and no matter how long the term of imprisonment fixed by his sentence, an absolute right to his liberty upon his taking an appeal and giving a bond. Our position in this regard is strengthened by the fact that all the statutory provisions which we have above considered were re-enacted in the Revision of 1865, and hence must be construed as all existent, if it is possible to construe them harmoniously. *Gallegos v. Pino*, 1 N. M. 410; *In re Watts*, Id. 541; *Chaves v. Perea*, 3 N. M. 71, 2 Pac. Rep. 73. The motion for a rehearing will be overruled.

O'BRIEN, C. J., and SEEDS, MCFIE, and FREEMAN, JJ., concur.

(11 Mont 155)

KLEIN *et al.* v. DAVIS *et al.*

(Supreme Court of Montana. July 25, 1891.)

INJUNCTION—DISSOLUTION—DISCRETION OF COURT.

A temporary injunction to restrain a trespass was granted on filing a complaint. The affidavits filed in support of a motion to dissolve the injunction showed that defendants owned a placer mining claim in a gulch above plaintiffs' land, on which defendants had a right to dumptailings; that defendants had been engaged in digging a flume on plaintiffs' land for 18 months, and had dug it for a distance of 750 feet, at an expense of \$1,500, without objection, and with plaintiffs' full knowledge, and had but 23 feet further to go to complete the flume when the temporary injunction was granted. The court viewed the premises. *Held*, that it was not an abuse of discretion to dissolve the injunction.

Appeal from district court, Lewis and Clarke county; HORACE R. BUCK, Judge.

Action by Henry Klein and Elizabeth Constans against Joseph Davis and others for damages and for an injunction. Temporary injunction dissolved. Plaintiffs appeal. Affirmed.

On the complaint filed, the plaintiffs obtained from the judge of the district court a temporary restraining order. The defendants moved to discharge the order, on affidavits by them filed, and on the

complaint. The order was discharged, from which plaintiffs appeal to this court. It appears from the complaint that the plaintiffs are the owners of certain premises lying in a gulch, which, for convenience of designation, will be called the "Dumping Ground." It is described by metes and bounds. That about April 15, 1891, defendants entered upon said ground, and commenced to excavate and tear up the soil, and wash out the gold therein contained, and convert the same to their own use, and proceeded to tear out a retaining dam of plaintiffs, and to run down *débris* and mining tailings upon said ground, (the dumping ground so above designated,) to the damage of plaintiffs in \$2,000; and have extracted gold-dust therefrom to the value of \$3,000, the property of plaintiffs. The prayer is for damages and injunction. Upon this complaint alone application was made to the district judge for a temporary restraining order, which was granted. On the motion to dissolve the order, the defendants filed affidavits. These affidavits fully deny that defendants have torn out any retaining dam of plaintiffs; deny that defendants have taken any of the gold in the ground or converted the same to their own use; and, in fact, deny all the equities set up by plaintiffs, except in the matter more fully set out below. The judge of the district court, at the request of the parties, and accompanied by a representative of each side of the litigation, went upon the ground, and made a personal examination of the same in the presence of such representatives. It further appears from the affidavits of defendants, and we state only that which is fully conceded by all parties, and omit all in regard to which there is any controversy, that the defendants own another piece of ground, south of the dumping ground, and up the gulch therefrom, and adjoining the same. This latter piece we will designate as the "Mining Ground." The title to the mining ground and the easement in the dumping ground (below described) came to defendants by mesne conveyances from the same source. The mining ground was described in the first conveyance as "the following described placer mining claim, situated," etc.; describing it by metes and bounds. From the same source of title came to the defendants an easement on the dumping ground. That easement is described as "a right of dumping tailings from the above described ground [the mining ground] upon that portion of said lot 74, [describing the ground, which we designate as the "dumping ground;"] the said parties of the first part covenanting and agreeing not to interfere with the said party of the second part in his exclusive right of dumping tailings," etc. This description of the easement is that contained in the first deed in the chain of title which ends in the defendants. Plaintiffs claim that the easement purports to be enlarged in one of the subsequent mesne conveyances. But that will not be noticed. We will take the description of the easement as originally granted, in regard to which there is no controversy that it came to defendants. It is also shown by defend-

ants' affidavits that they and their predecessors had the same easement by prescription for 13 years. As to the alleged trespasses, which plaintiffs desire to restrain, it is shown that, in order to fully use the right to convey tailings upon plaintiffs' said land, it was necessary to sink a flume upon the ground; and that defendants commenced such work in April, 1890, and since then have been engaged in sinking a trench for such flume, and had dug it for a distance of 750 feet, at an expense of \$1,500, from the lower part of the dumping ground up to within 28 feet of the mining ground; that the plaintiffs had full knowledge of said operations, and never objected thereto, or disputed defendant's rights, until they reached the point 28 feet from the mining ground, and this action was commenced. It is conceded that plaintiffs own the dumping ground, and that defendants own the easement thereon; that defendants' estate in the premises is the dominant one, and plaintiffs' the servient. There is no denial of the allegation that it is necessary to place a flume upon the dumping ground, in order to fully exercise the right of dumping the tailings.

Comly & Foote, for appellants. *B. Platt Carpenter*, for respondents.

DE WITT, J., (*after stating the facts*.) An important question has been presented by counsel; that is to say, whether, the right to dump tailings granted to defendants, such grant included the right to run a bed-rock flume across the dumping ground; such flume, it being claimed by defendants, was necessary to the exercise of the right to dump tailings. This question is interesting, and largely the gist of the case, and, as it seems to us, should be determined upon a full investigation of the facts, and the nature, character, and proposed uses of the flume. This could be done upon a trial. The matter is now before us only on the complaint and affidavits, on an appeal from an order dissolving a temporary injunction. Aside from the point just referred to, we find that all of plaintiffs' alleged equities are denied by the defendants' affidavits. The question of law that we have noticed we do not feel impelled to investigate at this stage of the case, as it is before us upon a pleading and affidavits only, which are, each in itself, *ex parte* in character; and the allegations are not subjected to cross-examination, which would bring out all the facts as upon a trial. It appears to us that a clear and full knowledge of the facts in relation to the flume would greatly aid a court in finally determining whether its proposed use was within the grant of the easement to dump tailings. We leave that matter for the investigation of the lower court, for the reason that the question of the dissolution of the temporary injunction can be decided upon other grounds. The proposed flume was a considerable enterprise. It extended 750 feet. It had been in construction for a year and a half. Only 28 feet remained to be built. Plaintiffs stood by for a year and a half, and offered no objection to the prosecution of the work, until only 3 or 4 per cent. of the whole remained to be done,

and they then concluded that irreparable injury was about to be done them by the completion of these 28 feet. An injunction would not apply to the past work. It was only a matter of restraining the completion of a few feet of a large work. It is noticed above that all the allegations as to taking out gold and tearing down the dam are denied. Therefore the only question is whether the district judge abused his discretion in dissolving the temporary injunction as to completing the 28 feet of flume. The judge went upon the premises and made a personal examination. "The granting or refusing of an injunction is a matter of discretion in the court below." *Mining Co. v. Murray*, 9 Mont. 475, 23 Pac. Rep. 1022, citing the early cases of *Nelson v. O'Neal*, 1 Mont. 284, and *Atchison v. Peterson*, Id. 361. We are of opinion that there was no abuse of discretion by the district judge, and his order dissolving the injunction is affirmed.

BLAKE, C. J., and HARWOOD, J., concur.

POWER *et al.* v. KLEIN *et al.*

(*Supreme Court of Montana*. Aug. 31, 1891.)

INJUNCTION—DESTROYING EASEMENT.

A complaint which alleges that plaintiffs own mining claims adjoining and above defendants' land, and that they have a right to dig trenches and construct flumes across defendants' land, and have so constructed trenches and flumes, which defendants are filling and destroying, and will continue to do so unless restrained by order of court, shows a *prima facie* case for granting a temporary injunction.

Appeal from district court, Lewis and Clarke county: HORACE R. BUCK, Judge.

Action by Thomas C. Power and others against Henry Klein and others for injunction. Temporary injunction granted. Defendants appeal. Affirmed.

Comly & Foote, for appellants. B. Platt Carpenter, for respondents.

DE WITT, J. This action is for damages and injunction. It is a companion to the case of *Klein v. Davis*, 27 Pac. Rep. 511, (just decided.) The defendants therein are the plaintiffs herein. The plaintiffs herein filed their complaint, praying that the defendants be enjoined from interfering with the construction of the flume described in the case of *Klein v. Davis*. The same proposition of law will arise in this case as to the extent of the easement in the right to dump tailings. The plaintiffs, upon their complaint, obtained from the district judge a temporary injunction. The defendants did not move to dissolve, or make any showing by affidavits or answer why the injunction should not be granted. They appealed directly from the order granting the temporary injunction. Nothing is before this court but the complaint. Its allegations are undenied, and for the purpose of this review are taken as true. We do not know what may develop when an answer is filed, and evidence introduced, if the case goes that far, denying the alleged equities of plaintiffs. The question of the extent of the easement may be then tried upon a full hearing of the facts on each side. The complaint itself,

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we are of opinion, sets up a *prima facie* case for a temporary injunction, and this in consideration of the fact that the district judge examined the premises, and had an opportunity to form a conclusion which is not afforded to this court. We do not discover that there was an abuse of discretion by the judge of the court below. See cases cited in *Klein v. Davis*. The order granting the temporary injunction is affirmed.

BLAKE, C. J., and HARWOOD, J., concur.

SALLE v. MAYER. (No. 14,117.)

(*Supreme Court of California*. Sept. 12, 1891.)

CREDIBILITY OF WITNESS—CONTRADICTION—RECORD OF FORMER PROCEEDINGS—CROSS-EXAMINATION—HOSTILITY BEFORE TRIAL—EVIDENCE.

1. A tenant, in an action against his landlord for money expended and work done, testified on cross-examination that at the time of the landlord's entry he did not "claim to be in possession under a lease, because there was no lease." Thereupon, for the purpose of contradicting him by showing a former admission that his possession was that of a tenant, the landlord offered a transcript in a former action between them, wherein the tenant had recovered damages for the said entry. The witness was not asked what he had admitted or alleged in the former action; nor was his attention called to the transcript. *Held*, that it was not proper at that time for the purpose proposed.

2. Where a tenant, in an action against his landlord, produces a written statement of account, made nearly a year before the trial, the exclusion of an inquiry, on cross-examination, as to what his feelings towards the landlord were at the time he made the statement, is not prejudicial; since it was material, only, what his feelings were at the time he testified.

3. The testimony of the tenant that he was induced to go on the land by the verbal promise of the landlord that he would give him a five-years lease, and that after his removal he refused to execute it, but told him to go on and cultivate the land, and that he would pay him for the work, is not objectionable, as proving a lease for more than one year that is not in writing, where the tenant claimed nothing under a lease, and the testimony was intended only to explain how he came to be upon the land.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Assumpsit by Salle against Mayer. There was judgment for plaintiff, and defendant appeals. Affirmed.

Reymert, Orilla & Reymert, for appellant. Elmer E. Rowell and Willis, Cole & Craig, for respondent.

VANCLIEF, C. This action is of the nature of a common-law action of *assumpsit*. The complaint contains three counts: (1) For goods sold and delivered; (2) for money paid for the use of the defendant; and (3) for labor performed by plaintiff for the defendant. As to the first count, defendant's answer admits the sale of the goods, but pleads payment. As to the second, the answer merely denies that the defendant "is indebted to plaintiff in the sum" demanded, or in any other sum. As to the third count, the answer simply denies that plaintiff performed the alleged labor, or any labor, for defendant "at his

instance and request." The answer alleged counter-claims against the plaintiff for money paid for plaintiff's use, for money loaned, for personal property of defendant converted by plaintiff to his own use, and for pasturing plaintiff's cow. The balance of plaintiff's demand, after crediting defendant with payment of \$129.89, is \$873; and the amount of defendant's counter-claims is \$673. The case was tried by a jury, whose verdict was for plaintiff in the sum of \$500, upon which judgment was rendered. The appeal is from the judgment, and from an order denying defendant's motion for new trial.

1. The point that the evidence is insufficient to justify the verdict is not sustained; for, although the evidence is conflicting, that on the part of the plaintiff sufficiently tends to prove that a balance of \$500 was due from defendant to plaintiff, to justify the verdict.

2. It appears that plaintiff, with his family, was residing on defendant's land—a tract of 115 acres—from December, 1887, until February, 1889, during which period the alleged indebtedness of defendant to plaintiff accrued. The plaintiff testified that he was induced to go on the land by a verbal promise of defendant that he would execute to plaintiff a lease of the land for a term of five years; that after his removal the defendant refused to execute the lease, but told plaintiff to go on and cultivate the land, and that he (defendant) would pay for the work. Defendant's counsel moved the court to strike out "all the testimony in regard to the contract for the lease, * * * on the ground that the lease was for more than a year, and not in writing." It is insisted that the denial of this motion was error; but the testimony was not intended to prove a lease, but only to explain how plaintiff was induced to remove his family upon defendant's land. Plaintiff claimed nothing under the lease which he said had been promised by defendant, but distinctly testified that it was never executed. The testimony, therefore, was not objectionable on the ground stated.

3. While testifying in his own behalf, plaintiff produced a written statement of accounts between himself and defendant, which he said he had made nearly a year before the trial. This statement was marked, "Plaintiff's Exhibit One." On cross-examination defendant's counsel asked the following question: "What were your feelings toward the defendant at the time you made plaintiff's Exhibit One?" The court sustained an objection to this question, and it is claimed that the ruling was prejudicial error. But, conceding that it was error, I think it was harmless. It was material that the jury should have been informed what were the feelings of the witness towards the defendant at the time he was testifying. What they were 9 or 10 months before could have been material only by virtue of the *prima facie* presumption that unfriendly feelings usually continue 9 or 10 months. But, without the aid of this presumption, it must have appeared to the jury that the feelings of the plaintiff and defendant towards each other were hostile at the

time of the trial, and this was doubtless considered by the jury in estimating the credibility of plaintiff's testimony.

4. Before the defendant opened his case, and upon cross-examination of the plaintiff, defendant's counsel asked the following question: "Did you, on February 13, 1889, when defendant threw your things out, claim to be his tenant, and in possession of that place as his tenant?" The court sustained an objection to this question, but the witness answered the question as follows: "At that time I did not claim, and could not claim, to be in possession under a lease, because there was no lease." Thereupon, "for the purpose of showing the relation of plaintiff and defendant, February 13, 1889, and the character of plaintiff's possession," and to show a former admission of plaintiff that he was in possession as tenant, defendant's counsel offered in evidence what he called the "judgment roll" from a justice's court in a former action between the parties to this action, wherein the plaintiff herein recovered from the defendant \$50 damages on the following complaint: "(1) That on the 13th day of February, 1889, the defendant entered the premises of the plaintiff in the town of Rincon, and unlawfully and willfully and maliciously broke open the plaintiff's barn, and turned out the plaintiff's horse, which became estrayed; and said defendant also willfully and maliciously entered a building used and occupied by plaintiff as a cook-house and store-house, and took therefrom the farming tools, consisting of shovels, hoes, etc., and otherwise willfully and maliciously trespassed upon said premises. Plaintiff further alleges that, without giving legal notice, the defendant ordered plaintiff's family to quit said premises, and abused the wife of the plaintiff with rude and violent language, inspiring her with terror, and causing her great mental suffering. (2) That the plaintiff was damaged by said unlawful act of defendant in the sum of two hundred and ninety-nine dollars and costs." The answer to this complaint was merely a denial of each and every allegation of the complaint. Upon objection to the introduction of this transcript from the justice's court, the court ruled that it was not proper to introduce it at that time for the purposes proposed, and said: "It might be competent at some other time. You simply ask a witness a certain question, and then wish to contradict him at this time." In this there was no error. The witness had not been asked any question as to what he had admitted or alleged in the action in the justice's court; nor had his attention been called to the transcript of the case. If that transcript contained evidence relevant for the defense, it was not proper for defendant to introduce it at that time for the purposes proposed. It was afterwards offered, however, at a proper time, and excluded by the court; but the defendant did not except to the ruling of the court in finally excluding it.

5. The instructions of the court to the jury were as favorable to the defendant as he was entitled to ask, and there was no exception to any instruction given.

The instruction asked by defendant and refused by the court was not applicable to the evidence. There was no evidence tending to prove such an agreement or understanding as that stated in the instruction refused. I think the judgment and order should be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

91 Cal. 87

LATTIN *et al.* v. HAZARD. (No. 14,266.)

(Supreme Court of California. Sept. 5, 1891.)

SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY.

An agreement to convey land in consideration of the vendee building a dummy railroad through and by the vendors' premises, and operating the same for a period of 10 years, fare not to exceed a certain sum, cannot be enforced until the vendee has performed his part of the agreement by operating the road for the time specified, and at the fixed rate; since Civil Code Cal. § 3386, provides that "neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation."

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by Emma J. Latlin and others against Henry T. Hazard for specific performance of an agreement to convey land. Judgment for defendant on demurrer. Plaintiffs appeal. Affirmed.

Dooner & Burdett, for appellants. O'Melveny & Henning, for respondent.

TEMPLE, C. Plaintiffs appeal from a judgment against them on demurrer to their complaint. It is their second appeal, the former (85 Cal. 58, 24 Pac. Rep. 611) being from a similar judgment. The complaint was amended so as to avoid the defect then pointed out, and is now questioned upon other grounds. The action is to enforce specific performance of an agreement between James McLoughlin, as party of the second part, and a number of persons, who apparently owned severally various tracts of land in Los Angeles or the vicinity. Some of them agreed to convey to him certain lands and to give him the right of way for a street railroad, in consideration of which he agreed to extend and operate his steam-dummy railroad through and by their lands on a route designated. The party of the second part further stipulated "that the road shall be well and substantially built, and operated by steam-dummy motive-power, for a period of not less than ten years, and shall have a carrying capacity and speed equal to all the requirements of the said section and the business thereof." He further agreed that the fares should not exceed certain specified rates, "and that the rate so established shall not be raised for a period of ten years." It was stipulated that the subscriptions by those who gave land should be by their several grants of land, contiguous to the line of the railway, several-

ly conveying a clear title in every case, at the date of the agreement, or within 20 days thereafter, to be held in escrow until the completion and operation of the railroad. It is averred that the contract had been fully performed by McLoughlin. The contract was dated the 9th day of March, 1887. It does not appear when the suit was commenced, but the amended complaint was filed November 26, 1890. It is evident that some parts of the contract have not yet been performed by McLoughlin, as whose assignee plaintiff brings this suit.

The first point raised on the demurrer is that specific performance cannot be decreed, because, in the nature of things, the remedy is not mutual; that the contract could not be specifically enforced against McLoughlin, and has not been fully performed by him, "or nearly so;" and that the want of entire performance cannot be fully compensated in damages, because such damages cannot be estimated, nor does the plaintiff offer such compensation. The appellant does not contend that specific performance could have been enforced against McLoughlin, but contends that the deeds were to be delivered upon completion of the work, meaning the extension of the road, and that the road has been so constructed. As to the agreement to operate the road in a certain stipulated mode, with a stipulated efficiency, and at specified rates for 10 years, she says that is an independent covenant, upon which an action might lie for a breach. Unfortunately, that is an argument against her right to specific performance. Section 3386 of the Civil Code seems decisive of this point. Unless the remedy be mutual, specific performance will not be decreed, except where the other party has performed everything to which the other is entitled under the same obligation, or nearly so, and full compensation for any want of entire performance is made. The continued operation of the road was an important part of the consideration for the deed. The contract therefore is not nearly performed. Indeed, except by the general allegation that McLoughlin has fully performed, there is no averment that the road is now being operated. McLoughlin may be fully entitled to a conveyance, according to the terms of his contract, without being able to maintain this action. The rule upon this subject is sufficiently stated in the section of the Code cited, and the authorities may be found collected in Pomeroy on Specific Performance of Contracts, § 162 et seq. It makes no difference whether the covenants are concurrent or not. The agreement that McLoughlin will operate the road for the stipulated period in the mode agreed upon is a substantial and important part of the obligation, which has not been performed, and of which specific performance cannot be enforced by a decree. *Cooper v. Pena*, 21 Cal. 403; *Vassault v. Edwards*, 43 Cal. 458. Damages are not claimed in the complaint, nor is there an averment of an assignment of such a cause of action to plaintiff. Taking this view of the first point presented on the demurrer, it becomes unnecessary,

and perhaps it would be improper, to discuss the other important questions suggested. We think the judgment should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

90 Cal. 603

GARNSEY *et al.* v. GOTHARD *et al.* (No. 14,025.)

(*Supreme Court of California.* Aug. 31, 1891.)

TRUSTS IN LAND—HOW CREATED.

1. A daughter gave her father an absolute deed to lands, and the next day made a writing intended as a will, but which was void for irregularity, declaring that she deeded the land to her father for certain purposes therein stated. In a subsequent action concerning the land, the father filed a verified answer, averring that the land was conveyed to him in trust. *Held*, that this answer was sufficient to satisfy Civil Code Cal. § 852, which provides that no trust in relation to land is valid unless created or declared by a written instrument signed by the trustee.

2. The deed was not invalidated by the void will.

In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Action by Garnsey and others against George Gothard and Thomas Edwards for specific performance of contract, and to determine which defendant was entitled to payment of the contract price. The case turned entirely on the latter point. Judgment for defendant Gothard, and an order denying defendant Edwards a new trial, from which he appeals. Reversed.

Samuel Minor and Minor & Woodward, for appellants. *Wicks & Ward and Scarborough & Waterman*, for respondents.

SHARPSTEIN, J. This action is for the specific performance of a contract whereby defendant Gothard and his late wife, Elizabeth Jane, agreed to convey to the plaintiffs a certain tract of land, and 40 shares of water stock appurtenant thereto, upon their paying the stipulated price therefor, in certain installments, all of which, excepting the last, had been paid before the commencement of this suit, as stipulated; and the plaintiffs are ready and willing to pay the last installment to such person or persons as the court may determine is or are entitled to receive the same. The defendants, Gothard and Edwards, each claim to be entitled to receive said last installment. And defendant Gothard claims that he is also entitled to the installments which have been paid to defendant Edwards since the death of said Elizabeth Jane. The contest is wholly between the defendants, Gothard and Edwards, as to which of them is entitled to receive and hold the proceeds of said sale. The decision and judgment were in favor of Gothard and against Edwards, and the latter appeals from the judgment, and order denying his motion for a new trial.

The facts found by the court are that

the allegations of the plaintiffs' complaint are true. That entitled them to the relief prayed by and granted to them. The residue of the findings are upon the issues raised by the answers of defendants, Gothard and Edwards, as to their respective claims to the money paid and to be paid by plaintiffs under their contracts with the Gothards.

The first finding upon the issue is that "Elizabeth Jane Gothard (the wife of the defendant George Gothard, and mother of B. T. Gothard) on the 11th day of January, 1887, made, executed, and delivered to the defendant Thomas Edwards a conveyance of her interest in the real estate described in the plaintiffs' complaint herein. The conveyance was made in view of the approaching death of said Elizabeth J. Gothard, and for the purpose of putting the legal title to said realty in said Edwards, to collect the money then due on the contract for the sale thereof in said complaint set out, and hold the same in trust for Bertrude Gothard alone, and with an oral understanding then and there with said Edwards to that effect, and without other consideration than such understanding." The next finding is "that thereafter, to-wit, on the 12th day of January, 1887, the said Elizabeth Jane Gothard, in anticipation of death and *cum animo testandi*, made and signed" a paper, of which a copy is inserted in said finding, and among other things contains the following: "I deed to my father, Thomas Edwards, all interest in that property at Anaheim that I now own, being the same that was given me by deed of gift, except \$1,200 to pay the mortgage thereon; also \$500 that we received on the sale of the said land now due. \$3,100 which I request be used as follows: \$200 to be paid to Mr. Melrose, commission fees for selling the said place; \$100 to my husband, being in lieu for the \$100 that he has paid out of the \$500 that I gave him from my separate property; \$1,200 to be used to the best advantage in buying a lot for my remains, and erecting a good stone thereon, fencing the said lot in good shape; also to pay what portion of my funeral expenses shall be left unpaid. The remainder, which is \$1,600, is to be kept for the use of my child, Bertrude Thomas Gothard, until he becomes 21 years old; all interest on the same to be invested and added to the principal, with the exception of ten or fifteen dollars a year to keep my grave and lot in good condition. If he dies before the age of 21 years, then to my brothers' and sisters' children. It is also my desire that my burial lot shall be put in my child's name. [Signed] ELIZABETH J. GOTHARD." The court finds that the paper was not olographic, but was written by said Edwards, and was only subscribed by said Elizabeth Jane Gothard, and was without attesting witnesses; and that she died within less than twelve hours thereafter; and said paper "was intended by said decedent as her last will and testament, but that she died intestate and leaving no estate, and said attempted will was worthless for any purpose, and that she left no heirs at law other than the said George Gothard, her

surviving husband, and said Bertrude T. Gothard, her minor child." From the foregoing facts the court finds, among others, the following conclusions of law: "That the said sum of \$1,398.95 so due from plaintiffs shall be paid by them into the hands of said George Gothard, guardian; that the defendant Thomas Edwards is indebted to the estate of the minor B. T. Gothard in the sum of \$1,971, less \$211."

It is only on the supposition that the court lost sight of the fact before found, that said Elizabeth Jane Gothard conveyed her interest in said property to defendant Edwards, that we can account for the finding of these conclusions of law. There is nothing in the findings of fact, much less in the evidence, to base such a conclusion upon. The finding is that "Elizabeth Jane Gothard, on the 11th day of January, 1887, made, executed, and delivered to the defendant Thomas Edwards a conveyance of her interest in the real estate described in the plaintiffs' complaint." That imports a deed absolute on its face, as the evidence proves it to be. But the evidence *alunde* the deed, at least, tends to show that it was made, as the court finds it was, for the purpose of putting the legal title to said realty in said Edwards, to enable him to collect the money then due on the contract for the sale thereof in said complaint set out, and hold the same in trust. If the evidence is sufficient to establish a trust, there is nothing in the evidence or findings of fact to support the decision that Edwards, under the trust, is not entitled to hold all of the money paid and receive all to be paid by the plaintiffs for a conveyance to them of the land described in their complaint. *A fortiori*, if a trust has not been established, he is entitled to receive and hold it. We think, however, that a trust is established; and that the objects for which it was created are specified in the paragraph above quoted from the writing, which the court finds was made and signed on the 12th day of January, 1887, the day following the execution of the deed to Thomas Edwards. We do not overlook the provision of the Code that "no trust in relation to real property is valid unless created or declared by a written instrument, subscribed by the trustee or by his agent thereto authorized by writing." Civil Code, § 852. The defendant Edwards, by his verified answer in this action, has declared in a written instrument, in the most solemn manner, that the property in controversy was conveyed to him in trust. We think that a sufficient declaration in writing to satisfy the requirements of the Code.

The contention of counsel for respondent Gothard is that the writing of the date of January 12, 1887, was intended as a will, and, being so intended, it nullified the deed of January 11, 1887; that the deed, which is properly executed, was vitiated by a subsequent futile attempt to make a will; that the two instruments are so blended as to constitute but one; and that both must stand or fall "with the sufficiency or insufficiency of the execution of the testamentary paper dated January 12, 1887." There are cases in which it is

held that a deed and will made upon the same day constitute one testamentary act; and other cases in which deeds have been held to be testamentary. But we are unable to find any case in which it has been held that a deed, otherwise valid, is rendered invalid by a void instrument subsequently made by the grantor. The theory of respondent Gothard's counsel does not appear to have been adopted by the court below. But we can conceive of no sounder or more plausible theory upon which the decision of the court below could be sustained. We think the decision clearly erroneous, and would modify or direct a modification of the judgment in accordance with the views above expressed, were it not for the fact that there is no finding on one of the material issues. By the contract between the Gothards and the plaintiffs the former agreed to convey with the land described therein a "water-right thereunto appertaining, viz., forty shares." In his answer defendant Gothard states that he is the owner of said forty shares of water stock, and that it "is distinct and separate, a distinct property from said land." This presents an issue upon which there is no finding, and, under our view of the case, a complete determination of it could not be had in the absence of such a finding. We think appellant is entitled to receive and hold all the moneys paid or to be paid for the land conveyed to him by Elizabeth Jane Gothard. But if the water stock is owned by George Gothard he is entitled to the money paid or to be paid for that. And it is necessary that the court should find who owns the water stock, and what proportion of the money paid or to be paid by the plaintiffs is for said water stock. So much of the judgment only as adjudges "that on payment of the money remaining due by plaintiffs on the contract of purchase set up in plaintiffs' complaint, to-wit, the sum of \$1,398.95, the said Thomas Edwards and said George Gothard convey to plaintiffs herein the land and water stock in the complaint described," is affirmed. With that exception the judgment is reversed, and the cause remanded, with directions to the court below to try and find upon the issue raised by the allegation of defendant George Gothard that he is the owner of said 40 shares of water stock, and upon the trial of said issue the respective parties will be allowed to introduce any evidence pertinent to said issue.

We concur: HARRISON, J.; PATERSON, J.; McFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.

91 Cal. 1
STANTON v. QUINAN *et al.* (No. 14,049.)
(Supreme Court of California. Sept. 2, 1891.)

RIGHTS OF VENDOR—RE-SALE BY VENDEE.

1. On May 13, 1887, A. contracted with B. for the sale of land for \$1,000 cash, \$1,000 May 12, 1888, and \$1,500 May 12, 1889; deed to be executed on second payment; balance secured by mortgage on the land. On May 17, 1887, B. contracted to sell the land to C. On December 16, 1887, A. executed a deed to B., and took a mortgage on the land to secure the deferred payments. One note for \$1,000 was made payable May 16,

1888, and one for \$1,500, May 16, 1889. All parties were fully informed as to the contracts of May 18th and 17th. *Held*, that A. did not lose his lien by changing the form of the security and the date of payment.

2. The equities acquired by C. in the land were no greater than those of his vendor.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action by William F. Stanton against George Quinan, Thomas W. Grimes, and others to foreclose a mortgage. Decree for plaintiff. Defendants appeal. Affirmed.

Elmer E. Rowell and Willis & Cole, for appellant. *Harris & Gregg*, for respondent.

TEMPLE, C. This action is to foreclose a mortgage executed by defendant Quinan to one Salton. The appeal is upon the judgment roll. May 13, 1887, Salton contracted in writing with Quinan for the sale of the property described in the mortgage for \$3,500,—\$1,000 payable at once, \$1,000 on or before May 12, 1888; and \$1,500 on or before May 12, 1889. When the second payment was made, Salton was to convey to Quinan, receiving a mortgage on the property for the last payment. May 17, 1887, Grimes purchased the property from Quinan for \$4,000, payable \$1,500 in cash; \$1,900, May 16, 1888; and \$1,500, May 16, 1889. The contract was in writing, and contained a stipulation to the effect that upon full payment Quinan would convey the premises to Grimes free from all incumbrances. The two deferred payments were secured by negotiable promissory notes. December 16, 1887, before any of the deferred payments in their contract became due, Salton conveyed the property to Quinan, and took from him a mortgage to secure the money then due on the contract, made payable according to two promissory notes, being the mortgage and notes sued upon in this action,—one note for \$1,055.90, due May 16, 1888, with interest at the rate of 10 per cent. per annum; the other for \$1,574.38, payable May 16, 1889, with interest at 10 per cent. The rate of interest is the same as in the original contract; the notes became due four days, respectively, after the payments were to have been made under the contract. Before the execution of the mortgage, Salton knew of the purchase by Grimes, and the terms of his agreement with Quinan, and of the payment made by him; and the plaintiff purchased the mortgage with full knowledge of such facts. Grimes, also, at the time of his purchase, knew all the facts with reference to the contract between Salton and Quinan.

Appellant contends that Salton took the mortgage subject to his equities as purchaser from Quinan, and in this we agree with him; but we do not agree with his further contention that his interest in the land is not subject to the lien of the mortgage. Appellant was entitled to such rights with reference to the property as Quinan had under his contract. Salton and Quinan could not rescind it, or make its conditions more onerous. Had he asked for such relief, perhaps he would

have been entitled to a decree that, upon paying the amount due upon the contract, the mortgage should be satisfied, and a deed made to him for the property. But he does not propose to pay anything. The difference between the amount due on the contract and the mortgage is but trifling, and is due to compounding the interest before it was due. The appellant is not complaining of that, but contends that by the change in the form of the debt and security Salton lost his lien. In this he is mistaken. There is no merit in the objection made to the complaint; and, if there were, such an objection could only be made by special demurrer. We think the judgment should be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

91 Cal. 63

FERGUSON v. McBEAN *et al.* (No. 13,953.)

(*Supreme Court of California*. Sept. 5, 1891.)

CONTRACTS — PAROL EVIDENCE TO VARY — PRIVILEGED COMMUNICATION.

1. One who in writing assigns a written contract to another, knowing that a third person was to be equally interested with the assignee in the rights assigned, cannot show by parol that such third person was intended to be bound by an agreement which he did not sign, executed by the assignee in consideration of the assignment.

2. Evidence that the contract assigned was really owned by another person than the assignor was properly excluded as immaterial.

3. Communications to an attorney, which were intended to be imparted by him to others, are not privileged.

In bank. Appeal from superior court, San Bernardino county; JOHN R. AIKEN, Judge.

Action by M. L. Ferguson against Alexander McBean and A. V. Bills on contract for the sale of lands. Trial to the court. Judgment for plaintiff, and defendants appeal. Reversed.

E. Crossman and Hendrick & Younken, for appellants. *Rowell & Rowell and Hunsaker & Britt*, for respondent.

BEATTY, C. J. In order to a proper understanding of the various questions involved in this appeal it is necessary to state pretty fully the facts out of which the case arises. On June 7, 1887, the plaintiff, a married woman, living separate from her husband, entered into a written contract with the Colton Land & Water Company, whereby said company agreed to sell and she agreed to purchase certain real estate, situate in San Bernardino county, for the sum of \$57,000, to be paid \$1,000 cash on the delivery of the agreement, one-third of the balance in 15 days, and the remaining two-thirds in 6 and 12 months. It was stipulated that time was of the essence of the contract, and that failure by the vendee to comply with its terms should release the vendor from all obligation to convey, and work a forfeiture of all sums paid. It was further stipulated that at the time of paying the

first one-third of the purchase money the vendee should procure from one P. A. Raynor a release and settlement of certain claims of Raynor against the vendor then in litigation. In pursuance of the contract, and at the date of its delivery, Mrs. Ferguson made the cash payment therein provided of \$1,000, and thereafter obtained the consent of the vendor, indorsed in writing on the contract, extending the time for making the second payment to and including the 12th day of July, 1887. At the time of obtaining the extension she assigned the contract to the defendant McBean,—that is to say, her written assignment was to McBean alone; but she claims that it was in fact made to the defendants McBean and Bills jointly, such being the understanding and intention of the parties. In consideration of said assignment she received from McBean a contract in writing, signed by him alone, in the following terms: "It is hereby agreed on the part of Alexander McBean, of Oakland, California, to and with Mrs. M. L. Ferguson, that in case the said Alexander McBean shall sell or purchase the interest of the Colton Land and Water Company in and to certain lands, water, and agreements held in common with P. A. Raynor, under and by virtue of an agreement by and between said company and M. L. Ferguson, dated June 7, 1887, or any extension of time granted by said company or which may be given to said McBean, that he will pay to said Mrs. M. L. Ferguson or assigns the sum of three thousand dollars at the time of the consummation of said sale or purchase. Witness my hand and seal this 30th day of June, 1887. [Seal.] ALEXANDER McBEAN." But, although executed only by McBean, the plaintiff claims that this was understood to be and was equally the contract of Bills. Bills is a step-son of McBean, and it clearly appears that they were not only connected very closely in their personal relations, but that they were at and about this time engaged in the same kind of speculation in the same locality, and generally conversant each with the doings of the other; but they both deny that Bills had anything to do with the transaction between McBean and the plaintiff. Shortly before the time for making the second payment, McBean, who had gone to San Francisco, as he says, for the purpose of raising money or interesting parties with means to conclude the purchase, telegraphed to Colton announcing his failure, whereupon the plaintiff exerted herself, as she claims, to procure money for Bills, in order that he might make the second payment, and prevent a forfeiture of the contract. She claims that she did raise this money, and that Bills used it in making the second payment, and in obtaining a conveyance of the property in pursuance of the contract. The defendants deny this, and claim on the contrary that the money procured through the exertions of plaintiff was obtained for P. A. Raynor, who, in conjunction with Bills, subsequently purchased the same property mentioned in the contract, not, however, in pursuance of its terms, but under a separate and independent agreement en-

tered into between them and the owner after the expiration of the time, as extended for plaintiff's second payment. As to all these matters, the evidence is extremely conflicting, but it is not disputed that on the 12th day of July, the very last day for making the second payment under plaintiff's contract, Bills went to the office of the Colton Land & Water Company, and proposed to purchase the identical property described in the contract, and offered to pay on the purchase the same amount stipulated in the contract as a second payment. The company refused to entertain his proposition unless he produced the release of Raynor's claims, as provided by the contract. He offered to comply with this condition if they would give him until the next day to get the release, to which offer the company assented; and accordingly, on the following day, July 13th, Bills delivered Raynor's release, paid the sum of \$19,000, and received a conveyance of the land to himself. In making the purchase he claimed and received credit for the \$1,000 originally paid by the plaintiff; that is to say, he was credited on the purchase price of \$57,000 with the full sum of \$20,000, although he paid but \$19,000, and gave his notes for the balance of \$37,000, secured by mortgage on the land. After the conclusion of the purchase, and on the same day, he conveyed a half interest in the land to P. A. Raynor. The plaintiff thereafter demanded of each of the defendants payment of the sum of \$3,000, as provided in the written contract of June 30th, above quoted, and, payment being refused, she brings this action to recover that sum, with interest.

In her complaint, after setting out her agreement for the purchase of the land, and alleging the payment of \$1,000 at the date of its delivery, she proceeds as follows: "That on the 30th day of June, A. D. 1887, plaintiff, at the special instance and request of defendants, assigned to them the contract aforesaid, and all her interest therein, the said defendants and each of them promising and agreeing that in case they or either of them should purchase or sell the property of the said Colton Land and Water Company, and make the payments to said company as in said contract specified, and within any extension of time granted in which the same might be made, that they or either of them would pay to plaintiff the sum of three thousand dollars. And at the time of the making of said agreement between plaintiff and defendants it was agreed that the written evidence thereof should be between plaintiff and defendant McBean, but that defendant A. Bills should be equally interested therein, and that such written agreement should be binding upon both of defendants alike. And in case of either of the defendants purchasing or selling the said property of the said Colton Land and Water Company they would pay to plaintiff the sum of three thousand dollars. And that pursuant to said understanding defendant Alexander McBean drew and signed the instrument in writing of which the following is a copy, [here follows a copy of the contract of June 30th, above

quoted:] And that the consideration for which said assignment was so made to defendants was their agreement to pay said sum of three thousand dollars, as aforesaid." She then alleges a purchase of the property by defendants on July 12th; demand on them for payment of \$3,000, as provided by the contract of June 30th, and their refusal to pay; and prays judgment for that sum and interest. To this complaint each of the defendants demurred, generally for the want of facts, and specially on the ground of misjoinder of defendants, in that it appeared that Bills was not a party to or interested in the contract set out in the complaint. Their demurrers being overruled, the defendants answered separately, McBean denying that he ever bought any of the lands described in the contract, and Bills denying any connection with the contract of June 30th, or that he ever bought any land under or by virtue of plaintiff's contract with the Colton Land & Water Company. But neither defendant denied that said contract had been assigned to them. Upon these pleadings the parties went to trial, but during the progress of the trial, and after most of the evidence was in, the defendants, by leave of the court, filed amended answers, in which they separately denied any assignment of the contract of the Colton Land & Water Company to Bills, amplified their original denials on other points, and set up two additional defenses: *First*. That plaintiff was at the commencement of the action the wife of one J. B. Ferguson, and that the action did not concern her separate property. *Second*. That plaintiff was never the real owner of the contract of June 7th, which she pretended to assign to McBean, but that said contract, with all its rights and privileges, belonged to P. A. Raynor; and that plaintiff, knowing that Raynor was such owner, in making said pretended assignment was willfully and knowingly attempting to defraud McBean out of the sum of \$3,000. The case was tried by the court without a jury, and the findings and judgment were for the plaintiff. Defendants moved for a new trial, which was denied, and they unite in an appeal from the judgment and said order.

The most important question involved in the appeal is as to the liability of Bills on the contract upon which the action is founded. This question is raised not only by the demurrers to the complaint, but by numerous exceptions taken at the trial to rulings of the superior judge admitting oral testimony to the effect that Bills, although not named therein, was nevertheless a party to said contract. According to plaintiff's testimony, she knew at the time of the assignment of her contract that Bills was to be equally interested with McBean in the rights assigned, and was to be equally bound to pay the \$3,000. According to all the testimony, Bills was then present in San Bernardino, and in direct communication with the plaintiff. His interest, in other words, was fully disclosed at the time; and no reason existed—at least none is alleged—why he was not named as an assignee, and as a party to the agreement to pay for the assignment.

In short, it appears by the testimony more fully than by the complaint, though we think not more plainly, that the plaintiff deliberately chose to accept a contract in writing which did not name, nor by any of its terms bind, one of her intended assignees. Can she, under such circumstances, claim that he is bound? This is a question upon which there is a great conflict of authority in this country and England, and an adequate review of the cases in which it has been agitated would require a volume. We have neither time nor inclination to enter upon any such review, but content ourselves with saying that in our opinion the better reason and sounder policy are against the proposition. In England the rule seems to be pretty well settled, after much debate, the other way; but in the United States the weight of authority seems to be against the English rule. The cases in which the question has arisen are those in which an agent has contracted in his own name, and his principal has afterwards sued or been sued on the contract; and Judge Story, in his work on Agency, § 160a, says that the doctrine maintained in the more recent authorities is that, "if the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, he, the agent, will be liable to be sued and be entitled to sue thereon, and his principal also will be liable to be sued and be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it." But an examination of the authorities cited in support of this statement shows that they do not support it, as has been frequently pointed out. It is undoubtedly true that when the principal is undisclosed he may sue or be sued, but not when he is known, and especially not when he is present at the making of the contract. For a full and able discussion of the whole subject, see *Chandler v. Coe*, 54 N. H. 561, and *Gillig v. Road Co.*, 2 Nev. 216, and cases therein cited. Considered independent of authority, we think sound policy requires the enforcement, in cases such as these, of the general rule that a writing cannot be varied by parol. It is as important to know who has made a contract as to know its terms, and when the parties put it in writing there is no more reason or excuse for omitting the name of a known party, whom it is the intention to bind, than there is for omitting its most important stipulation. To allow such a practice opens the door in every case to such conflicts of evidence as this case illustrates upon a point which can be easily and forever set at rest by simply making the written evidence of the contract conform to the mutual understanding of the parties as to matters fully within their knowledge. We think the superior court erred in overruling the demurrers and in admitting the testimony referred to. This error compels a reversal.

of the judgment and order appealed from; but, as a new trial will be necessary, it is proper that we should dispose of some other questions likely to arise in the further progress of the case.

Although the plaintiff cannot recover on this contract against Bills, we see no reason why she may not recover against McBean upon pleadings properly amended. All the evidence in the record indicates pretty clearly collusion between McBean and Bills and Raynor, by means of which the two last named obtained the benefit of plaintiff's assignment to McBean. If in fact McBean turned the contract over to Bills and Raynor without a formal assignment of it, and they got the benefit of the assignment, and especially if McBean was a participant in their purchase, he became liable on his promise to pay the \$8,000.

The court erred in sustaining an objection to the offer to prove what plaintiff told Crossman, on the ground that it was a privileged communication. Crossman, as to that matter at least, was not the attorney, if he was her attorney at all; and, moreover, the statement, if made, was not intended to be confidential, but was made with the purpose of having it communicated to others.

The court did not err in excluding evidence that the contract with the Colton Land & Water Company was the property of Raynor. Whether it was or not is a question between Raynor and the plaintiff, to be litigated by them or their representatives. McBean got a valid assignment, and cannot be excused from paying the price because some one else may have a right to claim it from his assignor.

There is barely sufficient, but certainly not very satisfactory, evidence to sustain the finding that the plaintiff was, at the beginning of the action, living separate and apart from her husband, by reason of his desertion of her. There is no positive or direct evidence that he went away without or against her consent. And the evidence is likewise rather unsatisfactory on the point of the contract being her separate property, but we cannot say that it does not support the finding.

Other points made in the briefs are comparatively unimportant, and need not be particularly referred to. Judgment and order reversed, and cause remanded, with directions to the superior court to sustain the demurrers to the complaint, with leave to the plaintiff to amend as she may be advised.

WE CONCUR: DE HAVEN, J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.; HARRISON, J.; GAROUTTE, J.

91 Cal. 41

ALANIZ v. CASENAVE *et al.* (No. 14,156.)

(Supreme Court of California. Sept. 5, 1891.)

CANCELLATION OF DEED—FRAUD—PLEADING—CONFLICTING EVIDENCE.

1. A complaint for the reconveyance of real estate, which alleges that defendant, while acting as plaintiff's agent, proposed that she convey all her real estate to him for the purpose of managing the same, promising to reconvey on demand, that she was induced by his representations and promises to make the conveyances, and that at the time of making the prom-

ises he had no intention of performing them, but made them with the fraudulent purpose of inducing her to put the property in his hands that he might cheat and defraud her, sufficiently sets out the facts which constitute the alleged fraud.

2. The conveyance, under such circumstances, was without consideration.

3. Where a general fiduciary relationship exists, and confidence was reposed in the grantee, it is not necessary to allege or prove that the conveyance was taken with a fraudulent intent, in order to establish a constructive trust.

4. Where one, by means of a parol promise to reconvey, obtains an absolute deed without consideration from one to whom he stands in a fiduciary relation, the violation of the promise is constructive fraud.

5. Where the evidence is conflicting, the supreme court will not disturb the findings of the trial court.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action by Concepcion Alaniz against Pierre Casenave and Cayetana Casenave, his wife, for an accounting and reconveyance of real estate. Judgment for plaintiff. Defendants appeal. Affirmed.

Brousseau & Hatch and W. F. Williams, for appellants. *Smith, Howard & Smith and Smith, Winder & Smith*, for respondent.

TEMPLE, C. This action is for an accounting and to compel the reconveyance of real estate. The complaint charges that defendant Pierre is the husband of the other defendant, who is the niece and adopted daughter of plaintiff; that after their marriage, in 1870, defendant Pierre took charge of plaintiff's business, and has ever since continued to manage and control the same, as her agent; that in 1874 plaintiff sold some property, and placed the proceeds, about \$22,000, in the hands of said Pierre to manage for her; that with a portion of the money he purchased certain lots in Los Angeles, taking the deeds in her name, but retained the larger portion of the money; that on the 17th day of June, 1875, he proposed to her that for the purpose of managing her business she should convey all the lands to him, promising to manage and control the same for her, and reconvey on demand, and thereupon she conveyed all of the lands to him for the purposes mentioned; that she was living in the family of defendant at the time, had unlimited confidence in him, and was entirely under his control in business matters, being herself an illiterate and ignorant woman, entirely unacquainted with business, and was induced by his representations and promises to make the conveyances, and she is informed and believes that at the time of making the promises he had no intention of performing them, but made them with the fraudulent purpose of inducing her to put the property in his hands, that he might cheat and defraud her; that she had requested a reconveyance, which he refused to make; that he is indebted to her in a large sum, the amount of which she is unable to state, for portions of the money unexpended, and for rents received by him; and the proceeds of her property sold by him; that said defendant pretends that he never received from her, or for her use,

any money whatever, and that he did not receive said lands in trust, but purchased the same from her; that on the 22d day of May, 1888, said defendant conveyed said lands to his wife, the other defendant, by a deed of gift; that the said Cayetana was privy to all the fraudulent designs of her husband, and took the deed for the sole purpose of defrauding the plaintiff, and preventing the assertion of her rights, and in trust for the use and benefit of her husband.

The answer admits the relationship of the parties set out in the complaint, but denies that defendant Pierre was ever the agent of plaintiff, or managed any business for her in any capacity. Denies receiving any money for her. Denies that the lands were conveyed to him in trust, and avers that he purchased them for a valuable consideration. They deny that plaintiff was ignorant, illiterate, or unacquainted with business, or was under the control of said defendant, or was induced by any representations or promises to make the conveyances, or that he took the lands in trust or with any fraudulent intent. They also deny the indebtedness. They also charge that plaintiff had full knowledge of the conveyance to defendant Cayetana at the time it was made, and approved of it. That the deed was not made with any fraudulent intent, but in good faith, for the purpose of vesting the title in said Cayetana. All the facts alleged in the complaint are found by the court, except that the defendant Pierre, at the time he made the promises which induced plaintiff to convey the property to him, had no intention of fulfilling them, but made them simply with the fraudulent purpose of inducing her to put the property in his hands. On the other hand, the court finds: "Said defendant, at the time he made such representations and promises, had the intention in good faith of fulfilling the same, but afterwards conceived the design of claiming the same as his own." There is also a finding to the effect that said defendant still has in his hands \$23,700, money received for the use of plaintiff.

On this appeal the defendants make three points: *First*, the complaint does not state facts sufficient to constitute a cause of action; *second*, the judgment should have been for defendants on the findings; and, *third*, the evidence does not sustain the findings.

Under the first point the objection is that the facts which constitute the alleged fraud are not specifically set out, but we cannot agree with this proposition. A general fiduciary relation between the parties is averred; and that plaintiff reposed in the principal defendant unlimited confidence, and was entirely under his control, being herself ignorant and unacquainted with business; that he proposed the conveyances to enable him more conveniently to manage her business, and promised to hold and manage it for her, and to reconvey upon request. If the rule laid down in *Brison v. Brison*, 75 Cal. 525, 17 Pac. Rep. 689, is to be upheld, these facts, with the others, constitute a cause of action. It is not expressly alleged in the

complaint that the conveyances were without consideration, but such is the clear and necessary conclusion from the facts which are stated. The objections to the findings are necessarily of the same character, except that the court has failed to find the one fact of fraudulent intent existing at the time of the conveyance, but, on the contrary, finds that such fraudulent intent did not exist. But in the case of *Brison v. Brison*, supra, it was held that where a general fiduciary relation exists, and actual confidence is also reposed in the trustee, it is not necessary to allege or prove such fraudulent intent in order to establish a constructive trust, and the case of principal and agent is cited as an example of a fiduciary relation. In *Feeney v. Howard*, 79 Cal. 525, 21 Pac. Rep. 984, also written by Mr. Commissioner HAYNE, it is said, referring to the above case, that it was held: "If, by means of a parol promise to reconvey, a party obtains an absolute deed without consideration from one to whom he stands in a fiduciary relation, the violation of the promise is constructive fraud, although at the time of the promise there was no intention not to perform." The fiduciary relation, it is said, is one of the facts constituting the fraud, meaning that it was a necessary element in the case. See, also, *Broder v. Conklin*, 77 Cal. 330, 19 Pac. Rep. 513; *Adams v. Lambard*, 80 Cal. 426, 22 Pac. Rep. 180. This doctrine was again affirmed in the second appeal of *Brison v. Brison*, (Cal.) 27 Pac. Rep. 186.

The objection that the findings are not sustained by the evidence is based on several grounds. It is contended that the evidence does not show that the relation of principal and agent existed between the parties. The evidence on this point is not altogether satisfactory, owing chiefly to the confused and contradictory testimony of the plaintiff herself, but it cannot be said that there was no evidence to sustain the finding. Other parts of plaintiff's testimony tended strongly to prove the relation and absolute actual trust and confidence reposed in the male defendant, and she is corroborated by other witnesses. There is testimony, it is true, contradicting this testimony, but that was a matter for the trial court. The same is true of the question whether the parties did really intend to create a trust or not. It is also said that the evidence shows that the conveyances were made to defraud third parties, and the court should have so found. It seems that she feared that some heirs of her father might assert some kind of a claim against her which would compel her, as she says, "to come and go," and she did not wish to have the trouble. Thereupon the defendant, her son-in-law and agent, proposed that she convey to him, and he would take the trouble of the defense off her hands. She testifies that she did not fear any claim that her father's heirs might prefer, and that she so stated at the time. There is no evidence that the claims were asserted against her or her property, or could have been. The defendants deny the entire proposition. If such had been the nature of the conveyance, defendants certainly

would have known it, and could have defended on that ground. Courts will not allow a trust to be proven by a party to the fraud, if the trust was created for a fraudulent purpose, but before it will deny relief upon that ground there should be proof that some one was to be defrauded. Here there is no proof of a claim which it was intended to defeat, or that any creditor or claimant of any kind existed. As to the amount of money received, we do not understand that it is objected to as too much if the trust were properly established. We advise that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

91 Cal. 23

PEOPLE v. STAPLES. (No. 20,796.)

(Supreme Court of California. Sept. 3, 1891.)

COMPLAINT—WARRANT OF ARREST—NECESSITY OF DEPOSITION—SUFFICIENCY OF INFORMATION—BRINGING STOLEN PROPERTY INTO STATE—VENUE—EVIDENCE—HEARING ON APPEAL.

1. Pen. Code Cal. §§ 811-813, provide that when an information is laid before a magistrate he must take the depositions of the informant and his witness, if any; that the depositions must set forth the facts tending to prove the offense, and the guilt of defendant; that, if the magistrate is satisfied therefrom that an offense has been committed, and there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest. *Held*, that when the information is positive in its allegations of every fact necessary to support the charges laid, it is a sufficient deposition within the meaning of the statute, and a warrant may be issued thereon.

2. Where one charged with committing a felony is examined, and evidence adduced sufficient to justify the magistrate in holding the accused to answer the charge, an irregularity in the warrant of arrest is immaterial, since thereafter the accused is held under the commitment, which authorizes the filing of an information.

3. Under Pen. Code Cal. § 872, concerning commitment for public offenses, which provides that, if it appears from the examination that a public offense has been committed, the accused must be held to answer to the same, the fact that the offense charged in the information is different from that laid in the complaint does not affect the sufficiency of the information.

4. Under Pen. Code Cal. § 789, which provides that the jurisdiction of a criminal action for stealing in any other state and bringing the property into this state is in any county into or through which such property has been brought, an information which charges the defendant with having stolen property in Arizona, and that he did bring the same into the county of Los Angeles, charges an offense within the jurisdiction of the court of Los Angeles county.

5. Where the larceny was committed at or near the line between Arizona and California, on a moving train, it was proper to admit evidence that it was committed immediately after crossing the line into California, as the variance was not material, as taking the stolen property into Los Angeles county was a part of the offense, and it was immaterial whether it was stolen before or immediately after coming into the state.

6. The fact that the information alleged that the larceny was committed in Arizona, does not require the state to prove that the offense charged is defined by the laws of Arizona as larceny.

7. Where the evidence as to the value of the

property stolen is conflicting, the verdict of the jury upon that question is conclusive.

8. Pen. Code Cal. § 1252, which provides that "all appeals in criminal cases must be heard and determined by the appellate court within sixty days after the record is filed in said appellate court, unless continued on motion or with the consent of the defendant," is merely directory, and a failure to determine a case within the time mentioned does not entitle the defendant to a discharge.

In bank. Appeal from superior court, Los Angeles county; WILLIAM A. CHENEY, Judge.

Information against M. N. Staples, for grand larceny. Verdict of guilty. Defendant appeals. Affirmed.

Hugh J. & Wm. Crawford, for appellant. W. H. H. Hart, Atty. Gen., for the People.

BEATTY, C. J. The defendant was convicted in the superior court of Los Angeles county of the crime of grand larceny, and appeals from the judgment and from an order denying a new trial.

His first assignment of error is upon the order of the superior court overruling his motion to set aside the information. One ground of the motion was that the magistrate before whom his examination was had issued his warrant of arrest without having taken any depositions of witnesses in support of the charge laid in the complaint, thus violating,—as he claims,—the provisions of sections 811-813 of the Penal Code.¹ In support of this point he cites and relies on the case of *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. Rep. 619. But that case lends no support to his contention for two reasons. In the first place, the complaint in this case—unlike the complaint against Dimmig—is positive and direct in its allegation of every fact necessary to support the charge laid, and is therefore, in itself, a sufficient deposition within the doctrine of the Dimmig Case. In the second place, the want of jurisdiction to order an arrest becomes immaterial when the warrant of arrest is *functus officio*. In Dimmig's Case the objection was raised while the warrant was the only authority for holding him, and, the warrant being held invalid, he was necessarily discharged. But when a prisoner has been examined, and evidence adduced sufficient to justify the magistrate in holding him to answer on a charge of felony, the infirmity in the warrant of arrest, if any there be, ceases to be of any consequence, since he is thereafter held under the commitment, which of itself authorizes the filing of an information. The regularity of the information does not depend on the

¹Sec. 811. When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them. Sec. 812. The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant. Sec. 813. If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest.

complaint, but upon the order holding the defendant to answer. *People v. Velarde*, 59 Cal. 458; *People v. Wheeler*, 65 Cal. 77, 3 Pac. Rep. 892. This view also disposes of the second ground of the motion, viz., that the complaint alleged the larceny to have been committed in San Bernardino county, and the stolen goods to have been brought into Los Angeles county, whereas the information charges a larceny in Arizona territory, and a subsequent bringing of the stolen goods into Los Angeles county. Even if the offense charged in the information was, as claimed, totally different from that laid in the complaint, it would not affect the sufficiency of the information, since, as we have seen, the information does not depend on the complaint, but upon the commitment, and it does not appear that the order of commitment differed in any respect from the information. It is not claimed, and it cannot be, that the commitment must follow the complaint, for the statute and the decisions of this court, are directly to the contrary. It is the duty of the magistrate to hold the defendant to answer for the offense proved, whatever may have been the offense charged. Pen. Code, § 872;¹ *People v. Wheeler*, 73 Cal. 255, 14 Pac. Rep. 796. Therefore, if the evidence showed that the goods were stolen in Arizona territory, it was the duty of the magistrate to hold him for that offense, if it was in fact or law a different offense from that charged; and, if he failed to do so, it was, nevertheless, the duty of the district attorney, in drawing the information, to charge the offense according to the facts disclosed by the depositions, ignoring to that extent the form of the commitment. *People v. Vierra*, 67 Cal. 231, 7 Pac. Rep. 640; *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. Rep. 859. But in truth there is no substantial difference between the charge laid in the original complaint and that set out in the information. Each charges in effect a larceny in Los Angeles county. When goods are stolen in one jurisdiction and carried into another, in legal contemplation the crime of larceny is committed in both jurisdictions, and may be punished in either. Our statute on that point (Pen. Code, §§ 497, 786, 789,) merely re-enacts the law as it was before. *People v. Mellon*, 40 Cal. 654; *State v. Brown*, 8 Nev. 212. Or, perhaps, it is more correct to say that our statute has adopted one of the two views upon which the courts of other states have divided in deciding upon the common-law rule. It follows that in both the complaint and information the defendant was charged with an offense com-

mitted in Los Angeles county. The place where the goods were alleged to have been stolen—San Bernardino or Arizona—was a mere circumstance, and a wholly immaterial one, of the offense. The superior court did not err in refusing to set aside the information.

Nor did the superior court err in overruling the demurrer to the information. If we understand the position of appellant's counsel with reference to the demurrer, it is that the information does not charge an offense within the jurisdiction of the superior court of Los Angeles county, although no such objection is stated in the demurrer. The information charges in plain, direct, and unequivocal terms that the defendant did, in the territory of Arizona, unlawfully, willfully, and feloniously take, steal, and carry away from the possession of one Margaret McGregor a watch and chain, of the value of \$75, then and there being the personal property of said Margaret McGregor; and that, after having so unlawfully taken and stolen said watch and chain, he did bring the same into the county of Los Angeles. This states the exact offense defined in section 497 of the Penal Code, the jurisdiction of which is, by section 789,² conferred upon any county of the state, into or through which the stolen property has been brought.

Several instructions asked by the defendant were refused by the court. The only question worthy of consideration raised by the assignments of error upon these rulings is this: Was it essential to prove that the original larceny was committed in Arizona, as alleged in the information? The defendant was porter on a sleeping-car, upon which the owner of the stolen property, Mrs. McGregor, was traveling as a passenger from Chicago to this state. The watch and chain were stolen from her berth just about the time the train crossed the Colorado river from Arizona to San Bernardino county in this state. The evidence left it somewhat doubtful upon which side of the boundary the theft occurred, and the defendant asked the court to instruct the jury that they must acquit unless they were satisfied that the larceny was committed in Arizona. These requests to charge were refused, and the question is whether such refusal was error. We do not think it was. Whether the original larceny was committed in Arizona or across the line in San Bernardino, the taking of the stolen property into Los Angeles county was equally criminal; and not only was it equally criminal, it was the same offense, punishable in the same manner, to the same extent, in the same jurisdiction, under the same law. The precise spot at which the criminal act was initiated was a mere circumstance of the offense, properly enough stated in the information, but not essential to be proven

¹Sec. 872. If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the deposition an order, signed by him, to the following effect: "It appearing to me that the offense in the within depositions mentioned [or any offense, according to the facts, stating generally the nature thereof] has been committed, and that there is sufficient cause to believe the within-named A. B. guilty thereof, I order that he be held to answer to the same, and committed to the sheriff of the county of."

²Sec. 789. The jurisdiction of a criminal action for stealing in any state the property of another, or receiving it, knowing it to have been stolen, and bringing the same into this state, is in any county into or through which such stolen property has been brought.

as stated. If the information had charged a larceny in Los Angeles county, proof of an original taking in San Bernardino or in Arizona would have been admissible. The only real question is whether evidence of a larceny on the west bank of a river is such a substantial variance from the charge that it was committed on the east bank as to be inadmissible. Under the circumstances of this case, where the theft occurred on a moving train in the act of crossing the river, we do not think the variance was material.

As to the other instructions refused, it is sufficient to say of them generally that, so far as they were correct, they were given in better form in the charge of the court and in other instructions asked by the defendant and allowed.

It is contended that the evidence does not sustain the verdict, because—*First*, there was no evidence as to the laws of Arizona defining larceny; and, *second*, because the evidence clearly showed that the stolen goods were worth less than \$50. As to the first objection, we say that the laws of Arizona have no bearing upon the question whether our laws have been violated. We do not assume to punish offenses against the laws of other states and territories. When we undertake to punish as larceny the bringing into this state goods that have been stolen in another state or country, we mean goods that have been stolen according to our definition of larceny, for which we look to our own laws exclusively, and not the laws of other countries. As to the second objection, it is sufficient to say that there was some evidence that the watch and chain were worth more than \$50, and therefore the verdict of the jury on that point is conclusive.

There is no error in the record, and the judgment and order appealed from must be affirmed, unless a motion now made by the defendant to reverse the judgment and discharge him from custody must be granted on the ground that his appeal has not been decided within 60 days after the filing of the transcript here, as required by section 1252 of the Penal Code.¹ But no such consequence is annexed to a failure to comply with that provision, in which respect it differs from section 1382, which is mandatory in its requirement that a criminal prosecution must be dismissed, unless good cause to the contrary is shown, when the defendant is not brought to trial in the superior court within 60 days after the filing of an indictment or information. It is to be noted also that the latter section prescribes the means, and the only means, of enforcing the constitutional right of the accused to a speedy and public trial. Const. art. 1, § 13; *People v. Morino*, 85 Cal. 515, 24 Pac. Rep. 832. We do not, however, rest our denial of this motion upon any distinction between a constitutional and statutory right,—between the right to a speedy

trial and a speedy determination of an appeal,—but solely upon the ground that one provision is merely directory and the other mandatory in substance and in terms. Motion to reverse denied, and judgment and order affirmed.

We concur: SHARPSTEIN, J.; PATERSON, J.; DE HAVEN, J.; HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.

90 Cal. 627

PACIFIC ROLLING-MILL CO. *et al.* v. RIVERSIDE & A. RY. CO. (No. 14,333.)

(Supreme Court of California. Sept. 2, 1891.)

SPECIFIC PERFORMANCE — CONCLUDED CONTRACT.

Defendant offered to buy plaintiffs' street railroad at an agreed price, "offer based on a clear title." Plaintiffs prepared an agreement to be signed, and forwarded it to defendant, the title to be examined "before signing the agreement." Defendant's attorney objected to the title, and defendant notified plaintiffs thereof, who thought the title good, and wished to know what defendant would "finally conclude to do." Defendant refused to purchase. *Held*, that there was no such concluded contract as could be specifically enforced.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Action by Pacific Rolling-Mill Company and San Pedro Lumber Company against Riverside & Arlington Railway Company, to enforce specific performance of an alleged contract. Decree for plaintiffs. Defendant appeals. Reversed.

Goodcell & McIntyre, for appellant. *Byron Waters* and *Lyman Evans*, for respondent.

VANCLIEF, C. Action to enforce specific performance of an alleged contract by which the plaintiffs agreed to sell, and the defendant to buy, a certain street railway, situate in the city of Riverside, county of San Bernardino, and known as "Seventh Street & Grandview Railroad." Judgment for plaintiffs. Defendant appeals from the judgment, and from an order denying a new trial. At the time the agreement is alleged to have been made the plaintiffs did not have the legal title to the road they offered to sell, but held a certificate of purchase at a sheriff's sale, made under a decree enforcing a lien for the price of materials furnished to construct the road. The only evidence of the agreement is a written correspondence between the parties by mail, the letters from plaintiffs being dated at San Francisco, and those from defendant at Riverside. The appellant contends, among other things, that the correspondence does not prove a completed contract of sale. The first letter of the correspondence is from defendant, dated October 22, 1888, as follows: "Will you sell your Seventh-Street road for \$5,000 on six months' time, with interest at the rate of eight per cent. per annum? Note of undeniable value." In answer to this plaintiffs wrote November 15, 1888: "The rolling-mill company would sell the Seventh-Street road for \$6,500, on the following terms, namely: \$1,500 in cash and the balance in six months at eight per cent. interest, secured by good paper, or

¹ Sec. 1252. All appeals in criminal cases must be heard and determined by the appellate court within 60 days after the record is filed in said appellate court, unless continued on motion, or with the consent of the defendant.

mortgage on the other road." From defendant to plaintiffs, November 23, 1888: "We will pay you for the road and equipments as it stands, title, etc., to be subject to examination of our attorney, \$5,750, one-half in six months, and one-half in one year, to bear interest at eight percent. per annum; said notes to be secured by a mortgage upon all of our lines as well as upon the Seventh-Street line." Plaintiffs to defendant, November 27, 1888: "The price you offer is not enough. The time, terms, and security proposed will not be objected to if you will come to the price asked in former letter to you, to-wit. \$6,500. * * * There is another party figuring on the purchase of this railroad, and we hold ourselves at liberty, notwithstanding this offer to you, to sell to the first one who comes to our price. I note that your offer was for the road and equipments. We don't own the rolling stock or motive power." Telegram from defendant to plaintiffs, November 30, 1888: "We will agree to your price, and accept offer of 27th. Have written." Letter of same date as telegram, is as follows: "We will agree to your price and accept your offer of the 27th. If you will send us the papers, we will have our attorney examine your title, and prepare the notes and mortgage. Our offer is based on a clear title." Plaintiffs to defendant, December 4, 1888: "Dear Sir: Your telegram of 30th ult. was received, and your letter of same date was received this A. M. We note that your 'offer' is based on a clear title. Our title comes through a sheriff's sale under execution and order or decree of court in the case of V. S. Rannels & Sons et al. vs. J. A. Studabecker et als., superior court of San Bernardino county. We have the sheriff's certificate dated October 16, 1888. And six months after that date we or our assigns will be entitled to a deed, unless the property is in the mean time redeemed. If you are not satisfied to take our title as it now stands, and close the matter, you must give us some assurance that you will take our complete title when we get it. I supposed that some of your people knew that we took title through the sheriff's sale in October last, and hence I concluded that you would only be assured of the regularity and effectiveness of the proceedings up to that time. Let me hear from you." Defendant to plaintiffs, December 8, 1888: "Dear Sir: Yours of the 4th is at hand and contents noted, and in reply would say that we will be satisfied with a sheriff's deed. We are willing to close the matter up at the present time on the terms stated. If you will prepare a contract, we will submit it to our attorney. The contract to state the facts, and when the six months from the date of your purchase have expired the notes and mortgages can be made. Notes dating from date of our contract and purchase. We understand the above to be your wish, and we are willing to make such a paper." Plaintiffs to defendant, December 13, 1888: "Dear Sir: Inclosed find an agreement for your company to execute in regard to the purchase of the Seventh-Street Railway. Inasmuch as your company may change its

board of directors before the six months expire, and inasmuch as the emergency may arise which would induce you to mortgage or sell your road before the six months expire, and this agreement gives us no lien on any property, we request that you have Mr. Evans and J. G. North and some other one of your stockholders sign the guaranty attached to the agreement. You will note that the agreement says nothing about title. So you must make your investigations about title, if you wish, before signing the agreement. You can take a week to examine the title if you wish. I suppose I have your correct corporate name. Upon signing the paper as requested, and returning the same, the rolling-mill and lumber company will execute, and send you a duplicate." Defendant to plaintiffs, December 22, 1888: "Dear Sir: Yours of the 18th came duly, and the same was referred to our attorney. To-day we got his reply as inclosed. Can you give us any points that would set the matter at rest, and which could be submitted? We thought it was all right, and still hope you can make it clear to us." The opinion of defendant's attorney, inclosed in this letter of December 22d, was to the effect that the sheriff's deed would not convey the franchise, for the reason that the franchise had been granted to an individual person solely, and not to his assigns. Plaintiffs to defendant, December 27th: "Dear Sir: Yours of the 22d at hand. I have been trying to find time to send your attorney a list of authorities and memoranda, etc., but am still busy. I think, though, that I can remove your attorney's doubts. *First.* Our supreme court has decided that a right of way to maintain and operate a street railroad through the streets of a city is an easement and an interest in the land, (North Beach & M. R. Co.'s Appeal, 32 Cal. 506-512,) and therefore subject to execution. *Second.* The 7th-St. Railway was sold, not only under execution, but under the decree and order of the court. (See the decree.) The sale would have been good under the decree without execution. *Third.* The decree was made in a foreclosure suit of a mechanic's lien in which the city of Riverside and Studabecker were parties, and therefore bound by the judgment which decreed a sale of the franchise or right of way. We deny that the ground of the rejection of the title is good. But let us know what you finally conclude to do without delay, so that we know where we stand. You must be on or entirely off." On January 14, 1889, the defendant wrote: "We decline to purchase the 7th-Street franchise."

It seems clear that the correspondence does not prove such a concluded contract as may be specifically enforced by a court of equity. It does not appear that either party intended to be bound until a written contract expressing all the terms of the agreement should be executed. *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. Rep. 1136; *Pom. Spec. Perf.* §§ 58, 63, and authorities there cited. It is contended, however, for respondents, that all the terms of the contract were assented to and the contract completed, by defendant's letter of Decem-

ber 8th, in answer to that from plaintiffs of December 4th, in which plaintiffs say: "We note that your offer is based on a clear title. * * * If you are not satisfied to take our title as it now stands, and close the matter, you must give us some assurance that you will take our complete title when we get it." In answer to this defendant's letter of December 8th says: "We are willing to close the matter up at present on the terms stated. If you will prepare a contract, we will submit it to our attorney. The contract to state the facts," etc. Plaintiffs' letter (of December 18th) in reply to this shows that they did not understand that negotiations had terminated in a complete contract, and indicates that they knew defendant's ultimate decision depended upon whether or not it should be satisfied with the title derived through the sheriff's sale. This letter contained a draft of the agreement as then proposed by plaintiffs, (which does not appear in the record,) and says: "You will note that the agreement says nothing about title. So you must make your investigations about title, if you wish, before signing the agreement. You can take a week to examine the title, if you wish." Besides, this letter proposed, and the inclosed draft contained, a material new term to the agreement, viz., the personal guaranty of "Mr. Evans and J. G. North and some other one of your stockholders." No such guaranty had been asked or offered before. Plaintiffs' letter of December 4th asked "some assurance" that defendant would take their complete title when they should get it, but no kind of assurance was specified; and the only kind of assurance mentioned was that of a mortgage on defendant's roads. As contended by plaintiffs' counsel it seems to have been understood that plaintiffs would undertake to convey only such title as they got by the sheriff's sale; but it was quite as well understood that if, upon examination, the defendant was not satisfied with that title, it was not bound to purchase; otherwise, plaintiffs' letters of December 18th and 27th are unaccountable. In the latter plaintiffs undertook to answer the objections of defendant's attorney to their title, and close by saying: "We deny that the ground of the rejection of the title is good. But let us know what you finally conclude to do without delay, so that we know where we stand. You must be on or entirely off." This seems inconsistent with the alleged understanding of plaintiffs at the date of this letter, that the agreement had been completed by defendant's letter of December 8th. If the agreement to purchase only such title as plaintiffs had derived through the sheriff's sale had been closed 19 days before, why were plaintiffs concerned to vindicate that title? and why ask to be informed without delay what defendant finally concluded to do? and how could defendant be "entirely off?"

From a careful reading of the whole correspondence, I conclude (1) that plaintiffs proposed to sell only such title as they acquired through the sheriff's sale; (2) that it was not intended nor understood that the negotiations should be considered

closed, and the contract completed, until, upon examination, the defendant should become satisfied with that title, nor until a formal written contract should be executed by both parties; and (3) as it appears that defendant was not satisfied with the title, and that no formal or final written contract was executed by the parties, the fourth finding of the court to the effect that the agreement had been concluded, considered as matter of fact, is not justified by the evidence; and, as matter of law, it is a misconstruction of the written correspondence. In the process by which these conclusions have been reached the question discussed by counsel, as to whether or not the sheriff's deed would convey a perfect title, has not been considered material; and this accords with the construction contended for by respondents' counsel. Yet it may not be out of place to remark that it does not appear that the title was not rejected by defendant in good faith. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

90 Cal. 533

BURKETT v. GRIFFITH. (No. 14,254.)

(Supreme Court of California. Aug. 21, 1891.)

SLANDER OF TITLE — WHEN ACTION LIES — CONTRACT OF SALE — ENFORCEMENT — COMPLAINT — SPECIAL DAMAGES.

1. An averment that a certain person offered to buy plaintiff's land, and that the offer was accepted, but that, after the purchaser was informed of the false statements of another regarding the title, he was "deterred from carrying out his agreement," indicates that there was a valid contract enforceable against the purchaser; and no action, therefore, is maintainable for the slander.

2. A complaint for slander of title referred to certain leases, annexed as exhibits for the purpose of identifying the lands, in which plaintiff had a "leasehold interest, with option and privilege of purchase;" but failed to allege the nature and covenants of the leases, or the terms of the option, or the nature of plaintiff's rights thereunder, or whether such covenants and option were those contained in the exhibits. Held that, inasmuch as the alleged defamatory statements referred to the covenants of the leases, and plaintiff's rights thereunder, it was necessary to allege facts sufficient to show what such rights and covenants were; and exhibits attached to the complaint, merely to identify the land, were not sufficient for this purpose.

3. A complaint for slander of title alleging that a certain purchaser was informed of the false statements of a third person, and withdrew his offer, without alleging that such person made the statements to the purchaser, or directed them to be communicated to him, or that any one to whom they were communicated repeated them, or by whom he "was informed" of them, fails to show that the alleged damage was the natural and direct result of such statements.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Frank Burkett against G. J. Griffith to recover for slander of title.

There was judgment for defendant, and plaintiff appeals. Affirmed.

John Roberts and John D. Bicknell, for appellant. *Stephen M. White and George W. Knox*, for respondent.

HARRISON, J. The plaintiff brought this action against the defendant to recover the sum of \$25,000 damages caused by certain false and malicious statements alleged to have been made by him concerning certain property of the plaintiff. The defendant demurred to the complaint upon the grounds of insufficiency and uncertainty, and from a judgment entered upon an order sustaining the demurrer the plaintiff has appealed.

Although the term "slander" is more appropriate to the defamation of the character of an individual, yet the term "slander of title" has by use become a recognized phrase of the law; and an action therefor is permitted against one who falsely and maliciously disparages the title of another to property, whether real or personal, and thereby causes him some special pecuniary loss or damage. In order to maintain the action, it is necessary to establish that the words spoken were false, and were maliciously spoken by the defendant, and also that the plaintiff has sustained some special pecuniary damage as the direct and natural result of their having been so spoken. As words spoken of property are not in themselves actionable, it is necessary to allege the facts which show wherein the plaintiff has sustained damage; and, as special damage is the only ground upon which the action can be maintained, it is essential that such damage be distinctly and particularly set out in the complaint. *Linden v. Graham*, 1 Duer, 670; *Swan v. Tappan*, 5 Cush. 104; *Malachy v. Soper*, 3 Bing. N. C. 371. It is not actionable to speak disparagingly of the title of another unless he is damaged thereby. The utterance of a mere falsehood, however malicious, will not sustain an action unless damage has resulted therefrom, (Add. Torts, 25;) and the damage which can be recovered is only such as is the direct and natural result of the utterance of the words. As in all other cases dependent upon special damage, there must be both injury and damage. The slanderous words, false in fact and maliciously uttered, constitute the injury, and give the right of action; and the pecuniary damage sustained is the measure of recovery. If the words uttered are not false, or if there be no malice, there is no right of action, and there can be no recovery unless some special pecuniary damage has resulted from their utterance. In order to show that the words uttered have caused injury to the plaintiff, it is generally necessary to aver and show that they were uttered pending some treaty or public auction for the sale of the property, and that thereby some intending purchaser was prevented from bidding or competing. *Folk. Starkie, Sland.* § 123; *Odger, Sland. & Lib.* 138. "This action lieth not but by reason of the prejudice in the sale." Per FENNER, J., in *Bold v. Bacon*, Cro. Eliz. 346. If the plaintiff has merely a general intention to sell, or if the words uttered do not

reach any intending purchaser, or if they do not prevent any sale, or are uttered after the sale is completed or agreed upon and contracted for, the plaintiff does not suffer any damage from their utterance.

It is alleged in the complaint that in August, 1888, the plaintiff was the owner of a certain leasehold interest, with option and privilege of purchasing two certain tracts of land in Los Angeles county, and that one Arthur Sketchley was then negotiating and treating with him for the purchase of, and offered to purchase from him, an undivided one-half of the same for the sum of \$25,000, "and that the plaintiff accepted said offer;" that the defendant, well knowing the premises, did willfully, maliciously, and without probable cause, during the period that the said Sketchley was so negotiating and making the offer aforesaid, and prior and subsequent thereto, publicly state to divers persons, (naming them,) and to the plaintiff, "that the plaintiff had broken the covenants of his said leases, and had forfeited all rights thereunder and by virtue thereof," and that the defendant would not sell to the plaintiff, or to any person purchasing from him, the lands described in said leases, or execute a deed therefor on the tender of said purchase price; that the said statement and declarations were false, and were made by the defendant for the purpose of preventing the plaintiff from disposing of said leasehold interests and option, and that said Sketchley was informed of the said statements, and was intimidated, dissuaded, and deterred from carrying out his agreement with plaintiff, and withdrew his offer to purchase, and refused to purchase the same; that, but for said statements by defendant, Sketchley would have completed said purchase; and that by reason of the said statements plaintiff has been unable to sell said property to Sketchley, and has been thereby damaged in the sum of \$25,000. The averment in the complaint that Sketchley offered to make the purchase from the plaintiff, and to pay therefor the sum of \$25,000, and that "the plaintiff accepted said offer," must, for the purposes of the demurrer, under the familiar rule that the pleading is to be construed *contra proferentem*, be regarded as an allegation of a valid and efficient offer and acceptance, and that by virtue thereof a complete and executed contract of purchase and sale was entered into between them. This construction is corroborated by the subsequent averment that, after Sketchley was informed of the statements of the defendant, he was "intimidated, dissuaded, and deterred from carrying out his agreement with plaintiff," and shows that it was the intention of the pleader to allege such contract. This acceptance by the plaintiff of Sketchley's offer, and the agreement between them for the purchase and sale of the property, terminated the "treaty," and gave to the plaintiff a contract capable of being enforced against Sketchley, and on which he can recover any damages he may have sustained from its violation. The subsequent refusal by Sketchley to carry out his agreement did not give the plaintiff the right to recover

in this action the damages thus sustained. In an action like the present, the plaintiff can recover only such damage as he may have sustained by reason of an intending purchaser being prevented from making the contract; but the complaint herein shows that whatever statements or declarations were made by the defendant prior to the making of the contract did not have the effect to prevent Sketchley from entering into the same, and those which he made thereafter have not caused the plaintiff any damage which can be said to have resulted therefrom. We know of no case in which it has been held that, when the plaintiff has a valid contract of sale, he can recover damages for its breach against one whose words, however false and malicious, have induced the other contracting party to violate such agreement. In *Morris v. Langdale*, 2 Bos. & P. 284, in an action for defamation, the special damage alleged was that certain persons had refused to fulfill their contracts with the plaintiff in consequence of the words spoken; but Lord ELDON said: "Now, if the plaintiff has sustained any damage in consequence of the refusal of any persons to perform their lawful contracts with him, it is damage which may be compensated in actions brought by the plaintiff against those persons; and the law supposes that in such actions the plaintiff would receive a full indemnity." A similar principle is laid down in *Townsh. Sland. & Lib.* § 206; *Kendall v. Stone*, 5 N. Y. 14; *Vicars v. Wilcocks*, 8 East. 1; *Paul v. Halferty*, 63 Pa. St. 46; *Brentman v. Note*, 3 N. Y. Supp. 420. It is not shown by the complaint whether the plaintiff accepted the refusal of Sketchley to complete his purchase as a termination of the contract, or whether he still holds his right of action to enforce the contract. From the averment that "the said Sketchley was then and there, and at all times since has been, able and willing to purchase" the property contracted for, it would seem that Sketchley is still bound by the contract; and, if so, the complaint fails to show that the plaintiff has sustained any damage. In any action against Sketchley founded upon the contract, it would be no defense that he had been induced to refuse to complete his purchase by reason of the statements of the defendant alleged herein; and as, in such action, the plaintiff can recover all the damages he has sustained, he has no right of action herein against this defendant. If, on the other hand, the plaintiff has released Sketchley from the obligations of his contract, or does not desire to enforce the same, whatever damage he has suffered is the result of his own voluntary act, and cannot be visited upon this defendant. *Kendall v. Stone*, supra.

2. The complaint fails to show that the statements and declarations alleged to have been made by the defendant could have caused any damage to the plaintiff. It was necessary for the plaintiff to set forth and describe in his complaint the property respecting which the defamatory statements had been made, as well as to aver his title thereto, so that it might be shown wherein the defendant had done

him any injury. The defamatory statements alleged to have been made by the defendant are "that this plaintiff had broken the covenants of his said leases, and that plaintiff had 'orfeited all rights thereunder and by virtue thereof.'" The only leases referred to in the complaint are those which are annexed to it as exhibits for the purpose of identifying the lands in which the plaintiff had a "leasehold interest, with option and privilege of purchasing." The plaintiff has not alleged the nature or extent of his leasehold interest, or the terms of his option, or what were the covenants of his leases, or the nature of his rights thereunder; nor has he alleged that the covenants or the option are those which are contained in the exhibits. As the statements alleged to have been made by the defendant referred to the "covenants of his said leases, and his rights thereunder," it was necessary to aver facts sufficient to show whether he had any rights, or whether there were any covenants to be violated or broken. The exhibits attached to the complaint are made a part thereof only for the purpose of identifying the lands referred to, and do not satisfy this requirement of pleading. Argumentative pleading is no more permissible under the Code than it was at common law. Matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint. *Los Angeles v. Signoret*, 50 Cal. 298. The only property to which the plaintiff alleges that he had any title is the leasehold interest and option to purchase. He does not allege that the defendant denied his title to this property, but charges him only with disparaging certain rights which the complaint does not allege that he possessed. The allegation that the defendant had stated that he would not sell the lands described in the leases cannot be regarded as any slander of his title, even if the complaint had shown any right to make a purchase from the defendant. The plaintiff, moreover, does not allege that Sketchley was informed of this declaration of the defendant.

3. The complaint also fails to show that the special damage alleged to have been sustained by the plaintiff is the natural and direct result of the statements and declarations made by the defendant. This action is governed by the same rule that obtains in the ordinary action of slander, viz., that, if the words are not actionable in themselves, the originator of the slander is only liable for such damage as is the direct and natural result of his act, and that he is not liable for the subsequent repetition of those words by another without his direction or authority. *Folk. Storkle, Sland.* § 642; *Add. Torts*, 795; *Parkins v. Scott*, 1 Hurl. & C. 153; *Ward v. Weeks*, 7 Bing. 211; *Terwilliger v. Wanda*, 17 N. Y. 54; *Gough v. Goldsmith*, 44 Wis. 262; *Hastings v. Stetson*,

126 Mass. 329. This is but the application of the general rule that, when special damages are to be recovered, they must be the legal and natural consequence arising from the tort itself, and not from the wrongful act of a third party, remotely induced thereby. *Crain v. Petrie*, 6 Hill, 524. The only special damage which the plaintiff has alleged is that Sketchley was informed of the statements and declarations made by the defendant, and withdrew his offer to purchase, and that the plaintiff thereby sustained damage. It is not alleged that the defendant ever made any statement or declaration to Sketchley, or in his presence, or that he directed or authorized any of his statements to be communicated to him; nor is it alleged that either of the persons to whom the defendant made such statements repeated them to Sketchley, or by whom or in what manner Sketchley "was informed" of the statements. The only connection between the statements by the defendant and their reaching Sketchley is that the defendant made them for the purpose of circulating the rumor and conveying the impression that the plaintiff had violated the covenants and conditions of his leases. This, however, is too remote to render the defendant liable. We are of the opinion that the complaint fails to state a cause of action, and that the demurrer was properly sustained, and the judgment is therefore affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

90 Cal. 549

MILLER v. CUELHO, (two cases. Nos. 13,581, 13,633.)

(Supreme Court of California. Aug. 21, 1891.)

BOUNDARIES—OBLITERATION OF MONUMENTS—SUBSEQUENT SURVEYS—CONFLICT—EVIDENCE.

In an action for recovery of land, involving a dispute as to boundaries, it appeared that the township was partly surveyed in 1856, and the south-west corner of the section in controversy located and marked; that in 1871 the survey was completed on this corner; and that there was delineated on the plat, and mentioned in the field-notes, a certain road running north and south through the east half of the section. Afterwards the stakes and monuments of the original surveys became so far obliterated as to require restoration. Plaintiff's and defendant's surveys, starting from different points, were widely variant. Plaintiff contended that the only proper way to restore sectional corners was to go back to the nearest corner of the original survey east of the section in dispute; but neither party did this, and there was evidence that no such corners could be found. Plaintiff's survey started from the road mentioned in the survey of 1871. This survey, however, was entirely discredited by defendant's witnesses. Measuring from the south-west corner, which was undisputed, one mile east for the south-east corner, it was found to be nearly half a mile south-east of the point where plaintiff's survey located it. *Held*, that the jury were not bound to accept the measurements from the road as conclusive, and that a verdict for defendant was not unsupported by the evidence.

In bank. Appeal from superior court, San Luis Obispo county; T. H. REARDEN, Judge.

Action by Henry Miller against Bernardino Cuelho for the recovery of land.

There was judgment for defendant, and plaintiff appeals. Affirmed.

Chas. E. Wilson and W. H. Spencer, for appellant. *J. M. Wilcoxon*, for respondent.

BEATTY, C. J. The plaintiff in this action prosecutes separate appeals, No. 13,591 from the judgment, and No. 13,633 from an order overruling his motion for a new trial. No error is assigned upon the first appeal, but in support of his appeal from the order denying a new trial plaintiff contends that the verdict is contrary to the evidence. The action is for the recovery of land, and the plaintiff is undoubtedly the owner of the legal subdivisions described in his complaint; the only question in the case being whether a certain spring in the possession of the defendant is situated within the limits of such subdivisions as originally surveyed by the government. The defendant claims that the spring is upon an adjoining subdivision, the government title to which is in him. It will be readily understood from this statement that the dispute arises out of the fact that the stakes and other monuments by which the section and quarter section corners of the official survey were originally marked have become so far obliterated as to require restoration by means of new surveys. As frequently happens in such cases, the different surveyors who have undertaken this task have arrived at widely variant results,—the surveyor for plaintiff locating his lines so as to include the spring, and those employed by defendant bringing it within his lines. We are asked to decide, as matter of law, that the verdict for defendant is wholly unsupported by the evidence, because his surveyor did not use a proper method in his attempt to restore the lost corners of the section in which the lands of both parties are included. It seems that the exterior lines of the township were surveyed by a deputy surveyor, named Freeman, in 1856, who at the same time surveyed some of its interior or section lines. It is conceded on all sides that Freeman was very careful and accurate in his work, both in measuring his lines and marking his corners. But the deputy who completed the survey of the section lines of this township in 1871 is said—by some of the witnesses, at least—to have been careless and inaccurate, and it does not appear that any of the stakes or monuments by which he marked his corners are now discoverable, although many of Freeman's stakes and other marks are still standing and easily found. The particular section (section 8) in which the premises in controversy are included was partly surveyed by Freeman; that is, he located and marked the south-west corner of the section, and set a quarter-post on its south line. Afterwards, when Read completed the survey of the township, he closed his survey of section 8 on these corners, and laid it down on the township plat as a regular section, one mile square, and containing 640 acres. The plat made and returned by him, and approved by the surveyor general, does not indicate the position of the spring, and his field-

notes contain no reference to it; but there is delineated on the plat, and mentioned in the field-notes, a certain road extending north and south through the east half of the section, and thence north-east through the south-east quarter of section 5. In the field notes the distance from the north-east and south-east corners of section 8, at which this road is intersected by the north and south lines of section 8 and the east line of section 5, is given. The surveyor for plaintiff, failing to discover Read's corners, has taken this road as the basis of his survey and the means of restoring the lost boundaries of section 8. He admits that the road is not now where it was in 1871, but its old *situs* is so satisfactorily proven by him and a number of other witnesses, that, if it is to control in the re-establishment of the section lines, the claim of plaintiff to the spring seems to be well founded. But the misfortune of plaintiff's case is that, if the defendant's witnesses are to be believed, Read's survey is completely discredited, and no more reliance can be had upon his notes as to the location of the road than upon other statements therein, which must be erroneous if those respecting the road are correct. As above stated, his survey of section 8 closes on Freeman's corners, and shows a regular square of 640 acres; but, measuring from Freeman's monument at the south-west corner (the location of which is undisputed) one mile to the east for the south-east corner, it is found to be nearly half a mile south-east of the point where plaintiff's survey locates it, measuring from the road. Such being the case, it cannot be said that the jury were bound to accept the measurements from the road as conclusive, for who can say whether Read's mistakes were made in those measurements or in his measurements to Freeman's corners? That he made an error, and a very serious error, in one or the other set of measurements is clearly proved if the witnesses for the defendant tell the truth; and for the purposes of this decision we must assume that the jury believed them, and were right in believing them. The appellant, ignoring the weakness of his own case, directs the whole force of his argument against the defendant's survey, which he claims is wholly unreliable, because it started from the wrong corner of the section. He contends that the only way to restore the lost sectional corners of a township survey is to retrace the lines as they were originally run, from south to north and from east to west, going back for this purpose to the nearest ascertainable corner of the original survey east of the section in dispute. But, conceding the correctness of this rule, the plaintiff, upon whom rested the burden of proof, himself disregarded it. He complains that defendant did not start from some of Read's corners east of section 8, but neither did he. Besides this, his evidence seems to show that no such corners could be found. If, therefore, plaintiff's survey was sufficient to make out a *prima facie* case for him, the defendant's survey was certainly competent for the purpose of rebuttal. We cannot see that the supe-

rior court erred in holding that the verdict of the jury was not in conflict with the evidence. Judgment and order affirmed.

We concur: HARRISON, J.; PATERSON, J.; MCFARLAND, J.; DE HAVEN, J; GAROUTTE, J.; SHARPSTEIN, J.

8 Cal. Unrep. 430

TIBBETTS *et al.* v. CAMPBELL, Judge. (No. 13,994.)

(Supreme Court of California. Sept. 5, 1891.)

MANDAMUS TO JUDGE—REMEDY BY APPEAL.

Mandamus will not lie to compel the sustaining of a motion for judgment made by petitioner in an action in the trial court, and to permit him to prove certain allegations of his complaint; appeal being the proper remedy, if such rulings be erroneous.

In bank.

Application by Tibbetts and others for *mandamus* to compel John L. Campbell, judge of the superior court, to receive certain evidence in a pending suit. Writ denied.

Luther C. Tibbetts, for petitioners.

PER CURIAM. The affidavit in this case does not state facts sufficient to entitle the petitioners to a writ of mandate directing the respondent to do any of the things which it is alleged that he has refused to do. The overruling of petitioners' motion for a judgment in their favor in the case of Tibbetts *et al.* v. The Riverside Banking Company *et al.*, and the refusal to allow the plaintiffs therein to prove certain matters alleged in their complaint, were decisions of questions of law arising during the trial. If there was any error in such rulings, the petitioners were afforded a plain, speedy, and adequate remedy by an appeal from the final judgment rendered in the action. Application for writ denied.

91 Cal. 94

ONTARIO STATE BANK v. GERRY *et ux.*
(No. 13,993.)

(Supreme Court of California. Sept. 7, 1891.)

HOMESTEAD—LIABILITY FOR DEBTS—UNRECORDED MORTGAGE.

Under Civil Code Cal. § 1241, subd. 4, providing that the homestead is subject to sale in satisfaction of judgments obtained on debts secured by mortgage on the premises executed and recorded before the declaration of homestead was filed for record, an unrecorded contract for the purchase of real estate, given to the husband, and assigned by him as security for a debt, cannot be enforced by the assignee against the wife's recorded claim of homestead in the land, although it was afterwards paid for by the husband, and the title taken in her name.

In bank. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action by the Ontario State Bank against John Gerry and Eliza Gerry, his wife, upon a promissory note executed by defendant John Gerry, and to establish a lien on the homestead of defendants. Judgment for plaintiff, and defendants appeal. Reversed in part and affirmed in part.

L. E. Tabbs and H. C. Rolfe, for appellants. *Waters & Gird*, for respondent.

McFARLAND, J. On November 29, 1887, the defendant John Gerry made a promissory note to plaintiff for \$1,500 and interest, payable in three months. Gerry was at that time the holder of a written contract from one Osborn, who was then the owner of the lot of land and premises described in the complaint, by which Gerry was entitled to a conveyance of said lot upon his payment of certain money; and when Gerry gave said note to plaintiff he assigned said contract to plaintiff as security for the payment of said note. Afterwards Gerry paid to Osborn all the money due on said contract; and, at Gerry's request, Osborn executed a deed of conveyance of said lot to the defendant Eliza Gerry, who was and is the wife of said defendant John Gerry, which deed was recorded July 3, 1888. The defendants were residing on said lot, and on July 10, 1888, the defendant Eliza duly executed and had recorded a declaration of homestead on said premises. At that time she had no knowledge (if that be material) of the said assignment of said contract to plaintiff. Said assignment was never recorded; nor was there any record of any claim of lien of any character in favor of plaintiff against said premises. This present action was commenced March 7, 1889, to recover a judgment against John Gerry for the amount due on said note, and also to enforce a lien for the same on said premises against both defendants. The defendants answered, setting up their homestead right. The court below gave judgment against John Gerry for the amount of the note, and also decreed the sale of the premises and the foreclosure of all the right and title of both defendants in and to the same; and defendants appeal from the judgment.

The part of the judgment which decrees the sale of the premises is erroneous. The court seems to have acted upon the theory that, as the wife was not a subsequent purchaser for a valuable consideration, therefore, as against her, the prior unrecorded mortgage was valid. But the doctrine that unrecorded deeds and mortgages are good except as against subsequent purchasers for a valuable consideration, does not apply to homesteads. Rights to homesteads are defined by the provisions of the Code which directly deal with that subject. "The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead;" and a declaration of a homestead is not a "conveyance," as that word is used generally in the Code. Section 1241 of the Civil Code enumerates the cases where a homestead may be taken for a debt, and it can be so taken in no other instance. The only subdivision of that section upon which respondent could rest with any plausibility is the fourth, which is as follows: "On debts secured by mortgages on the premises executed and recorded before the declaration was filed for record." It makes no difference that the mortgage (if it was a mortgage on the land) in the case at bar was executed by the husband

before the legal title vested in the wife; the mortgage was not recorded "before the declaration of homestead was filed," and therefore cannot be enforced against the wife's claim of homestead; and the wife has a right in the homestead which she can protect, not only against the husband's creditors, but against the husband himself. The respondent could have protected his mortgage by simply recording it. There is no question here about the morality of the transaction. It is simply a matter of statutory provision. The judgment, so far as it adjudges the sale of the premises described in the complaint and the foreclosure of appellants' interest therein, is reversed. In all other respects it is affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; DE HAVEN, J.; HARRISON, J.; SHARPSTEIN, J.

(91 Cal. 101)

MINES D'OR DE QUARTZ MOUNTAIN SOCIETE ANONYME *et al.* v. SUPERIOR COURT OF FRESNO COUNTY. (No. 14,420.)

(*Supreme Court of California*. Sept. 8, 1891.)

WRIT OF PROHIBITION—WHEN ISSUED.

Where a court having jurisdiction of the subject-matter ordered service of summons by publication, defendant was not entitled to a writ of prohibition to stay proceedings until he should enter a general appearance or be personally served with summons, appeal from the judgment being the proper remedy.

In bank.

Application by the Mines d'Or de Quartz Mountain Societe Anonyme for writ of prohibition to the superior court of Fresno county. Application denied.

Daniel Titus, for petitioners.

DE HAVEN, J. The petitioners are non-residents of the state of California, and an action against them is pending in the superior court of Fresno county, in which that court made an order directing that the summons therein be served upon petitioners by publication. Thereafter the petitioners appeared specially in the action, and moved to vacate and set aside that order upon the alleged ground that the action is *in personam*, and therefore not one in which summons by publication is authorized. The motion was denied. After this petitioners again entered a special appearance in said action, and moved for an order staying all proceedings therein, until the summons should be personally served upon petitioners, or until such time as they should enter their general appearance. This motion was also denied, and the petitioners now ask that a writ of prohibition issue out of this court commanding said superior court to refrain from further proceeding in said action until petitioners shall enter their general appearance therein, or are personally served with the summons in the action.

We do not deem it either necessary or proper to determine at this time whether the action now pending against petitioners in the superior court is one in which the summons can be legally served by publication. That court has jurisdiction of the subject-matter of the action, and whether it has jurisdiction over the

persons & petitioners is a question which it must determine for itself before entering judgment in the action, and which it has the same authority to pass upon as any other question of law or fact which may arise during its progress, and, if in the decision error shall be committed to the prejudice of petitioners, the law affords them a plain, speedy, and adequate remedy by an appeal from any judgment which may be entered against them. *Agassiz v. Superior Court*, 27 Pac. Rep. 49, and cases cited. Application for writ denied.

WE CONCUR: BEATTY, C. J.; GAROUTTE, J.; MCFARLAND, J.; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

91 Cal. 107

PRESTON v. FREY *et al.* (No. 14,279.)

(*Supreme Court of California*. Sept. 9, 1891.)

SLANDER—EVIDENCE—MITIGATION OF DAMAGES—MALICE—PRIVILEGED COMMUNICATIONS—HARMLESS ERROR.

1. In an action for slander, evidence that the defamatory statements made by defendant were common reports in the place where plaintiff formerly lived is inadmissible in mitigation of damages.

2. Where, in an action for slander, a witness testifies to the defamatory words, which were spoken in his presence, and which clearly imputed want of chastity to a female, it is harmless error to allow him to state what he understood to be the import of the words, since they were actionable *per se*, within the provisions of Civil Code Cal. § 46.

3. In an action for slander, defendant, upon cross-examination, was asked, "Haden't you told some things about her [plaintiff] prior to that time?" referring to the date on which the defamatory words were spoken; and, "Had you made the statements prior to that time?" *Held*, that the answers were properly admitted for the purpose of showing malice.

4. In an action for slander, it appeared that the defamatory words were spoken voluntarily, in a spiteful and malicious manner, to one W., who repeatedly told defendant that he did not want to hear them. The parties had met for the purpose of compromising their troubles, upon plaintiff's request, at W.'s house. W. was not retained by either party as counsel or attorney. *Held*, that the statements did not constitute privileged communications.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action to recover damages for slander by Laura F. Preston, an unmarried woman, against Sarah F. Frey and Edward S. Frey, her husband. Trial to the court. Judgment for plaintiff. Defendants appeal. Affirmed.

Waters & Gird, for appellants. *L. Gill and Trippett & Neale*, for respondent.

BELCHER, C. This is an action to recover damages for slander. The plaintiff is an unmarried woman, and the defendants are husband and wife. The complaint alleges "that on the 7th day of October, 1889, in San Diego county, Cal., the defendant Sarah F. Frey maliciously spoke and published, in the presence and hearing of J. F. Walker, of and concerning the plaintiff, the false, unprivileged, scandalous, and slanderous words following, to-wit," then setting them out; "and that

said defendant thereby intended and did impute to plaintiff a want of chastity, and the defendant was so understood thereby by those who heard her, to plaintiff's damage in the sum of twenty thousand dollars." The defendants answered, specifically denying the said allegations of the complaint, and for a separate defense pleaded, in substance, that prior to said 7th day of October certain controversies and differences, set forth in the answer, existed between plaintiff and the defendant Sarah F. Frey; that the said Walker was an attorney at law and justice of the peace at Perris, in the county of San Diego; that at the request of plaintiff, and pursuant to agreement between plaintiff and defendants and said Walker, plaintiff and defendants met at the office of Walker for the purpose of making an amicable and peaceable settlement of said matters of difference and controversy, Walker then and there being the mutual adviser and counselor of both plaintiff and defendants; and that all the statements made by defendants concerning plaintiff were made, in the course of an attempted settlement, to Walker, as their mutual counselor and adviser, without malice, in reply to allegations and demands of plaintiff, and to the end that an amicable settlement might be had, and for no other purpose; and that all of said statements were privileged. They further allege that all of said slanderous statements were made as matters of common report only. The case was tried by the court without a jury, and the findings were that all the allegations of the complaint were true, and all the allegations of the answer were untrue; that the defendant Sarah F. Frey, at the time and place named, maliciously spoke and published, in the presence and hearing of J. F. Walker, of and concerning the plaintiff, the false, unprivileged, scandalous, and slanderous words set forth, and that the plaintiff had been damaged thereby in the sum of \$1,000; and that the parties prior to said speaking and publication had not agreed to submit the matters of grievance between them to said J. F. Walker. Judgment was accordingly entered in favor of the plaintiff for the sum of \$1,000 and costs, from which and from an order denying a new trial the defendants appeal.

It is argued for appellants that the judgment should be reversed because of several errors committed by the court in the reception and rejection of evidence, and because the findings were not justified by the evidence. It appears that the parties formerly lived in the state of Kansas, and had been living in the town of Perris, in San Diego county, for some three years. The plaintiff had heard that Mrs. Frey was speaking disrespectfully of her, and circulating slanders, and she wished her to retract the slanders, and to sign a paper to that effect. At plaintiff's request, the parties met at Walker's office to talk the matter over, and, if possible, settle their troubles. Mrs. Frey refused to sign any paper, and proceeded to make the statements complained of in regard to the plaintiff's past life. These statements were that the plaintiff had

been in a house of prostitution; had been afflicted with a venereal disease; had given birth to an illegitimate child; and that she was in love with a young man named, and had exposed her person, laid down on a bed, and wanted him to go to her. Walker testified that when she commenced he said: "Mrs. Frey, I don't want to hear this story at all; compromise this matter, and stop it." I asked her not to tell it, but she went on without any answer being made." And again: "As Mrs. Frey was repeating her story, I repeatedly told her I didn't want to hear it, and that it was not what I was there for. No one there requested her to state what she did say. It was entirely voluntary on her part. It was said in a spiteful, malicious manner. She may have said, and I think she did say, that those things were reported, but she several times turned to Miss Preston, and said: 'Fanny, you know it is so;' and 'that she could prove these allegations by any quantity of witnesses.'" Mrs. Frey testified: "I don't know whether the reports were true. I know that there were such reports out against her. No one at that meeting asked me to repeat these things. I did so voluntarily. At the time I made these statements to Mr. Walker and Miss Preston, in Mr. Walker's office, I believed the reports to be true. I did not state that the reports were true, but said that I had heard them."

One of the errors assigned was the refusal of the court to allow defendants to prove that the statements made by Mrs. Frey were common reports in the state of Kansas. The evidence was objected to as irrelevant, immaterial, and incompetent, and we think the ruling proper. The law on this subject is stated as follows in Newell on Defamation, Slander, and Libel, (page 893, § 70): "Evidence of previous publication by others is inadmissible in mitigation of damages. The fact that others besides the defendant have defamed the plaintiff is a wholly irrelevant matter. And so is the fact that on such former occasions the plaintiff did not sue the publisher, or take any steps to contradict the charges made against him. And when the falsehood thus unchallenged grows to a persistent rumor or general report, which the defendant hears, believes, and repeats, it is not regarded in law as a mitigating circumstance. Evidence of any such rumor is altogether inadmissible." And see the same author, p. 350, §§ 3, 4; also, 13 Amer. & Eng. Enc. Law, p. 441; and *Wilson v. Fitch*, 41 Cal. 384.

It is claimed that other errors were committed in the reception of, and in the refusal afterwards to strike out, portions of the testimony of Walker. He was permitted to state all that was said and done in his presence, and that he understood from the language used that Mrs. Frey intended to impute to the plaintiff a want of chastity. It is argued that some of the statements made by the witness were in relation to matters not within the issues made by the pleadings, and were therefore irrelevant and immaterial for any purpose, and that the understanding of the witness as to the import of the words

was of no consequence, and proof of it therefore wholly inadmissible. We see no material error in the rulings. All of the statements testified to were made on the same occasion, and were parts of one transaction. It was proper, therefore, for the plaintiff to prove all that was said by Mrs. Frey, and how it was said. And if it was error to allow the witness to state what he understood to be the import of the words spoken, it was error without harm. The words imputed a want of chastity beyond question, and were actionable *per se*. Civil Code, § 46.

A similar objection is made to some of the testimony given by Mrs. Frey on cross-examination. She was asked: "Haden't you told some things about her [plaintiff] prior to that time?" (October 7, 1889;) and, "Had you made the statements prior to that time?" The answers to the questions were properly admitted for the purpose of showing malice. "It is always competent in an action for defamation to prove a repetition of slanderous charges for the purpose of showing malice, and it is wholly unnecessary to plead the repetition of the words." Newell, Defam. p. 349, § 1.

The claim that the findings were not justified by the evidence is rested upon the assumption that the slanders were spoken under circumstances which made them privileged communications. A privileged communication is one made "without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." Civil Code, § 47, subd. 3. Here the words were spoken "in a spiteful, malicious manner," to one who was not interested therein, and who repeatedly told the speaker that he did not want to hear them. They were spoken voluntarily, as shown by the testimony of Walker and admitted by Mrs. Frey, no one at the meeting having asked her to repeat them. Walker says he "had been retained by neither one of them in any way, shape, or form, as a counsel or lawyer." Under these circumstances, the statements complained of were, in our opinion, rightly held by the court below to be malicious slanders, and not privileged communications. See Newell, Defam. p. 515, §§ 114, 115. It follows that the judgment and order should be affirmed, and we so advise.

We concur: VANCLIFF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

91 Cal. 30
PERRI v. BEAUMONT. (No. 13,737.)

(Supreme Court of California. Sept. 3, 1891.)

SWAMP LAND—CONTEST—INSUFFICIENCY OF COMPLAINT—DETERMINATION OF ENTIRE CONTROVERSY.

The complaint, in a contest concerning the purchase of swamp land, alleged that defendant, in 1873, filed an application of purchase, and re-

ceived a certificate, but that the land had not then been surveyed as swamp land; that in 1888 plaintiff filed a like application, and also a protest against the issuance of any further evidence of title to defendant; and that plaintiff was at that time, and is now, an actual settler having valuable improvements on the land, and possessing all the personal qualifications entitling him to purchase it. There was no allegation that the land had been surveyed when plaintiff's application was filed. *Held*, that it was the duty of the court to determine the entire controversy, under Pol. Code Cal. §§ 3414, 3415, which provide that, in certain contests, the surveyor general must refer the matter to the district court, and that, after such reference, either party may bring an action to determine the conflict; and that plaintiff was entitled to a judgment as to the validity of defendant's application, even though the complaint failed to show the survey necessary to validate his own. *Urton v. Wilson*, 65 Cal. 11, 2 Pac. Rep. 411, overruled.

In bank. Appeal from superior court, Kern county.

Action by Perri against Beaumont to determine a contest regarding the purchase of swamp and overflowed land. There was judgment for defendant, and plaintiff appeals. Reversed.

J. B. Lamar and E. Rousseau, for appellant. *Hagan & Van Ness*, (Geo. C. Gorham, Jr., of counsel,) for respondent.

DR HAVEN, J. This action is based upon an order of reference made by the surveyor general of the state referring to the superior court of Kern county a contest concerning the right to purchase certain swamp and overflowed land. It is averred in the complaint, in general terms, that the defendant, Beaumont, filed with the surveyor general, in 1873, his application to purchase the land in controversy, and that in 1874 a certificate of purchase was issued to him thereon, and that at the time of filing said application the land had not been surveyed or segregated as swamp and overflowed land. The complaint further alleges that plaintiff, in the year 1888, filed in the office of the surveyor general of the state his application to purchase said land, and at the same time filed a protest against the issuance of any further evidence of title based upon defendant's application and certificate of purchase. The complaint also alleges that at the date of his application the plaintiff was and still is an actual settler on the land applied for, and has valuable improvements therein, and that he possesses all the personal qualifications to entitle him to purchase the said land. It is not averred, however, that the land was surveyed at the date of plaintiff's application. The defendant demurred to the complaint upon the general ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff failing to amend, the court rendered judgment that he take nothing by the action, and that defendant recover from plaintiff his costs. The plaintiff appeals from this judgment.

It is clear that, upon the facts stated in the complaint, the plaintiff was not entitled to a judgment directing the approval of his application to purchase, as it is not alleged that the land applied for was surveyed at the date it was made; but, al-

though the plaintiff may not have been entitled to all the relief demanded, still if, upon the facts alleged, he was entitled to any relief against the defendant, the demurrer was improperly sustained, and the judgment in favor of defendant for his costs is erroneous. The complaint does allege facts showing the defendant's application and the certificate of purchase issued thereon to be invalid, and consequently that he has no right by virtue thereof to acquire a patent from the state. The question is thus presented whether, in view of these facts, the judgment rendered by the court against plaintiff, and in favor of defendant for his costs, was proper. It is urged by respondent that, inasmuch as the complaint does not show that the land in controversy was subject to sale at the date of plaintiff's application, he is not entitled to a judgment as to the validity of defendant's application upon the facts alleged, and is therefore in no position to complain of the judgment appealed from; and this contention of respondent seems to have been upheld by this court in the case of *Urton v. Wilson*, 65 Cal. 11, 2 Pac. Rep. 411, and perhaps, also, in *Millidge v. Hyde*, 67 Cal. 5, 6 Pac. Rep. 852, and it may be that there are *dicta* in other cases which also support this view. The decisions, however, have not been uniform, and, upon full consideration, we are of the opinion that the rule announced in *Urton v. Wilson*, *supra*, should not be followed. The jurisdiction of the superior court in this class of cases is special, and is conferred by sections 3414 and 3415 of the Political Code,¹ and when invoked it is the duty of the court to proceed and determine the entire controversy referred to it for decision. *Garfield v. Wilson*, 74 Cal. 175, 15 Pac. Rep. 620. In this latter case the court also said: "But though the plaintiff had no right to purchase the land, and even if he had not sought to purchase it, he could still contest the right of the defendants to purchase it." This is in accordance with the law as declared in the earlier and well-considered case of *Cunningham v. Crowley*, 51 Cal. 123, in construing section 17 of the "Act to provide for the management

¹ Sec. 3414. When a contest arises concerning the approval of a survey or location before the surveyor general or concerning a certificate of purchase or other evidence of title before the register, the officer before whom the contest is made may, when the question involved is as to the survey, or one purely of fact, or whether the land applied for is a part of the swamp or overflowed lands of the state, or whether it is included within a confirmed grant, the lines of which have been run by authority of law, proceed to hear and determine the same; but when, in the judgment of the officer, a question of law is involved, or when either party demands a trial in the courts of the state, he must make an order referring the contest to the district court of the county in which the land is situated, and must enter such order in a record-book in his office.

Sec. 3415. After such order is made, either party may bring an action in the superior court of the county in which the land in question is situated, to determine the conflict; and the production of a certified copy of the entry, made by either the surveyor general or the register, gives the court full and complete jurisdiction to hear and determine the action.

and sale of lands belonging to the state." (St. 1867-68, p. 511,) a section which does not materially differ from the above-cited sections of the Political Code. In that case, in speaking of the object and scope of the action to determine conflicts arising in the office of the surveyor general, the court said: "The purpose of the action is not to annul the certificate of location or purchase, or other evidence of title; but, if both of the parties are applicants for the purchase of the lands, the purpose is to procure a determination of the question as to which applicant has the better right to purchase them; or, if the contest has its origin in a protest, filed by a person who is not seeking to purchase the lands from the state, the purpose of the action is to determine whether the party against whom the protest is filed has the right to purchase the lands; and the annulment of the certificate of purchase, or other evidence of title, is merely a consequence of the determination that the party holding it was not entitled, as against the other party, to effect a purchase of the lands. In other words, the statute provides a mode by which, and the parties in whose name, an action may be instituted to determine which party has the better right to purchase the lands, where there are contesting applicants, or to determine, in case of a mere protest, whether the party against whom the protest is filed is entitled to make the purchase." The court in this case, as well as in that of *Garfield v. Wilson*, supra, was speaking of a contest properly originating in the office of the surveyor general, and referred to the court for decision. It is unnecessary at this time to determine whether sections 3414 and 3415 authorize a mere volunteer, who does not seek to purchase the land himself, and who does not possess the personal qualifications entitling him to do so, or one who is without any interest in the land, to be affected by a sale by the state, to originate a contest by filing a protest against the issuance of title to a prior applicant. This is not such a case. Upon the facts stated in the complaint, the plaintiff was a person authorized by law to initiate this contest, and it was the duty of the court to decide as to all the matters involved therein, and referred to it for decision; and one question so referred was as to the right of the respondent to receive from the state a patent for the land involved in this action. It cannot be said that the plaintiff is not aggrieved by the failure of the court to decide this part of the controversy, and adjudge defendant's application void. The plaintiff is an actual settler upon the land, and has valuable improvements thereon. In addition to this, he is possessed of all the personal qualifications which would entitle him to purchase, if the land were surveyed, and it is alleged that he desires to purchase it. It is clear, therefore, that he has an interest in preventing defendant from acquiring the legal title from the state. But the judgment in this case leaves the defendant free to proceed upon his present application, and acquire such title, and it cannot be assumed that he may not be able to do so. A pat-

ent, although based upon an invalid application, is conclusive as against all persons other than those who have prior to its issuance initiated a valid right to purchase from the state; and, upon the facts alleged, the plaintiff was entitled to a judgment which would make it impossible for the defendant to clothe himself with such a title by virtue of his present application. The judgment must be reversed, and, we think, it would be proper for the court to still permit the plaintiff to amend his complaint by adding thereto an averment that the land in controversy was surveyed at the date of his application, if he so desires.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; HARRISON, J.; GAROUTTE, J.

91 Cal. 108

MILLER v. HIGHLAND DITCH CO. *et al.*
(No. 14,170.)

(*Supreme Court of California*. Sept. 9, 1891.)

TAXATION OF COSTS—BURDEN OF PROOF—NECESSARY DISBURSEMENTS.

1. Where the prevailing party inserts a charge in his memorandum of costs which does not appear upon its face to be a necessary and proper disbursement, the burden of proof is upon the claimant.

2. A charge of \$500 for a map in a bill of costs is not a necessary disbursement, appearing as such on its face, which, unless controverted, will control the court on taxation.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Action by George Miller against Highland Ditch Company *et al.* Defendants appeal from an order refusing to retax plaintiff's costs. Order reversed. For former report, see 25 Pac. Rep. 550.

Waters & Gird and *George E. Otis*, for appellants. *Willis, Cole & Craig* and *Harris & Gregg*, for respondent.

BELCHER, C. This is an appeal from an order of the court below refusing to retax the plaintiff's costs. It appears from the bill of exceptions that a duly-verified memorandum of costs, a copy of which is set out, was filed by the plaintiff in proper time. One of the items in the memorandum is as follows: "Paid J. B. Pope for map introduced in evidence, adopted by judge in his findings, and made part thereof, \$500." Other items are for the attendance of witnesses a stated number of days. The defendants served, and filed in due time, notice of motion to retax the costs, and their objection to the item above quoted was: (1) That the same is not a proper charge, nor authorized by law to be included in plaintiff's bill of costs. (2) That said charge is excessive, and far beyond the value of said map; that said map is of not any greater value than \$5, and could not have cost the plaintiff herein a greater sum." The objections to the other items were that the charges were for a greater number of days than the witnesses were actually in attendance. "Whereafter the defendants' said motion came on regularly for hearing before the court, both parties appearing by counsel,

and plaintiff introduced no evidence whatever, whereupon the court refused to strike out any part of any of the said items of costs, and denied defendants' said motion; to which ruling the defendants did then and there duly except." The respondent contends that, in a case like this, the burden is upon the party moving to strike out, and that, as no evidence was offered at the hearing of the motion as to the circumstances under which the map was made and introduced in evidence, or as to its value, it must be presumed that the court below did not abuse its discretion in allowing the charge therefor to stand as made; and in support of this position *Barnhart v. Kron*, 28 Pac. Rep. 210, is cited. In that case a cost-bill was filed, and all the items in it were for the attendance of witnesses, and the fees of the sheriff, clerk, and reporter. A motion was made to retax the costs, by striking out each and every item thereof, upon the ground that none of the items were incurred by the respondent in establishing his defense to the action, but that each of them was incurred by his co-defendant. The motion was denied by the trial court and on appeal it was held that the allowance or disallowance of items for the expenses and disbursements incurred upon the trial of an action must be left, in nearly every instance, to the discretion of the judge before whom the cause was tried; that there was nothing in the record showing that the court did not properly exercise its discretion in refusing to strike out the items objected to; and that the memorandum of costs was properly verified, "and unless controverted, should control the decision of the court." This is undoubtedly the correct rule where the charges appear on their face to be for proper and necessary disbursements in the action. The rule, however, ought not to be extended, and, in our opinion, it should not be applied where the charges do not appear on their face to be proper and necessary. In such cases the burden should be on the claimant, and not on the moving party, and, if he fails to introduce evidence to justify and sustain his charges, they should be stricken out on motion. For example, if the prevailing party should put in his cost-bill charges for the services of an expert accountant, or of a surveyor in the field, such charges would not appear on their face to be necessary disbursements, (*Faulkner v. Hendy*, 79 Cal. 285, 21 Pac. Rep. 754; *Haynes v. Mosher*, 15 How. Pr. 216; *Mark v. City of Buffalo*, 87 N. Y. 189;) and he ought not to be permitted to rest on his oars and say, because the court may have appointed the expert or directed the survey, that his verified memorandum, unless controverted by proofs on the other side, must control the decision. In this case we think the charge for the map comes within the exception above stated. Presumably the map was made for the plaintiff and at his request, and the burden was therefore upon him to show that the disbursement was a necessary and proper one in the action. We advise that the order be reversed, and the cause remanded, with instructions to the court below to sustain

the motion of defendants to strike out from the cost-bill the item of \$500 above mentioned.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is reversed, and the cause remanded, with instructions to the court below to sustain the motion of defendants to strike out from the cost-bill the item of \$500 above mentioned.

(81 Cal. 129)

PICO v. COHN *et al.* (No. 13,892.)

(*Supreme Court of California*. Sept. 10, 1891.)

VACATION OF DECREE—FRAUD—BRIBING WITNESS.

A decree will not be vacated merely because the prevailing party obtained it by bribing a witness to swear falsely. Affirming 35 Pac. Rep. 970.

On rehearing.

Anderson, Fitzgerald & Anderson, De Valle & Munday, and *Smith, Winder & Smith*, for appellant. *A. Brunson* and *Stephen M. White*, for respondent.

PER CURIAM. After a full consideration of the argument presented upon the rehearing in this cause, we are satisfied with the former decision rendered in February, (25 Pac. Rep. 970,) and for the reasons there given the judgment appealed from is affirmed.

(81 Cal. 51)

PEOPLE v. PARKER. (No. 20,806.)

(*Supreme Court of California*. Sept. 7, 1891.)

BURGLARY—INFORMATION—COMPLAINT AND COMMITMENT—SURPLUSAGE.

1. A magistrate who committed a person on the charge of burglary returned to the superior court only the sworn complaint, upon which was indorsed the order of commitment. The complaint alleged that the accused "entered a barn with intent to commit larceny, said barn being located on the Simmons ranch," etc. The commitment was as follows: "It appearing to me that the offense in the within deposition mentioned has been committed, and that there is sufficient cause to believe" "the accused guilty thereof," etc. Held, that Penal Code Cal. § 806, providing that when a defendant has been thus committed the district attorney shall file an information "charging the defendant with such offense," did not authorize an information charging that the accused feloniously entered a barn, "the property of one G. W. Ditman," since the information must be based entirely on the commitment or the facts stated in the depositions. Following *People v. Lee Ah Chuck*, 66 Cal. 668, 6 Pac. Rep. 889, and *People v. Vierra*, 67 Cal. 281, 7 Pac. Rep. 640.

2. In the absence of any other description of the barn, the allegation of ownership was necessary.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Prosecution for burglary against *Flem Parker*. Defendant before plea moved to set aside the information, which being denied, he appeals. Reversed.

J. S. Clack and *Charles G. Lamberson*, for appellant. *Maurice E. Power*, *Atty. Gen. Hart*, and *Wm. H. Layson*, for respondent.

GAROUTTE, J. An information was filed charging the defendant with the crime of

burglary. Before pleading he moved to set aside the information upon the ground "that he had not been legally committed by a magistrate." Upon the hearing of the motion it was shown that G. W. Ditman filed a sworn complaint before a magistrate, alleging "that one Flem Parker, on or about the 20th of November, 1890, and before the filing of this complaint, at the county of Tulare, state of California, did willfully and unlawfully enter a barn with intent to commit larceny, said barn being located on the Simmons ranch, in said Kaweah township," etc. There were no other depositions in the case, and upon the complaint was indorsed the following commitment: "It appearing to me that the offense in the within deposition mentioned has been committed, and that there is sufficient cause to believe the within-named Flem Parker guilty thereof," etc. The information charges that "the said Flem Parker, on or about the 20th day of November, 1890, and before the filing of this information, at the county and state aforesaid, did willfully, unlawfully, and feloniously enter a certain barn, the property of one G. W. Ditman, with intent then and there and therein to commit the crime of larceny."

The motion to set aside the information should have been granted, for the foregoing record discloses that the defendant was never committed by a magistrate for the offense charged in the information. Under the law, as declared in *People v. Lee Ah Chuck*, 66 Cal. 663, 6 Pac. Rep. 859, and *People v. Vierra*, 67 Cal. 231, 7 Pac. Rep. 640, the district attorney is allowed to file an information based either upon the offense set out in the commitment or upon the facts disclosed by the depositions, and that is the limit of his authority.¹ This information is based neither upon the commitment nor the facts set out in the complaint or deposition. It alleges that the defendant entered a certain barn, the property of one G. W. Ditman, with the intent, etc. The record is entirely silent as to any such state of facts, and the district attorney in framing his information is bound by the record.

It is insisted that the allegation of ownership of the barn in G. W. Ditman is immaterial, and therefore harmless. While in charging the offense of burglary it may not be necessary in all cases to allege ownership of the property entered, yet, in this case, it was a necessary allegation, for it constituted the entire and only description of the barn which the defendant is charged with feloniously entering. Let the judgment be reversed, and the cause remanded, with directions that the information be set aside.

We concur: BEATTY, C. J.; DU HAVEN, J.; SHARPSTEIN, J.; MCFARLAND, J.; HARRISON, J.

¹Pen. Code Cal. § 809: "When a defendant has been examined and committed, as provided in section 872 of this Code, it shall be the duty of the district attorney, within 30 days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with the offense," etc.

PATERSON, J. If the question were an open one, I should say that an information could not be sustained unless it charged the offense charged in the complaint, and for which he was examined and committed by the magistrate. Such it appears to me is the view of the supreme court of the United States in *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292. Our own cases, however, hold that the district attorney may prosecute for any offense shown by the depositions taken on the preliminary examination. I therefore concur.

91 Cal. 124

SAN BERNARDINO NAT. BANK v. COLTON LAND & WATER CO. *et al.* (No. 14,380.)

(*Supreme Court of California.* Sept. 10, 1891.)

NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER — INDORSEMENT BY CORPORATION — NOTICE TO HOLDER — FINDINGS.

1. In an action on a note signed by a corporation, and by its president and one other director individually, the corporation alone answered, alleging that it was merely an accommodation maker, that the execution of such a note was in excess of its corporate authority, and that the payee, and the bank to which it was transferred after maturity, had knowledge of the fact at the time of the execution and transfer. The president testified that he told the payee he wanted the money for his individual use, and that he would give the corporation as security. The payee testified "that he knew nothing about who was the principal debtor, or for whose use the money was obtained." The evidence showed also that the note was made under a resolution of the directors of the corporation to "borrow" the money; that the resolution, which was written by the president, was delivered by him to the payee at the time he received the money; and that the signature of the corporation appeared first upon the note. Held that, as the evidence was conflicting, and there was nothing on the face of the transaction to indicate that it was not in the ordinary course of business, a judgment against the corporation would not be disturbed.

2. A finding that the note was executed for a valuable consideration was admitted by the answer, and was not inconsistent with a finding that the defendant corporation received no part of the consideration.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action by San Bernardino National Bank, a corporation, against the Colton Land & Water Company, a corporation, and others, to recover on a promissory note. There was judgment for plaintiff, and defendants appeal. Affirmed.

Goodcell & Leonard, for appellants. Frank F. Oster, for respondent.

FITZGERALD, C. This action is brought to recover on a promissory note for \$2,500, executed by the defendants to the Farmers' Exchange Bank, a corporation, and by it indorsed to plaintiff after maturity. The note, which is joint and several, is dated July 28, 1887, and is signed by the defendants in the following order: "Colton Land and Water Company, by A. B. Hotchkiss, Pres't. A. B. Hotchkiss. J. C. Peacock." The demurrer to the complaint was properly overruled. The Colton Land & Water Company alone answered, alleging that it was merely an

accommodation maker; that such execution of the note was in excess of its corporate authority; and that the plaintiff and its assignor had knowledge of the fact at the time of the execution and transfer of the note. Judgment was rendered in favor of plaintiff, and the defendants the Colton Land & Water Company and A. B. Hotchkiss appealed from the judgment. Subsequently an appeal was taken by the defendant corporation from the order refusing a new trial, but it is stipulated that both appeals be heard as one upon the same transcript. It appears that the note sued on was made by the defendant corporation in pursuance of the following resolution adopted at a meeting of the board of directors of the Colton Land & Water Company, held at Colton on the 27th day of July, 1887, at which five of the directors, including the defendants Hotchkiss and Peacock, were present: "Resolved by the board of directors that this company borrow \$2,500, and execute its note therefor, at regular market rate of interest, to such person as might have the money to lend it." The following stipulation was entered into between the parties hereto: "That the articles of incorporation of the Colton Land & Water Company included no power of the corporation to make accommodation paper, or to sign paper as an accommodation maker or indorser, but the corporation had the power, under its corporate powers, to sign negotiable paper for the purpose of paying corporate indebtedness, or for in any way carrying out the purposes of the incorporation, as set forth in the answer, including the borrowing of money for its own purposes." Plaintiff offered no evidence, but rested its case on the pleadings. The defendant Hotchkiss was sworn as a witness for the defense, and testified substantially as follows: That he stated to Mr. Drew, the president of the Farmers' Exchange Bank, that he wanted the money for his individual use, and that he would give the Colton Land & Water Company as security; that he got the money on the note sued on, and used it for his own purposes, and that the Colton Land & Water Company was simply security thereon, as was Mr. Peacock; that the body of the resolution, in pursuance of which the note was given and the money borrowed, was in his handwriting; and that he delivered it with the note to Mr. Drew, when he received the money from the bank, at which time he was the president, and acting as such, of the Colton Land & Water Company. Mr. Drew was then called as a witness for the defense, and testified substantially "that he knew nothing about who was the principal debtor, or for whose use the money was obtained on the note." On cross-examination, he stated "that he understood the money was for Hotchkiss, but whether it was something the company was owing him, or whether it was borrowing for him, he was not clear." The statement by Hotchkiss that the defendant corporation signed the note merely as accommodation maker or surety, and that it was so understood and accepted by the Farmers' Exchange Bank, is contradicted by

Drew, and is inconsistent with the act of the board of directors of the defendant corporation, by which it resolved to "borrow" the money, and with the fact that the resolution, which was written by Mr. Hotchkiss, who is an attorney as well as president of the corporation, was delivered by him with the note to the bank at the time he received the money, and with the further fact that the signature of the defendant corporation, by its president, Hotchkiss, should appear first on the note,—a rather unusual place, it must be conceded, for the signature of an accommodation maker or surety. It would appear, therefore, that, aside from the testimony of the defendant Hotchkiss, there is nothing that is even remotely suggestive of the slightest suspicion that the transaction, on its face, was not in the ordinary course of the business of the defendant corporation, and one that was clearly within the scope of its corporate authority. The court, in its decision, found that neither the plaintiff nor its assignor, the Farmers' Exchange Bank, had any knowledge whatever, either actual or constructive, that the defendant corporation executed the note in question as an accommodation maker or surety, and not as principal. As the evidence on this point is substantially conflicting, the finding thereon will not be disturbed on the ground of the insufficiency of the evidence to justify it. It is insisted by appellant that the fourth and ninth findings are contradictory. In this view we cannot concur. The fourth finding, that the note was executed for a valuable consideration, is admitted by the answer, and is in no respect inconsistent with the ninth finding, that the defendant corporation received no part of the consideration. We therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

91 Cal. 74

PAINTER *et al.* v. PASADENA LAND & WATER CO. *et al.* (No. 14,064.)

(Supreme Court of California. Sept. 5, 1901.)

WATER-RIGHTS — RESERVATION IN DEED — VALIDITY.

1. A land and water company conveyed a tract of land through which ran a ditch, reserving the ditch and a strip of land 10 feet wide on each side of it; also the right to enter on the lands for the purpose of making repairs, and to tunnel or in any manner develop the waters on the lands. The reservation provided that the grantees were not to use any of the water in the ditch, nor use any water on the land, except for the purpose of irrigation and for domestic use. *Held*, that the reservation included about an acre of water-bearing land which was in the tract, and the undeveloped water therein, less the quantity required to irrigate the tract and for domestic use.

2. Where a deed described the land conveyed by courses and distances, and conveyed no specific number of acres, it was competent for the grantor to except a swamp or marsh from the operation of the deed.

3. Where it appeared from the deed that

part of the land was water-bearing land and part so dry that it required irrigation, the subject-matter supported the reservation of the water land, and the exception was not void for uncertainty because the boundaries of the excepted land must be shown by evidence.

4. The rights reserved were appurtenant to the ditch and water-rights, and passed by grant from the company to defendant, though the reservation contained no power of assignment or words of inheritance, since Civil Code Cal. §§ 1072, 1092, 1105, provide that no such words are requisite, and that a fee is presumed to pass unless the grant expresses a different intention.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Painter and others against the Pasadena Land & Water Company to enjoin it from entering upon certain lands and taking water therefrom. Decree for plaintiffs, and order denying a new trial. Order affirmed. Decree modified.

Anderson, Fitzgerald & Anderson, for appellants. *Lee, Gardiner & Scott*, for respondents.

PATERSON, J. On April 23, 1887, the Lake Vineyard Land & Water Association conveyed the land described in the complaint to plaintiffs' grantors. The deed contained the following provisions: "Provided, that the said A. Elliott and G. A. Richardson do not construct or allow to be constructed on the above-described land any work that will in any manner injuriously affect the waters or water-rights of this association. And it is distinctly understood that the said association reserves the right at all times to enter upon said lands for the purpose of making any repairs or for the development of the waters of this association. And a strip ten feet wide on each side of the water-ditch of said association is hereby expressly reserved from the above sale, and under no consideration is the above description, or anything in this resolution contained, to be construed as conveying any part or portion of the aforesaid water-ditch or waters, or of the land for ten feet on each side thereof. And the aforesaid Elliott and Richardson shall not, and in purchasing this land they agree not to, use any water for other than domestic purposes and for irrigating said land; neither are they to sell, give away, or allow to be wasted any water whatsoever. And under no consideration are they to use any water from the ditch of said association. And the said association reserves the right to tunnel, or in any other manner to develop the waters of said association on this land. And it is also clearly understood that the association reserves the right of way through the above-described lands for a wagon road,—either the present road or one as good." Plaintiffs have acquired all the rights of Elliott and Richardson, and the defendants have succeeded to all the rights reserved to the Land & Water Association which could be transferred by it to a third party. The statement on motion for a new trial shows: "That there was on this tract of land a marshy, swampy piece of water-bearing land of from a three-fourth acre to an acre and one-quarter dimension; that

the water came to the surface and became running water in this piece of land 'only where it is treuched;' that when Richardson and Elliott first bought and took possession of the land there was no water running 'to amount to anything,' only 'sieeping a little over the bank;' that an inch and two-thirds of water measured under a four-inch pressure has been developed by Elliott and Richardson and plaintiffs on this piece of marshy or swampy land, and has been and was at the beginning of this suit all used by plaintiffs for domestic purposes and irrigation of the tract of land conveyed by said deed to Elliott and Richardson. An unimpeached witness on behalf of defendants testified that in his opinion twenty inches of water measured under a four-inch pressure, over and above the water now being used, could be developed on said piece of marshy or swampy land." The defendants claim that the right to enter upon the land, dig trenches, and develop the water resting in the swampy portion referred to was reserved to the association in its deed to Elliott and Richardson, and that they succeeded to the same right through the deed from the association to them. They were proceeding to enforce such claim when this action was brought to restrain them from so doing. Plaintiffs contend that no such rights were reserved to the association, and, if they were, they were personal to the association, and could not be transferred to defendants or any other person. The court below sustained plaintiffs' contention, and gave judgment in their favor. Defendants have appealed from the judgment, and from the order denying their motion for a new trial.

Were the rights claimed by defendants reserved to the association? It is evident that the parties had under consideration certain waters other than those in the ditch, and intended to define what their respective rights to the same should be under the deed. It was stipulated that "under no consideration" were the grantees "to use any water from the ditch of said association," but of the other waters they were to have sufficient for "domestic purposes and for irrigating said land." Where were the waters other than those in the ditch from which the grantees might draw sufficient for domestic uses and irrigation? Manifestly they lay quiescent in the "marshy, swampy piece of water-bearing land" in which "the water came to the surface, and became running water only where it was treuched." There was about one acre of the land capable of producing over 20 inches of water. This is the water which the grantor retained the right to develop. There was no other water to develop. The association certainly did not desire to tunnel for, "or in any other manner to develop," water already running in its ditch. The grantor was a water association, and the owner of a large body of water-bearing lands, including the land described in the deed. A large portion of the tract conveyed was dry, but susceptible of cultivation when irrigated. The association wanted the water to assist in feeding the ditch which ran through the tract granted, and the grantees want-

ed the land, with water sufficient for domestic and irrigation purposes. The association conveyed the land, but reserved to itself the ditch and the water therein, together with a strip of land 10 feet wide on each side thereof, and all undeveloped water in the land conveyed, less the quantity required to irrigate the tract and for domestic purposes. It is clear that such was the intention of the parties, and it is expressed in language so plain that there is little, if any, room for controversy.

Were the rights thus reserved capable of assignment? It is claimed by respondents that rights like those reserved in the deed to Elliott and Richardson, and now under consideration, cannot be granted over unless the power of assignment is expressly given to the grantor, or the usual words of inheritance to pass the fee are used, showing an intent to extend the right beyond the present grantee; that the rights reserved were not made appurtenant to any land of the grantor, and were, therefore, mere rights in gross which are not assignable. We do not deem it necessary to discuss the legal and technical etymology of exceptions, reservations, or *profits & prendre*. A right reserved may be an exception though designated in the deed as a reservation. The strip of land 10 feet wide on each side of the ditch reserved in the deed is clearly an exception. The other rights reserved are either exceptions or *profits & prendre*, and, if exceptions, neither the word "heirs" nor express power of assignment was required to enable the grantor to transfer his rights to the appellants. *Whitaker v. Brown*, 46 Pa. St. 198; *Emerson v. Mooney*, 50 N. H. 319; *Gould, Waters*, § 310. Regarded as a profit or interest in the soil, or, as it was designated in the Norman-French, a right of *profits & prendre in alieno solo*, the same result follows. When such a right is reserved in a deed by which lands are conveyed, it is equivalent, so far as the creation of the right of common is concerned, to an express grant of the right by the grantee to the grantor, (*Wagner v. Hanna*, 38 Cal. 116;) and in this state words of inheritance are not requisite to transfer a fee in real property, (Civil Code, §§ 1072, 1092, 1105.¹) These provisions of the Code were intended to change the common-law rule, not only with respect to a transfer of the fee, but of all other estates in real property. In cases of exception, where the grantor owns the fee, such words would be entirely superfluous, because the thing excepted never passed to the grantee; and, as a reservation of a right of *profits & prendre* was assignable

at common law with words of inheritance, we think, under the provisions of the Code quoted, it may now be assigned without such words. The original and underlying principle of the old rule requiring words of inheritance in the grant conferring the fee—which was of feudal origin—was that the personal services of the grantee were the only consideration of the grant, and the estate, therefore, would not continue beyond the life of the grantee, unless the grantor expressly provided that it should extend to his heirs. The great changes which have occurred in the political and business relations of life, however, have done away with the reason for such a rule, and there is certainly no reason why an absolute estate should pass without words of inheritance, and the reservation of a right of *profits & prendre* should not. The cases cited by respondents which relate to water running on the surface do not aid us in determining the question before us in this case. There is a wide and apparent distinction between the water of a running stream and water which rests in the soil. The former assumes a distinct character from that of the earth; no exclusive property can be acquired in it while it is still flowing in its natural condition, distinct and separate from the land over which it runs; the latter is confined in the earth, and "has no distinctive character of ownership from the earth itself any more than the metallic oxides of which the earth is composed." *Roath v. Driscoll*, 20 Conn. 540; *Cross v. Kitts*, 69 Cal. 222, 10 Pac. Rep. 409. In *Hanson v. McCue*, 42 Cal. 309, the court said: "Water filtering or percolating in the soil belongs to the owner of the freehold, like the rocks and minerals found there. * * * The owner may appropriate the percolations and filitations as he may choose, and turn them to profit if he can." Being an integral part of the realty, the right to take it away for use or profit is as much a *profit & prendre* as the right of fowling, fishing, hawking, or the common of turbary, or the common of estovers. *Washburn, Easem.* (2d Ed.) *10; *Hill v. Lord*, 48 Me. 100; *Goodrich v. Burbank*, 12 Allen, 459; *Chatfield v. Wilson*, 28 Vt. 49. In *Trustees v. Youmans*, 50 Barb. 319, the court, in speaking of subterranean waters, said: "The water belongs to the soil, is part of it, and may be used, removed, and controlled to the same extent by the owner."

Respondents claim that neither percolating nor standing waters can be granted without a grant of the soil above and below, and that, if the reservation under consideration be held to mean both water and soil, the exception is void because repugnant to the estate granted. We do not think this contention is sound. If the deed in express language had excepted all the water-bearing lands from the tract granted,—and that is practically though not precisely what was done, because the grantors reserved the right to enter and "to tunnel, or in any other manner develop the waters of the association on this land,"—the exception would not be repugnant to the grant. The grant was not of any specific number of acres. The

¹"Sec. 1072. Words of inheritance or succession are not requisite to transfer a fee in real property."

"Sec. 1092. A grant of an estate in real property may be made in substance as follows: 'I, A. B., grant to C. D. all that real property situated in * * * county, state of California, bounded as * * * follows: * * * Witness my hand this * * * day of * * * 18—. A. B.'"

"Sec. 1105. A fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended."

land was described by courses and distances, and it was as competent to except from the operation of the grant the marsh or swamp as it was to except 10 feet on each side of the ditch. If a grant of land be for 20 acres, and 1 acre be excepted therefrom, the exception is void because repugnant to the grant. "So one may grant a farm, excepting the meadow; but to grant a pasture and meadow, excepting the meadow, would be repugnant and void." 3 Washb. Real Prop. (5th Ed.) 464. Nor can it be said that the exception would be void for uncertainty. It appears from the provisions of the deed that a portion of the tract conveyed is water-bearing land, and some of it is so dry that it requires irrigation to fit it for cultivation. The subject-matter, therefore, supports the exception, and the exception is not void because the boundaries of the part excepted must be shown by evidence. The evidence shows that out of the 32 acres granted there is only from three-fourths of an acre to an acre and one-quarter which can be used for the production of water, and that this small parcel is capable of yielding over 20 inches of water. It is apparent, therefore, that the quantity excepted can be easily located and defined, and that there is not much basis for the respondents' disquietude on account of what they term "such a tremendous and destructive power over their property" * * * as that which is now claimed by appellants." Sections 801 and 802 of the Civil Code are cited to show that the rights reserved were mere servitudes in gross, and incapable of being granted over. There is no doubt that the servitudes enumerated in section 801 are real servitudes imposed for the benefit of the estate to which the right belongs, and resting upon the estate on which the obligation is imposed, and that those named in section 802 are personal, not attached to any dominant estate, and are not assignable. We cannot, however, regard the rights in question as mere servitudes, but, if they are, they were created as incidents or appurtenances to the ditch and water-rights of the company, and passed by the grant to appellants. At common law a *profit à prendre*, if granted in gross, was regarded as an estate or interest in the land itself. 6 Amer. & Eng. Enc. Law, p. 142. Such a right "has always been considered in law a different species of right from an easement," and, although capable of being transferred in gross, may also be so attached to a dominant estate as to pass with it by a grant transferring the land with its appurtenances. *Huntington v. Asher*, 96 N. Y. 610. As stated before, the intention of the parties is clearly expressed in the deed, and this being so, little weight should be attached to technical definitions of terms used. It matters but little what name we give to the rights reserved to the grantor in the deed. Attempts to create symmetry in the law by classification and designation of classes of different kinds of rights connected with and springing out of lands are always hazardous. From whatever stand-point we view the case, and whatever may be the true and technical term

applicable to the rights reserved, we are led to a conclusion different from that reached by the learned judge of the court below.

It is claimed by respondents that all of the water on the land is necessary for irrigation and domestic purposes, and that the court found this contention to be true, but we do not so construe the findings. It is found that certain waters rise and flow from springs existing on the land which have been sufficient to furnish water for the irrigation of a large portion of the land; that about 10 acres of the land have been irrigated, plaintiffs "using therefor all of the said waters so rising and flowing on said lands; * * * and all of the water rising on said land was at all of the times herein mentioned needed for the proper irrigation of said land, and for proper domestic use thereon;" that defendants have dug and excavated ditches which have interrupted the flow of a portion of said waters "so rising and flowing as aforesaid," and prevented the same from flowing into the conduits of plaintiffs, "and plaintiffs have ever since the making of said excavation been and now are prevented from using said portion of said waters for the irrigation of said land or otherwise;" that defendants, "claiming they had the right to appropriate and take for their own use and benefit, and convey from said land, all of the waters so flowing in said trenches and ditches excavated as aforesaid, and at least four-fifths of the other waters rising and flowing on said lands as aforesaid, entered in and upon said land, and diverted all of said waters so flowing in said trenches and ditches excavated as aforesaid, and the greater portion, to-wit, at least four-fifths of said other waters rising and flowing on said land as aforesaid, * * * so that plaintiffs were then and there wholly deprived of all use thereof;" that plaintiffs have since said diversion turned the water back into their conduits, and used the same for irrigation and for domestic purposes, but defendants still unlawfully threaten to again divert, and at all times thereafter to appropriate and take, for their own use and benefit, all of the waters so diverted by defendants. These facts found by the court entitled the plaintiffs to an injunction restraining the defendants from diverting the water which plaintiffs needed for irrigation and domestic purposes, and to that extent the decree is correct; but the judgment went further, and declared that the defendants "have not, nor has either of them, any estate, right, or interest of, in, or to such land and waters, so owned as aforesaid by said plaintiffs, or any part thereof, nor of any easement or servitude upon or against said land, or any part thereof;" and adjudged that the defendants and those claiming under them be perpetually enjoined from appropriating or taking "said waters rising and flowing, or hereafter to rise or flow, upon said land so owned by said plaintiffs, or any part thereof, or from in any manner interfering with said plaintiffs' use, control, and possession of said waters, or from in any manner interfering therewith, or from en-

tering in or upon said land owned by said plaintiffs, to excavate, dig, or bore thereon, or otherwise disturb the soil thereof." These latter provisions of the decree go beyond the relief to which the plaintiffs are entitled. The defendants are entitled to go upon the land for the purpose of making repairs, and to tunnel, or in any other reasonable manner to develop the water which may exist in the water-bearing lands of the tract, and which may not be required by plaintiffs for irrigation and domestic purposes. How many tunnels or how many ditches may be cut in the land by appellants cannot be determined in advance. All that can be said in that regard is that they will be held to a reasonable exercise of the right to develop the water remaining after the plaintiffs have secured enough for irrigation and domestic purposes. The order denying a new trial is affirmed, but the cause is remanded, with directions to the court below to modify its decree in accordance with the views we have expressed.

We concur: HARRISON, J.; GAROUTTE, J.

91 Cal. 146

GOULD V. STAFFORD. (No. 14,273.)

(*Supreme Court of California.* Sept. 11, 1891.)

WATER-RIGHTS—CONVEYANCE—CROSS-EXAMINATION OF WITNESS.

1. In an action for damages, and to restrain an alleged wrongful and excessive diversion of water from a stream, the evidence showed that defendant was a riparian owner above plaintiff, and had let a tract of land, which was riparian to the stream, agreeing to construct a flume to it; that he employed one C. to construct it; that defendant agreed that C., in consideration of his work on the flume, should have a partial use of it, to convey water to his land, lying below the tract let; that there was no permanent dam across the stream to divert the water into the flume, but that the lessee and C. placed temporary obstructions in the stream at low stages of water, without any directions from defendant. *Held*, that a finding that defendant had diverted and misapplied water, or that he authorized such misapplication by others, could not be sustained.

2. The rights of a riparian proprietor to the flow of a stream of water over his land may be severed from the land by grant, and where such right has been conveyed without reservation the grantor cannot maintain an action to enjoin a diversion of water from the stream.

3. Where, in such case, the riparian rights had been conveyed to the Montecito Water Company, and an officer of the Montecito Valley Water Company testifies that the company is paying the expense of the litigation, it is error to rule that the witness cannot be asked on cross-examination, "Why does the company pay the expense of this litigation?" as it is proper to show the witness' interest, though it does not appear that the last-named company is identical with or the successor of the other.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by Fred S. Gould against O. A. Stafford for damages and to enjoin the diversion of water. Judgment for plaintiff. Defendant appeals. Reversed.

B. F. Thomas, for appellant. John J. Boyce, for respondent.

VANCLIEF, C. Action for damages resulting from the alleged diversion of water by

defendant from Montecito creek, in the county of Santa Barbara, and for a perpetual injunction against such diversion in the future. Both parties claim to be riparian proprietors upon both sides of the creek, the defendant's land being about one mile above that of the plaintiff's. The complaint charges that in January, 1882, by means of a dam across a main branch of the creek, (the Cold Spring branch,) and certain flumes and ditches erected and maintained by the defendant, he "prevented a portion of the waters naturally flowing in said creek from flowing down to and reaching plaintiff's land and premises. That defendant wrongfully and unlawfully has continuously since said time appropriated and taken for his own use a large portion of the waters naturally flowing in said stream as aforesaid, and has wasted said water, and applied the same to unlawful purposes, and prevented the entire quantity so taken from again returning to the natural bed or channel of said Montecito creek, or any of its branches, and said waters have by means of said unlawful diversion been wasted and lost, and have not reached the land of plaintiff," whereby plaintiff's land has been deprived of the flow of the water, and of the use thereof for necessary or any purposes, and in the seasons of scarcity of water the bed of said creek, within the premises of plaintiff, has become dry for a long period, and plaintiff has been deprived of the use of any water of said creek for domestic or other reasonable and lawful uses, to the damage of plaintiff in the sum of \$5,000, and that defendant threatens to continue, and, unless restrained, will continue, such unlawful diversion, to the lasting and irreparable injury of plaintiff and his land. The amended answer of the defendant, on which the case was tried, denies that the waters of said creek naturally flow through plaintiff's land later than the month of June, except in extraordinarily wet seasons; and specifically denies all the wrongful acts charged in the complaint. The answer alleges the defendant's riparian ownership of land as above stated, and that on November 19, 1881, the defendant leased to Ah Young, a Chinaman, a part of his riparian land on the west side of the creek, and sets out the lease, as follows: "Agreement. In consideration of the sum of one hundred dollars (\$100) per annum, to be paid semi-annually in advance, I agree to lease to Ah Young my field of eight (8) acres, more or less, lying on the west side of Cold Spring creek, formerly known as the 'Sanchez Land,' for the term of five (5) years from date of this agreement. I furthermore agree to build a six-inch flume to carry water from the creek to the land, he, Ah Young, agreeing to keep said flume and the fence now about the land in good repair, as they are at present. O. A. STAFFORD. Montecito. S. B. Co., Cal. [Chinese mark.] AH YOUNG. November 9, 1881." The answer further alleges that defendant did not agree to furnish the lessee any particular quantity of water, or any water except such as the lessee was entitled to by the terms of the lease, viz., so much as was appurtenant to the land

leased by reason of its being riparian to the creek; that Ah Young took possession of the leased premises on November 9, 1881, and he and his assigns continued to occupy the premises under the lease until November 9, 1886. It is also alleged in the answer "that no notice was given to defendant before the commencement of this action to abate any dam in said creek, or that the waters of said creek which flowed into said flume were being or had been wasted or misapplied."

As to the alleged riparian ownership of defendant, and the lease and possession of the lessee under it, the court found the answer to be true. As to the alleged want of notice to defendant there is no finding. As to damages, the plaintiff withdrew all claim except for nominal damages, and the court found only nominal damages. But upon all other material issues the court found for the plaintiff, and gave judgment against defendant for nominal damages and costs assessed at \$263.60, and perpetually enjoined and commanded him, substantially, as follows: *First*. From wasting, or permitting to be wasted, any portion of the waters of said creek or the branches thereof. *Second*. From diverting or using, or permitting to be diverted or used, any of said waters upon any other land than the riparian land of the defendant. *Third*. From diverting or permitting to be diverted, for the purposes of irrigation, all the waters of said creek or any of its branches, "at any season of the year, for purposes of irrigation, and from interrupting or interfering with the said supply of water so enjoyed by the plaintiff for domestic and household purposes, and for watering his stock; and from permitting the same to continue un-restored, and from permitting to continue on his land or at the dam erected by him, any means or appliances whereby the said uses of plaintiff therein are or may be diverted or interfered with." *Fourth*. In case the defendant should divert and use a portion of the waters of said stream for the purpose of irrigating his riparian land, he is commanded by "substantial and proper artificial means and methods" to conduct back to the channel of the creek, above the lands of plaintiff, all surplus water not necessary for such irrigation, and not being used therefor, so that the same may be restored to the natural channel above the lands of plaintiff, without waste or unnecessary diminution. *Fifth*. It is adjudged that the use by the defendant of the waters of said stream for the purpose of irrigation is subordinate to the right of the plaintiff to use the same for domestic and household purposes and the watering of stock. The case was here on a former appeal, (77 Cal. 66, 18 Pac. Rep. 879,) but the questions now presented are different from those decided on the former appeal. The defendant appeals from the judgment, and also from an order denying his motion for a new trial.

1. The appellant contends that the evidence does not justify the finding that the defendant by any means diverted, misapplied, or wasted any water from the Cold Spring branch of the creek; or that he caused, authorized, or promoted any such

misapplication or waste by others. The evidence tends to prove no other wrongful or excessive diversion than that from the Cold Spring branch through the flume to the garden leased to Ah Young; and the only evidence claimed to have any tendency to prove that defendant caused or authorized such diversion, or any waste or misapplication of the water, is that he executed the lease to Ah Young, and constructed the flume according to the terms of the lease; and also that he employed one Chico to construct the flume, and agreed that Chico should have a partial use of the flume to convey water to his land, situate below the Chinese garden, in consideration of his work upon the flume. The flume tapped the stream above defendant's land, and defendant acquired the right of way for it upon the land of others. There never was any permanent dam across the stream to divert the water into the flume. In the early part of each season, when the stream carried a large quantity of water, very little, if any, obstruction was required to turn sufficient water into the flume to fill it. A few rocks thrown into the stream were then sufficient to turn water into the flume to its full capacity. Later in the season, as the water in the stream diminished, the obstruction was increased until the lowest stage of the water, when a dam composed of stones, brush, and mud was extended entirely across the stream. This dam was washed away in the winter or spring of each year. The defendant testified that the dam and obstructions by which the water was turned into the ditch were annually constructed by the lessee of the Chinese garden and Chico; and that he (defendant) neither assisted in their construction, nor directed or advised as to the manner or extent thereof, nor as to the quantity of water to be diverted thereby. This testimony is corroborated by that of other witnesses, and there is no evidence to the contrary. Nor is there any evidence tending to prove that Chico was the agent or servant of the defendant for any other purpose than the construction of the flume, or that defendant ever controlled, aided, or advised Chico in regard to diverting or using the water of the stream. It appears that Chico extended the flume from the Chinese garden to his place lower down the creek, where he irrigated a strawberry bed and an orchard of pear trees; but there is no evidence tending to prove whether or not he owned the land thus occupied and irrigated by him, or whether it was riparian to the creek, or how much water he used. Upon cross-examination of Packard, the principal witness for plaintiff, defendant's counsel asked him: "What portion of the water flowed into the flume that Chico used?" This question was objected to by plaintiff's counsel as irrelevant and immaterial, and the court sustained the objection. The defendant also testified that he was never notified before the commencement of this action that more water was being diverted by means of the dam and flume than his lessee and Chico were entitled to divert, nor that the water diverted by them was misapplied or wasted; and his

testimony in this respect was not disputed. There is no question that the Chinese garden was riparian to the creek, and that the owner thereof, or his lessee, was entitled to such reasonable use of the waters of the creek to irrigate the same as was consistent with the rights of other riparian owners. The evidence shows that the quantity of water that might be so used at any given time depended upon the stage of the water in the creek, which varied in different years, as well as at different seasons of the same year. It follows that defendant had a perfect right to construct a flume to convey water from the stream to his land, for his own use or the use of his lessee, of sufficient capacity to carry all the water that he or his lessees might be entitled to use at any season of any year. The mere capacity of the flume did not concern other riparian owners, as they could object to only an unlawful or excessive use of it. The flume was not a nuisance *per se*; and after the defendant leased it, he had no more power or right to control the use of it by the lessee, than he had to control the use of the land and other fixtures leased. The lessee alone was responsible for his wrongful use of it, by which others were injured. "A landlord is not responsible to other parties for the misconduct or injurious acts of his tenants to whom his estate has been leased for a lawful and proper purpose, when there is no nuisance or illegal structure upon it at the time of the lease." *Kalis v. Shattuck*, 69 Cal. 593, 11 Pac. Rep. 346, and authorities there cited. The relation of Chico to the defendant, after the flume was constructed, was either that of lessee or licensee of the flume alone, in consideration of his labor in constructing it; and since the defendant neither authorized nor participated in a wrongful use of the flume by Chico, he was not liable, unless the lease or license contemplated, or necessarily involved, a nuisance or a wrongful use. *Gwatney v. Railroad Co.*, 12 Ohio St. 92; *Wood, Landl. & Ten.* § 539. As the flume was not a nuisance *per se*, and was, unquestionably, adapted to a lawful use, there can be no presumption against the defendant, in the absence of evidence, that he intended or contemplated an unlawful use of it by his lessee or licensee. For the reasons above stated I think the finding under consideration is not justified by the evidence.

2. Appellant's counsel further contends that the twelfth finding is not justified by the evidence. That finding is to the effect that by the diversions of the waters complained of "the plaintiff has suffered material damage, and the rights of plaintiff as a riparian proprietor have been infringed and injured, and are threatened with further irreparable injury, as far as said riparian rights are concerned." In support of this point it is claimed that the evidence shows that plaintiff had no riparian rights that could have been infringed or injured; that prior to plaintiff's purchase of the land described in his complaint as to which he claims riparian rights, his grantors had granted to Montecito Water Company (a California corporation) all riparian rights to water appurtenant to

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or parcel of said land, in consideration of certain shares of stock in that corporation, which shares of stock entitled the holder thereof to a certain quantity of water, in proportion to the number of shares, to be conveyed to the land through pipes or aqueducts by the corporation; and that, during the time the defendant is alleged to have diverted water from the creek, the Montecito Water Company, by virtue of that grant, was diverting water from the same stream, and conveying such portion of it to plaintiff's land as plaintiff was entitled to in consideration of the grant. To prove this alleged grant the defendant put in evidence a long and complicated written agreement between riparian proprietors on the creek (23 in number, including plaintiff's grantors) of the first part, and the Montecito Water Company of the second part. Among other things, this agreement purports to be a grant by the parties of the first part to the Montecito Water Company of all the rights of the grantors to the waters of the creek for the consideration above stated. In addition to this, the evidence tended to prove that the plaintiff regarded the agreement as valid and binding upon him; that, as successor to his vendors, he had applied to the corporation to have their stock transferred to him, and that it had been so transferred on the books of the corporation; and that he had received on his land water from the corporation for domestic and other uses during the time he complains of having been deprived of water by the defendant; but whether during all that time he received from the corporation as much water as he was entitled to by the agreement does not clearly appear. The agreement purports to be a substitute for a lost agreement, to which it refers, and, in some undefined respects, to be different from the lost agreement. Besides, it is not clear that all the parties to the lost agreement are parties to the substituted agreement. It is also quite apparent upon the face of the agreement that, in order to construe it and determine its effect, if any effect it can have in this action, it will be necessary to consider the circumstances under which it was executed, and the acts of the parties under it, of which there was not sufficient evidence upon the trial. *Gould, Waters*, § 319. In view of the record here, I think it cannot be said that the evidence does not justify the finding that the plaintiff has riparian rights which were infringed by the diversions of water complained of, or that the court improperly declined to give to the agreement above referred to, as presented on the trial, the effect claimed for it by counsel for appellant; although it may turn out, upon a proper construction of that agreement, (which is not attempted here,) in the light of all the circumstances which may be lawfully considered as aids to such construction, that the agreement may have the effect claimed for it by counsel for appellant; and for the purposes of a new trial, which must be granted upon other grounds, it is proper to pass upon some of the questions of law discussed by counsel relating to the grant of riparian water-rights, and the effect thereof. The

right of a riparian proprietor to the flow of a stream of water over his land is an incident of his property in the land, is annexed to the land, and considered part and parcel of it, (Civil Code, § 662; Water Co. v. Forbes, 62 Cal. 182;) but may be severed or "segregated" from the land by grant, by condemnation, or by prescription, (Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645; Water Co. v. Mayberry, 88 Cal. 69, 25 Pac. Rep. 1101; Washb. Easem. pp. 12 and 385; Ang. Water-Courses, §§ 96, 141, 146.) If, therefore, the grantors of the plaintiff, while they owned the land, granted to the corporation, (Montecito Water Company,) "its successors and assigns," all or any portion of their riparian rights to the waters of Montecito creek, they thereby, to the extent of such grant, severed from the land their riparian rights, and disabled themselves to grant such rights to the plaintiff; and, consequently, their grant of the land to the plaintiff did not pass the riparian rights theretofore granted to the Montecito Water Company, without which the plaintiff is not entitled to complain that those rights have been infringed by the defendant. In other words, the plaintiff is not entitled to maintain an action for the protection of rights which he has not. It is suggested, however, that even in this supposed hypothetical case, the plaintiff would have a reversionary right to be protected against the acquisition by defendant of a right by prescription; but this would depend upon the terms and conditions of the grant to the Montecito Water Company. If that grant is only for a limited term, or is upon a condition subsequent by which it may be terminated, the plaintiff would be entitled to maintain an action to protect his reversionary right; but if the grant is absolute and unconditional the plaintiff has no reversionary interest. That such a grant may be absolute and unconditional appears by the authorities above cited, but for reasons above stated it is not intended to intimate in this opinion what construction should be given to the written agreement above referred to, in any respect.

3. G. H. Gould was called as a witness for plaintiff, who, after testifying in chief to facts material to plaintiff's case, on cross-examination testified that he is the brother of plaintiff, and one of plaintiff's attorneys in this action; that he is a member and the president of the Montecito Valley Water Company, and that the last-named company pays the expenses of the litigation. Thereupon he was asked the following question: "Why does the Montecito Valley Water Company pay the expenses of this litigation?" Plaintiff's counsel objected to this question, on the ground that it was irrelevant and immaterial, and the court sustained the objection, to which ruling defendant's counsel excepted. It does not appear by the record that the Montecito Valley Water Company is identical with, or successor to, the Montecito Water Company, yet, for the purpose of showing the interest, bias, and prejudice of the witness the question was proper on cross-examination, and the court erred in sustaining the objection to

it. Under the circumstances, a liberal cross-examination of the witness should have been allowed. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

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BEHLOW v. SHORB *et ux.* (No. 14,088.)

(Supreme Court of California. Sept. 11, 1891.)

SUMMONS IN ACTION FOR MONEY ONLY—NOTICE—AMBIGUOUS COMPLAINT—APPEAL—CLERICAL ERROR IN JUDGMENT.

1. Under Code Civil Proc. Cal. § 407, subd. 4, which provides that, in an action arising on contract for the recovery of money or damages only, the summons shall contain "a notice that, unless the defendant so appears and answers, the plaintiff will take judgment for the sum demanded in the complaint, (stating it.)" a summons in an action for goods sold is sufficient which states that the "action is brought to obtain a judgment * * * for the sum of" \$2,843.25, "with legal interest * * * until paid, alleged to be due plaintiff upon account, and for costs of suit. Reference is had to complaint for particulars."

2. A complaint in an action for goods sold and delivered is not uncertain or ambiguous because it fails to state where the goods were sold.

3. Where the judgment rendered was for \$53 more than the amount found due, and was doubtless an error in computation of interest, which, if brought to the attention of the court below, would have been corrected, the objection being first made in the supreme court, the judgment will not be reversed, but will be ordered reduced by that amount.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WILLIAM H. CLARK, Judge.

Action by William Behlow against J. De Barth Shorb and wife on account for goods sold. Judgment for plaintiff. Defendants appeal. Affirmed.

Chapman & Hendrick, for appellants. Gottschalk & Luckel, for respondent.

BELCHER, C. This is an action on account for goods, wares, and merchandise alleged to have been sold and delivered by plaintiff to defendants between the 1st day of May, 1887, and the 1st day of March, 1888, and to have been of the value of \$2,843.25. The defendants moved the court to quash the summons issued in the action, and served upon them, upon the ground that it did not state the amount for which the plaintiff proposed to take judgment. The portion of the summons objected to as insufficient reads as follows: "The said action is brought to obtain a judgment of said court for the sum of two thousand eight hundred and forty-three 25-100 dollars, with legal interest thereon from March 1, 1888, until paid, alleged to be due plaintiff upon account, and for costs of suit. Reference is had to complaint for particulars. And you are hereby notified that if you fail to appear and answer the said complaint as above required, said plaintiff will cause your default to be entered, and take judgment as prayed for." The motion was denied, and

an exception reserved. Shortly afterwards, the plaintiff, after due notice to defendants' attorney, moved that the summons be amended so as to meet the objections urged against it; but this application was resisted by the defendants, and thereupon denied by the court. After their motion was denied, the defendants demurred to the complaint on the ground (1) that it did not state facts sufficient to constitute a cause of action; and (2) that it was uncertain, ambiguous, and unintelligible, in that it did not appear therefrom where the said goods were sold. The demurrer was overruled, and the defendants answered. They averred that the whole sum sued for had been paid, and that no part thereof was then due or payable to the plaintiff. They also, by way of counter-claim, averred that they sold, and on the 23d day of August, 1888, conveyed, to plaintiff a certain piece of land for and in consideration of the sum of \$5,900, and "that at the time of the execution of the said conveyance the said plaintiff had agreed to sell and deliver the goods, wares, and merchandise mentioned in the complaint, and to do certain work for the defendants; and, it being then uncertain what the amount and value of said goods or of said work and labor would be, it was agreed between the plaintiff and the defendants that when the said contract on the part of the plaintiff had been performed, if the reasonable value of the same amounted to less than the consideration for said land, to-wit, \$5,900, the said William Behlow should pay to the defendants the difference between the value of said goods and labor; and if the value of said goods and labor amounted to more than the sum of \$5,900, these defendants would pay to the plaintiff the difference between the said purchase price of said land, and the value of said goods and labor. And defendants further aver that no part of the consideration for said conveyance was paid by the plaintiff at the time, or at any other time, except under the contract aforesaid; and that after deducting the amount stated in the complaint as the value of the said goods, to-wit, \$2,843.25, there remains due and owing to the defendants from the said plaintiff the sum of \$3,056.75, no part of which has been paid;" and for the last-named sum and costs they prayed judgment. The case was tried by the court without a jury, and the findings were, in substance, that there were two distinct transactions between the parties; that between the dates named in the complaint the plaintiff sold and delivered to defendants the goods, wares, and merchandise sued for, and that the same were to be paid for in money, and the full and reasonable value thereof was the amount demanded, no part of which, or any interest thereon had ever been paid; that the conveyance of the land for \$5,900 set up in the counter-claim was not in consideration of the sale and delivery of the goods sued for, but of other goods received from plaintiff by defendants at or about the time of the delivery of the said deed the value of which last-mentioned goods amounted to the sum of \$6,039.96; that the value of all the goods sold

and delivered by plaintiff to defendants was \$8,883.21, and the total value of the land conveyed to plaintiff was \$5,900, and that besides the land nothing was paid to plaintiff on account of said goods or otherwise by defendants or either of them; that nothing was due the defendants from plaintiff by reason of the matters set up in their counter-claim; and, as conclusions of law, that plaintiff was entitled to judgment against defendants for the sum of \$2,843.25 with interest thereon at the rate of 7 per cent. per annum from March 1, 1888, until paid, and his costs. Judgment was accordingly entered on the 28th day of December, 1889, for the sum of \$3,261.21 and costs, and that defendants take nothing by reason of their counter-claim. From this judgment, and an order denying a new trial, the defendants appeal.

1. The first point made for a reversal is that the court erred in refusing to quash the summons. It is said the notice in the summons was insufficient, because it did not state the amount for which judgment would be taken in case the defendants failed to appear and answer, as required by section 407, subd. 4,¹ of the Code of Civil Procedure. We think the summons in effect complied with the requirements of the statute.

2. It is claimed that the demurrer ought to have been sustained upon the ground that the complaint was uncertain and ambiguous. We see nothing in this point. It was not necessary for the plaintiff to state in the complaint where the goods were sold.

3. It is earnestly contended that the findings were not justified by the evidence; that the sales of the goods were not separate and distinct transactions; that plaintiff by splitting his demand, and suing for a part of it, waived any right to ever sue for the balance; and hence that defendants could interpose and maintain any defense to this action that they could have interposed and maintained to the whole demand if sued upon. It is unnecessary to state the evidence, which covers a hundred pages of the transcript. There was some conflict, but, after reading the whole of it, we are of the opinion that it was amply sufficient to justify the findings and decision of the court. The judgment cannot, therefore, be reversed on this ground.

4. Finally, it is suggested that the judgment is for \$53 more than the amount found to be due, with the interest thereon at the rate and for the time allowed. This seems to be so, but the point appears to be made here for the first time. If the suggestion had been made to the court below, doubtless the error in the computation of interest would have been corrected at once. It follows, in our opinion, that the judgment and order should be affirmed, except that the court below should be directed to modify the judgment by striking therefrom the sum of \$53; the

¹Section 407, subd. 4: In an action arising on contract for the recovery of money or damages only, the summons shall contain "a notice that, unless the defendant so appears and answers, the plaintiff will take judgment for the sum demanded in the complaint, (stating it.)"

costs of the appeal to be borne by the appellants.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed, and the court below is directed to modify the judgment by striking therefrom the sum of \$53; the costs of the appeal to be borne by the appellants.

(2 Wash. St. 653)

NOYES v. PUGIN.¹

(Supreme Court of Washington. Aug. 1, 1891.)

BREACH OF CONTRACT—QUANTUM MERUIT—MEASURE OF DAMAGES—EVIDENCE—INSTRUCTIONS.

1. Where, in an action by an architect for services, both parties testified fully, and there was a direct conflict in the testimony, a refusal of the court to set aside a verdict on the ground that the evidence failed to show an employment of plaintiff will not be inquired into on appeal.

2. An architect contracted to draw plans and specifications for a building, let the contract, and superintend the construction, and was to receive for his services $3\frac{1}{4}$ per cent. of the cost of the building. After the plans and specifications were completed the employer refused to accept them. *Held*, in an action upon *quantum meruit*, that the measure of recovery was such a proportion of the $3\frac{1}{4}$ per centum as the work done bore to the whole work contracted for.

3. An instruction that plaintiff must establish the material allegations of his complaint by a preponderance of "testimony" is not erroneous. It will be presumed that the jury understood the word as referring to all the evidence.

Appeal from superior court, King county.

Action by B. A. Pugin against John Noyes upon a *quantum meruit* for services. Judgment for plaintiff. Defendant appeals. Reversed.

G. E. M. Pratt and Thompson, Edsen & Humphries, for appellant. Strudwick, Peters & Collins, for respondent.

ANDERS, C. J. This action was brought by respondent in the court below upon a *quantum meruit* for services alleged to have been rendered for and at the request of appellant, as architect in drawing plans and making estimates for the erection of a building to be known as the "Noyes Block" in the city of Seattle. A general denial was filed by the defendant, and upon the issues thus joined a trial was had by a jury, who returned a verdict for plaintiff for the amount claimed in the complaint. It appears from the record that the plaintiff testified substantially, at the trial, that the defendant, at a certain time and place, told him that two architects (as he recollected or thought) had proposed to make drawings or sketches of the proposed building, with the understanding that, if the sketches were not adopted by defendant, the latter was to pay nothing for the work, and that he would like to have plaintiff also make such sketches upon the same terms; that plaintiff accepted the proposal, made the sketches, and submitted them to the defendant, who expressed himself satisfied, and stated that they were just what he wanted, and gave plaintiff the order to go on and complete the drawings; that he agreed with defendant to

make the drawings and specifications complete, let the contract, and superintend the erection of the building, for $3\frac{1}{4}$ per cent. of the estimated cost thereof; that he completed the plans, and wrote the specifications in full, with the exception of some minor details as to interior finish; and that the defendant, on being notified that the plans were ready, refused to accept the same, and denied ever having requested or ordered plaintiff to do the work. The plaintiff estimated the cost of the building according to his plans and specifications at \$90,000, and testified that the labor performed by him in making the drawings and specifications was worth $2\frac{1}{2}$ per cent. of that sum; and in this he was corroborated by other witnesses. Several architects also testified that the usual price charged by architects for drawing plans and specifications and superintending the erection of buildings, or, in other words, for "full professional services," was 5 per cent. of the estimated cost. The defendant claimed and testified that he never employed or requested plaintiff to make plans and specifications for his building; that the only agreement or understanding between him and plaintiff was that if the latter should submit sketches which should be adopted by defendant, then and in that event he was to pay plaintiff for the work, but not otherwise; and that plaintiff proposed to do the whole work for $2\frac{1}{2}$ per cent. of the cost of the building; and that plaintiff, at the time of said proposal, stated that the building could be constructed for \$60,000.

The first contention of appellant is that the evidence fails to show any employment of respondent by him, or that he ever requested the latter to perform the labor for which he now seeks compensation, and that the court below erred in not setting aside the verdict for insufficiency of the evidence. Upon that point both parties testified fully; and, there being a direct conflict between the testimony of plaintiff and defendant, it was for the jury to determine, under all the facts and circumstances before them, upon which side lay the preponderance of the evidence; and, not being convinced that the verdict was unwarranted by the evidence, we cannot say that the court erred in refusing to set it aside and grant a new trial upon the ground above indicated.

Counsel for appellant further contend that the court erred in charging the jury as to the measure of damages recoverable by plaintiff. The following is the instruction complained of: "If you find from the evidence that there was a contract of employment to do the work as claimed by plaintiff, your next inquiry should be, did the plaintiff do the work as requested? If he has, he is entitled to recover what the evidence shows such work to be reasonably worth. Was there a contract to do this work that the plaintiff claims? If there was not, he is not entitled to recover. If there was a contract, and he has performed the work according to that contract, he is entitled to recover what the evidence shows the services were worth." The point made is that, as the plaintiff claimed to have done the work

¹Rehearing denied.

under a contract whereby he was to receive $3\frac{1}{2}$ per cent. upon the estimated cost of the building as compensation for his entire services, the jury should have been instructed that he could only recover what the services rendered were worth, at the contract price. On the other hand, the respondent claims that, as the contract was broken by appellant, he was no longer bound by its terms, and was entitled to recover what he could show his labor was worth; or, in other words, that the law implies a contract, in such cases, to pay the reasonable value of the work done, without regard to the original agreement between the parties. And the question for our determination is, which of the two theories should be adopted in the case at bar. The plaintiff had his choice of two remedies, viz.: Either to bring his action for a breach of the contract,—in which event he might have recovered not only the value of the labor actually performed, at the contract price, but also all profits he might have shown would have been realized by him if he had been permitted to do the entire work in accordance with the terms of the agreement,—or to disregard the contract and sue for the value of his services. He chose the latter alternative, and must be confined to such an amount as he ought to recover, under the circumstances. In regard to the measure of damages, it is a universal and cardinal principle that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs. *Suth. Dam. p. 17, § 1.* and cases cited. Applying this principle to the case before us, what should be the compensation of appellant for the work actually done? His labor conferred no benefit upon appellant, because his plans were not adopted or used by the latter; and hence the cases holding that a defendant who has prevented the other party from fully performing his contract of service must pay for benefits received are not applicable to this case. He proved by a number of witnesses that the whole work he agreed to do was worth 5 per cent. of the cost of the building, which was placed by him at \$90,000, and that the part performed was worth $2\frac{1}{2}$ per cent., and the jury by their verdict awarded him that proportion of \$90,000. But he also testified, as we have seen, that he agreed to do the entire work of drawing the plans and specifications, letting the contract, and superintending the erection of the building for $3\frac{1}{2}$ per cent. of the estimated cost. If, therefore, he had performed the whole work according to his agreement, and appellant had neglected or refused to pay him therefor, and he had brought his action upon the common counts for work and labor, instead of suing upon the contract, the measure of the recovery, according to the adjudged cases, would have been the contract price. And, this being so, it is difficult to perceive why the respondent in this case should receive more compensation for the labor actually performed by him than he would

have received for the same services had the contract not been broken by appellant. The authorities which hold the contrary doctrine, and maintain that the plaintiff in such cases may recover what his labor was actually worth, without regard to the contract, proceed upon the theory that, if one party to an agreement sees fit to violate it, the law will then step in, and imply a new and different one in favor of the other party to the contract. But we think it is rather the province of the law to provide remedies for enforcing contracts, and for indemnifying parties injured by their breach, than to make new and different ones. In cases where one party performs labor for another at his request, and without any stipulation as to remuneration therefor, then it is but just that the party performing should be paid what his services are reasonably worth, as that is presumed to have been their mutual understanding, and as otherwise he would be without remedy; but, when the parties themselves have agreed upon a price to be paid for services rendered by one, for the other, that price, so far as it can be made applicable, should be the measure of compensation for work done under the contract.

The rule is well stated by SUTLIFF, J., in *Doolittle v. McCullough*, 12 Ohio St., at pages 366 and 367, as follows: "But when the special contract is proved, whether by the plaintiff or defendant, under which the services were rendered, the special, and not the implied, contract must determine the rights and liabilities of the parties arising in regard to the services. The price having been determined and mutually agreed upon by them, neither of the parties can vary the price so fixed by the contract. Nor, as to the price of the services actually rendered under the contract while in force between the parties, can it avail the plaintiff, bringing his action to recover therefor, that since the rendering the services the defendant has put an end to the special contract. The fact would still remain that the services were rendered under a special contract, and at the price agreed upon, and expressed by the parties. If the action upon the contract so made by the parties, and terminated by the defendant against the will of the plaintiff, be brought to recover damages generally, the same rule would apply as to the services actually rendered. The party having rendered the services would be entitled to recover at the rate agreed upon and stipulated in the contract between the parties, although of much less value than the price expressed in the contract; and in like manner the plaintiff would be restricted to the amount stipulated in the contract as the agreed price, although actually of much greater value." And on page 369 it is further said that "it may be laid down as a rule, in all such cases, that the express contract so existing between the parties necessarily furnishes the measure of damages to the extent of the evidence thereby afforded, and to the same extent as in actions brought to recover damages in like cases where the contract continues in force, and has not been terminated, but only neglected and unperformed

on the part of the defendant." See, also, *Koon v. Greenman*, 7 Wend. 121; *Bagley v. Bates*, Wright, 705; *Chicago v. Tilley*, 103 U. S. 146; *Western v. Sharp*, 14 B. Mon. 144; *Field*, Dam. 302. We are aware that in a considerable number of decisions found in the books the doctrine is broadly stated that in cases like this the plaintiff may recover the reasonable value of the services rendered, irrespective of the price stipulated and agreed upon by the parties; but we think the more just and equitable rule to be that laid down by the court in *Doolittle v. McCullough*, supra. Upon this question, Mr. Sedgwick, while appearing to incline to the opposite doctrine, in his work on the Measure of Damages, (volume 1, pp. 473, 474, 7th Ed.,) says: "So, also, if the contract is rescinded, one party stopping the work while the other is ready to proceed. In this case he is at liberty to prove the value of his services, but the contract is nevertheless not to be altogether disregarded." It was not shown in this case that it was impracticable to apportion the value of plaintiff's services according to the rate of compensation claimed to have been stipulated for, and we are therefore of the opinion that the court below should have instructed the jury that, if they found that the plaintiff performed the services claimed to have been rendered by him under a contract specifying the price to be paid for doing the whole work agreed to be done by him, the measure of his recovery would be such a proportion of the contract price as the work done bore to the whole work embraced by the terms of the agreement, and that the failure to so instruct was error.

Counsel for appellant also insist that the court erred in permitting the respondent to show the customary price charged by architects for such services as those rendered by appellant. But from what we have already said it is scarcely necessary to discuss that question. It is sufficient to remark that where no rate of compensation has been agreed upon, or where there is a conflict of evidence as to whether there was a rate agreed on or not, such testimony is competent; but where a contract for a specified sum is proved, as before stated, the parties must be controlled by it.

It is further contended that the court below erred in charging the jury that before the plaintiff could recover he must establish the truth of all the material allegations of the complaint by a preponderance of the testimony. It is claimed that the court should have used the word "evidence" instead of "testimony," and that a failure to do so was error. While there is, perhaps, a technical, legal distinction between the two words, we have no doubt the same meaning was conveyed to the minds of the jury by the word "testimony" that would have been conveyed by the word "evidence," and that appellant was in no wise injured by the charge of the court as given. Indeed, the words, according to Bouvier, are synonymous in meaning, though "evidence" includes "testimony," as well as all other kinds of proof. Bouv. Law Dict. tit. "Testimony."

The judgment of the court below is reversed, and the cause remanded for a new trial in accordance with this opinion.

STILES, HOYT, and SCOTT, JJ., concur.

STATE *ex rel.* YESLER *v.* PROSSER *et al.*
(Supreme Court of Washington. July 8, 1891.)

RIPARIAN RIGHTS—TIDE-LANDS—HARBOR LINES—PROHIBITION.

1. A littoral land-owner cannot assert title to land lying below the line of ordinary high tide, as against the state, in the absence of a license from the state. Following *Eisenbach v. Hatfield*, (Wash.,) 26 Pac. Rep. 539.

2. Const. Wash. art. 15, providing that the legislature shall provide for a commission to establish harbor lines in navigable waters of all harbors in the state within or in front of corporate limits of a city or within a mile thereof, and shall provide for the leasing of the rights to build and maintain wharfs, etc., does not recognize any rights in riparian owners to tide-lands unless under licenses from the state, and the commission may include such lands within the harbor lines.

3. Where a riparian proprietor has no right of title to tide-lands, simply owning the wharf thereon, including such lands within the harbor lines is not such an interference with the ownership or possession of the wharf as will authorize a court to issue a writ of prohibition.

4. If the laying of such lines was in violation of the acts of congress concerning navigation and harbor lines, the United States, by its proper officers, alone can interfere.

Appeal from superior court, King county; I. J. LICHTENBERG, Judge.

Petition for writ of prohibition by state of Washington *ex rel.* H. L. Yesler against the Board of Harbor Line Commission, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garrettson, and D. C. Guernsey. Writ granted. Defendants appeal. Reversed.

W. C. Jones, Atty. Gen., for appellants. Thomas Burke and J. C. Haines, (Burke, Shepard & Woods, of counsel,) for respondent.

HOYT, J. The most important questions in this case are the same as those discussed and covered by the opinion in the case of *Eisenbach v. Hatfield*, 26 Pac. Rep. 539, (decided at the last session of this court.) Yet in view of the immense interests involved in the principles therein announced we have again gladly listened to the able arguments of counsel made before us, and have carefully examined the exhaustive briefs filed, and again reviewed all of the questions decided in the case above cited; and it is only necessary for me to say that the opinion of the court has not been changed by such re-examination. The court is still of the opinion that, as against the state, a littoral owner, simply as such owner, can assert no valuable rights below the line of ordinary high tide. The somewhat careful examination which I have given this case has confirmed my opinion that at common law the sovereign power (resting in England in parliament) could take such lands without compensation, and absolutely exclude the littoral proprietors from any rights thereto. In fact such is conceded to be the power of parliament by nearly all of the

courts. Even those which have taken the strongest ground against the doctrine of the case above cited have admitted such to be the rule. Note the argument of Chancellor ZABRISKIE in his dissenting opinion, *Stevens v. Railroad Co.*, 34 N. J. Law, 554. While conceding this, they say parliament has this power because it is all-powerful, and can legislate as it pleases. This is true, but why is it true? Simply because in it is embodied the sovereign power. In my opinion, the same power vested in parliament and king in England is here vested in the people, who are fully as much sovereign here as parliament and king there. Here the people of a state are absolutely sovereign, except as controlled by the constitution of the United States; and I do not think that it can be successfully contended that the powers of the people of the states have been thus controlled as to the questions here involved. I am unable to find any clause of the constitution of the United States looking to such control, and, as I read the decisions of the United States supreme court, it has expressly decided that the states are in no wise controlled in this matter. Acting within their sovereign power, as above recognized, the people of this state, in forming a constitution, saw fit to assert the title of the state to the lands in question, and, having done so, they are the only power that can interfere with such title. But it is said that, while such assertion of title is made in the constitution,¹ it is so made subject to vested rights of the riparian owner to be asserted in the courts. I am of the opinion that this vested right cannot be held to be such as is incident to the riparian owner simply as such, but must be held to apply only to some special right held by such owner by way of improvements made under express or implied license from the representative of the sovereign power. To hold that the former was intended, would practically destroy the title of the state, and would, therefore, be inconsistent with the assertion of such title; while the latter construction will give force to every word, and make the provision in its entirety a consistent one. When the people say that they assert the state's title it must be held to mean the entire and exclusive title. Of course the rights of the state, as above stated, are subject to the paramount right of the United States to regulate commerce and navigation, as to which I shall say a word later on.

The doctrine of the case of *Eisenbach v. Hatfield*, above cited, must obtain, and under it the rights of the parties hereto must be determined. It will thus be seen that the petitioner has no rights to the land in controversy, and at the most the only vested right he has is in the wharf constructed thereon; and for the purposes of this case I shall assume (though we do not now decide that ques-

tion) that the petitioner has such a right in such wharf that it could only be taken from him after compensation paid therefor. But will this right aid him in this controversy? Will the fact that he has a right to be compensated for his said improvements allow him to prevent the carrying out of a great state policy in the establishment of harbor lines? Can it be contended that this work must stop, or that the line must be laid around the several wharves which have been erected by riparian owners? I think all these questions must be answered in the negative. The riparian proprietor, as we have seen, has no interest in the land, but simply in the wharf on the land; and, this being so, it cannot be said that simply including the land under the wharf within the harbor lines is such a taking or damaging of the wharf as will entitle the owner to compensation. It does not follow from such including within the harbor lines that the state has or ever will interfere with his ownership or possession of said wharf. If his property is neither taken nor damaged, the only ground upon which he can ask the interposition of the courts is that a cloud is about to be cast upon his title. Upon this question I am of the opinion that his title is not of a nature to be clouded, being only a right to the structure upon the land without any right in the land itself. But, even if it were, the proceedings complained of could constitute no cloud thereon, for, if the contention of petitioner is correct, the harbor line commission could not lawfully act until legislation had been had, providing a method by which the vested rights of all riparian owners who had wharfed out could be protected; and if this is so, then their want of authority to act is known to every one, and must be held to be apparent from the face of the proceedings, and therefore their acts could not constitute a cloud. If, on the other hand, they have authority to act at all in advance of such legislation, they must be held to have authority to lay their lines across the wharf of petitioner, and all others similarly situated. I think that the argument of counsel that this legislation is opposed to that of congress enacted upon the subject of navigation and harbor lines, cannot be sustained. All such legislation must be presumed to be in the interest of commerce and navigation until the contrary appears. Besides, the United States, by its proper officers, is the only party that could interfere in such a case. The extraordinary writ of prohibition should only be granted in a clear case, and when no other remedy is available; and I am of the opinion that petitioner has no cause of complaint; and, if he has, I am not satisfied that the ordinary proceedings in law or equity will not ultimately completely protect his rights. The judgment must be reversed, and the cause remanded, with instructions to dismiss the petition.

ANDERS, C. J., and SCOTT and DUNBAR, JJ., concur.

STILES, J. I concur in the disposition of this case, as I look upon the threatened

¹ Const. Wash. art. 15, provides that the legislature shall provide for the appointment of a commission to establish harbor lines in navigable waters of all harbors in the state within or in front of the corporate limits of a city or within a mile thereof, and shall provide for the leasing of the right to build and maintain wharves, docks, etc.

action of the board of harborline commissioners in the filing of a map of the harbor line of the city of Seattle as a clearly legitimate exercise of the power of the state to regulate and control the harbor within its limits to the extent of fixing the point beyond which wharves must not extend. In *Com. v. Alger*, 7 Cush. 53, the like action was upheld, although the soil beneath the wharf complained of was the property of the appellant in fee under the Massachusetts ordinance of 1647. As to the consequences which may follow through the action of the tide-land commissioners, I think them too remote for adjustment or discussion in the present proceedings.

(2 Wash. St. 638)

MCSORLEY et al. v. HILL, (two cases.)

(*Supreme Court of Washington*. Aug. 1, 1891.)

PUBLIC LANDS—OREGON DONATION ACT—EFFECT OF DIVORCE—REGISTER CERTIFICATE—INNOCENT PURCHASER.

1. Act Cong. Sept. 27, 1850, § 4, (9 St. U. S. a. 76, p. 497,) granted to every white settler of the public land, over 18 years of age and a citizen of the United States, who was then a resident of Oregon, or who should become a resident on or before December 1, 1850, and who should reside upon and cultivate it for four consecutive years, 320 acres if a single man, or 640 acres if married, or being married within one year from December 1, 1850, one-half to himself and one-half to his wife in her own right. *Held*, that a married man who became a resident prior to December 1, 1850, and settled on the land in April, 1852, lost his right to claim 640 acres, upon being subsequently divorced, and that his second marriage, in January, 1853, did not restore it.

2. The second wife could not claim in virtue of the right of the first, under section 4, nor in her own right, under section 5, of the act, which granted 320 acres, to be divided in like manner, to such settlers becoming residents between December 1, 1850, and December 1, 1853, if married, or if marrying within one year after reaching the territory.

3. Section 7 of the act relating to proof by settlers provides that, upon its being made, the surveyor general or other officer appointed by law shall issue certificates, under rules prescribed by the commissioner of the general land-office, setting forth the facts and the amount to which the parties are entitled. The surveyor general shall return the proof to the commissioner, and, if he finds no valid objection thereto, patents shall issue according to the certificates, upon being surrendered. *Held*, that a certificate issued to the settler and his second wife by the register of the local land-office and four years' residence on the land gave them no vested right therein which could pass to third persons, where the action of the local land-office was subsequently reversed by the commissioner.

4. Having no vested right in the land, their grantees, by deed executed before the issue of the certificates, could not claim to be an innocent purchaser for value.

5. Act Cong. April 11, 1860, for the relief of Charles Porterfield, deceased, providing that Porterfield warrants may be located on any of the public lands which have been and may be surveyed, and which have not been otherwise appropriated at the time of such location, within any of the states where the minimum price for the same shall not exceed \$1.25 per acre, refers to public lands not appropriated by law, and such warrants may be located upon lands in Oregon, although occupied by a settler under an invalid donation claim.

6. Act Cong. March 23, 1853, § 1, providing "that all warrants for military bounty lands which have been or may hereafter be issued un-

der any law of the United States . . . are hereby declared assignable," applies to the Porterfield land-warrants.

Appeal from superior court, King county; LICHENBURG, Judge.

Action by Alice S. Hill, executrix of William C. Hill, against Charles and Ellen McSorley, for possession of real estate. Judgment for plaintiff, and defendants appeal. Action by Charles and Ellen McSorley against Alice S. Hill, executrix of William C. Hill, to declare a trust. Bill dismissed. Plaintiff appeals. Modified and affirmed.

In April, 1852, one D. S. Maynard, under the act of September 27, 1850, commonly known as the "Oregon Donation Law," made settlement upon a tract of 640 acres of land in King county, as a donation claim. Maynard had taken up his residence in Oregon in September, 1850, and in April, 1853, he filed in the office of the register and receiver at Olympia his notification No. 407, claiming this 640 acres of land as a donation claim, one-half for himself and one-half for his wife, Catherine T. Maynard; continued his residence upon the land; complied with the law in respect to cultivation; and made his proof as required by the act. After his term of residence was completed, but before the land-office had issued any certificate to him for the land, in 1867, Maynard and his wife, Catherine T., executed a deed of the land in dispute, for a valuable consideration, to Hugh McAleer. In 1869, two years after this deed was recorded, and after McAleer had taken possession of the land, the local land-office issued a certificate, as provided by section 7 of the donation act, to David S. Maynard and Catherine T. for the tract of land in question, the west half to the husband and the east half to the wife. The east half embraces all the land now in litigation. In 1871 the general land-office reversed the action of the local land-office in giving the east half to Catherine T., and found that it belonged to a former wife of D. S. Maynard, Lydia A., whom he married in 1823, and from whom he was divorced on the 24th day of December, 1852, by the legislature of Oregon. On the 15th day of January, 1853, he was married to Catherine T. The honorable secretary of the interior, upon appeal, rejected the claim of both wives, and ordered the patent for the west half to issue to Maynard as a single man, which was done. Between the year 1875, when this final action was taken by the department, and the year 1880, divers claims were made to this land, none of which were held valid by the department. On the 8th day of January, 1880, W. C. Hill, party to these suits, and one J. Vance Lewis, made application at the local land-office to locate Porterfield warrants upon this land, which application was rejected, but upon appeal was allowed. Eleven months after this application, viz., on December 16, 1880, Hugh McAleer, having lived since 1867 upon the land, offered a homestead application, which was rejected by the local land-officers, whose action, upon appeal, was sustained. McAleer, however, had made a prior homestead application in April 1, 1880, which was rejected by the local land-

office, and from which no appeal was taken. McAleer, so far as the proof shows, was a foreigner, having never completed his naturalization. Certain of the heirs of Hugh McAleer are in possession of a portion of this land. Lewis' and Hill's entries under the Porterfield warrants were allowed, and patents duly issued to them. Lewis and wife conveyed their interest to Hill, who holds the legal title to the land, and brings the first suit (No. 6,142) against McSorley and other heirs of Hugh McAleer for possession. The defendants set up McAleer's rights under the deed from Maynard, and his homestead application, and also bring the second action (No. 6,238) to declare Hill a trustee for McAleer. In the ejectment suit they also attack the validity of Hill's patent, because they say the Porterfield warrants are not properly located, and therefore the patent is void. Both causes proceeded to trial by the court, and were heard together. In the first action, the ejectment suit, a judgment was awarded plaintiff for possession of the land, and a writ of possession directed. The second action was by the lower court dismissed, with a judgment for defendant for his costs. Mr. Hill died, and both these suits are continued in the name of Alice S. Hill as executrix.

Jacobs & Jenner and *W. R. Andrews*, for appellants. *Junius Rochester*, for respondent.

DUNBAR, J. The first question here is, did the deed from Maynard and wife to McAleer convey title to the land in question, or did Maynard and wife have any interest or right in said land which could by them be conveyed? Section 4 of the donation act of 1850 (9 U. S. St. at Large, 497) granted to every white settler of the public lands, (with the necessary qualifications of age and citizenship,) who was then a resident of the territory of Oregon, or should become a resident therein on or before the 1st day of December, 1850, the quantity of one half section, or 320 acres, of land for a single man, and for a married man, or if he should become married within one year from the 1st day of December, 1850, the quantity of one section, or 640 acres, of land, one-half to himself, and the other half to his wife, to be held by her in her own right, and provided that the surveyor general should designate the part inuring to the husband and that to the wife. Maynard became a resident of Oregon prior to the 1st day of December, 1850, and was also a married man, being the husband of Lydia A. This relation was still continuing in April, 1852, when he made his settlement on a donation claim, and he and his wife were entitled to 640 acres, one-half to inure to him, and the other to his wife, Lydia A. But about the middle of December, 1852, he was divorced from Lydia A. On January 15, 1853, he was married to Catherine T. By this act of divorcement, the claim of Lydia A. to one-half of the land became annulled, and Maynard became a single man. It would be a novel mode of administering the law to allow a man to escape marital responsibility by divorcing his wife, and still allow him benefits that attach ex-

clusively by reason of his relation as a husband. Thirty days elapsed between the time he was divorced from Lydia A. until he was married to Catherine T. During these 30 days he was a single man, and it cannot be contended that he would have been entitled under section 4 to have claimed the provision giving to married men 640 acres each. After he became a married man again, and commenced the settlement with Catherine T., the law only allowed him, by reason of his marriage relations, 320 acres. The new wife should certainly not be allowed, either in morals or in law, to claim any rights through the wife whom she had supplanted. This provision of the law was made for the benefit of women who were married prior to December 1, 1851. Catherine T. was not married prior to that date, and she must claim through her own marriage, and not the marriage of Lydia A. Maynard, by his own volition, destroyed the relationship which entitled him to 640 acres, and, so far as Maynard's interest is concerned, the extra 320 acres which a married man could take was not intended as a personal right attaching to or prerogative of the husband, which he could take from one wife by divorcement, and confer upon another; and he was not placed in any different position with reference to it by his marriage in 1853. This doctrine is substantially announced by the supreme court in *Maynard v. Hill*, 125 U. S. 216, 8 Sup. Ct. Rep. 723, where the court, in reference to the standing of this identical land, says: "When, therefore, the act was passed divorcing the husband and wife, he had no vested interest in the land, and she could have no interest greater than his. * * * A divorce ends all rights not previously vested. Interests which might vest in time upon a continuance of the marriage were gone." There was only one way by which Catherine T. could have become entitled to 320 acres under the donation act, and that was to have married some qualified donation applicant prior to December 1, 1851.¹ This she did not do. We do not think the claim of Catherine T. Maynard was within the letter or the spirit of the law. Section 5 of the act of February 14, 1853, which is amendatory of the act of September 27, 1850, in our judgment simply extends the time within which persons shall acquire title under the donation act, but it does not undertake to change the qualifications of the applicant. This, we

¹ Sec. 5. That to all white male citizens of the United States, or persons who shall have made a declaration of intention to become such, above the age of twenty-one years, emigrating to and settling in said territory between the first day of December, eighteen hundred and fifty, and the first day of December, eighteen hundred and fifty-three, who shall in other respects comply with the foregoing section and the provisions of this law, there shall be, and hereby is, granted the quantity of one quarter section, or one hundred and sixty acres, of land, if a single man; or if married, or if he shall become married within one year from the time of arriving in said territory, then the quantity of one half section, or three hundred and twenty acres, one-half to the husband and the other half to the wife in her own right, to be designated by the surveyor general as aforesaid.

think, has been the universal and unquestioned construction of this statute.

It is claimed by appellant that the acts of Maynard and his wife were of such a character as to create in them a vested right, although no patent had ever issued to them; and cites, to sustain this proposition, *Barney v. Dolph*, 97 U. S. 656; *Lytle v. State*, 9 How. 333; *Stark v. Starrs*, 6 Wall. 417; *Simmons v. Wagner*, 101 U. S. 261. We do not think that the cases cited support the contention. The provision in section 4 of the original donation law, prohibiting the sale of lands until after patent was issued, was repealed July 17, 1854. In *Barney v. Dolph* the court decided that the repeal of this provision implied the power to convey all the government had parted with, but that was the extent of the decision. In that case it was not disputed that Waymire and his wife were entitled to patent; but here the testimony is that Catherine T. Maynard never could have secured a patent; that she had no right to a patent, and therefore had nothing to sell. *Simmons v. Wagner* was a case where the land was sold by the United States, and the purchase money paid. There the purchase money was the main consideration, and it was held that, where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to patent actually issued. To the same effect is *Stark v. Starrs* and *Lytle v. State*; but these cases have no application to the case at bar, because the main question here is whether or not the right to patent ever did become vested. If we assume that it did, we take for our premises the very question in controversy. So far as cases are concerned which are cited showing that the final certificates of registers and receivers in pre-emption cases confer vested rights, they are not in point here; for, although this court is divided in its opinion as to the force and effect of such certificates, (see *Pierce v. Frace*, 26 Pac. Rep. 192, 807, decided at the January term,) yet such certificates stand on a distinct footing, the pre-emption law especially providing "that the proof of settlement and cultivation shall be made to the satisfaction of the register and receiver." Here a discretion is vested in the register and receiver. But section 7 of the donation law, (act of 1850,) among other provisions regarding the proof of donation settlers, says: "And upon such being made, the surveyor general, or other officer appointed by the laws for that purpose, shall issue certificates, under such rules and regulations as may be prescribed by the commissioner of the general land-office, setting forth the facts in the case, and specifying the amount to which the parties are entitled; and the said surveyor general shall return the proof so taken to the office of the commissioner of the general land-office; and, if the said commissioner shall find no valid objections thereto, patents shall issue for the land according to the certificates aforesaid, upon the surrender thereof." No discretion whatever was given to the surveyor general, but, on the contrary, it was especial-

ly conferred upon the commissioner. And in *Stark v. Starrs* the court decided, in construing this act, that the right of the claimant to a patent became perfected when the certificate of the surveyor general and the accompanying proofs were received by the commissioner of the general land-office, and he found no valid objections thereto. The main question in controversy in that case was as to whether the land in controversy was brought under the operation of the town-site act by the organic law of August 14, 1848, establishing the territorial government of Oregon, thus rendering it not subject to the donation act of 1850; and it was upon this proposition that the commissioner objected to the issue of the patent to Stark, and not upon the ground that he found any fault with the proof made of settlement and cultivation under the donation act. And the supreme court of the United States, finding that the provisions of the town-site act did not embrace the land in controversy, and that it was subject to donation entry, and that the proof of residence and cultivation under the donation act had been made and submitted to the commissioner, and that he found no valid objections thereto, sustained Stark's entry. But that state of facts does not exist in this case. On the other hand, the commissioner, in construing the provisions of the donation law, raised an objection to the entry, and decided that Catherine T. Maynard had no rights to the land.

Concluding, then, that the Maynards had no vested rights in the land, we come to the consideration of the question whether or not McAleer is entitled to consideration as an innocent or *bona fide* purchaser for value. In support of the affirmative of this proposition, it is urged that the proofs were made in 1856, and that no fault had been found with them up to the time of his purchase, 11 years afterwards; that he made the purchase in good faith, and without any knowledge or notice of defect in the title of his grantors, if one existed; that he was an innocent purchaser, and as such entitled to the same protection as if every requirement of the land laws had been complied with by his grantees; and *Colorado Coal, etc., Co. v. U. S.*, 123 U. S. 314, 8 Sup. Ct. Rep. 131, and many other cases, were cited in support of this doctrine. While some of the language in the *Colorado* case would seem, at first blush, to sustain the position of appellant, yet we think a careful examination of the whole case will not justify this conclusion. That was a bill in equity, filed in the name of the United States by the attorney general, the object and prayer of which was to declare void and cancel 61 patents for as many distinct pieces of land alleged to have been fraudulently obtained through collusion and fraud; also that the land was not agricultural, but mineral, land, and therefore not subject to pre-emption entry. The answer of the defendants denied all the allegations in the bill alleging fraud, and denied that any of the lands were mineral lands, and alleged they were innocent purchasers in good faith. Under these issues,

the court found that a fraud had been perpetrated upon the United States, and that the parties who acquired title under the patents knew nothing of the frauds; that it was not such a fraud as would prevent the passing of the legal title by the patents; and that it followed that, to a bill in equity to cancel the patents upon these grounds alone, the defense of a *bona fide* purchaser for value, without notice, is perfect; and stated, as an elementary doctrine of equity, that, "where a grantor has been induced by fraud to part with the legal title to his property, he cannot reclaim it from subsequent innocent purchasers for value." It will be observed that the court was considering this case with reference to the passing of the legal title, and not a mere equitable interest, and a title, too, which was evidenced by the highest authority,—a patent from the United States. The patents to all these different pieces of land having been issued prior to the deed made to the defendants, the court in that case rendered its decision with particular reference to the character of the title, as is easily gathered from its approval and quotation of the opinion of the supreme court of the United States in the Maxwell Land-Grant Case, 121 U. S. 825, 7 Sup. Ct. Rep. 1015, where the court says: "If the proposition as thus laid down in the cases cited is sound in regard to the ordinary contracts of private individuals, how much more should it be observed when the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal? In this class of cases the respect due to a patent, the presumption that all the preceding steps required by the law have been observed before its issue, the immense importance and necessity of the stability of titles depending upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations under which this is attempted are clearly stated and fully sustained by proof." But in the case at bar McAleer is attempting to set aside this conveyance by the government, a conveyance by patent, an instrument under seal, and the signature of the president of the United States; a proof of title which is commonly accepted and relied upon by the unprofessional mind as conclusive. And what claim does he interpose against it? Not a patent to the land himself, as did Stark in the case cited by appellant of Stark v. Starrs; not a deed from parties whose qualifications under the donation act were unquestioned, and whose rights to a patent to the land, by reason of their fulfillment of the requirements of the law, were conceded by all parties to the controversy, as did Dolph in Barney v. Dolph; but a deed from a party who the land department decided had no rights to the land in controversy, and to land which the department, as we believe rightfully, restored to the public domain. And this deed was, as the record shows, given to McAleer more than a year before the original donation certificate issued to his gran-

tors from the local land-office. So that McAleer simply took by that deed what the Maynards had a right to sell; and, as they had no right to sell anything, he took nothing. He purchased an inchoate or imperfect title, and he must stand or fall by it as it existed in the hands of his grantors. *Kramer v. Arthurs*, 7 Pa. St. 170; *Briscoe v. Ashby*, 24 Grat. 478.

Concluding, then, that McAleer has no rights under his deed from the Maynards, we come to the consideration of the rights he claims to have acquired by virtue of his homestead application. After his preemption claim, which he made in 1874, had been decided against him by the commissioner, and subsequently on appeal by the secretary of the interior, he made application to make homestead entry. This was on April 1, 1880. The district land-office refused the application. Whatever rights he may have had under that application, by reason of residence or otherwise, we are not called upon to investigate here; for he had the right of appeal, and did not avail himself of it, and that application was virtually abandoned. However, we seriously question if section 3 of the act of May 14, 1880, could be construed to confer any right in McAleer, as against rights of other parties existing at the time of the passage of the act; and are inclined to think that it was the intention of the law not to interfere with any intervening rights, the same as many other provisions of the land laws for the relief of settlers. Prior to McAleer's application, and prior to the passage of the act of May 14, 1880, to-wit, on January 8, 1880, Lewis and Hill made application to locate Porterfield warrants on the land in question. This application was rejected for the reason that the land was embraced within the limits of the town of Seattle, but afterwards, upon appeal, it was allowed, and in course of time patents were issued therefor. On the 16th of December, 1880, the application of the city of Seattle for the lands was withdrawn. On that day McAleer made homestead application for the land, and his application was rejected on the ground that such land had been previously applied for by said Lewis and Hill.

With this view of the law, then, the controversy is narrowed to this proposition: Were the lands legally located by the said Porterfield scrip? Appellants contend—*First*, that Porterfield warrants are not locatable upon occupied lands; *second*, that the warrants are not assignable; and, *third*, that the warrants are not locatable upon unoffered land. The act of congress approved April 11, 1860, entitled "An act for the relief of the legal representatives of Charles Porterfield, deceased," provides, among other things, that Porterfield warrants may be located on any of the public lands which have been and may be surveyed, and which have not been otherwise appropriated at the time of such location, within any of the states of the United States where the minimum price for the same shall not exceed \$1.25 per acre," etc. It is claimed by the appellee that the phrase "otherwise appropriated" means any public lands not regularly appropriated by vir-

tue of some provision of law for its disposition; and it is insisted that the language in this case is distinguished from that employed in the act of April 5, 1872, providing for the location of Valentine scrip, where the language was, "such scrip may be located upon any of the unoccupied and unappropriated lands of the United States." This is the construction given to this expression by the land department, and, in our judgment, is the correct one. There would be no reason or justice in allowing a mere unauthorized and illegal occupancy to prevent the location; and, if appellant's interpretation is to be accepted, it matters not how illegal or unwarranted the occupancy may be. Besides, there is a well-recognized difference in the words. Webster's first definition of "appropriation" is, "setting apart for a particular use." Occupancy may always include an appropriation, but an appropriation does not necessarily include occupancy. For instance, the government may appropriate land for military reservations, or Indian reservations, but they may or may not occupy them as such. This is a word commonly used by the government in setting aside lands for special purposes, and we cannot give it the construction claimed by appellee without doing violence to its generally accepted meaning. This is the view evidently taken by the supreme court of the United States in the case of *Wilcox v. Jackson*, 13 Pet. 512, where the court says: "Now, this is appropriation, for that is nothing more nor less than setting apart the thing for some particular use."

As to the assignability of these warrants, the act for the relief of Porterfield provided for the appropriation of these lands according to the directions contained in his last will and testament; and the will, which is filed as an exhibit in this case, "authorizes and empowers the trustees, in their discretion, to sell or exchange, or otherwise dispose of, all or any part of the property herein given in trust, and the proceeds arising from such sale, exchange, etc., to reinvest in other property." Construing the act in connection with the will referred to by the act, it appears to us that the intention of congress was to make the warrants assignable. By the ancient common law, things in action, expectancies, possibilities, and the like were not assignable, and the assignee thereof acquired no rights which were recognized by a court of law; and says Mr. Pomeroy: "The court of chancery from an early day rejected this rule as narrow, and even absurd. Equity has always held that the assignment of a thing in action for valuable consideration should be enforced." *Pom. Eq. Jur.* § 1270. Again, the act was so construed by the executive department of the government which was charged with issuing the warrants in form; and the said warrants are on their face issued to William Kinney and Thomas J. Michie, as executors of Robert Porterfield, deceased, or their assignees, etc.; and a note at the bottom of the warrants, over the signature of the commissioner of the general land-office, is as follows: "This warrant may be located upon un-

offered land, and is assignable in the manner and form prescribed by the rules and regulations of this office under the act of March 3, 1855." The statute having been thus construed by the executive department of the government, and innocent parties having acquired rights under that construction, those rights ought not to be divested, unless it clearly appears that the construction was wrong. The supreme court of the United States, in *U. S. v. Moore*, 95 U. S. 763, says: "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject; not infrequently they are the draughtsmen of the laws they are afterwards called upon to interpret." In support of this doctrine is cited *Edwards v. Darby*, 12 Wheat. 210; *U. S. v. Bank*, 6 Pet. 29, and *U. S. v. Macdaniel*, 7 Pet. 1. In *Brown v. U. S.*, 113 U. S. 568, 5 Sup. Ct. Rep. 648, it was held that, in case of ambiguity in a statute, contemporaneous and uniform executive construction is regarded as decisive. To the effect that great weight should be given to such construction, we cite *Edwards v. Darby*, 12 Wheat. 206; *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. Rep. 739; *U. S. v. Dickson*, 15 Pet. 141; *U. S. v. Gilmore*, 8 Wall. 330. In addition, we see no reason why these warrants should be excluded from the provisions of section 1 of the act of March 22, 1852, entitled "An act to make land-warrants assignable, and for other purposes." That act is sweeping in its declarations. It declares "that all warrants for military bounty lands, which have been or may hereafter be issued under any law of the United States, * * * are hereby declared to be assignable," etc. It is true that these warrants are not like some other military land-warrants, but they were given to Porterfield's heirs for military services rendered by Porterfield, or in lieu of other lands which had been given to him for such services in the Revolutionary war, which amounted to the same thing, and are to all intents and purposes military land-warrants, and as such are assignable under the general statute. We do not think, from the language of the statute, that it contemplated restricting these locations to lands only that were subject to private entry; or, in other words, to simply fix upon them a value of \$1.25 per acre; and, unless it clearly appears from the act that such was the intention, the executive department having placed the other construction upon the act, and having made them locatable upon unoffered land upon their face, under the doctrine of the law in the last cases above cited, we do not think we are justified in disturbing rights that have been acquired under this construction of the law. There is no question but that many of the equities in this case are in favor of McAleer and his heirs, and, were we to decide the case upon sympathy, our judgment would probably be different; but, as we view the law, there is no escape from the conclusions we have reached. In the court

below damages were awarded in the sum of \$750 to appellee for the detention of the premises, without allowing anything for the improvements made. Section 541 provides that, "when permanent improvements have been made upon the property by the defendant, or those under whom he claims, holding under color of title, adversely to the claim of the plaintiff, in good faith, the value thereof at the time of the trial shall be allowed as a set-off against such damages." Under this statute, appellee in this court waives any right to damages, and consents that the judgment be so modified. The order of the court is that the judgment of the court below be so modified, and that with such modification judgment is affirmed.

ANDERS, C. J., and SCOTT, STILES, and HOYT, JJ., concur.

MCALDER *et al.* v. HILL.

(Supreme Court of Washington. Aug. 1, 1891.)

Appeal from superior court, King county; I. J. LICHTENBURG, Judge.

Jacobs & Jenner and W. R. Andrews, for appellants. Junius Rochester, for respondent.

DUNBAR, J. For the reasons assigned in the case of *McSorley v. Hill*, 27 Pac. Rep. 552, the judgment in this case is affirmed.

ANDERS, C. J., and SCOTT, STILES, and HOYT, JJ., concur.

AUSTIN *et al.* v. CITY OF SEATTLE *et al.*

(Supreme Court of Washington. Aug. 1, 1891.)

MUNICIPAL BONDS—STREET ASSESSMENTS—CONSTITUTIONAL LAW—UNIFORM TAXATION.

1. Const. Wash. art. 7, providing that "taxes shall be equal and uniform and according to value," does not include local assessments for street improvements; and Charter City of Seattle, art. 8, § 7, providing that the cost for improving streets shall be met by assessments levied upon the abutting property according to the front foot, is not unconstitutional.

2. Charter of Seattle, art. 8, § 8, authorizes the city council to issue local improvement bonds, and section 9 provides that they shall be paid for by the city from the proceeds of the assessments, in the improvement districts, "but the city shall be liable for the payment of both principal and interest." *Held*, that such bonds, when issued, will constitute part of the city's general and primary indebtedness, and an ordinance attempting to make it liable only in the event of a failure to collect the assessments is invalid; and the bonds cannot be issued when the amount would increase the debt of said city in violation of Const. Wash. art. 8, § 6, forbidding any city to become indebted to an amount exceeding $1\frac{1}{2}$ per cent. of its taxable property, except by the consent of three-fifths of its voters.

3. Const. Wash. art. 8, § 6, declares that no city shall "for any purpose" become indebted "in any manner" to the amount exceeding $1\frac{1}{2}$ per cent. of its taxable property without the assent of three-fifths of its voters; "provided, further, that any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding 5 per centum additional, for supplying such city or town with water, artificial light, and sewers," etc. *Held*, that indebtedness for water and sewage purposes is no part of the general indebtedness of a city, and need not be considered in determining whether the city has already reached its 5 per cent. limit of general indebtedness.

Appeal from superior court, King county.

Action by J. E. Austin and John H. Carr against the city of Seattle to enjoin the issuance and sale of street improvement bonds. Judgment for defendant. Plaintiffs appeal. Reversed.

A. Battle, for appellants. O. Jacobs, for respondent.

STILES, J. There are two questions presented for decision in this case: (1) Is the provision of section 7, art. 8, of the charter of the city of Seattle, adopted October 1, 1890, constitutional, it providing that the cost of improving streets in that city shall be assessed and levied upon the property benefited thereby and abutting thereon, to the center of the blocks, or to the distance of 120 feet on each side of the improvement, if the abutting land is not platted, and that the said cost shall be assessed upon such property in proportion to the number of feet of such lands or lots fronting thereon? (2) It being conceded that the city of Seattle has already passed the one and one-half per cent. limit of indebtedness, can it, without popular vote to increase its indebtedness, issue street improvement bonds under the provisions of section 9, art. 8, of said charter?

1. The first proposition, it is claimed by the appellants, must be answered in the negative, because, under the constitution, all taxes and assessments for such special purposes must be levied according to the value of the property taxed. It is true that article 7 of the constitution expressly provides that taxes in the state of Washington shall be according to value, and also that they shall be equal and uniform. It is true, also, that it must be conceded that special taxes or assessments levied for local improvements in cities and towns are so levied under the exercise of a branch of the taxing powers of the state. But, while the question has heretofore been the subject of much controversy in the courts, we think the doctrine is well established at this time that the general use of the term "taxes" in the constitution does not necessarily include what is meant by the term "assessments," in connection with street and other local improvements, but applies only to the larger exercise of the sovereign power of the state, either directly or through its inferior instrumentalities of county, city, town, school-district, etc., in raising general revenues for the support and maintenance of government. In some of the states, as Illinois, Wisconsin, Tennessee, and Alabama, under their earlier constitutions, in which there was no particular mention of assessments or special taxes, but only a general provision that taxes should be equal and uniform and according to value, it was held by the courts of those states that there could be no such thing as a special local assessment upon a portion of the property within the limits of a municipal corporation to defray the expenses of improvements peculiarly beneficial to such local areas. *City of Chicago v. Larned*, 34 Ill. 203; *Mobile v. Dargan*, 45 Ala. 310; *Weeks v. Milwaukee*, 10 Wis. 242; *Taylor v. Chandler*, 9 Helsk. 349,—the theory of those courts being that any improvement made

by a municipal corporation which would authorize taxes of any kind to pay for it must be a public improvement, and therefore must be paid by the public generally, through the levy of taxes upon the whole community. In Alabama, under the constitution of 1875, the provisions of which are very similar to our own, the case of *Mobile v. Dargan* was disregarded, and the correctness of its reasoning criticised and denied. Mayor, etc., v. Klein, 89 Ala. 461, 7 South. Rep. 386. And in Illinois, under her constitution of 1870, which contains a provision in almost the exact language of section 9, art. 7, of our own constitution, the case of the *City of Chicago v. Larned* was held to be no longer applicable; the court holding that an assessment according to frontage was not unconstitutional. *White v. People*, 94 Ill. 604. In *Peay v. Little Rock*, 32 Ark. 81, we find the only case which holds, under a constitutional provision similar to our own, that an assessment according to frontage is not a lawful assessment. This case was strongly relied upon in the argument to sustain the appellants' point, but an investigation of it shows that the supreme court of that state based its decision mainly upon the older cases in Illinois and Wisconsin, some of which, as we have seen, have since been overruled in the states where they were made; and the argument in *Peay v. Little Rock*, is so clearly, as we think, based upon the theory that there can be no valid local assessment, that its value as an authority is destroyed.

Section 9, art. 7, of our constitution, is as follows: "Sec. 9. The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." The discussion of this identical section in the constitution of Illinois, found in the case of *White v. People*, supra, is so thorough and full that it is not necessary for us to enter upon a further examination. In this case the legislature has seen fit to leave the matter of determining in what mode street assessments shall be levied to the people of the city of Seattle, and they have chosen "frontage" as their system. Concerning this method, Cooley on Taxation, (page 644, 2d Ed.,) says: "In many instances * * * the legislature has deemed it right and proper to take the line of frontage as the most practical and reasonable measure of probable benefits, and making that the standard, to apportion the benefits accordingly. Such a measure of apportionment seems, at first blush, to be perfectly arbitrary, and likely to operate in some cases with great injustice; but it cannot be denied that, in the case of some improvements, frontage is a very reasonable measure of benefits, much more just than value could be, and perhaps approaching equality as nearly as any estimate of benefits made by the judgment of men. However this may be, the authori-

ties are well united in the conclusion that frontage may lawfully be made the basis of apportionment." Adopting these views, we do not see why we should disturb the charter provisions.

2. A general demurrer was sustained to the complaint in this case in the court below, and the appeal is from a judgment against the plaintiff entered thereon. The complaint shows that the authorities of the city of Seattle had, after proper proceedings, ordered the improvement of Broadway from the north side of Yesler avenue to De Forrest street by grading and constructing sidewalks on both sides of the same, and that they were about to issue certain bonds for the cost of the improvement, under the terms of the charter. The charter (article 8, § 8) provides: "There shall be two modes of making payment for such local improvements, to-wit, 'immediate payment' and 'payment by bonds,' and the council shall, in the ordinance providing for such improvement, declare in which mode such payment shall be made. The mode to be adopted shall be by payment by bonds, except in case the owners of more than three-fifths of the number of the front feet of the property fronting on such street in the district shall petition for the other mode, at or before the passage of such ordinance, in which case the council shall adopt the mode petitioned for." And section 9 reads: "If 'payment by bonds' is to be made for such improvement, then, and in such case, each estimate and roll shall be made and returned, and corrections made, and the notice given, as in the eighth section herein above provided, and the cost and expense of the improvement shall be assessed against the lots and parcels of land as in said section declared, payment for the crossing to be made as therein stated, and a copy of such roll filed with the city treasurer. But the ordinance shall further declare, on making such levy, that the sum charged against each lot and parcel of land may be paid in not more than ten equal annual payments, with interest upon the whole sum so charged at the rate of seven per cent. per annum, the interest to be paid annually; and the city treasurer shall proceed to collect the amount due each year in the same manner as provided for collections in section eight hereof; and, in all cases of such payments by bonds, the city council shall issue the bonds of the city for the whole estimated cost of such improvement, less the cost of such crossings, and the amount assessed against lands of the United States, the state of Washington, state university, county of King, city of Seattle, or any school-district. Such bonds shall be called 'Local Improvement Bonds, District No. —, of the City of Seattle,' shall be payable not more than ten years after date, with interest at a rate not exceeding six per cent. per annum, payable semi-annually at the office of the city treasurer. Such bonds shall be sold after thirty days' public notice thereof given, to the highest bidder therefor, but in no case shall such bonds be sold for less than par; and the proceeds shall be applied in payment of such improvement, the principal and in-

terest of which bonds shall be paid by the city from proceeds of such local assessment, but the city shall be liable for the payment of both principal and interest; and all funds raised in each improvement district, as well as funds borrowed therefor, shall be paid into a fund for such district, to be called 'Local Improvement Fund, District No. —, of Seattle.' As was premised, the city of Seattle has already passed the limit of $1\frac{1}{2}$ per cent. of her indebtedness, based upon the assessment roll of August 30, 1890, and no vote has been taken authorizing the increase of her indebtedness. The city council, by ordinance No. 1696, has provided for the issuance of Broadway Improvement bonds in the sum of \$17,812.50; and the appellant contends that the city has no power, without a vote of authorization, to issue such bonds, for the reason that, when issued, they will constitute evidences of primary indebtedness of the city. The ordinance (section 5) provides: "The principal and interest of such bonds shall be paid by the city from the proceeds of such local assessments, but the city shall be liable for the payment of both principal and interest, if it fails or neglects to collect said assessments, or fails or neglects to collect sufficient to pay the principal or interest on said bonds when they fall due." For the city, it is claimed that the bonds when issued would not constitute primary indebtedness of the corporation, for the reason that they are payable out of the fund to be created under the terms of the charter, and that the ordinance makes the city liable only in case of its failure or neglect to collect the assessment, or to collect sufficient to pay the principal and interest of the bonds when they fall due. The appellant must succeed in his contention because the ordinance does not comply with the charter. The last clause of section 9 is, "and the city shall be liable for the payment of both principal and interest;" and the council has no power to issue a bond which does not provide for a liability equal in degree with that provided by the charter.

3. The main question, however, was whether, in view of the city's indebtedness, already exceeding $1\frac{1}{2}$ per cent., it can issue these bonds without a vote of the people.¹ It is a rule established by many authorities that when a municipal corporation is about to order improvements of this class it may do so without making itself primarily liable for the cost thereof. The city of Seattle has already done so to a large extent, and this court has held that the unpaid warrants issued by it, drawn upon and payable out of special assessment funds, do not constitute a

part of its municipal indebtedness, within the meaning of the constitution, (*Baker v. Seattle*, 27 Pac. Rep. 462;) but it is competent for such a corporation to make itself primarily liable for such improvements, and to make their cost a part of its debt. In this instance the language of the charter is too clear for construction. It is evident therefrom that its framers intended to give a degree of strength and stability to improvement bonds by pledging the faith of the city for their payment in the first instance. The bondholder, under this charter, need look only to the city for the payment of his principal and interest; the city is to be his debtor, not the property within the district, nor the owner of the land. Upon this point learned counsel cited us to a line of authorities from the state of Indiana, and sought to rely upon them in support of his position, but an examination of the cases fails entirely, we think, to uphold him. The case of *Quill v. City of Indianapolis*, 124 Ind. 292, 23 N. E. Rep. 788, is the latest of the cases cited, and we shall examine that case, as well as the law upon which it was based, briefly. The constitution of that state (article 13) provides: "No political or municipal corporation in this state shall ever become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount, given by such corporation, shall be void." It was conceded that the bonded indebtedness of the city of Indianapolis exceeded the limit fixed by the constitution, and the question was whether it could, under the act of March 8, 1889, continue to issue improvement bonds; and the court held, under the statute governing the issuance of the bonds proposed, they would not constitute a portion of the city's indebtedness, but would be valid obligations. But, turning to the statute in question, we find that no liability whatever was laid upon the city, even by its failure, neglect, or refusal to collect the annual installments; but that the owner or holder of the bonds was given the right to foreclose the lien of the assessment upon the assessed property as a mortgage would be foreclosed in any court of competent jurisdiction, and for that purpose the bonds when issued were declared to transfer to the owner thereof all the right and interest of the city in and to the assessment and the lien thereby created. The effect of this statute seems to have been to make of each assessment district a *quasi* corporation, whose agent for the making of the improvement, the creation of the lien, and the issuance of the bonds was the city; but after the issuance of the bonds the city had no duty to perform other than that of paying over to the bondholders the money which it might receive from time to time. This, it will be seen, is a case very broadly to be distinguished from the one at bar, and renders the authority of the Indiana case

¹ Const. Wash. art. 8, § 4, provides that no city shall for any purpose become indebted to an amount exceeding one and one-half per cent. of the taxable property without the assent of three-fifths of the voters therein; "provided, further, that any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding 5 per centum additional, for supplying such city or town with water, artificial light, and sewers, when the works of supplying such water, light, and sewers shall be owned and controlled by the municipality."

of no force. The case of *U. S. v. Ft. Scott*, 39 U. S. 152, is one where the state of Kansas made a provision in the charter of cities of the second class, within which was the city of Ft. Scott, almost identical with that of the charter of the city of Seattle; and it was there held that the liability of the city was absolute without reference to the fact that it was authorized to levy special assessments for the payment of its improvement bonds, and intended, as a fact, that the bonds should be paid out of the assessments when collected.

Incidental to the further facts of this case, it appears that the appellant contends that the sum of \$955,000 of bonded indebtedness, which was incurred by the city of Seattle on the 20th day of August, 1890, for water and sewerage purposes, should in some way affect the question of the issuance of bonds in this case; but this claim is not warranted. The city was authorized by the act of February 26, 1890, to become indebted for the purpose of furnishing itself with water and sewerage and light plants in a sum equal to 5 per cent. of its assessment. This \$955,000, being issued for the special purposes under which the city is authorized by section 6, art. 8, of the constitution, to become indebted in a sum equal to 5 per cent. in addition to 5 per cent. of indebtedness authorized for general purposes, is not to be considered as constituting a part of the general indebtedness of the city, inasmuch as its assessment in 1890 is shown to have been upwards of \$26,000,000, which would allow it a general indebtedness of upwards of \$1,300,000, and a special indebtedness for water, sewers, and lights of as much more. Again, it is charged that the Broadway improvement will exceed an expenditure of \$5,568.50 for the cost of the improvement at the intersection of cross-streets, and therefore will add that much more to the city's indebtedness, but, so far as appears, the city may intend to pay that sum out of its current revenues, which will not, therefore, increase its indebtedness, in a constitutional sense, to that extent. If so, there is no objection on that ground to the improvement. The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

ANDERS, C. J., and SCOTT and DUNBAR, JJ., concur.

STATE *ex rel.* SMITH, Mayor, *v.* MILLS.
(Supreme Court of Washington. July 17, 1891.)

QUO WARRANTO—WHEN LIES—PROCEDURE.

1. Code Wash. § 703, relating to *quo warranto* proceedings, provides that the information may be filed by the prosecuting attorney, or by any other person on his own relation whenever he claims an interest in the office, franchise, or corporation which is the subject of the information. *Held*, that the mayor of a city has not such an interest in the office of city councilman as to entitle him to maintain, on his own relation, *quo warranto* to oust an alleged usurper of such office; but the usurpation affects the public alike, and the remedy is by proceedings on the part of the state.

2. Code Wash. § 702, provides that an infor-

mation in the nature of *quo warranto* may be filed in certain specified cases. Section 706 provides that, whenever an information in *quo warranto* is filed, "a notice signed by the relator shall be served and returned as in other actions," and that "defendant shall appear and answer or suffer default, and subsequent proceedings be had as in other cases." *Held*, that an information for the usurpation of a public office is not addressed to the discretion of the court, but is a matter of right in the cases specified in section 702.

3. Laws Wash. 1889-90, p. 182, § 114, prescribes that the mayor shall preside at all meetings of the city council, and in his absence the council may appoint a mayor *pro tem.* Laws Wash. 1889-90, pp. 178-198, §§ 104-141, as amended by Act March 9, 1891, § 4, provide that the number of councilmen in cities of the third class shall be increased from six to seven, and authorize the mayor or mayor *pro tem.*, on or before June 15, 1891, with the consent and approval of the council, to appoint the additional member. The mayor of Vancouver on March 30, 1891, prior to the meeting of the city council, filed with the clerk a nomination for an appointment to the office of councilman. At an adjourned meeting of the council held on the same evening, and in the absence of the mayor, a mayor *pro tem.* was elected. The mayor's nomination was rejected, and a nomination by the mayor *pro tem.* confirmed. *Held*, that such appointment and confirmation were authorized.

Appeal from superior court, Clarke county; N. H. BLOOMFIELD, Judge.

Action by J. R. Smith, in his official capacity as mayor of Vancouver, to oust A. F. Mills from the office of city councilman. Judgment for plaintiff. Defendant appeals. Reversed.

On March 30, 1891, the plaintiff filed with the city clerk a nomination for an appointment to the office of councilman. Vancouver being a city of the third class, such appointment was necessary under the Laws of 1890, as amended by the Laws of 1891. At an adjourned meeting of the council held the evening in which the mayor filed the nomination, and in the absence of the mayor, a mayor *pro tem.* was elected. The council rejected the mayor's nomination, and the nomination of defendant by the mayor *pro tem.* was confirmed, and the appointee thereafter qualified.

W. Byron Daniels and Williams & Woods, for appellant. Wiswall & McCredie, for respondent.

DUNBAR, J. This case presents to our consideration two questions: *First*, does the complaint show that the respondent has sufficient interest in the office claimed to have been usurped to entitle him to appear as relator in an information in *quo warranto* proceedings? *Second*, did the mayor *pro tem.*, by and with the consent of the city council, have the power to appoint the additional councilman? The law involved in these propositions was presented so ably and concisely by counsel on the respective sides that the court has been greatly aided in its investigations. It seems hardly necessary, for the purpose of this investigation, to consider the history of the writ, or of the information in the nature of *quo warranto*, further back than the statute of Anne, (9 Anne, c. 22,) when the proceeding by information, which had before been a criminal proceeding, became the means of determining civil

rights between private parties, and the rights which could before be investigated only through the interposition of the writ of *quo warranto*. Under that statute any one could prosecute the usurper of an office simply by leave of the court. The practice then soon obtained to allow informations almost as a matter of course. "Indeed," says Mr. High, in his Extraordinary Legal Remedies, § 605, "to such an extent had the granting of these informations been carried that it was frequently deemed prudent not to show cause against the rule *nisi*, lest the respondent should thereby disclose his grounds of defense." It finally became noticeable that the remedy was abused, and used for the gratification of personal malice, and the courts again began to exercise their rights under the statute of Anne, and would not allow the information to be filed unless it appeared that the relator had some interest in the matter. The discretion of the court had to be appealed to in each instance. So far there can be no difference of opinion, but from this on there are some distinctions claimed by both parties. For instance, it is claimed by the appellee that there is a distinction in the necessary interest of the relator where the action is brought to disenfranchise the corporation, or take its life, and where it merely goes to the administration of corporate functions; and authorities are cited which seem to establish this distinction. No doubt, in reason, a greater interest in the relator should be required where the life of a corporation is at stake, and where the public would suffer by its destruction, than where a simple functional power is called in question; though it may be said in this connection that our statute does not recognize this distinction. See section 702, subd. 1, Code. On the other hand, it is contended that while, under the statute of Anne and kindred statutes, where the discretion of the court is to be exercised, the private individual or tax-payer may file the information, yet in statutes similar to ours, where courts are divested of this discretion, the rule is changed, and the information must be filed by the state's officer, or, if filed by the private individual, he must show some special interest in the subject of the controversy; and the cases cited by appellee, all being cases either under the common-law rule or in compliance with the requirements of the statute of Anne, are not in point. After a careful consideration of the authorities and cases cited, we are inclined to adopt this view.

In *Murphy v. Bank*, 20 Pa. St. 415, the court in rendering the opinion says the substance of the statute of Anne had been adopted before the Revolution as a part of the common law, and was a part of the law in Pennsylvania, and that the practice of the court was not affected by the statute of 1836. Mr. High had special reference to the statute of Anne, and to the discretion of the court, in section 681, cited by appellee, where he says: "The statute of Anne extended the remedy by *quo warranto* information, which had before been considered much in the nature of a prerog-

ative one, to private citizens desiring to test the title of persons usurping or executing municipal offices and franchises, and rendered any person a competent relator in such proceedings who might first obtain leave of the court to file an information." *State v. Tolan*, 33 N. J. Law, 195, was tried under a statute giving discretion to the court to allow or reject the filing of the information. The judgment in *State v. Hammer*, 42 N. J. Law, 436, was based upon the same ground; and the court in discussing this question says: "All that the court requires in such instances is to be satisfied that the relator is of satisfactory responsibility," etc. In *Churchill v. Walker*, 68 Ga. 681, leave of the court had first to be obtained. In *Com. v. Meesser*, 44 Pa. St. 341, the statute was the same, and even with that statute the court reluctantly sustained the case by reason of some special act; for after expressing its reluctance the court says: "We observe that by the act of April 24, 1854, § 3, (not cited to us in arguing these disputes, and not before noticed by us,) any tax-payer may obtain an injunction against any violation of the charter law of the city, and we may take this as a fair analogy for granting this writ." And then the court adds, "especially as we can prevent the abuse of it by the exercise of discretion," etc. Thus it will be seen that the practice of allowing private individuals, who are not specially interested, to interfere with the public officers of the state, is bottomed on the idea of the discretion of the court, and that the court can restrain any abuse that might otherwise flow from allowing irresponsible parties to make the state a party to their petty troubles and personal likes and dislikes. And the appellee seems imbued with this idea, for he says in his brief: "It is important that we bear in mind that any evils that might arise from permitting the writ to issue at the instance of a private relator are properly and sufficiently guarded, since it can issue only in the sound discretion of the court." But we look in vain for any discretion given to the court by our statute. The common law on that subject has been supplanted by the statute,—the state has legislated on the subject,—and it is to the statute we must look, not only for the practice of the court, but for the qualifications of the relator. Section 702 provides that "an information may be filed against any person or corporation in the following cases," (subsequent subdivisions reciting the cases.) Section 706 provides that, "whenever an information is filed, a notice signed by the relator shall be served and returned as in other actions. The defendant shall appear and answer, or suffer default, and subsequent proceeding be had as in other cases." There is no discretion given to the court, and, if discretion should be given to the court, the discretion should not go beyond the statutes. The statutes specify those who have the legal right to invoke this remedy. If the relator has a standing here, it must be under section 703, which is as follows: "Sec. 703. The information may be filed by the prosecuting attorney

in the district court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person, on his own relation, whenever he claims an interest in the office, franchise, or corporation which is the subject of the information." The legislature has looked out for the interests of the public by providing that the information shall be filed by the prosecuting attorney, either on his own relation, or when directed by the court or other competent authority; and private interests are provided for in the latter part of the section by the words, "or by any other person on his own relation." When? When he "claims an interest in the office, franchise, or corporation which is the subject of the information." What interest is meant? Surely not an interest in common with other citizens, for the protection of that interest is already provided for in the first part of the section. If the statute is to be construed as having any meaning at all, and if words are to be given their ordinary meaning, and the ordinary grammatical construction is given to the language and sentences, it must mean that the interest must be a special interest, not common with the interests of the community. Section 705 confirms this view: "Sec. 705. Whenever an information shall be filed against a person for usurping an office, by the prosecuting attorney, he shall also set forth therein the name of the person rightfully entitled to the office, with an averment of his right thereto; and when filed by any other person he shall show his interest in the matter, and he may claim the damages he has sustained." Thus it will be seen that when the information is filed by the prosecuting attorney in the interests of the public, those interests need not be shown, but when filed by any other person he shall show his interest in the matter, and he may claim the damages he has sustained. What possible damages could the mayor be entitled to in this case? Or what damages could any one be entitled to who had no interest separate from the common interest of the public?

The following sections: "Sec. 707. In every case wherein the right to an office is contested, judgment shall be rendered upon the rights of the parties, and for the damages the relator may show himself entitled to, if any, at the time of the judgment. Sec. 708. If judgment be rendered in favor of the relator, he shall proceed to exercise the functions of the office, after he has been qualified as required by law, and the court shall order the defendant to deliver over all books and papers in his custody, or within his power, belonging to the office from which he has been ousted." "Sec. 710. When judgment is rendered in favor of the plaintiff, he may, if he has not claimed his damages in the information, have his action for the damages at any time within one year after the judgment,"—all convey the idea that where the relator is other than the prosecuting attorney he must show his interest, and will be entitled to damage if

he prevail, showing conclusively that his interest must be a special interest, and that his damage would be equally distinct. It is not alleged in the complaint that the relator is even a tax-payer, so that the cases cited on that question are not in point, even if the law of this state should be construed to permit a tax-payer to become a relator in such case. He appears simply claiming the interest of a mayor. It is difficult to see what interest the mayor has in the office of a city councilman that any other citizen has not. He is interested in the rightful administration of the laws, but so is every other citizen. If he be a tax-payer he is interested in an economical administration, but so is every other tax-payer in the city. It may be fairly presumed that he is an influential citizen, and commands the esteem and confidence of his fellow-townsmen, but this does not give him any additional legal interest in the city government. So far as the remarks of Judge Dillon (1 Dill. Mun. Corp., 4th Ed., § 13, cited by the court below in its very able accompanying opinion) are concerned, they might be profitably considered by a legislative body, but certainly can be of little assistance to a court in construing a statute. Judge Dillon was indulging in a statement of what he thought the law should be; the province of the court is narrower,—it is to ascertain what the law is. Inasmuch as the statute seems to tolerate but one construction, it appears hardly worth while to specially review the authorities cited by appellant. We have examined them, and they bear out his contention. It is true that in *Miller v. Town of Palermo*, 12 Kan. 14, as cited in appellant's brief, the relator sought to have the corporation dissolved; but the judgment of the court seemed to be based on the general proposition that, if the injury is one that particularly affects a person, he has a right to the action; if it affects the whole community alike, their remedy is by proceedings by the state through its appointed agencies. It is contended by the appellee that, under our system of government, where the people have so prominent a part in the filling of offices, to prevent an interested citizen to apply for a writ of inquiry, excepting by the consent and in the name of the prosecuting attorney, is going far towards the practice of governments where kings and kingly officers do the governing. But the very fact that under our system of government the people have so prominent a part in the filling of the offices is an answer to the objection, as it places in their hands a remedy for any abuse that might grow up under the system. The ancient writ of *quo warranto* was exclusively in the interest of the king, and the subject had no right to invoke it at all. Its office was to inquire into the usurpation of, and to protect, the prerogatives of the crown; but he who draws a parallel between the use of a legal remedy exercised by the ancient kings for the benefit of the crown, and a remedy exercised by public officers under our system of government for the benefit of the public, fails to discriminate between a

monarchical and republican form of government. Ours is purely a representative government; the government is the people, and the prerogative of the government is a prerogative of the people; and the public prosecutor represents and acts for the people, and is responsible to the people alone for his office. The representatives of the people, in exercising their legislative discretion, have not deemed it proper, or to the best interest of society that grievances of a public character, affecting the whole community alike, should be investigated at the suit of a private individual, but through the agency of a public officer, who represents and has in charge the interest of the whole community. This principle is not confined to this particular remedy, but is applicable to the law governing the enforcement of other rights. Whether the legislation be right or wrong, the statute on the subject of information will bear no other construction or interpretation than that embodied in this general statement: that if the injury is one that is peculiar to the individual he has his right of action, but if it affects the whole community alike the remedy is by proceedings by the state through its appointed agencies.

As to the second proposition, it seems to us there can be but little controversy. The appointing power is given by the proviso to section 4 of the amendatory act of 1891, and is as follows: "Provided, that the mayor, or mayor *pro tem.*, shall, on or before the 15th day of June, 1891, with the consent and approval of the city council, appoint the additional member," etc. There is no greater power conferred by this section on the mayor than there is on the mayor *pro tem.*; either one could, with the consent of the council, make this appointment any time before the 15th day of June, 1891. The only question is, was Hidden properly acting as mayor *pro tem.* at the time the appointment was made? If he was, the power to appoint was conferred upon him by the statute, and it is not questioned that he was at such time a lawfully acting mayor *pro tem.* It is made the duty of the mayor to preside at all meetings of the council; and the law provides that in case of his absence the council may appoint a mayor *pro tem.*¹ It matters not what the cause of the mayor's absence was, or whether he was in the city or out of it; he was absent from the meeting of the council, and this was the only fact the ascertainment of which was necessary by the council to authorize the appointment of a mayor *pro tem.* The demurrer to the information should have been sustained. It follows that the judgment is reversed, and the case remanded to the lower court with instructions to proceed in accordance with this opinion.

ANDERS, C. J., and STILES, HOYT, and SCOTT, JJ., concur.

¹Laws Wash. 1889-90, §§ 104-141, inclusive, pp. 178-198, as amended by Act March 9, 1891, § 4, provides that the number of councilmen in cities of the third class shall be increased from six to seven.

IVENSON v. CALDWELL *et al.*

(Supreme Court of Wyoming. Aug. 18, 1890.)

STATUTE OF FRAUDS — PROMISE TO PAY DEBT OF ANOTHER — APPEAL — MODIFICATION OF JUDGMENT.

1. A contract, whereby one guarantied to pay attorneys a fee for acting as counsel in a certain suit for a third party, in consideration that they would obtain an agreement in writing from the third party that he would pay a sum of money which he was then owing to a bank of which the party giving the guaranty was president and a large stockholder, is not within the statute of frauds.

2. Under Rev. St. Wyo. § 3128, which provides that a judgment rendered by the district court may be reversed, vacated, or modified by the supreme court, where no errors appear of record, except that judgment was rendered for an amount larger than demanded in the complaint, the judgment will be modified, and affirmed accordingly.

Error to district court, Albany county; M. C. SAUFLEY, Judge.

Action by Isaac P. Caldwell and Herman V. S. Groesbeck against Edward Iverson to recover an attorney's fee guarantied. Judgment for plaintiffs. Defendant brings error. Modified and affirmed.

Brown & Arnold, for plaintiff in error. *Lacey & Van Devanter*, for defendants in error.

CONAWAY, J. Defendants in error sued plaintiff in error in the district court of the first judicial district, alleging as a cause of action that plaintiff in error "agreed and guarantied to pay a retainer fee of five hundred dollars" to defendants in error as attorney and counsel fees in a certain suit in which David B. Dole was plaintiff and Charles Hecht was defendant, in case the said David B. Dole would not pay the same; they, the said defendants in error, having theretofore been employed as counsel and attorneys for the said David B. Dole in said suit and action; in consideration that defendants in error would obtain and secure from said David B. Dole an agreement in writing to and with one Robert Marsh that he, the said David B. Dole, would pay to the Wyoming National Bank of Laramie City, Wyo., of which bank plaintiff in error was president and chief officer, and owner of a large amount of the capital stock thereof, whatever should be due to the said bank from said Dole on certain promissory notes then and there held by said bank. It is further alleged that defendants in error obtained such an agreement as was specified, and that said David B. Dole has not paid the sum of \$500, or any part thereof, but is still indebted for the same, as well as plaintiff in error, together with interest thereon from the 29th day of April, A. D. 1889, at the rate of 12 per cent. per annum; of which said plaintiff in error on said 29th day of April, A. D. 1889, had notice, and was then requested by defendants in error to pay the same. It is further alleged that no part of said sum has been paid by said Dole or plaintiff in error, though each of them has been frequently requested by defendants in error to pay the same. Prayer accordingly. Judgment for defendants in error for \$500, with interest at 12 per cent. per annum

from April 29, 1887. It is urged on behalf of plaintiff in error that the contract or agreement sued on was to pay the debt of another, and, not being in writing, is void under the statute of frauds. It would not be profitable to enter upon a general discussion of the statute of frauds, or to attempt a review of the cases that have arisen and been decided under that statute. The cases are in hopeless conflict. They cannot all be reconciled. The most we can attempt to do is to ascertain whither the weight of authority leads, and to follow. The weight of authority seems to be greatly in favor of the rule established by the courts of Massachusetts and many other states, and very fairly stated in the following language: "That cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but when the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute." *Nelson v. Boynton*, 3 Metc. (Mass.) 396. This particular case is cited as a well-considered and leading case, and as stating the rule briefly and succinctly, though there are many later cases from the same and other states decided upon the same principle. This rule also has in its favor the authority of the supreme court of the United States. *Emerson v. Slater*, 22 How. 28. There are a few conflicting decisions, notably in Wisconsin. In equity performance in whole or in part has always been held, by an overwhelming weight of authority, to take a contract out of the operation of the statute, and, in proper cases, to authorize a decree for specific performance of the contract. In this case the object of plaintiff in error in undertaking to pay the debt of Dole to defendants in error was clearly not to benefit Dole, but to secure to himself the benefit of a valuable security for a debt which Dole owed the bank, in which he (plaintiff in error) was largely interested. Defendants in error performed upon their part their contract with plaintiff in error. Specific performance upon his part would be payment of the money according to the terms of the contract upon which this action is brought. This is not a case requiring a decree of specific performance in order to do justice and equity between the parties. A money judgment is all that is necessary, and all that is sought. Whatever might be our conclusion were the matter one of first impression, the authorities are too numerous, eminent, and pertinent to be disregarded. We are constrained to hold that the contract in question in this case between plaintiff in error and defendants in error, having been entered into by plaintiff in error mainly, if not entirely, to secure a benefit to himself, and having been performed upon their part by the defendants in error, does not come within the operation of the statute of frauds.

The judgment, however, is for a larger

amount than is claimed in the petition. Under our liberal statute of amendments, the petition might have been amended by permission of the trial court, even after judgment, to correspond with the facts proved. There was no attempt to do this. The defect in the petition is not in the prayer for relief alone. If such were the case, there are authorities to the effect that the prayer might be disregarded, and relief granted according to the case made by the evidence, and within the issues made by the pleadings. In this judgment interest is allowed from April 29, 1887, two years longer than shown by the petition to have accrued. It is suggested that this is a mere clerical error, which may be disregarded. It might be considered so if there were other allegations in the petition fixing a time from which interest should run. There is no such showing. The language of the petition shows rather that defendants in error considered notice of non-payment by Dole and demand of payment upon plaintiff in error necessary to fix the liability of the latter, or, at least, to authorize the collection of interest. Their failing to amend would seem to indicate that they never abandoned this view in pleading, although they have abandoned it in argument. It would seem that they never intended to charge or claim interest prior to April 29, 1889. However this may be, there are two years' interest included in this judgment, and not included in the issues presented by the petition or in the prayer for relief. This is error. The petition fails to sustain the judgment to that extent. It appears, however, that there was a fair trial upon the issues actually made by the pleadings, and that the special verdict of the jury is sustained both by the pleadings and by the evidence. This last consideration disposes of the charge of misconduct on the part of the attorney of defendants in error before the jury. It shows that the jury were not influenced by such alleged misconduct to the prejudice of plaintiff in error. The error is in the judgment, not in the verdict. The judgment is not sustained by the pleadings or by the verdict. It would seem that the error is not one calling for a reversal and new trial, but rather for a modification of the judgment under section 3123 of the Revised Statutes.¹ The judgment of the district court in this cause is therefore modified to the extent that the principal sum of \$500 shall draw interest at the rate of 12 per cent. per annum from April 29, A. D. 1889, and not from April 29, 1887, and the judgment otherwise is affirmed, and the cause will be remanded for further proceedings in accordance with this opinion.

MERRELL and SCOTT, JJ., concur. GROESBECK, C. J., being a party, did not sit.

¹ Rev. St. Wyo. § 3123: "A judgment rendered or final order made by the district court may be reversed, vacated, or modified by the supreme court, for errors appearing on the record."

In re Wright.

(Supreme Court of Wyoming. June 11, 1891.)

CONSTITUTIONAL LAW—EX POST FACTO LAWS—INDICTMENT BY GRAND JURY — SUBSTITUTION OF INFORMATION.

Const. Wyo. art. 1, §§ 9, 13, provide that "the right of trial by jury shall remain inviolate in criminal cases;" that "hereafter a grand jury may consist of twelve men, * * * but that the legislature may change, regulate, or abolish the grand jury system;" and that, "until otherwise provided by law, no person shall for a felony be proceeded against criminally otherwise than by an indictment." *Held*, that Sess. Laws Wyo. 1890-91, c. 59, p. 213, entitled "An act to change and regulate the grand jury system," etc., and providing, among other things, that all crimes, misdemeanors, and offenses may be prosecuted either by indictment as "hereinafter provided," or by information, and that no grand jury shall "hereafter" be summoned, unless the same be ordered by the court, does not disparage any substantial rights or constitutional guaranty, and is not *ex post facto*, therefore, in applying to offenses committed prior to its passage. *People v. Tisdale*, 57 Cal. 104, distinguished.

Application of Leonard Wright for a writ of *habeas corpus*. Denied.

Donzelmann & Van Orsdel, for petitioner.
Charles N. Potter, Atty. Gen., for the State.

GROESBECK, C. J. This is a hearing upon the demurrer to the answer and return of A. D. Kelley, sheriff of Laramie county, to the petition for the writ of *habeas corpus*, and to the writ. It is admitted that the demurrer raises all the questions involved, and that the decision upon it will dispose of the entire case. The answer and return of the sheriff show that the petitioner, Leonard Wright, is restrained of his liberty by the said sheriff in the jail of said Laramie county, under a sentence of the district court of said county, for the term of two years and six months, under his plea of guilty of an assault with an attempt to commit rape. The defendant was informed against by the county and prosecuting attorney of said county for the crime of rape, under the provisions of the law passed by the first legislature of the state of Wyoming, approved January 10, 1891, entitled "An act to change and regulate the grand jury system by reducing the number of grand jurors, providing that a grand jury shall be summoned only when ordered by the court, and providing for the prosecution by information, and the procedure thereunder." Sess. Laws Wyo. 1890-91, c. 59, p. 213. The offense is charged in the information as having occurred on the 16th day of December, A. D. 1890, nearly a month before the act took effect; and the counsel for the petitioner claim that the petitioner, notwithstanding his plea of guilty, should be proceeded against by indictment instead of by information, as, prior to the passage of the act above named, he could only have been accused by indictment. It is urged that the petitioner is held without due process of law, and that the law applying to the prosecution of offenses committed prior to its enactment is an *ex post facto* law, and in violation of section 35 of the declaration of rights, (Const. Wyo. art. 1,) which states that "no *ex post facto* law, nor any law impairing the obligation of

contracts, shall ever be made." The constitutional authority for the enactment of the statute is found in said article, and reads as follows: "Sec. 9. The right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury may consist of twelve men, any nine of whom concurring may find an indictment, but the legislature may change, regulate, or abolish the grand jury system." "Sec. 13. Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by an indictment, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." The act providing for prosecutions by information, and under which the petitioner was accused, provides, among other things, that all crimes, misdemeanors, and offenses may be prosecuted in the court having jurisdiction thereof, either by indictment, as "hereinafter provided," or by information. It further provides that "no grand jury shall hereafter be summoned or required to attend at the sittings of any district court in this state, unless the same shall be ordered by a district court, or by the judge thereof, in the vacation or recess of said court, and the grand jury shall consist of twelve men, nine of whom must concur in the finding of an indictment." The act was undoubtedly intended to apply to prosecutions of all offenses committed prior to the passage of the act as well as to those committed thereafter. There is no repeal of existing laws, nor any saving clause providing that offenses committed prior to the passage of the act shall be inquired of, prosecuted, and punished under laws existing at the time of the passage of the act. It seems that the legislature had determined to dispense with grand juries after the act took effect, except when called by the court or judge thereof, following very closely the law of Michigan in this respect. The general right to substitute prosecutions by information in place of prosecutions by indictment is conceded, in view of the constitutional provisions in this state, and it is not claimed that this infringes any right of a defendant. Indeed, this has been so frequently settled that it is unnecessary to cite any authorities, but we cite a few, which have come immediately under our observation. *Hurtado v. People*, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292; *In re Lowrie*, 8 Colo. 499, 9 Pac. Rep. 489; *State v. Barnett*, 3 Kan. 250; *Rowan v. State*, 30 Wis. 129. These cases dispose also of the question as to whether or not a proceeding by information is due process of law, and we do not consider it necessary to dwell longer on this point. We reach the vital question, which it is practically admitted is the only one before us, whether or not the petitioner has a right to complain now, after his plea of guilty has been entered, that he was not indicted by a grand jury. Notwithstanding the somewhat singular case presented to us, of a defendant, represent-

ed in every stage of the case by eminent counsel, waiting until he has withdrawn his plea of not guilty, after he has interposed his plea of guilty, after he has had ample time to raise all objections to the validity of the proceedings, now asking this court to release him from imprisonment under what he claims is a void sentence, we shall proceed to determine the question whether or not the district court for Laramie county acquired jurisdiction of the case by the information filed therein, or whether the petitioner had a right to be indicted by the grand jury of said county.

The rules laid down for the determination of the question as to whether or not a law is *ex post facto* are found in the case of *Calder v. Bull*, 3 Dall. 386, and have been very generally adopted by the courts of this country. They define the following laws as *ex post facto*: (1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime or makes it greater than when it was committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. Mr. Justice CHASE, who delivered the opinion of the court, says: "But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction." Tested by these plain rules, there would be little difficulty in determining the question before us; but the courts have not contented themselves with this clear definition; and so it was held by Mr. Justice WASHINGTON, in his charge to the jury in a United States circuit court, that "an *ex post facto* law is one which in its operation makes that criminal which was not so at the time when the action was performed; or which increases the punishment; or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." *U. S. v. Hall*, 2 Wash. C. C. 366. In the case of *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. Rep. 443, this last definition was quoted with the evident approval of the learned justice delivering the opinion of the supreme court of the United States in that case, with a statement that the case was carried to the supreme court and the judgment affirmed, as reported in 6 Cranch, 171; but a careful investigation of the opinion in the case last cited will show that the charge of Mr. Justice WASHINGTON was not considered, or even touched upon, in the opinion of the court. It will be seen that the familiar definition of Blackstone found in his Commentaries (volume 1, p. 46) has been much enlarged by modern decisions. Blackstone thus defines the meaning of an "*ex post facto* law:" "When, after an

action, indifferent in itself, is committed, the legislature then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it." Judge Cooley, in his work on Constitutional Limitations, (5th Ed., p. 329,) says: "But, so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained, and applied to past transactions, as doubtless would be any similar statute, calculated merely to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right." This definition was accepted as most satisfactory in the case of *Robinson v. State*, 84 Ind. 452, where a statute, providing that, "in all questions affecting the credibility of a witness, his general moral character may be given in evidence," was held not to be an *ex post facto* law. The court say: "The statute is general, and applies to the trial of all criminal cases. It furnishes merely a rule of practice applicable alike to trials for offenses committed before and after its passage. It does not come within the constitutional inhibition of an *ex post facto* law." *Vide Ex parte Bethurum*, 66 Mo. 545. The celebrated case of *Kring v. Missouri*, supra, was a step further in the direction of enlarging the meaning and definition of an *ex post facto* law. *Kring* had pleaded guilty to murder in the second degree, and his conviction of this crime, under the law of Missouri in force at the time of the commission of the crime, was an acquittal of the crime of murder in the first degree. The constitution of Missouri had been changed after the commission of the crime in such manner as to abrogate this provision. The supreme court of the United States, by a bare majority of the justices, held this constitutional provision to be an *ex post facto* law, and that it could not apply to offenses committed prior to the taking effect thereof. Counsel for the petitioner urge with great force the following language of Mr. Justice MILLER, who delivered the opinion of the court, as a new definition of an *ex post facto* law: "Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the of-

fense was committed, and such legislation not be held to be *ex post facto* because it relates to procedure, as it does, according to Mr. Bishop? And can any substantial right which the law gave the defendant, at the time to which his guilt relates, be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." The learned justice who delivered this opinion did not seem to be satisfied with the definition, as he restates the definition in the Case of Medley, 134 U. S. 160, 10 Sup. Ct. Rep. 384, as follows: "The term '*ex post facto* law,' as found in the provision of the constitution of the United States, to-wit, that 'no states shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts,' has been held to apply to criminal laws alone, and has been often the subject of construction in this court. Without making extracts from these decisions, it may be said that any law which was passed after the commission of the offense for which the party is being tried is an *ex post facto* law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, (Calder v. Bull, 3 Dall. 386, 390; Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. Rep. 443; Fletcher v. Peck, 6 Cranch, 87,) or which alters the situation of the accused to his disadvantage; and that no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards, by which the punishment is not increased."

This is a material change in the definition given in the case of Kring v. Missouri, and it now remains to be seen whether or not the situation of the accused has been altered to his disadvantage. We do not see that it has. How does the change in the accusing tribunal take away any substantial rights of the accused? He admits himself, by his solemn plea of guilty, to be rightfully accused of a grade of the offense with which he is charged, and this presumably by the advice of his counsel, after due time has been given to him to plead, and after he has deliberately withdrawn his plea of not guilty. Should he now be heard to complain that a grand jury of 16 men, as required by the law in force at the time of the commission of the offense, might not have indicted him? He admits his guilt, and after conviction and sentence says that he was not properly accused. This is a travesty upon justice, and illustrates the absurdity of the proposition laid down by some of the courts. It has, however, been recently held by the supreme court of Montana, in the case of State v. Ah Jim, 23 Pac. Rep. 76, that the constitutional provision there reducing the number of grand jurors from 16 to 7, 5 of whom must concur in the finding of an indictment, is self-executing; and the court quotes with approval the following cases to show that such provisions apply to offenses committed before the passage of a law, and are not *ex post facto* in their

nature or effect: Cooley, Const. Lim. 272, 331, 332; People v. Mortimer, 46 Cal. 114; Bish. St. Crimes, §§ 178, 180. In the California case (People v. Mortimer, supra) it was held that "it is not an uncommon practice to change the number of grand jurors required to investigate criminal charges, but we have never heard the right of the legislature to make such changes questioned; neither has it ever been claimed that the charge must be investigated by the precise number of grand jurors of which that body was composed at the time the act was committed;" and the Missouri case was noticed in this opinion of the Montana court. So, then, it was held that the reduction in the number of the accusing body did not invade any substantial right of the defendant. If the broad definition of Mr. Justice MILLER in the Kring Case, apparently modified in the Case of Medley, supra, was followed, it would seem that such a change in the number of the grand jury might be the loss of a substantial right to the accused. If the defendant has an unalterable right to be accused by indictment, it would seem that he has a right to be presented by 12 men out of 16, if such law existed at the time of the commission of the offense; and that if a reduction in the number of the grand jury is not a change in his substantial rights, to his disadvantage, the abolition of the accusing body itself would not be. He has been presented by a sworn officer, and, under our law, an official under bond, and the information must have been sworn to, as the law requires it. It was held in the case of Marion v. State, 20 Neb. 233, 29 N. W. Rep. 911, that although a law in force at the time of the commission of an offense (murder) provided that juries should be the judges of the law, and was repealed before the trial, it was competent to make the judge, instead of the jury, judge of the law of the case, as the legislature could make such a change, and that such a law was not *ex post facto*. The court adhered to its definition of an "*ex post facto* law" made in the case of Marion v. State, 16 Neb. 349, 20 N. W. Rep. 289, which is nearly in line with the definitions given heretofore, and says: "The procedure only has been changed. The degree of punishment, the character of the offense, and the rules of evidence remain as under the former law. It may be observed that the only change in the law is to provide another tribunal to pass upon the law of the case. Prior to the change, if the words in the former Code are to be taken at their full meaning and import, the jury were the judges as to the law of the case on trial. After the change, the court sits in that capacity, and is the judge of the law. No vested right of the plaintiff in error is affected. A new tribunal may be erected, or a new jurisdiction given to try him, and no right is abridged." Com. v. Phillips, 11 Pick. 28. Now, certainly, here was a change in the powers of the trial jury. They were stripped of their right to act as judges of the law, and the court was clothed with that power, and yet this was held to be no infraction of the rights of the defendant. In the case of People v. Tisdale, 57 Cal. 104, a

case upon which the counsel for the petitioner greatly rely, and which they state to be the only case directly in point, found after the utmost diligence, the court said: "The real and only question is whether an information presented after the repeal of a law, which required that a person who violated it should be proceeded against by indictment, can be sustained for an offense committed before the repeal." That court held that the law was not intended to be retrospective, like ours. It also held that a constitutional guaranty such as existed at the time the respondents were charged with the violation of a statute could not be taken away by any act of the legislature. This seems to be the view taken by the supreme court of Washington, in the case of *McCarty v. State*, 25 Pac. Rep. 299. In this case the offense occurred before the admission of the state into the Union, and the court there held that the guaranty of the constitution of the United States was in force at the time of the commission of the offense, and could not be taken away, and that the defendant was entitled to be presented by a grand jury. This was held evidently with much hesitation, as the court announces on the petition for a rehearing that in view of the public importance of the question, and in view of the fact that the case was submitted without oral argument on the part of the state, it would not be bound by the opinion rendered on the constitutional questions involved. The situation of the petitioner here is different. The constitution of Wyoming was in force five months before the offense was committed, and the only constitutional guaranty which was given to the defendant, except as to the passage of an *ex post facto* law, was that, "until otherwise provided by law, no person shall for a felony be proceeded against criminally, otherwise than by indictment, except," etc. It has been otherwise provided by law, and the defendant has not been deprived of any constitutional guaranty. The framers of our constitution did not mean to follow the language of the federal constitution that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of public danger." The intention appears plainly in our constitution that there should be no constitutional guaranty of a presentment or indictment of a grand jury, and that nothing should impede the right of the legislature to change, regulate, or abolish the grand-jury system.

We cannot refrain from alluding to one provision of the law before us. It is provided in Kansas and in Michigan, by statute, that no information shall be filed until a preliminary examination has been had, unless such examination be waived, except in cases of fugitives from justice. This safe rule was enlarged so that a prosecuting attorney may file an information when he is satisfied that a crime has been committed. This is a dangerous power to lodge in the hands of a prosecut-

ing officer, for he may keep a prisoner, unable to give bail, in durance, without a preliminary examination, until the next term of court, which may be months ahead. The law makes provision for preliminary examinations, and the accused ought to have this hearing, or an opportunity for it, where he can introduce witnesses in his behalf,—a privilege not accorded to him before a grand jury, one of the strong arguments for dispensing with that *ex parte* tribunal. We do not now intimate how we would decide this matter if properly before us, but we deem it proper to call attention to it, so that under the new practice there may be no excuse for following a dangerous method of procedure. We are forcibly impressed with one fact that crops out in the examination of this question. In the states of Michigan, Kansas, and Wisconsin, the ordinary method of accusation in criminal cases is by information, and has been for years. In Kansas and Michigan, and probably in Wisconsin, no provision was made as to offenses committed prior to the passage of the law providing for prosecutions by means of information, and yet not a single case has been found where the question raised here has been presented to the court of last resort in any of these states, although such cases must have arisen. It is a strong presumption that such prosecutions as to past offenses were universally conceded to be legal, although the constitutions of these states surely contain the familiar provision that "no *ex post facto* law shall ever be passed." Even if such a clause does not appear there, it is in the federal constitution, and this is as much an inhibition upon the legislature of the states as if it had been incorporated in the state constitution. *Ex parte Bethurum*, 66 Mo. 545. We do not favor the practice of looking into the constitutionality of a statute in *habeas corpus* proceedings. In the states of Michigan, Missouri, Nebraska, Texas, and Iowa, in *habeas corpus*, the courts will not look beyond the judgment and re-examine the charges on which it was rendered, or pronounce the judgment an absolute nullity, on the ground that the constitutionality of the statute under which the conviction took place, or upon which the indictment was based, is controverted. That question, it is said, must be tested on appeal, writ of error, or trial in the appropriate court. *Church, Hab. Corp.* § 370, and the cases there cited. But the supreme court of the United States in *Ex parte Siebold*, 100 U. S. 371, has established a different doctrine; and this seems now to be the rule in *habeas corpus*, as the learned author of the work above cited states: "But we apprehend the true rule to be that when a prisoner alleges that the law under which he was convicted and sentenced is unconstitutional, or has been repealed before the trial and judgment, he may have these matters passed upon by the highest judicial tribunals, whether the attack upon the judgment be collateral, as by *habeas corpus*, or direct, as by appeal or writ of error." *Church, Hab. Corp.* § 370. We do not see that the law of this

state providing for prosecutions by information is *ex post facto* in its nature, nor that it has infringed any of the substantial rights of the petitioner, nor that he has lost any constitutional guaranty; and, entertaining these views, the demurrer to the answer and to the return of the sheriff must be overruled, and the petitioner remanded to the custody of the sheriff of Laramie county.

CONAWAY and MERRELL, JJ., concur.

FRANCE v. CONNOR *et al.*

(Supreme Court of Wyoming. June 1, 1891.)

DOWER — TERRITORY OF WYOMING — EDMUNDS-TUCKER ACT.

Act Cong. March 3, 1887, (Edmunds-Tucker Act,) entitled "An act to amend" certain legislation against polygamy in the territories, provides in section 18, par. a, that "a widow shall be endowed of a third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage." Paragraph b provides that the widow of an alien shall have dower in her husband's lands if she be an inhabitant of "the territory" at the time of her husband's death. Sections 15-25, excepting section 18, by their terms relate exclusively to Utah territory. Other sections expressly relate to all the territories. *Held*, that section 18 related exclusively to Utah territory, and did not give dower in lands in Wyoming territory to the widow of the owner; dower having been abolished by the Wyoming statute, (Rev. St. Wyo. § 2221.)

Error to district court, Carbon county; SAMUEL T. CORN, Judge.

Petition by Amanda W. France against John W. Connor and William R. Brown for the assignment of dower. Demurrer sustained. Plaintiff brings error. Affirmed.

C. N. Potter, for plaintiff in error. John W. Lacey and Brown & Arnold, for defendants in error.

GROESBECK, C. J. The following facts appear in the petition of the plaintiff in error: She was married to James France, February 7, 1887, and he died intestate, August 21, 1888, leaving her, his widow, surviving him. March 16, 1888, James France, being then insolvent, executed and delivered to the defendants in error a deed of assignment, under the laws of Wyoming territory, of all of his property not exempt from execution, including realty of considerable value, situate in the county of Carbon, for the benefit of all of his creditors. The assignees have since been in the possession of all of the assigned property. Mrs. France did not join in the deed of assignment, and brought suit in the district court of Carbon county for the admeasurement and assignment of dower in the realty so assigned, and for an accounting of all the rents, issues, and profits thereof since the death of her husband, to the end that she may have her dower rights therein, which she claims. The assignees, defendants in error, demurred to this petition on the grounds that the court was without jurisdiction to grant the relief prayed for, and because the petition does not state facts sufficient to constitute a cause of action. The demurrer was taken under advisement by said district court, the

Honorable SAMUEL T. CORN, then associate justice of the supreme court of Wyoming territory, presiding as judge of said court, and the demurrer was thereafter sustained by the district court. Mrs. France excepted thereto, and failing, and not desiring to plead further, judgment was rendered for the defendants in error, and she prosecutes proceedings in error in this court.

The plaintiff in error in the court below and in this court and in the brief and argument of her counsel asserted her right to dower under section 18 of an act of the congress of the United States known as the "Edmunds-Tucker Act," entitled "An act to amend an act entitled 'An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two."

Dower and tenancy by the curtesy were abolished at a very early day in the territory of Wyoming by an act entitled "An act regulating descent and distribution of property," approved December 10, 1869, which was incorporated with slight amendments in the Revised Statutes of Wyoming for 1887, and is found in section 2221 thereof, in the following language: "Dower and the tenancy by the curtesy are abolished, and neither husband nor wife shall have any share in the estate of the other, save as herein provided." It is by the terms of section 18 of this Edmunds-Tucker act that plaintiff is entitled to dower, if at all, as it is conceded that she is not entitled thereto under any law of the territory of Wyoming. Although not mentioned in the brief of counsel, we deem it proper to state that the legislative assembly of Wyoming passed a statute, approved March 9, 1888, which, among other things, made provision for the release of dower and all rights of the wife in the lands of the husband, mainly in cases of homestead, and providing a simple method of procedure where the wife is insane. The statute does not confer or recognize the right of dower, but, on the contrary, expressly disclaims such a purpose. The closing section of the statute is as follows: "Nothing herein contained shall, of itself, be deemed to confer upon any married woman any dower interest in the lands of the husband; but whenever and so long as any such right of dower exists by virtue of the laws of congress or otherwise, the same may be relinquished, released, or barred, as herein provided." Sess. Laws Wyo. 1888, c. 75, p. 167. It is necessary, therefore, to review the history of the legislation of congress germane to the general object and purview of the act, to ascertain the mischief sought to be remedied by this legislation, and the reasons that impelled congress to enact the various laws to check, restrain, and punish the practice of polygamy. The first attempt of congress in this direction was the enactment of the anti-polygamy act, entitled "An act to prevent the practice of polygamy in the territories of the United States and other places, and disapproving and annulling

certain acts of the legislative assembly of the territory of Utah," approved July 1, 1862. This act has three sections. The first defines the offense of bigamy, and prescribes the penalty therefor, and by the express terms of the section the law applies to the territories of the United States, and to any other place over which the United States have exclusive jurisdiction. This section became section 5352 of the Revised Statutes of the United States. Section 2 annuls an ordinance of the provisional government of the so-called "State of Deseret," incorporating the Church of Jesus Christ of Latter-Day Saints, validated by an act of the legislative assembly of the territory of Utah, and all other acts and parts of acts of said legislative assembly which "establish, support, maintain, shield, or countenance polygamy." Section 3 limits the value of real property to be held in any territory of the United States by any religious corporation or association to the sum of \$50,000. This last section became section 1890 of the Revised Statutes of the United States. This anti-polygamy act remained in force as originally enacted for nearly 20 years, when it was amended by what is known as the "Edmunds Law," entitled "An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," approved March 22, 1882, (22 U. S. St. at Large, c. 47, p. 30.) This act contains nine sections, but only the first and second sections are amendatory of the original act. Section 1 amends section 1 of the anti-polygamy act, (section 5352, Rev. St. U. S.;) and section 2 has a saving clause as to offenses committed prior to the passage of this amendatory act. The other sections, except the last, which is numbered 9, relate to the defining of the offense of unlawful cohabitation, the method of procedure in the courts in the prosecution of the cognate offenses of polygamy and unlawful cohabitation, the qualification of jurors, a provision for the amnesty of offenders convicted under prior laws, legitimates the issue of Mormon marriages born prior to January 1, 1883, disqualifies polygamists and bigamists as voters, and makes them ineligible to hold office or any place of public trust. Section 9 provides for a board or commission, to be appointed by the president of the United States, by and with the advice and consent of the senate, to have control and charge of elections and registration in Utah, etc.

The next law on this subject is found in the act, which took effect without the signature of the president, March 3, 1887, which is familiarly known as the "Edmunds-Tucker Act," the title to which is quoted supra. It has 27 sections, and the subject-matter of the act is much broader than the title. It is not wholly amendatory of the Edmunds law of March 22, 1882, but contains many other matters foreign to the object and scope of the act as expressed in the title, which does not contain the clause "for other purposes," which is inserted therein only as part of the title of the Edmunds law. The act

is a mosaic of legislation, and its loose arrangement is a powerful argument in favor of the wise provision of the constitutions of many of the states, which does not appear in the federal constitution, that no bill, except general appropriation bills and bills for the codification and general revision of the laws, shall be passed containing more than one subject, which shall be clearly expressed in the title. Grouping the sections in some sort of system, it will be observed that 16 sections, (6, 7, 8, 11, 12, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, and 27,) by the express terms of each, respectively, apply only to the territory of Utah. In the above-indicated order they repeal laws of Utah providing that prosecutions for adultery can only be commenced on the complaint of the husband or wife; enlarge the powers and jurisdiction of the court commissioners appointed by the supreme and district courts of Utah; enlarge the powers of the United States marshal for Utah, and his deputies; repeal laws of Utah giving illegitimate children capacity to inherit from the father; repeal laws of Utah conferring jurisdiction on probate courts, or judges thereof, other than matters of administration of the estates of decedents, and the guardianship of persons and property of infants and those of unsound mind; repeal laws of Utah incorporating the Perpetual Emigration Fund Company; dissolve that corporation, and prohibit the reincorporation thereof, or of associations of like character; require the attorney general of the United States to institute proceedings in the supreme court of Utah to carry into effect the provisions of section 15, and to dispose of the property of said corporation mentioned therein; repeal the act of the legislative assembly of Utah, and of the so-called "State of Deseret," incorporating, continuing, or providing for the Mormon Church; dissolve said corporation, and require the attorney general to institute proceedings to wind up its affairs, etc.; provide for the appointment of judges of the probate courts in Utah by the president, by and with the advice and consent of the senate, and annul laws of Utah providing for the election of such judges; repeal laws of Utah authorizing women to vote, and prohibit their voting in that territory; repeal laws of Utah providing for the numbering and identifying of the ballots of electors at any election; provide for the redistricting of Utah, and the apportionment of representation in the territorial legislature, and that none but citizens of the United States shall vote at any election in said territory; continue in force the provisions of section 9 of the Edmunds law of March 22, 1882, referring to the registration of voters and the elections in Utah, until by suitable legislation of the legislative assembly thereof the provisions of the law are re-enacted and approved by congress; prescribe qualifications for voting and holding office in Utah, and a test oath for voters, officers, and jurors therein; abolish the office of territorial superintendent of district schools, created by the laws of Utah, and require the supreme court of that territory to appoint a commissioner of schools, with the

same powers and duties exercised by such superintendent, and with additional powers and duties, prescribed by the act; and suspend the laws of Utah for the election and appointment of such officer last named; and repeal the militia laws of Utah. Six sections of the act (1, 2, 3, 4, 10, and 18, the dower section) do not express where they apply in direct terms, but it may be easily gathered from the context of the original and amendatory acts that all but the last section named, 18, are applicable to all of the territories. Sections 3, 4, and 5 enlarge the number of offenses that may be prosecuted and punished, and were enacted, doubtless, to shut off not only polygamy, where proof might be difficult to obtain, but all acts of unlawful sexual intercourse, as these sections define the cognate offenses of adultery, incest, and fornication, and prescribe penalties therefor. Section 10 is in the nature of a proviso to section 9, and saves the right to introduce other legal proof of marriages than the record thereof provided in said section 9, and made *prima facie* proof of the facts therein stated; while sections 1 and 2, respectively, make the husband or wife of the accused a competent witness, under certain restrictions, in all prosecutions for bigamy, polygamy, or unlawful cohabitation, and provide for a summary method for securing the attendance of witnesses in such prosecutions. Four sections of the act, (9, 13, 14, and 26,) by the express terms of each, respectively, apply in any or all of the territories. They provide for the certifying of all marriages solemnized in the territories, and for the record thereof; for proceedings to forfeit the property of religious corporations or associations obtained or held in excess of the limit of \$50,000, and in violation of section 3 of the anti-polygamy act of July 1, 1862, (Rev. St. U. S. § 1890,) and for the escheat thereof; for summary process to compel the production of all books, papers, documents, and records of such corporations or associations; and provide for the appointment of trustees to hold the real property of such religious corporations, and the manner of such appointment. Nine sections of the act (6, 11, 12, 15, 17, 19, 20, 21, and 27) repeal or annul in express terms laws of Utah on subjects named therein, showing conclusively that congress had full knowledge of the terms of the laws of Utah deemed obnoxious, and by it disapproved and annulled. Section 11 of the act annuls and disapproves laws of Utah which provide for or recognize the capacity of illegitimate children to inherit or to be entitled to any distributive share in the estate of the father, saving the rights of all illegitimate children legitimated by section 7 of the Edmunds act of March 22, 1882, and of illegitimate children born 12 months after the passage of the act (the Edmunds-Tucker law.) No section of the act modifies or changes in any way, by express terms or by any inference, the laws of descent or distribution of any territory except that of Utah.

This leaves for consideration the dower section, numbered 18, which does not state where it applies. It was undoubtedly

borrowed from the laws of New York relating to the dower of widows, as appears from the 17th Congressional Record 49th Cong. pt. 1, p. 457, (proceedings of the senate of January 6, 1886.) Senator Edmunds, the author of the senate bill, recognized this source of the dower section, as he stated, on moving certain amendments thereto, that paragraph *a* of said section, (then section 25 of the bill,—senate bill 10,) was, he believed, "taken verbally from the laws of the state of New York, which are very much like the laws of other states." A comparison of the New York statute with section 18 of the Edmunds-Tucker act discloses that but few changes were ingrafted on the New York law. The words, "unless she shall have lawfully released her right thereto," in paragraph *a*¹ of section 18, were added as a measure of precaution; and where reference is made in the body of the section to a mortgage, there is added, "or conveyance in the nature of a mortgage;" and where the word "mortgagee" is found in like situations, the words, "or grantee in such conveyance," are added; but, notwithstanding these modifications, and another which we shall presently examine, it is apparent that the structure of this dower section is based upon the New York statute, of which it is almost an exact copy. In paragraph *b* of the dower section the words "this state" as they appear in the New York statute are stricken out, and the words "the territory" inserted in lieu thereof. As we think that this paragraph, which is the only guide or reference in this disputed section to the locality where the same applies, will materially aid in the construction of the entire section, we quote the paragraph in full: "(b) The widow of any alien who, at the time of his death, shall be entitled by law to hold any real estate, if she be an inhabitant of the territory ["this state" in the New York statute] at the time of such death, shall be entitled to dower of such estate in the same manner as if such alien had been a native citizen." The borrowed law applied to but one jurisdiction,— "this state." Is it not plain to be seen that the one who drafted the bill intended by striking out these words, and inserting in their place "the territory," that the section should apply to but one jurisdiction,— "the territory" he had in his mind at the time? Contrasted with the language employed in three acts of congress,—the anti-polygamy law, the Edmunds and the Edmunds-Tucker acts,—it appears that when congress legislated for all of the territories it did so in the act in express terms, and it so spoke when legislating for some particular territory. This has been the custom of congress in its acts relating to all or any of the territories, not only in the acts we have been considering, but in all of its legislation of many years concerning the territories. So it was held by the supreme court of the District of Columbia in the case of *U. S. v. Crawford*, 12 Cent.

¹Section 18, par. *a*: "A widow shall be endowed of third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she shall have lawfully released her right thereto."

Rep. 404, that these acts which we are considering, although containing the language, "in a territory of the United States, or other place over which the United States have exclusive jurisdiction," did not apply to the District of Columbia, and that a prosecution for fornication under section 5 of the Edmunds-Tucker act could not be maintained under the law in said jurisdiction, inasmuch as the history of legislation in reference to that district shows that, where congress intended to legislate therefor, its habit has been to do so in express terms; and this decision was rendered in the face of the fact that congress has exclusive jurisdiction over the said district. When congress limits the operation of any law to a particular district or districts, it has invariably, we believe, pointed out specifically the locality or localities where the legislation is meant to apply. In all such cases we think that the presumption would be that any given locality is not within the operation of the statute, unless clearly made so upon the face of the act itself. This seems to be the theory of the case just quoted. It is urged that these words, "the territory," should be so construed as to mean the territory in which the real estate is situate, and not the territory of Utah; but we find in the act that, where such words were necessary to make clear the meaning, they were carefully inserted. In section 13 of this Edmunds-Tucker act it is made the duty of the attorney general of the United States to institute proceedings to forfeit and escheat to the United States the property of corporations and associations held in violation of the acts of congress; and this section also provides that "all such property so forfeited and escheated to the United States shall be disposed of by the secretary of the interior, and the proceeds thereof applied to the use and benefit of the common schools in the territory in which such property may be." Such care exercised in one portion of the act is striking and significant, as it shows the intent and purpose of congress in harmony with its habit, as, when a provision is made for the benefit of or applicable to any or all of the territories, it is so stated or may be easily gathered from its enactment. It is further argued with considerable ingenuity that this dower section is separately written, like other parts of the bill, and that the subjects embraced in the different sections were strung together without logical sequence or any proper classification of subjects; and that the fact that Utah, and no other territory, is specifically mentioned in the preceding section 17, wherein the incorporation of the Mormon Church is dissolved, and proceedings provided for the winding up of its affairs in the courts of Utah, and that section 19, following, provides for the appointment by the president, by and with the advice and consent of the senate, of all judges of the probate courts in Utah, and disapproves and annuls all laws of that territory which require the election of such judges, has no bearing in the construction of this section 18. This view we do not entertain, as we believe that it is not in harmony with the principles governing the

legal construction of an act. Not only is each portion of an act to be construed with every other portion, but the entire act is to be construed in connection with all other acts *in pari materia*. The division of an act of congress into sections does not interfere with this principle of construction.

The division of legislation by different sessions of congress separated by many years does not vary the rule; nor does the division of legislation into different acts interfere with it. It is contended that sections which do not have within themselves a limitation of their application apply "throughout the entire jurisdiction over which congress may legislate," and that sections 3, 4, and 5 of the Edmunds-Tucker act do so apply, because not so limited. We have already indicated our views on that point, but we may say further that we do not consider it a safe rule to follow in the construction of congressional legislation. A better reason may be found why these sections 3, 4, and 5 apply in all of the territories (not throughout the entire jurisdiction over which congress may legislate) than the reason given in the general language of the sections. Why should each section specify the extent or limit of its application? Where a limitation is once ascertained and clearly defined, what necessity is therefor repeating it in legislation upon the same subject, until the limitation is changed, whether the legislation is all in the same section, or in the same act, or of the same year, or by the same congress, or whether it is in many sections, or in many acts, or many years, by many congresses? The limitation may be expressed over and over again, as it often is; but is this necessary? Sections 1 and 2 of the act, general in terms, are doubtless applicable in all of the territories, because they make specific provisions in certain proceedings, examinations, and prosecutions marked out in the act to which this Edmunds-Tucker act is amendatory, and which are applicable in all of the territories. Sections 3, 4, and 5 apply to the same territorial extent, because of the natural and logical connection of the language as well as the subject-matter, and because they define and prescribe a penalty for cognate offenses to those of polygamy and unlawful cohabitation, defined in the last preceding act. There is nothing to indicate an intention to make any change in the jurisdiction where these parts of the act apply. The numbers of the sections interpolated are insignificant, and do not of themselves change the meaning of the significant words of the section, or affect them in any way. This division of a law into sections is purely arbitrary, and is controlled by no rules of grammar, logic, or law, and is made merely for convenience of reference, and is no more a part of legislation than mile-stones are a part of the highway. So of section 18,—the dower section. The language is not to be severed from its actual and natural connection with what follows and what precedes it. If the words "Sec. 18" had been omitted, and had not been inserted until the point where "Sec. 19" is placed, there

would have been no question raised. What effect can these words, "Sec. 18," have upon the meaning of the effective language of the act? This brings us to the consideration of the relative words, "the territory," and we must ascertain what territory is meant. All language is relative to and dependent upon other language employed in the same and immediate connection. The expression quoted is relative in a more specific and in a grammatical sense, and the rule for our guidance in this particular is not a doubtful one. The authorities appear to be numerous and harmonious to the effect that "relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent." *Suth. St. Const.* § 267, and the authorities there cited. The last antecedent territory is Utah. Why do not the relative words "the territory" refer to the last antecedent? Where does the contrary intention appear? In the original bill, as it passed the senate, the dower section was the last section of the bill, and followed section 24 thereof, which declares vacant the office of territorial superintendent of district schools, created by the laws of Utah, and provides that the supreme court of the territory shall appoint his successor, etc. This provision, somewhat modified, has been incorporated in section 25 of the act. In the house bill, which was passed as a substitute for the senate bill, the dower section was numbered 22, and followed a section annulling and declaring void all laws passed by the general assembly of Deseret, or by the legislative assembly of Utah, granting and confirming any water, timber, or herd rights on any part of the public domain, or any special privilege therein, to any person or any civil or ecclesiastical corporation or association, etc., which was eliminated from the bill by the conference committee, and preceded a section relating to the formation of new election districts in Utah, and providing for the new apportionment for members of the Utah legislature. *Vote 18 Congressional Record*, pt. 1, pp. 581-583. Hence it appears that in every arrangement of the bill and its subdivisions into sections in all of the mutations of legislation this dower section either followed a section or was imbedded between sections in terms applying only to the territory of Utah.

But we may decide this question upon broader grounds, that appear to us to be conclusive. At the time of the passage of the Edmunds-Tucker law there were eight territories of the United States, viz., Arizona, Dakota, Idaho, Montana, New Mexico, Utah, Washington, and Wyoming. Montana alone had dower, and it had been abolished by statutes that had stood for many years in Dakota, Idaho, Utah, and Wyoming. *Comp. Laws Utah 1876*, § 1022, found in section 2530, *Comp. Laws 1888*; *Comp. Laws Dak. 1887*, § 3402; *Rev. St. Idaho, c. 3, tit. 2, § 2493-2512*, Revision 1887; *Rev. St. Wyo. 1887*, § 2221. In Arizona, Idaho, New Mexico, and Washington the law of community property prevailed, to which the Pacific states and

territories have clung with so much persistency. It came in with the law of France and Spain, and is a legacy of the Louisiana purchase and the Mexican accession. The central or fundamental idea of the community system is that marriage creates a partnership in property between husband and wife, and that all property resulting from the labor of both or either of them, except by gift, devise, bequest, or descent, called "acquets" or "acquest property," inures to the benefit of both of them; and, though community property has not all the incidents of partnership property, it has many of them, and is commonly spoken of as partnership property. With some changes, such as making provision for the segregation of the separate property of either spouse from the community property, and other slight modifications, this law is not only in force in these jurisdictions along the Pacific coast, but has found deep root in the legislation of the states of Texas and Louisiana. The system is a child of the civil law, and is not recognized by the common law.

In Washington it seems that the husband cannot incur or sell the community real estate unless the wife join in the deed or other instrument of conveyance by which it is conveyed or incumbered; and upon the death of the husband or wife the survivor has one-half of the community property, freed from all but the community debts, and the other half is subject to the testamentary disposition of the husband and wife, subject to the community debts. In Idaho the husband has management and control of the community property, with the like absolute power or disposition (other than testamentary) as he has of his separate property or estate; but such disposition does not extend to the homestead occupied or used by the husband or wife as a residence. In Arizona the husband only may dispose of the community property during coverture. In all of these seven territories where dower was abolished, or where community property was substituted for it, the most liberal provisions exist as to homestead rights, and the consent of the wife must be had to sell or incumber the homestead, the value of which ranges from \$1,000, in Washington, to \$5,000, in Idaho. The widow is given a large share of her husband's estate where he dies intestate. Where there is a surviving child or children she is given a moiety of the estate, in some of these jurisdictions; in others, one-third; and, in the event of no issue surviving the deceased husband, she has even a larger share of the estate; so that in these territories she was dealt with far more graciously than at the common law. *Rev. St. Ariz. 1887*, §§ 1460, 2100-2102; *Comp. Laws N. M. 1884*, §§ 1411-1414, 1422; *Comp. Laws Dak. 1887*, §§ 2594, 3401, 3402; *Code Wash. 1881*, §§ 342-348, 2400-2417, and *Laws 1887-88*; *Rev. St. Idaho*, §§ 2493-2512, pp. 307-309, and *Id.* pp. 363-366, 606-609, 645-649; *Comp. Laws Utah 1876*, §§ 700-732.

In Wyoming the homestead can only be sold or incumbered with the consent of the wife, she being required to join in the mortgage or deed; and the right of home-

stead is to the extent of \$1,500, the proceeds upon the sale thereof being exempt from execution or attachment, as well as the homestead itself. The homestead, with a considerable amount of the property of the decedent, is set apart to the widow, and does not pass into administration. If the husband die intestate, the widow receives one-half of the estate if there be a surviving child or children, or the descendants thereof; and if there be none, all of it, if the same does not exceed in value \$10,000; and, if above that amount, she receives three-fourths of the estate, and the other heirs named in the act one-fourth. Rev. St. Wyo. §§ 2063, 2064, 2122, 2780, 2789. It may be true that in Wyoming, and probably in some of the other territories existing at the time of the passage of the Edmunds-Tucker law, a profligate husband might dispose of, by will, his entire property, except the homestead, and thus leave the widow without means; but such could not be the case in Washington or Idaho, and probably in other of the seven territories named. There the right of community property vesting in the wife could not be the subject of testamentary disposition. It is incredible that congress, knowing all these laws, could have intended to confer a lesser right on married women in those territories which provided more generously for them than the Edmunds-Tucker law. Its anxiety was to protect the first or lawful wife of Mormon or plural marriages, and this appears plainly in the report of the conference committee of the senate and house on the various bills, as a paragraph added to the dower section was stricken from the act, and this provided that the term "lawful wife," referred to in the section as it now stands, should be held to mean, in all cases of Mormon or plural marriages, the first wife, and that such wife only should be entitled to dower, under the act, on the death of her husband. The reason for striking this clause from the bill was stated to be that it was best to leave that matter to the courts. 18 Congressional Record 49th Cong. pt. 1, p. 583, and *Id.* pt. 2, p. 1879. Dower was conferred by this act to protect the first wife by offering to her and her children privileges which were denied to them under the laws of Utah, and to prevent the husband there from making such testamentary disposition as to exclude the first wife and the legitimate children, or to force her and her children to share the property with the other wives and children of a polygamous marriage.

The law of Utah on the subject of distribution of, and the right of succession to, the estates of deceased persons at the time of the passage of the Edmunds-Tucker law was as follows: "Sec. 25. Illegitimate children and their mothers inherit in like manner [as legitimate] from the father, whether acknowledged by him or not; provided, it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children." Comp. Laws Utah 1876, § 677. This act was declared valid and binding, and an illegitimate child was allowed to inherit his share of his deceased father's

estate, by the decision of the supreme court of the United States in the case of *Cope v. Cope*, 137 U. S. 682, 11 Sup. Ct. Rep. 222; it being held that the Edmunds-Tucker law expressly saved such rights by the proviso to the eleventh section thereof. There was no such act in any other territory, and it seems clear to us that this dower section was aimed solely at the condition of affairs existing in Utah. Congress did not surely, while legislating to protect the lawful wife in Utah, intend to supplant the beneficent provisions of the laws of those territories which had with a free hand bestowed the right of community property upon the lawful wife. It did not intend to strike down any of the rights which married women possessed there; and to grant this to be true is to concede that the law does not apply, and was never intended to apply, to Wyoming, as it must apply to all of the territories or to Utah alone. The abolition of dower in the territories where the law of community property did not prevail was probably caused by a desire to remove all restraint from alienation, except in the territory of Utah, where illegitimate children and their mothers were allowed to inherit, and where the practice of plural marriage was covertly upheld and boldly recognized in the statutes.

The Wyoming law was borrowed from Colorado, where it is found on the statute-books to-day, and was followed by a more valuable gift than the right abrogated, as the innovation was condoned by granting to the widow a larger share in the estate of her intestate husband than was bestowed by the common law, and by enlarging her rights as a *feme covert*, so circumscribed by the common law.

If the position be taken that the act conferring dower did not repeal the laws relating to community property where they had sway, it will readily be seen that such legislation would have been a fruitful source of litigation, an absurd attempt to ingraft the dower right of the common law upon the unfriendly and alien root of the civil law, and to give to the widow a disproportionate share in her husband's realty,—a position that need but to be stated to show its absurdity. Congress must be presumed to have known the *status* of all this diverse legislation in all of these jurisdictions at the time of the enactment of the Edmunds-Tucker law. A statute is always construed with reference to the intent of the legislative power; and to arrive at that intent the courts always first undertake to ascertain the mischief which the legislature had in view, and which they desired to correct.

An examination of all these statutes relating to the practice of polygamy shows that the purpose of congress was to destroy it in the territory of Utah, where it was chiefly intrenched. *U. S. v. Crawford*, *supra*. It did not intend to upset the laws of seven jurisdictions where polygamy had not gained such a foothold, or to throw into them an apple of discord, to be fought over in the courts. It had wisely provided in its legislation regarding certain of the territories that the laws passed therein should be submitted

to congress, and, if disapproved, the same should be null and void. Rev. St. U. S. § 1850. It provided further, that in all of the territories a copy of the laws and journals of the legislative assembly, within 30 days after the end of each session thereof, should be transmitted to the president, and that two copies of the laws, for the use of congress, should within the same period be forwarded to the presiding officer of each house of congress. Id. § 1844. The object of these provisions was to keep the executive and legislative departments of the federal government constantly apprised of all territorial legislation, to the end that, if the same or any part thereof was objectionable to congress, it might be repealed or amended. *Clinton v. Englebrecht*, 13 Wall. 446; *Bank v. State*, 12 How. 8. An inspection of the congressional debates upon the bill which culminated in the Edmunds-Tucker act discloses that none of the laws of the different territories upon the rights of married women, community property, or succession or distribution of the estates of decedents were discussed, or even mentioned, save, perhaps, as to Utah. There was not the slightest indication of any dissatisfaction in the minds of the national legislators, some of whom were able jurists, with the laws of any territory upon these subjects, except as to the laws of Utah. One may look in vain in the discussions upon the bill for any design, intent, or purpose to annul or modify any law of any territory except Utah in these respects. The action of congress on the bill is properly denominated in the Congressional Record, "Polygamy and Affairs in Utah," and the course and tenor of all the debates plainly indicate that these subjects alone received the attention of congress in the two years of the gestation of this statute. Moreover, congress seems to have been extremely anxious, even in the case of legislation in Utah, to preserve the rights of illegitimate children there, for it enacted as a proviso at the end of section 11 of the act that said "section shall not apply to any illegitimate children born within twelve months after the passage of this act, nor to any child made legitimate by the seventh section of the act of March 22, 1882." This solicitude of the law-making power was recognized in the remarkably clear and able opinion of Mr. Justice Brown in the case of *Cope v. Cope*, supra, which may well be quoted as an authority in favor of many of the propositions we have laid down herein. Such tender solicitude as to existing rights which this act breathes concerning "affairs in Utah" shows the disposition that congress had in the passage of this act, and it certainly ought to have had the same paternal regard for other communities which had been planted with so much care on the frontier. The whole current of congressional legislation, ever since territories have been created, concerning them and their internal affairs, has been to disapprove and annul laws objectionable and displeasing to congress by express terms, and not by any implication; and the same course is pursued in the act before us. Why should such care be exercised in regard to Utah, and not to

other territories? It seems clear to us that, none of the laws of the territories other than Utah having been disapproved or annulled on the subjects of dower, community property, or succession, congress never intended to disapprove and annul them. To hold otherwise is to stretch the rules of construction to an unreasonable length, and to be blind and deaf to the history of all congressional legislation concerning the territories. Nay, more, it is to say that congress has set aside, without reason, and by inference and implication, the great right of home rule, of dealing with "rightful subjects of legislation," vested in territorial legislatures, and only withdrawn in extreme cases.

We cannot extend the application of this dower section to embrace this jurisdiction in common with others, without being against reason and precedent. It is true that the supreme court of the state of Montana, in the case of *Chadwick v. Tatem*, 23 Pac. Rep. 729, held that the Edmunds-Tucker act conferred dower in the territory of Montana and in other territories, but the learned counsel for the plaintiff in error, with commendable frankness, admitted that he had learned upon inquiry that that point had not been raised in the brief of counsel or argued before that court. With all due deference to the learned judge who delivered the opinion of the court in that case, we think that an examination of the opinion will show that such a statement was not necessary to the decision of the question, as the court held that the law of Montana conferring dower had not been repealed by the codification of the statutes of that territory, and because it appears that the inchoate right of dower had become consummate long before the passage and taking effect of the Edmunds-Tucker act.

It has been held in a recent case before the supreme court of the United States that in all cases of ambiguity, the contemporaneous construction not only of the courts, but of the departments and even of officials whose duty it is to carry the law into effect, is controlling. *Schell's Ex'rs v. Fauché*, 138 U. S. 562, 11 Sup. Ct. Rep. 376. In the opinion of the court a case (*Stuart v. Laird*) is cited from 1 Cranch, 299, 309, where it was held that a practical construction of the constitution of the United States that the justices of the supreme court had a right to sit as circuit judges, although not appointed as such, was not open to objection. Says the court: "It is sufficient to observe that practice and acquiescence under it for a period of several years commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled." In the case of *Clinton v. Englebrecht*, 13 Wall. 446, supra, in passing upon the question of following in the federal courts the laws of the territory wherein the same are held relating to the impaneling of jurors, the court says: "This uniformity of construction by so many territorial legislatures of the organic acts in relation to their legislative authori-

ty, especially when taken in connection with the fact that none of these jury laws have been disapproved by congress, though any of them would be annulled by such disapproval, confirms the opinion, warranted by the plain language of the organic act itself, that the whole subject-matter of jurors in the territories is committed to territorial regulation." *Vide* *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *Cooley v. Port-Wardens*, 12 How. 299; *Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. Rep. 279; *The Laura*, 114 U. S. 411, 5 Sup. Ct. Rep. 881, (*Pollock v. The Laura*.) The construction of this act—the Edmunds-Tucker law—in relation to the application of the dower section thereof to the territories by jurists and legislators of the territories affected ought, we think, to have a controlling effect. It is a contemporaneous construction of the highest character, and falls within the decisions above cited. In Utah alone, in its *Compilation of 1888*, is section 18—the dower section—recognized as part of the law. There has been no legislation in the other territories affected, adjusting their statutes to this new condition of affairs, if it existed; and this omission is convincing proof that the said section is not regarded as in force in those jurisdictions. Washington has amended her community property act by providing, among other things, that the husband or wife may convey to the other his or her share of the community property; and this was done by an act approved February 2, 1888, nearly a year after the Edmunds-Tucker act took effect, and while Washington was yet in its territorial condition. The *Compilation of Dakota*, while containing its organic act, and the provisions of the Revised Statutes of the United States relative to it and common to all of the territories, including certain sections of the Edmunds-Tucker act, does not refer to the dower section. The law of Arizona relating to the rights of married persons was submitted by the commission revising her laws, was passed by her legislature, and received the approval of her governor, February 28, 1887, nine days after the Edmunds-Tucker law came into the hands of the president, and when its provisions must have been known to the entire coun-

try. The laws of that territory relating to descent and distribution were approved March 8, 1887, five days after the taking effect of the said act of congress. The Revision of Idaho went into effect after this act became a law. In all of the territories except Utah, where the dower section probably applies, and in Montana, where dower existed at the time of the passage of the act, the utmost disregard has been manifested as to this section, which, if it were a law, would be fraught with so much interest to the people. We cannot imagine such an apathy on the part of lawyers and laymen if the section conferred dower in these jurisdictions; and this palpable disregard of the section plainly indicates that it is not considered applicable where it has been so profoundly ignored. Taking into consideration, therefore, the inherent evidences of the act itself, the history of legislation of congress for the territories, the legislation on the subject of polygamy, the construction of the dower section, the source from whence it was derived, the *status* of the laws of the different territories at the time of the passage of the Edmunds-Tucker act, and the construction evidently put upon the disputed section, we reach the conclusion that said section 18 of said act, relating to the dower of widows, did not confer dower upon married women in the late territory of Wyoming, and was not at any time applicable to said territory. This cause was pending for a long time in the supreme court of the territory, and it is important that the grave questions involved in the case should be speedily settled. The judgment of the district court of Carbon county for the defendants in error is affirmed.

MERRELL, J., having been of counsel in kindred cases, and announcing in open court his disqualification, under the provisions of section 6 of article 5 of the constitution of this state, the Honorable RICHARD H. SCOTT, judge of the district court of judicial district No. 1, was called in by the remaining judges of this court, and sat with them in the hearing of this cause.

CONAWAY and SCOTT, JJ., concur in the foregoing opinion.

ADAMS v. McPHERSON.

(Supreme Court of Idaho. Sept. 22, 1891.)

DISMISSAL OF APPEAL—RECORD—FINAL JUDGMENT.

Where the record on appeal fails to show a final order or judgment from which an appeal could be taken, the appeal will be dismissed.

Appeal from district court, Lemhi county; C. J. BERRY, Judge.

Action by George N. Adams against M. M. McPherson. There was a judgment or defendant, and plaintiff appeals. Appeal dismissed.

Ralph P. Quarles, for appellant. Texas Angel, for respondent.

HUSTON, J. The record shows no final order or judgment from which an appeal could be taken. Appeal dismissed; costs awarded to respondent.

SULLIVAN, C. J., and MORGAN, J., concur.

(7 Utah, 450)

CITY OF SPRINGVILLE v. FULLMER.

(Supreme Court of Utah. Sept. 12, 1891.)

WATER-RIGHTS—POWER OF CITY TO ACQUIRE—INJUNCTION TO RESTRAIN DIVERSION.

1. 1 Comp. Laws Utah 1888, § 1050, authorizes the city of Springville to provide the city with water, to dig wells, lay pump logs and pipes, and erect pumps in the streets, for the extinguishment of fires and convenience of the inhabitants. Section 1045, Id., provides that the city council shall have power to make such ordinances, consistent with law, as it deems necessary for the benefit, regulation, convenience, and cleanliness of the city, for the protection of property from fire, and for the health and happiness of the city. *Held*, that the city was authorized to acquire all water-rights necessary to supply the inhabitants of the city with water.

2. 2 Comp. Laws Utah 1888, § 2780, provides that "a right to the use of water for any useful purpose * * * is hereby recognized and acknowledged to have vested and accrued, as a primary right, to the extent of, and reasonable necessity for, such use thereof, * * * whenever any person or persons shall have taken, diverted, and used any of the unappropriated water of a natural stream," etc. Section 2782 provides that the right to the use of water "may be appurtenant to the land on which such water is used, or it may be personal property, at the option of the rightful owner of such right." *Held* that, where a city, with consent of the original appropriators, took control of the waters of a certain creek, and distributed them to the inhabitants of the city, the right to exercise such control vested in the city, and it was authorized to maintain a suit to enjoin an individual from diverting the waters to his own use.

Appeal from district court, first district; JOHN W. BLACKBURN, Justice.

Action by the city of Springville against John S. Fullmer to restrain him from diverting the waters of Sage creek and Fullmer springs. A nonsuit was ordered, and plaintiff appeals. Reversed.

George Sutherland and Thurman & King, for appellant. Saxey & Whitecotton, for respondent.

ZANE, C. J. This is an appeal from an order of nonsuit, and also from an order overruling appellant's motion for a new trial. The action was for an injunction to restrain the respondent from diverting the waters of Sage creek and Fullmer springs. It appears from the evidence in

the record that these waters were appropriated in 1862 to domestic and agricultural uses by six men, and that with their express consent Springville took control of them in 1876, and since then has distributed them by its water master, according to rules and regulations made by authority of ordinances, to a portion of the people of the city, including the original appropriators, who have used them for domestic and agricultural purposes, and that the city has kept the ditches in which such waters were conducted in repair.

The ruling of the court below assigned as error was based upon the assumption that the plaintiff had no such right to control the use of the waters of the creek and springs as authorized it to institute and maintain this action. Section 15 of the charter of Springville is as follows: "To provide the city with water, to dig wells, lay pump logs and pipes, and erect pumps in the streets, for the extinguishment of fires and convenience of the inhabitants." Section 1050, 1 Comp. Laws Utah 1888, and section 1045, Id., further provide as follows: "The city council shall have power and authority to make, ordain, establish, and execute all such ordinances, not repugnant to the constitution of the United States or the laws of this territory, as they may deem necessary for the peace, benefit, good order, regulation, convenience, and cleanliness of said city, for the protection of property therein from destruction by fire or otherwise, and for the health and happiness thereof." These sections gave the plaintiff authority to use all reasonable means to supply the people within its borders with water for all useful and beneficial purposes, and to such end to acquire all necessary water rights, by appropriation and use, or other lawful ways, and to make and enforce reasonable rules and regulations to control the same. And, having the power, it was the duty of the plaintiff to use it, so far as the health, safety, convenience, and good of its inhabitants demanded. In addition to the powers expressly conferred by its charter, the law added such implied powers as might become necessary to give effect to them.

Having determined that the plaintiff possessed authority to acquire the right to the waters of the creek and springs, the further question arises, did it do so? Section 2780, 2 Comp. Laws Utah 1888, is as follows: "A right to the use of water for any useful purpose * * * is hereby recognized and acknowledged to have vested and accrued, as a primary right, to the extent of, and reasonable necessity for, such use thereof under any of the following circumstances: (1) Whenever any person or persons shall have taken, diverted, and used any of the unappropriated water of any natural stream, water-course, lake, or spring, or other natural source of supply. (2) When any person or persons shall have had the open, peaceable, uninterrupted, and continuous use of water for a period of seven years." The term "person," when used in the act in which the above section is found, is declared in section 2786, Id., to include corporations. Section 2782, Id., provides that the

right to the use of water "may be appurtenant to the land upon which such water is used, or it may be personal property, at the option of the rightful owner of such right." The authority of the plaintiff to control, distribute, and regulate the use of the waters of the creek and spring in question vested in the city when the water master, with the express consent of the six appropriators and owners, took control of them, and distributed them to such original appropriators and others, and continued to regulate and control their use. Such appropriators and owners have not objected, and, after such consent and acquiescence as is shown by this record, their objections, if made, would not be heard. During such consent and acquiescence property must have been acquired and improved with respect to the right to use the waters in dispute as distributed by the city, and to deprive them of such use would be inequitable. *Irrigation Co. v. Moyle*, 4 Utah, 327, 9 Pac. Rep. 887.

The municipal government of Springville is a legal agency of the people, created for their benefit, and to act for them. Having acquired the right to control and distribute the waters in question, and such authority having been given to be exercised for the benefit of the people, and such exercise being beneficial, the same became obligatory upon the city. (*Levy v. Salt Lake City*, 5 Utah, 302, 18 Pac. Rep. 598;) and it was not only the right, but the duty, of the city to employ such remedies as the law or the rules of equity authorized to defend and maintain such right to control the use of such waters by the people.

We hold that the court erred in granting the nonsuit and in overruling the plaintiff's motion for a new trial. The judgment of the court below is reversed, and that court is directed to grant plaintiff's motion for a new trial.

ANDERSON and MINER, JJ., concur.

(7 Utah, 454)

NELSON v. BRIKEN,

(*Supreme Court of Utah*. Sept. 12, 1891.)

RECORD ON APPEAL — MOTION FOR NEW TRIAL — GENERAL EXCEPTIONS.

1. Newly-discovered evidence, contained in a motion for a new trial, though printed in the abstract, cannot be considered on appeal, unless incorporated in the statement or bill of exceptions.

2. Under a general "exception to the charge," if any part of the charge be correct, it is sufficient to sustain the entire charge.

Appeal from district court, Salt Lake county; CHARLES S. ZANE, Justice.

Action by Jasper M. Nelson against Peter C. Briken to recover the price of land under a contract of sale. There was judgment for plaintiff, and defendant appeals. Affirmed.

A. G. Morrell, for appellant. O. W. Powers, for respondent.

ANDERSON, J. Plaintiff held a contract with J. W., C. H., and S. J. Jenkins for the purchase from them by plaintiff of certain real estate. He sold and assigned the contract to the defendant for \$1,200, of which

\$500 was paid down, and the balance of \$700 was to be paid in a short time, and, failing to do so, this action is brought to recover the same. The defendant, by his answer, alleged fraud in the sale to him of the contract, and denied any indebtedness to the plaintiff, and sought to recover back the \$500 already paid to plaintiff. There was a trial to a jury, and a verdict and judgment for plaintiff for \$746.66 and costs. The defendant gave notice of his intention to move for a new trial on account of errors of law occurring at the trial, and on account of newly-discovered evidence, and that the motion would be made upon affidavit and a statement of the case. The court overruled the motion for a new trial, and the defendant brings this appeal from the order overruling this motion and from the judgment. The matter contained in the motion for a new trial on the ground of newly-discovered evidence was not incorporated in any bill of exceptions nor statement of the case, and, although printed in the abstract, cannot be considered on this appeal. Nevertheless we have examined the affidavit in connection with the other evidence in the record, and think the court did not err in refusing a new trial on this ground. The court, we think, charged the jury correctly on the law applicable to the case, and to which no exceptions were taken except in these words: "Exception to the charge by the defense." Under such a wholesale exception as this, if any part of the charge is correct it is sufficient to sustain the entire charge. No statement of the case appears to have been settled on the hearing of appellant's motion for a new trial, and hence there is nothing properly before this court for consideration. The judgment of the district court is therefore affirmed.

BLACKBURN and MINER JJ., concur.

(7 Utah, 456)

SALINA CREEK IRRIGATION CO. v. SALINA STOCK CO. et al.

(*Supreme Court of Utah*. Sept. 12, 1891.)

WATER-RIGHTS—PRIOR APPROPRIATION.

In an action to establish a right to all the waters of a certain creek it appeared that it was fed by two tributaries, which furnished about one-third of the water. Plaintiff's grantors had not appropriated all of the water of the creek prior to the appropriation by defendant's grantors of nearly all the waters of the tributaries, and the water appropriated by defendant ran off his land into the creek, so that its flow was not materially lessened during part of the irrigation season. Held, that plaintiff was entitled only to the amount of water appropriated by its grantors, and a judgment for plaintiff, reserving undefined rights to defendant in the waters of the tributaries, was erroneous.

Appeal from district court, first district; J. W. BLACKBURN, Justice.

Action by Salina Creek Irrigation Company against Salina Stock Company and Edwin A. Ireland to establish a water-right. Decree for plaintiff, and defendants appeal. Modified and remanded.

Bennett, Marshall & Bradlev, for appellants. Critchlow & Rawlins, for respondent.

MINER, J. This contention grows out of a claim on the part of the respondent

corporation to all the waters of Salina creek, which is fed by the waters of the Yogo and Neoeche creeks, its tributaries, and which furnish about one-third of its waters; the respondent claiming that for twenty years it and its appropriators and grantors have used and are entitled to use its waters for farming, irrigation, and culinary purposes, and that the appellants, by means of dams and ditches, have during the last six years diverted and used the waters of Yogo and Neoeche creeks, so that they have been wholly lost to the respondent, etc. The answer puts in issue the contention of the plaintiff, and claims that for more than 10 years prior to the commencement of this action its grantors and lessors and appropriators had owned and been in possession of, and are entitled to the possession and use of, all the waters of said Yogo and Neoeche creeks for farming, stock-raising, agricultural, and domestic purposes, and asks a decree quieting title, etc. On the trial the court granted a decree to the respondent, reserving undefined rights in the waters of Yogo and Neoeche creeks to the appellants. From this decree the appellants appeal, alleging, among other grounds of error: *First*, that they were surprised at the testimony of one S. H. Gibson; *second*, that the admission in evidence of certain deeds executed in 1889 and 1890, purporting to convey to respondent certain waters in Salina creek, was error, as its grantors were not shown to be owners or prior appropriators of water; *third*, that there was no evidence whatever to justify the findings and decree of the court; *fourth*, that the decree is so uncertain that the rights of neither party can be ascertained under it. As we look at the case, it will be unnecessary to review all of the several assignments of error presented.

It appears from the testimony that the respondent corporation was organized in 1880. That in 1863 several families settled in Salina, and used some of the water of Salina creek. That in 1866 this settlement was broken up by the Indians, and such waters were not used until 1871. That some of the old settlers and some new ones returned to Salina in 1871, and again commenced the use of the waters of Salina creek. This settlement gradually increased until 1874, when there were from 30 to 40 families, and in 1882 about 75 families were residing there. The amount of land irrigated in 1889 was about the same as was irrigated in 1874, except during the periods of high water. The particular land irrigated in 1874 was not all irrigated in 1889, but other lands had been previously substituted therefor. That nearly all the water of Salina creek was used during the irrigation season from 1871 to 1878 by different persons, not all of whom were shown to be grantors of the respondent. That in 1876 the appellants or their grantors diverted a portion of the waters of Yogo and Neoeche creeks several miles above Salina, and continued such diversion during the spring, summer, and fall of each year up to the time this action was commenced, in February, 1890, for the purpose of irrigating land on these tributa-

ries to Salina creek for farming and stock-raising and culinary purposes. That these two streams furnished about one-third of the waters of Salina creek, and empty into it above the land irrigated by the respondent.

Various deeds executed in 1889 and 1890, purporting to convey water-rights of the grantors in Salina creek to the respondent, were received in evidence under objection. Several of these grantors were shown to be residents of Salina, and appropriators of water from Salina creek, prior to the date of the appropriation by appellants' grantors of the waters of Yogo and Neoeche creeks, and no specific right, appropriation, or title to water from this creek is shown by the evidence to have been in all of the other grantors of the respondent,—that is, no sufficient connection is shown to exist between such persons who conveyed to the respondent and the persons who appropriated and used the water of Salina creek prior to the time when appellants appropriated the waters from Yogo and Neoeche creeks. The several persons shown to have owned water in Salina creek, and to have conveyed their right to the respondent by deed, only claimed to have appropriated water sufficient to irrigate from two to four hundred acres in a dry season, while the capacity of the stream is shown to be sufficient to irrigate from four to five hundred acres in a dry season, and more than double that number of acres in a wet season. It also appears that the appellants used the waters of these creeks up to June 15th of each year so freely as to completely saturate the ground, and form therefrom a running stream into the Salina creek during the summer season, and that in consequence of this the actual flow of the Salina creek was not materially lessened during part of the irrigation season; it being claimed that nearly as much water ran off from appellants' land into Salina creek later in the season as was turned onto it early in the season. These facts, taken in connection with other evidence in the case, go to show that respondent's appropriators and grantors did not make prior appropriation of all the waters of Salina creek prior to the time that appellant's appropriators and grantors appropriated nearly all of the waters of Yogo and Neoeche creeks, in 1878. It is not enough for the respondent to show that appellants diverted some of the waters from the stream, if what was left to the respondent's use was more than its appropriation, or more than it is shown to have obtained by the deeds of the actual appropriators, with whom respondent has proved a continuous, connecting, and subsisting title; for if it be true that the respondent has failed to connect itself with the title of all the appropriators, except by verbal sale, its appropriation does not antedate its own possession, which possession was in part shown to be subsequent to 1878. Pom. Rip. Rights, § 58; Smith v. O'Hara, 43 Cal. 371; Lobdell v. Hall, 3 Nev. 507; Chiatovich v. Davis, 17 Nev. 133.

Without entering into a discussion of the other questions presented by the record, we are satisfied from the facts shown

that the appellants are entitled to the use of more water than is awarded them in the decree of the court below, and that the decree of the court below, as well as the findings of facts, should be modified and made more certain, so as to settle the whole controversy between the parties,—settle it so that it may be ascertained with reasonable certainty how much the court has decreed in favor of either party without a resort to further proceedings. This should be done upon the proofs taken in the case without the necessity of awarding a new trial. The respondent should be entitled to the use and appropriation of all of the waters flowing or to flow through or in Yogo and Neoche creeks during the period from and including the 15th day of June to the 1st day of November in each year, except that during 24 hours of Monday of each week during that period the appellants shall have the exclusive use of one-half the waters flowing through Yogo creek, and during 24 hours of Friday of each week during that period the appellants should have the exclusive use of one-half of the water flowing through Neoche creek for farming, grazing, stock-raising, and culinary purposes; and that during all such period the appellants should also have the right to the use of the waters of both such creeks as may be necessary for watering stock and for culinary purposes only; and that from and including the 1st day of November to the 15th day of June in each and every year the said respondent should be entitled to the use and appropriation of such waters of Yogo and Neoche creeks as it may need for culinary and domestic purposes, and for watering stock and agricultural purposes, not exceeding one-half the waters flowing through such creeks; and that during the same period last stated the appellants shall be entitled to use and appropriate such waters of Yogo and Neoche creeks as they may need for the same purpose, not exceeding one-half of the waters flowing through such creeks; and each party should be enjoined from interfering with the rights of the other under such decree. This case is remanded, with directions to the court below to modify the decree and findings so as to conform to this opinion.

ZANE, C. J., and ANDERSON, J., concur.

(7 Utah. 462)

WALTON *et al.* v. JONES *et al.*

(Supreme Court of Utah. Sept. 12, 1891.)

TAX COLLECTORS — ACTION ON BOND — PARTIES — AMENDMENT OF COMPLAINT.

1. Where a county tax collector, whose official bond is payable "to whomsoever it might concern," fails to make his annual settlement with the school trustees, and to pay over the full amount of all school taxes due, as required by St. Utah 1888, § 1922, the trustees are the proper parties, under section 3169, which provides that every action must be prosecuted in the name of "the real party in interest," to sue on the collector's bond to recover such unpaid school taxes.

2. Where the complaint in an action against a tax collector on his official bond alleged that on a certain date there were school taxes in his hands, which he refused to pay over to the trustees, the allowance of an amendment that they

remained in his hands until a later date is not erroneous, where the issue was made at the trial, and the amendment was allowed after submission for the purpose only of making the pleading conform to the proof.

3. Nor is it erroneous, in such case, to allow an amendment that the collector and his sureties intended to execute the official bond required by law, since the intention of the parties and the legal effect of the bond, which was set out in the original complaint, must be determined by the court.

Appeal from district court, Utah county; JOHN W. BLACKBURN, Justice.

Action by Andrew J. Walton, Hyrum Richards, and Daniel D. Green, school trustees of Schofield school-district No. 3, Emery county, Utah territory, against Elisha W. Jones, collector, and Joseph B. Weeks and Leander Lemmon, sureties on his official bond. There was judgment for plaintiffs, and defendants appeal. Affirmed.

Sutherland & Iudd, for appellants. *Geo. Sutherland*, for respondents.

ZANE, C. J. The appellant Elisha W. Jones was assessor and collector of Emery county in Utah territory during the years 1888 and 1889, and as such gave the official bond on which this suit was brought in the sum of \$2,000, with the other defendants as his sureties, payable in terms "to whomsoever it might concern," conditioned for the faithful performance of his official duties. Among others, the original complaint contained an allegation that on December 31, 1889, there was in the hands of Jones, due to the plaintiffs, as such trustees, school taxes in the sum of \$444.40, which he refused to pay to them. This allegation the defendants denied in their answer. The case was tried before the court without a jury, and taken under advisement; and afterwards, before deciding it, the court gave the plaintiffs leave to amend the complaint, as follows: "That the defendants intended to execute the official bond provided by law, and to bind themselves to the territory of Utah and Emery county as provided by law; and that on the 8th day of March, 1889, there was in the hands of defendant Jones, and due plaintiffs, of the school taxes of their district, \$446.40." To the order allowing this amendment the defendants excepted. The amendment embraces two new allegations,—one as to the intent of the parties expressed in the bond, and the other was that the \$446.40 sued for remained in the collector's hands on the 8th day of March, 1889.

As to the first amendatory allegation. The bond was set out in terms in the original complaint, and the court was bound to determine the legal effect of the language used. It appears from the language of the bond that Jones was elected to the office of assessor and collector of Emery county, and that it was given to secure the faithful performance of the duties of that office; and from the facts averred in the complaint it appears that Jones had in his possession as collector, on March 8, 1889, \$446.40 of taxes assessed and collected in 1888, which had been apportioned as provided by law to the district of which the plaintiffs were trustees. Section 1922, 1 St. 1888, provides that

"the collector shall on the first of each month, or oftener, if required, pay over to the trustees all money collected by him for district school purposes; and on or before the 31st day of December of each year shall make a final settlement with said trustees, paying the full amount of all school taxes due, whether collected by him or not. School trustees' receipts shall be received by the collector in payment of district school taxes." This section made it the duty of the collector to pay the \$446.40 to the plaintiffs on the 31st day of December, 1888, and, not having done so, on the 8th day of March, 1889, it was still his duty to pay it. And section 3169, volume 2, same statute, provides that "every action must be prosecuted in the name of the real party in interest." The plaintiffs, as trustees of their district, were the parties in interest as to the money sued for. The case of *People v. Holmes*, 5 Wend. 191, was an action in the name of the people on the official bond of a constable. In its opinion the court said: "A constable, before he enters upon the duties of his office, is required to execute an instrument in writing, by which he and his sureties shall jointly and severally agree to pay to each and every person such sum of money as the constable shall become liable to pay on account of any execution that shall be delivered to him for collection. 2 Rev. Laws, 184. The statute prescribes what shall be the substance of the instrument, but is silent as to its form. This court decided as early as 1822 that a penal bond to the people would be a compliance with the statute. It has, however, been since decided (2 Wend. 281) that this is not the only form of the security. It may be, and perhaps it would be, best that it should be a simple agreement, without any penalty to pay to any person who might be aggrieved by the constable's neglect of duty. But the instrument on which this action is brought is in a form which has been approved by this court. Although it is a bond given expressly to the people, yet it is contended that a suit on it cannot be maintained in the name of the people, but that the action should be covenant on the condition in the name of the party aggrieved. Covenant might undoubtedly be maintained on the bond, but it does not follow that an action in the present form cannot be sustained." Analogous to the above case is *Fellows v. Gilman*, 4 Wend. 414. In it the court said: "It must undoubtedly appear that the covenant which is alleged to have been broken was made for the benefit of the person bringing the action. He must in some manner be pointed out or designated in the instrument; but it is not necessary that his name should in terms be used. * * * So, in this case, the defendants covenant to pay to each and every person such sum or sums of money as the constable shall become liable for on account of any execution which may be delivered to him. This, in connection with the allegations and averments in the declaration, shows as satisfactorily as in the case of an heir or executor that the plaintiff was one of the persons for whose benefit the covenant

or instrument was designed." So by the bond in question the defendants covenanted to pay to whomsoever it might concern; and the facts stated in the bond and complaint show with sufficient certainty that the plaintiffs, as trustees of Schofield school-district No. 3, were the persons for whose benefit the covenant relied on was made; and, that being so, this action was properly brought by them.

As to the point made by the defendants that the court erred in granting leave to amend the complaint by alleging the intention of the defendants in making the bond, we do not regard the amendment as material. That intention must be determined from the language used in the light of the circumstances attending its use.

As to the averment that the money sued for remained in Jones' hands on March 8, 1889, the issue was made on the trial, and all the evidence with respect to it was admitted. The court, by allowing the amendment, recognized the issue as having been made, and approved it. In fact there was no room for controversy upon the evidence that the money was in Jones' hands at the latter date. The amendment was made after the case had been submitted, and before it was decided, for the purpose of making the allegations of the complaint conform to the facts proven. The result of the trial could not have been otherwise if leave had been given to answer the allegations of the amendments. In view of the evidence, we hold that the order permitting the amendment was not erroneous. In support of this position we cite *Thomas v. Nelson*, 69 N. Y. 118. We find no error in the record sufficient to require a reversal of the judgment of the court below. Judgment affirmed.

MINER, J., concurs. ANDERSON, J., did not sit in the hearing of this case.

(7 Utah, 467)

PECK et al. v. REES.

(Supreme Court of Utah. Sept. 12, 1891.)

DEED — GIFT CAUSA MORTIS — DELIVERY AFTER DEATH BY GRANTOR'S AGENT—PLEADING.

1. In an action to quiet title, brought by devisees against one claiming under a deed executed by the devisor subsequent to making the will, defendant offered no proof, but, after plaintiffs had closed their evidence, moved to amend the answer by striking out an admission that the deed was intended as a gift in anticipation of the approaching death of the grantor. *Held*, that where the evidence introduced by plaintiffs without objection showed that the deed was made as a gift *causa mortis*, it was not prejudicial error to refuse the amendment.

2. A deed of gift of lands made *causa mortis*, and delivered after the grantor's death by his agent, in accordance with previous instructions, passes no title, as the death revokes the agency.

3. Where the grantor was under no obligation to the grantee by reason of indebtedness, kinship, or otherwise, to convey the land to her, no equity was created, by reason of his intention to make the gift, superior to the equity of the devisees.

Appeal from district court, Weber county; JAMES A. MINER, Justice.

Action to quiet title by Dwight Peck, Fred Peck, Leonard Peck, Sarah Fisher, Howard Peck, Julia Warley, Amelia Thews, Mary Scott, Charles Peck, Emma

Waas, and Julia Eliza Peck against Cecilia Rees. Judgment for plaintiffs. Defendant appeals. Affirmed.

Miller & Maginnis, for appellant. *Smith & Smith*, for respondents.

ANDERSON, J. The complaint in this case alleges that the plaintiff Julia Eliza Peck is the widow and the other plaintiffs are the children and heirs at law of Henry Peck, late of Oneida county, Idaho territory, deceased; that Henry Peck died at Malad, Oneida county, Idaho territory, on or about the 23d day of July, 1889; that about 10 days before his death he made a will by which he devised to the defendant certain real estate situated in Cache county, Utah territory; that the devise in the will was for the purpose of having carried out the testator's temple work, (meaning thereby certain pious, superstitious, and polygamous practices of the Mormon church,) to be carried on in the Mormon temple at Logan, Cache county, Utah; that the will was duly probated August 29, 1889, and the plaintiffs Howard Peck and Dwight Peck duly qualified as executors, and letters testamentary were duly issued to them on that day; that after the execution of the will, to-wit, on the 17th day of July, 1889, the said Henry Peck executed a deed for the same real estate to the defendant, but that the deed was wholly without consideration, and was never delivered, and that after the death of the said Henry Peck the deed came wrongfully into the possession of the defendant, and she caused the same to be recorded in the records of Cache county, Utah. The plaintiffs claim to be the owners of the land under the will and as heirs of Henry Peck, and asked to have their title quieted against the defendant. The defendant, by her answer, denied that the deed was never delivered, or that it came wrongfully into her possession, and alleged that the deed was duly executed by Peck in his lifetime, and "by him delivered to one Jenkin Jones, unconditionally, for the use and benefit of this defendant, with express directions and authority to deliver the same to this defendant upon the death of said Henry Peck, as a gift *causa mortis*; and that said deed was made and delivered in anticipation of the approaching death of said Henry Peck," and that Jones delivered the deed to her in pursuance of such authority. The depositions of Jenkin Jones, Henry R. Jones, and Howard Peck were introduced and read on behalf of plaintiffs. No evidence was offered by the defendant. At the close of the evidence the defendant asked leave of the court to amend her answer by striking out the words "*causa mortis*," and that said deed was made and delivered in anticipation of the approaching death of said Henry Peck," which was refused by the court, to which ruling the defendant excepted, and assigns the same as error.

The court found that Henry Peck was the owner of the land in controversy at the time of his death; that within 10 days prior to his death he made an attempted devise of his property to the defendant, Cecilia Rees, by will, which devise

was void under the statutes of Idaho territory, where he resided prior to his death on the 22d day of July, 1889, and after his said will had been written; "and as an attempt to make a testamentary disposition of said property to the defendant, and without any consideration whatever, either good or valuable, made, executed, and delivered to one Jenkin Jones a deed for said property, said deed being in favor of the defendant, Cecilia Rees, she being named as grantee therein; that Jenkin Jones had no authority from the defendant to receive said deed, and was directed by said Henry Peck to keep said deed until after his death, and then deliver the same to the defendant; that about one week after the death of Henry Peck, Jenkin Jones sent said deed to the defendant through the United States post-office; that until she received said deed through the mail the defendant had no knowledge of the existence of such deed, or of any deed." The court found that the plaintiffs are the only heirs at law of said Henry Peck, and are the residuary legatees under the will. As conclusions of law the court found that the deed never became operative, and is void; that the plaintiffs are the owners of the property, and entitled to a decree quieting their title to the same. The defendant made a motion for a new trial, which was overruled, and the appeal is from the findings and judgment.

Counsel for defendant say in their brief that all claim of the defendant under the will is abandoned, and that they rest their case on the deed alone, and that the only question they present for determination is, was there a delivery of the deed? They further say in their printed brief in this court that "It is admitted that the grantee, Cecilia Rees, had no knowledge of the execution of the deed until received by her through the post-office, about one week after the death of Henry Peck. It is further admitted that neither the grantee, nor any person for her, paid any consideration for the deed." The evidence as to the delivery of the deed is as follows: Jenkin Jones, a witness for the plaintiffs, testified: "I knew Henry Peck in his lifetime. I saw a deed for the Cache county land, which appeared to be executed by him, and the deed was in my possession. Henry R. Evans delivered the deed to me at my residence in Malad City, just a little time before Henry Peck's death, and said at the time of delivery, here was a deed for me to keep. No instructions at that time were given me. The deed was delivered to Cecilia Rees, after the death of Henry Peck for fully a week. I sent it, addressed to her, through the post-office. * * * A short time before the death of Henry Peck he called on me, and told me he was very sick, and did not know whether he would get well or not, and said he might make a paper or deed for Cecilia Rees, and asked me if I would deliver it, and told me to keep the matter to myself." Henry R. Evans testified: "Was acquainted with Henry Peck in his lifetime. I wrote a deed for him, conveying to Cecilia Rees the property in Cache county, and described in the complaint. * * * I had possession of the deed after it was made,

and delivered it to Jenkin Jones. I received from Henry Peck instructions to deliver the deed to Jenkin Jones, with directions that he should send it to Mrs. Cecilia Rees, and I gave Jenkin Jones that direction. The deed was made and executed about a week before the death of Henry Peck. I delivered the deed to Jenkin Jones on the day it was made and executed. The deed was made in view of the approaching death of Henry Peck, and there was no express instructions whether it was or was not to be delivered in case he should live. He said Jenkin Jones would know what to do with it. I had already written his will for him." Howard Peck, a son of Henry Peck, and one of the plaintiffs in this action, testified that the deed was intended by his father as a gift in view of approaching death.

It will be observed that, even if the court had permitted the defendant to make the proposed amendment to the answer, striking out the admission that the deed was intended as a gift in view of the approaching death of Henry Peck, still that fact was abundantly proved by the evidence already introduced, and without objection; so that, even if the court erred in refusing to allow the amendment, it worked no prejudice to the defendant. The right to make the amendment is claimed under section 3256, 2 Comp. Laws 1888. We think there was no error in refusing the amendment. If the amendment had been made, the answer would have still contained the affirmative allegation that Peck executed and delivered the deed to Jenkin Jones for her benefit, and "with express directions and authority to deliver the same to this defendant upon the death of said Henry Peck."

While there can be but little doubt that the deed from Peck to the defendant was made to evade the statute of Idaho territory which rendered the devise in the will to defendant void in case Peck should die in less than 30 days after the execution of the will, still he had a right to deed her the property as a gift, and confer upon her a good title; and the only question for determination is, did he so far execute his intentions as to render the deed operative? It is essential to the validity of every deed that it be delivered to and accepted by the grantee. It need not be delivered by the grantor himself, but may be delivered by any one duly authorized by him to make such delivery. Nor need it be delivered to the grantee in person, but may be delivered to any one authorized by the grantee to receive or accept it. If, however, a grantor execute a deed of gift of real estate, and place it in the hands of an agent to deliver to the grantee, and the grantor dies before delivery, no delivery can then be made, because the authority of the agent to act ended with the death of the principal; and in this case, unless the delivery to the agent Jones was a delivery to the defendant, there was no such delivery of the deed as would render it operative, and transfer the title to the defendant.

Peck being under no obligation, legal or moral, by reason of indebtedness, kinship, or otherwise, to convey the land to

the defendant, no equity was created in her favor by reason of his intention to make the gift, superior to the equity of his heirs, and unless he succeeded in making the gift to her complete in his life-time by delivery of the deed, no title could pass to her. But Jones was not the agent of the defendant to accept the deed for her, and hence a delivery to him was not a delivery to her. It does not appear in the evidence that Jones even knew her, but it does appear that he was not her agent for any purpose connected with the deed, for it is conceded she had no knowledge that such a deed, or any deed, would be made by Peck to her. Jones was the agent of Peck, and had no authority to do anything with the deed except as authorized by Peck, and Peck could have demanded and regained possession of it at any time during his life-time. While, therefore, it was out of his immediate possession, it was under his control, and liable at all times to be recalled and canceled by Peck. The title, then, was in Peck at the time of his death, and not in defendant, for she had not so much as heard of the deed, much less accepted it, and did not hear of it for a week after Peck's death. Suppose she had died the next day after Peck's death, but before Jones forwarded her the deed, to whose heirs would the property have descended,—the heirs of Peck or the heirs of the defendant? If to her heirs, it could only be because the title was fully vested in her by the execution of the deed, although she had never accepted it by herself or agent, nor even heard of it, and we would have a case where a delivery of a deed was not essential to transfer title. If we concede that Jones could deliver the deed to the defendant a week after the death of Peck, and, when delivered to her, it would vest the title in her from that date, where was the title between the death of Peck and the delivery of the deed to the defendant? If the title was in abeyance during this time,—floating around, as it were,—what would have been the result if Jones had lost or destroyed or refused to deliver the deed? Suppose the instructions to Jones should be construed to mean that he was not to await the death of Peck before delivering the deed, and Peck had demanded the return to him of the deed, and that the defendant had heard of the deed and demanded of Jones that he deliver it to her, who would have had the greater right to it? We think there can be no question but that Jones, being the agent of Peck, would have been bound to redeliver the deed to him, for it is of the essence of a gift that it be voluntary, and may be recalled at any time before actual completion. In *Younge v. Guilbeau*, 3 Wall. 636, the grantor executed and caused to be recorded a deed to the grantee, without the knowledge of the grantee, and he did not know of its execution until after the death of the grantor, when the deed was found among his papers. In a suit between the heir of the grantor and those holding under the grantee the supreme court of the United States said: "The delivery of the deed is essential to the transfer of title. It is the final act.

without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed, or the right to retain it. Its registry by him is entitled to great consideration upon this point, and might, perhaps, justly, in the absence of opposing evidence, a presumption of delivery." In *Parmelee v. Simpson*, 5 Wall. 81, one Bovey conveyed certain real estate to Simpson, to whom he was indebted, and placed the deed on record without the knowledge of Simpson. Two days later he mortgaged the same lands to Parmelee, and the mortgage was recorded before Simpson knew of the deed to him, and the court held that the mortgage took precedence over the deed. The court said: "The placing of the deed on record was Bovey's own act, and done without the assent of Simpson. Under this state of facts there was manifestly no delivery. The execution and registration of a deed, and delivery of it for that purpose, does not vest the title in the grantee. If Simpson had agreed to accept the deed in liquidation of his debt, and constituted the register his agent to receive it, then the delivery of the deed to the register would have been, in legal contemplation, a delivery to him." See, also, *Maynard v. Maynard*, 10 Mass. 456; *Samson v. Thornton*, 3 Metc. (Mass.) 281; *Jackson v. Phipps*, 12 Johns. 419; *Jackson v. Leek*, 12 Wend. 105. So, in this case, the delivery of the deed to Jones did not vest the title in the defendant; and before she knew of its existence and had an opportunity to accept it, the title passed upon the death of Peck to the plaintiffs by operation of law. The judgment of the district court is affirmed.

ZANE, C. J., and BLACKBURN, J., concur.

(7 Utah, 475)

GOODWIN v. HAMILTON *et al.*

(Supreme Court of Utah. Sept. 12, 1891.)

APPEAL—FINDINGS—EVIDENCE.

Where the evidence supports the findings of the court below, and there is no error in the record, the judgment will be sustained.

Appeal from district court, Salt Lake county; THOMAS J. ANDERSON, Justice.

Action by J. M. Goodwin against A. N. Hamilton and others. Judgment for plaintiff. Defendants appeal. Affirmed.

J. G. Sutherland, for appellants. Arthur Brown, for respondent.

ZANE, C. J. The court below found that prior to 1886 the plaintiff and the defendant A. N. Hamilton were the owners of 120 acres of land, situated within the limits of Salt Lake City; that each owned an undivided one-half of it, subject to a mortgage of \$3,000; that Hamilton, for himself, and by virtue of a power of attorney from Goodwin, conveyed the same to defendant De Lashmutt, in pursuance of a contract requiring him to divide it into lots and blocks, and dispose of it to the best advantage; and to retain of the proceeds such money as he might advance in plating and selling, and such as he might pay to remove the mortgage, and one-fourth of the net proceeds, and to pay to Good-

win and Hamilton the other three-fourths. There was evidence tending to prove that the defendant A. N. Hamilton, before the institution of this suit, assigned all of his interest in the land and by virtue of the contract to his wife, Mary A. Hamilton. As to that issue the court found that no assignment was made until after the sale of the land by De Lashmutt to the purchasers Kinney and Gourlay on the 2d day of July, 1887; and further, that, if any such assignment was made after that time, it was immaterial to the rights of the parties. Mrs. Hamilton is not a party to this suit, and, if she has a substantial equity in these funds, she will be at liberty to institute proceedings to obtain it. We are not disposed to disturb this finding of the court below. It appears further from the findings and the evidence that De Lashmutt advanced to plaintiff and defendant Hamilton \$1,000, upon which he was entitled by the contract to 10 per cent. per annum interest until repaid; that plaintiff and Hamilton negotiated the sale of the property for \$10,000, and that De Lashmutt executed and delivered the deed; that it was not platted and sold in lots, and that it would have brought much more if it had been so platted and sold, as the contract required. The court below allowed De Lashmutt the amount advanced by him and interest, as provided by the contract, and held that he was not entitled to one-fourth of the net proceeds of the sale. We are not disposed to disturb this finding and holding of the court. We are of the opinion that the court below did substantial justice. We do not find any error in this record requiring us to reverse the judgment of the court below. Judgment affirmed.

BLACKBURN and MINER, JJ., concur.

MEYERS *et al.* v. PACIFIC CONST. CO.

(Supreme Court of Oregon. July 8, 1891.)

CONTRACTS—SUBMISSION OF DISPUTES—FRAUD—ACTIONS.

The contract under which plaintiff performed work for defendant construction company in building a railroad provided that monthly advances were to be made him on the basis of measurement and classification of the work by defendant's engineer, and that all disputes as to amount or classification of work were to be referred to the divisional engineer, whose decision thereon should be final. Held, that plaintiff could maintain an action for the fraud of defendant's engineer in underestimating and classifying his work, without alleging that reference had been duly made to the divisional engineer or that he was privy to the fraud, so that the reference would be useless.

Appeal from circuit court, Benton county; R. S. BEAN, Judge.

L. Flinn, Rufus Mallory, and John Burnett, for appellant. James K. Weatherford, W. S. McFadden, and J. F. Watson, for respondents.

LORD, J. This action was brought by the plaintiffs against the defendant for work and labor performed by them under three separate contracts set out in the complaint, and also for damages alleged to have been sustained for breach of them.

contracts by the defendant. All the contracts contain the same provisions, and are identical, except that they cover different times for their performance, and different portions of the railroad to be constructed. They are minute in detail, specifying the prices to be paid for the various kinds of work to be performed, and prescribing what is solid rock, what is loose rock, what is cement gravel, what is hard-pan, etc.; and providing also that the work done by the plaintiffs shall be measured and estimated by the company's engineer for each month, and that payment shall be made by the defendant for the amount so ascertained upon the 1st of every month, etc., less 10 per cent.; and that such monthly estimate shall cover the work done as fully as possible without complete detail measurements and calculations of all parts of the work done; but that the divisional engineer, in calculating or classifying, or approving the final estimate, shall not be bound by such monthly statements and classifications, but that such estimates shall be considered merely a basis for the defendant's monthly advances on account of the plaintiffs as contractors. And, finally, these contracts provide that "any dispute or difference between the company and the contractors under this contract as to the classification of work or otherwise shall be referred to the decision of the divisional engineer of the company, whose decision shall be final and conclusive on both parties to such dispute or difference." The contention for the defendant is that, under these contracts, neither party could claim the benefit of them upon any point in dispute or difference arising between them in estimating or classifying the work done, unless the same was submitted to the divisional engineer for his decision, which would be binding upon them in the absence of fraud or gross misconduct evidencing bad faith. Hence the defendant claims that the plaintiffs are precluded, by such stipulation in their contracts, from bringing or maintaining any action, unless they can allege and show that the matters in dispute, in respect to the work done under them, have been submitted to the divisional engineer, and that his decision in the premises was fraudulent, or characterized by such gross mistakes or misconduct as would amount to fraud or bad faith. Within this view, a complaint would fail to state a cause of action that omitted to allege the submission of the matter in dispute, arising out of the contract, to the decision of the divisional engineer, and the misconduct on his part, which operated to avoid the conclusive effect of his decision. The only allegation in the complaint which can have any reference to this aspect of the case is as follows: "As a reason for abandoning said work on and under said contract, was and is that the estimates of plaintiffs' work, given by the defendant's engineers, was for less than the amount of work done by the plaintiffs; and that said estimates and classification of said work by said engineers was false, unfair, and unjust, and was made so by said engineers with the intent on the part of the defend-

ant to defraud the plaintiffs, and to deprive them of the just compensation for said work." It would seem from this allegation that the plaintiffs considered and intended to charge that the estimates given by the company's engineers for the work done by them were so much less than they had in fact performed, and that not only the estimates of the same, but its classification by them, were so plainly wrong and unjust, as to impute misconduct or bad faith on their part, indicating an intent to defraud the plaintiffs, and to deprive them of their just compensation. The wrong measurement and classification of the work as rendered by the company's engineers are the grounds of grievance, and to which the plaintiffs object. Assuming this to be true, the occasion would seem to be an appropriate one to invoke the decision of the arbiter selected by them to settle such differences, without resort to litigation, unless he was privy to the fraud, or practiced it himself. The reference to him was intended to correct any wrong or unfair measurement or classification of the work done by the engineers in charge, and his decision is binding and conclusive on both parties to the contract, unless he in some way practiced fraud, or was privy to it. It is fraud on his part, or refusal to act when alleged, that gives the right of action. Now, there is a total absence of any allegation that the incorrect estimates or classifications of the work made by the company's engineers, and alleged to be so gross and unfair that an intent to defraud is charged, were or have ever been submitted to the divisional engineer, so that this matter of difference arising out of the contract may have been decided by him, and litigation avoided. The object of such stipulations is to prevent disputes, and to secure accuracy of measurement and classification of the work done. Nor is there any allegation that he practiced or was privy to any fraud. All that is alleged is that the engineers who made the measurements and classifications committed gross error, or acted unfairly and unjustly; but this is no allegation of fraud which would excuse the reference of such disputed questions to the divisional engineer. It is owing to the supposed competency and fairness of such officer to properly classify the work performed, and to accurately estimate it, in case of dispute or difference, that he has been selected, and his decision made final and conclusive. A submission of the matter alleged to him, in the absence of any imputation of fraud or bad faith on his part, we have a right to assume would have resulted in correcting any mistake or wrong, either in the estimates or classification of the work performed, and thus avoided the matter now in dispute. It is in this way that the plaintiffs would have received the just compensation to which they were entitled under the terms of their contract, or at least the kind of evidence to prove their right to it, in case of refusal after its submission and decision. It is therefore incumbent on the plaintiffs to allege and show a compliance with this condition of their contract, or at least a reasonable ef-

fort to comply with its condition, before any action can be maintained.

In *Howard v. Railroad Co.*, 69 Pa. St. 494, there was a contract for the construction of a railroad, containing, among other things, a stipulation of this character, and the court says: "It is agreed that to prevent disputes the engineer of the work shall in all cases determine the amount or quality of the several kinds of work which are to be paid for under the contract, and decide every question which can or may arise relative to the execution of the contract on the part of the contractors; that his decision has been uniformly held to be final and conclusive. It would therefore appear that this suit cannot be maintained by all or any of the parties of the first part, who are precluded by their own covenants." In *U. S. v. Robeson*, 9 Pet. 319, it was held that when the parties to a contract fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks the enforcement of the agreement must show that he has done everything on his part to carry it into effect. The cause of action is not perfect unless the prescribed mode of determining the extent of the liability has been pursued or has been dispensed with. In *Searle v. Railroad Co.*,¹ recently decided by Mr. Justice DEADY, the question in the case was whether the defendant refused to refer the matter of difference to the divisional engineer under a contract identical with those set out in this record, and the plaintiffs were allowed to amend their complaint so as to make that allegation, and maintain the action. In *Butler v. Tucker*, 24 Wend. 449, it was held that where one party enters into a contract for doing work, and binds himself that the whole shall be done and completed to the entire satisfaction of the other party and of third persons, in an action to recover the price stipulated to be paid for the work it is necessary to aver in the pleading that the work was done to the satisfaction of the arbiters designated in the contract. *BROUSSON, J.*, saying: "When parties fix on an umpire, and agree to abide his decision, neither of them, without the consent of the other, can withdraw the question of performance from the common arbiter for the purpose of referring it to the decision of a jury." In *Construction Co. v. Stout*, 8 Colo. 61, 5 Pac. Rep. 627, it was held in an action to recover a balance alleged to be due on a contract for the construction of the defendant's road, where, under the terms of the contract, payments are to become due upon the inspection and estimates of the engineer of the defendant company, no right of action accrues until such estimates are procured, unless the engineer refuses to act, or some other matter in avoidance appears; *BECK, C. J.*, saying: "An examination of the cases cited shows that stipulations of this character are extensively used in contracts relating to the building of railroads, and that their validity has been sustained by the most eminent courts. Where, as in the present case, an inspection and an estimate by the en-

gineer in charge of the work are required by the terms of the agreement before either a monthly or final payment may be demanded, such stipulation forms a condition precedent, and no right of action exists until such inspection and estimate are made. Or, if a dispute arises between the contracting parties as to the quality or sufficiency of the work performed under the contract, the dispute must be settled in the manner and by the person provided by the contract before a resort may be had to another forum. *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Jackson v. Cleveland*, 19 Wis. *400; *Hudson v. McCartney*, 33 Wis. 331; *Reynolds v. Caldwell*, 51 Pa. St. 298; *Snell v. Brown*, 71 Ill. 133; *Humaston v. Telegraph Co.*, 20 Wall. 20; *Fox v. The Railroad*, 3 Wall. Jr. 243. Causes sufficient to excuse a resort to the arbiter designated in the agreement may arise, as where he refuses to act, or is prevented from acting by the opposite party. But one of the parties cannot arbitrarily ignore or revoke the stipulation, and resort in the first instance to the courts of law." In *Railroad Co. v. Riley*, 7 Colo. 494, 4 Pac. Rep. 785, the action was brought to recover a balance claimed to be due for grading seven sections of the defendant's railroad. The appellee claimed that the total amount of work done by him was underestimated by the engineer, and that consequently his compensation was less by several thousand dollars than it should have been. In this regard, the grievances were like the case at bar. But the court says: "His position is, and must be, that the aggregate amount of grading done under the contract is not one of the matters as to which the engineer's decision was to be final and conclusive. Upon this view alone could he have maintained his action; for the engineer had passed upon the measurement, and fixed the amount of work to be performed. Appellee charged no fraud against the officer, nor does he aver or attempt to prove any such mistake on the latter's part as will vitiate his determination of the question. These things being true, the engineer's decision would be final if the matter is covered by the italicized phrases in the paragraph of the agreement." *Condon v. Railroad Co.*, 14 Grat. 302; *Vanderwerker v. Railroad Co.*, 27 Vt. 130. In the case at bar the matter alleged, affecting the plaintiffs' right of compensation, is that the estimates of the work performed by them were grossly underestimated and wrongly classified by the company's engineers, the identical matter as to which the divisional engineer's decision was to be final and conclusive. The plaintiffs charge no fraud against the divisional engineer, nor do they aver any, or any excuse for not resorting to him, and yet attempt to maintain the action in disregard of their stipulation. Where parties standing upon an equal footing deliberately select a person as fit and competent to decide, and by whose determination they have agreed to abide, it is but reasonable and proper that the contractor should be held to the performance of his agreement. *Hudson v. McCartney*, 33 Wis. 331. The divisional engineer was selected

*. ¹ No opinion written.

and the stipulation entered into for the sole purpose of settling all differences which might arise in estimating the work done, its classification, and matters of that kind; making his decision final so that litigation—the present action—might be avoided. It is on account of these alleged erroneous measurements and classifications that a dispute or difference exists, whereby the plaintiffs claim they have not received as much money as was their due under the contract. This is the foundation of their grievance. Their contract provides the person to whom shall be referred such disputes or differences as to the calculation and classification of the work performed, and until such reference is made there is no performance of this condition, and no right of action exists. It is intended to prevent the parties to it from resorting to the law to settle their differences when the contract has provided the person to determine the matter, and whose decision is final in the absence of fraud or palpable mistake. It operates alike on both, and, before any of the parties to the contract can claim any benefit from it in regard to any differences which may arise between them, either as to the classification or otherwise of the work performed, the matter must be referred to the divisional engineer for his decision, and until that is done, or some valid reason alleged for not doing it, no right of action exists. It is enough that the parties have seen fit to insert the condition that any dispute or difference arising under their contract “as to the classification of the work or otherwise” shall be referred to such officer, whose decision shall be final, that its performance is required before resort can be had to any legal tribunal. The plaintiffs are as much bound by this part of their contract as any other, and it is necessary for them to allege and show compliance with it, or at least some excuse for not doing it, before they can maintain an action. As the allegation is insufficient, in the view expressed, to show a breach, or give a right of action, it results that the overruling of the demurrer, the admission of the evidence, and the giving of the first instruction excepted to was error for which the judgment must be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

BEAN, J., did not participate in this decision.

KIRMAN *et al.* v. HUNNEWILL *et al.* (No. 14,463.)

(Supreme Court of California. Sept. 11, 1891.)

APPEAL—WHEN TAKEN—SUPERSEDEAS.

1. In California, an appeal from a judgment taken more than one year from the entry thereof will be dismissed.

2. Whether *supersedeas* should be granted pending an appeal from an order denying a new trial will not be considered on motion to dismiss an appeal from the judgment.

In bank. Appeal from superior court, Mono county; O. F. HAKES, judge.

Action by Kirman and others against

Hunnewill and others. Judgment for plaintiffs, and defendants appeal. Dismissed. Wm. O. Parker, C. A. Schuman, and Jas. E. Goodall, for appellants. Richard S. Miner, for respondents.

PER CURIAM. Motion to dismiss appeal. The judgment in this cause was entered November 2, 1888, and the appeal therefrom was not taken until more than one year thereafter, viz., December 8, 1890. The motion to dismiss the appeal therefrom must therefore be granted. Whether the appellants are entitled to have the execution of the judgment stayed until the determination of the appeal from the order denying a new trial, cannot be considered upon this motion. See *Fulton v. Hanna*, 40 Cal. 278. The appeal from the judgment is dismissed.

ELY v. FERGUSON. (No. 13,283.)

(Supreme Court of California. Sept. 14, 1891.)

WATER-RIGHT—APPROPRIATION OF SPRINGS—PUBLIC LAND.

1. A rightful occupant of public land can acquire a water-right which will become appurtenant thereto, although the land was unsurveyed, and he had no legal title when the right was acquired.

2. Water flowing from springs may be appropriated under Civil Code Cal. § 1410, providing for the appropriation of “running water flowing in a river or stream or down a canon or ravine.”

Commissioners’ decision. Department 1. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action by Benjamin Ely against Louisa J. Ferguson to restrain her from obstructing the flow of water in ditch owned by plaintiff. Decree for plaintiff, and defendant appeals. Affirmed.

R. W. Crump, (Ira C. Jenks, of counsel,) for appellant. F. E. Baker, for respondent.

BELCHER, C. The plaintiff brought this action to obtain a perpetual injunction restraining the defendant from obstructing the flow of water into a ditch constructed to convey the water to his land, to be there used for domestic and irrigating purposes. The court below granted the injunction as prayed for, and the defendant appeals from the judgment and an order denying a new trial.

The ditch referred to was constructed in 1862 by one Jamison, and it extended from the land now owned by plaintiff to that now owned by defendant. These two tracts of land were situate in Lake county, and were then public land of the United States, but were separately inclosed, and occupied by Jamison. On the land now owned by defendant there was a marsh containing about four acres, and on one side of it were hills, near the base of which several springs of water flowed out, carrying in the aggregate, during the summer and fall months, as estimated, about 24 inches of water measured under a 4-inch pressure. These waters flowed into the marsh, and thence through a natural channel to and across the land now owned by plaintiff. The ditch was constructed around the side of the marsh so as to take

In the waters of all the springs and conduct them to plaintiff's land at points higher than they would otherwise have reached. In 1867 Jamison posted and had recorded a notice that he claimed all the water flowing from the different springs for purposes of irrigation. In 1870 he sold his possessory claim to the land now owned by defendant, and one-half of the water appropriated by him, to one Chambers, and reserved by his deed the other half of the water for use on the land now owned by the plaintiff, where he then lived. In 1872 he posted and caused to be recorded another notice of appropriation, in which he claimed one-half of the water flowing from the different springs, amounting to 12 inches under a 4-inch pressure, and the ditch already constructed. Chambers sold his possessory claim to R. K. Ferguson, the defendant's predecessor in interest, who in 1885 obtained a United States patent to the land, "subject, however, to any vested and accrued water-rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water-rights." Jamison continued to live on the land now owned by the plaintiff, and to use the water carried to it by his ditch for irrigating and other purposes, until 1872, when he conveyed the land with its appurtenances to one White, who in 1878 obtained a United States patent therefor. White conveyed to Getz in 1879, and Getz to the plaintiff in 1883, who has ever since been the owner of the land. Each of these deeds described the land and granted the title thereto, with its appurtenances. Each of the plaintiff's grantors, while they respectively owned the land, and afterwards the plaintiff, continued to claim and use thereon one-half of the water flowing from the springs until June, 1887, when the defendant obstructed the ditch, and thereby prevented any of the said waters from flowing through the same to plaintiff's land.

Only two points are made for a reversal of the judgment. It is claimed—*First*, that water flowing from springs cannot be appropriated, citing section 1410 of the Civil Code, which provides: "The right to the use of running water flowing in a river or stream, or down a canon or ravine, may be acquired by appropriation;" and, *second*, that, if Jamison did acquire a right to the use of the water of the springs and marsh, the land to which he conducted it was then unsurveyed public land, to which he had no semblance of title, and hence the water-right did not become appurtenant to the land, and could not be passed to another except by deed. We do not think either of these claims can be sustained. Water flowing from springs, as the evidence showed and the court found that this water did, may be appropriated. *Cross v. Kitts*, 69 Cal. 222, 10 Pac. Rep. 409; *De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. Rep. 563, and 22 Pac. Rep. 198. And the fact that the ditch was constructed up to the mouth of the largest spring, as testified by some of defendant's witnesses, cannot affect the result.

So the fact that the land to which the water was taken by Jamison was at the

time unsurveyed public land did not prevent the water from becoming appurtenant thereto. He was not a trespasser on the land, but a rightful occupant. All public lands are open to occupation and settlement by citizens of the United States, or those who have declared their intention to become such. He was living on the land, having an orchard and garden thereon, and farming a part of it. And from the earliest times in this state it has been customary to divert water onto the public lands for mining, agricultural, and other purposes, and this right was, in 1866, confirmed and approved by act of congress. See act and authorities cited in *De Necochea v. Curtis*, supra. The Civil Code provides: "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit; as in the case of a way or water-course, or of a passage for light, air, or heat, from or across the land of another." Section 662. And see *Farmer v. Water Co.*, 56 Cal. 11. It follows, in our opinion, that the court below rightly granted the injunction, and that the judgment and order should be affirmed.

WE CONCUR: FITZGERALD, C.; VANCE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

91 Cal. 37

MARSTON v. WHITE et al. (No. 14,323.)

(Supreme Court of California. Sept. 4, 1891.)

FORECLOSURE—SALE EN MASSE.

Where distinct parcels of land have been separately offered at a foreclosure sale without bids being received therefor, a sale *en masse* is not invalid under Code Civil Proc. Cal. § 694, providing that when the sale is of real property, consisting of several known lots or parcels, they must be sold separately, and that the judgment debtor, if present, may also direct the order in which the property shall be sold, when it consists of several parcels, or of articles which can be sold to advantage separately; and the sheriff must follow such directions.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

Action by George W. Marston against Arville A. White and others to foreclose a mortgage. There was a decree of foreclosure, and a sale thereunder, which defendants afterwards moved to set aside. The court denied the motion, and defendants appeal from the order. Affirmed.

Conklin & Hughes, for appellants. Luce, McDonald & Henderson, for respondent.

BELCHER, C. This is an appeal from an order refusing to set aside a sale of real property under a decree of foreclosure of mortgages upon the property. It appears from the bill of exceptions that the property described in the mortgages and decree of foreclosure consisted of two parcels of land known as "Lot D" and "Lot I" in block G, of Horton's addition to the city of San Diego. The decree was duly rendered on the 12th day of October, 1889, and thereafter, on the 3d day of March, 1890, when the sheriff of San Diego county, after due notice, was about to sell the property under an order of sale issued in pursuance

of the decree, the appellant directed the sheriff, both orally and in writing, to sell the lots separately, and as to the order in which they should be sold. The sheriff offered the lots for sale separately, as directed, but received no bids for either of them, and he then offered them as a whole, and they were struck off and sold to the respondent, who was the highest bidder, and one of the mortgagees. A return to this effect was made on the writ, and a certificate of sale given to the purchaser. On the 14th of August, 1890, the appellant served upon the respondent her affidavit and notice of motion to set aside the sale upon the ground that the lots were not sold separately as required by section 694 of the Code of Civil Procedure, and as directed by her. When this motion came on to be heard, the appellant introduced in evidence her notice of motion and affidavit in support thereof, a copy of the notice served on the sheriff prior to the sale, the order of sale and the sheriff's return thereon, and then rested. After argument by counsel for the respective parties, the court denied the motion, and the appellant excepted to the ruling.

Section 694 of the Code of Civil Procedure provides that "when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or, when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately; and the sheriff must follow such directions." It has been held that this section is applicable to sales under a decree of foreclosure, when the decree is silent as to the manner or order in which the separate parcels shall be sold. *Improvement Co. v. Bedford*, (Cal.) 27 Pac. Rep. 39. It does not, however, render a sale of separate parcels *en masse*, in disregard of its requirements, absolutely void. Such a sale is voidable, and, on timely application, will ordinarily be set aside. *San Francisco v. Pixley*, 21 Cal. 57; *Blood v. Light*, 38 Cal. 654; *Browne v. Ferrea*, 51 Cal. 552; *Vigoureux v. Murphy*, 54 Cal. 346. But while the rule declared by the Code as above is controlling, and should be strictly followed, still it cannot be held to apply where each distinct parcel is first offered for sale separately, and no bids are received. In such case the property may then be offered and sold as a whole, and the sale will be upheld unless other reasons appear for setting it aside. The rule applicable to such cases is stated, and, as we think, correctly, in *Freeman on Executions*, § 296, as follows: "The rule that distinct parcels should be separately sold is not generally enforced to the extent of denying the right to sell when the sale can be made in no other way. Hence the officer, after offering the parcels separately, and in various combinations, without receiving any bids, may then offer and sell them *en masse*." And see authorities cited. Here the lots were offered separately,

as directed by the appellant, and the only ground urged for setting aside the sale was that they were then sold together. This, as we have seen, was not a valid ground, and hence it follows that the order appealed from was proper, and should be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

91 Cal. 283

MILLER v. SEARS *et al.* (No. 14,371.)

(Supreme Court of California. Sept. 19, 1891.)

ESCROW—INCOMPLETE CONTRACT.

Where a contract for the exchange of lands was not to be complete until the parties were satisfied as to the title, the deposit of a deed with a third person by one party for delivery to the other "when everything is all right and perfected," does not constitute a delivery in escrow.

Department 2. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by Miller against Sears to recover possession of certain deeds and mortgages. Plaintiff was nonsuited, and appeals. Reversed.

Gould & Stanford, for appellant. E. W. Sargent and Albert M. Stephens, for respondents.

DE HAVEN, J. This is an action to recover the possession of certain described instruments, consisting of a note, mortgage, and two deeds, each signed by the plaintiff, and alleged to have been deposited with the defendants. The plaintiff was nonsuited, and the question before us is whether the testimony of plaintiff was such as to show that the documents in controversy were delivered by him to defendants in escrow, as claimed by them.

We think the fair import of the testimony is to the effect that plaintiff had made an agreement, subject to further consideration as to title, with one Stimson and a Mrs. Buttner for the purchase of certain property from them, and the sale by him of certain lots to them, and as part of this transaction the note, mortgage, and deeds of plaintiff and the deed of Stimson and Mrs. Buttner for plaintiff were signed and left with defendants to be delivered "when everything was all right and perfected." Upon this point the plaintiff testified: "I said to Mr. Sears: 'You take these papers, and when everything is all right and perfected, you give these papers to me, and these others to him.' That was the agreement. * * * The transaction was not completed on that day because we had no abstract of title at the time. We knew nothing about the titles, and we had to leave that to after-consideration. If it had been perfect, of course we should have handed over the papers." Upon this state of facts it cannot be held that plaintiff's papers were delivered to the defendants as an escrow. There was no contract of sale concluded between the plaintiff and the other parties to the negotiation, as the question of

title remained to be settled to the satisfaction of the contracting parties. This fact alone is fatal to the contention of respondents that they held the documents in controversy as an escrow. The law upon this point is very clearly stated by Mr. Justice RHODES in delivering the opinion of this court in *Fitch v. Bunch*, 30 Cal. 209, as follows: "An escrow differs from a deed in one particular only, and that is the delivery. Not only must there be sufficient parties, a proper subject-matter, and a consideration, but the parties must have actually contracted. * * * The actual contract of sale on the one side and of purchase on the other is as essential to constitute the instrument an escrow as that it be executed by the grantor; and until both parties have definitely assented to the contract the instrument executed by the proposed grantor, though in form a deed, is neither a deed nor an escrow; and it makes no difference whether the instrument remains in the possession of the nominal grantor or is placed in the hands of a third party pending the proposals for the sale or purchase." But, in addition to this, we do not think that it can be held, upon the facts above stated, that the defendants were given the right to deliver these papers without further direction from the plaintiff. The delivery was not absolute and beyond the control of the plaintiff. There was to be no delivery to the other parties until "everything was all right and perfected;" and, as there is nothing in the evidence to indicate that this matter was to be determined except by the future agreement of the parties themselves, it follows that defendants held the documents in controversy as mere depositaries, subject to the future direction of the plaintiff, and were not authorized to do anything with them until notified by plaintiff that he was satisfied with the title he was to receive. For this reason also it must be held that the evidence does not show a delivery of these instruments in escrow. *James v. Vanderheyden*, 1 Paige, 386. It follows from the foregoing views that the court erred in granting the motion for nonsuit. Judgment and order reversed.

We concur: BEATTY, C. J.; MCFARLAND, J.

91 Cal. 48

SAPPENFIELD v. MAIN ST. & A. P. R. CO.
(No. 14,155.)

(Supreme Court of California. Sept. 5, 1891.)

INJURY TO EMPLOYE — DEFECTIVE APPLIANCES —
OPINION EVIDENCE.

1. Where the pin holding the single-tree to the draw-head of a street-car came out, releasing the horse, and the driver was dragged over the dash-board, it was error, in an action for the resulting injury, to charge that it is the duty of a master to furnish such appliances "as combine the greatest safety with practical use;" since a master need only furnish appliances reasonably safe, though better ones exist; and a subsequent charge, given at the master's request, which correctly states the law, does not cure the error.

2. Under Code Civil Proc. Cal. § 1870, subd. 9, which provides that a witness may give his opinion "on a question of science, art, or trade, when he is skilled therein," it is error to allow a witness, who for about two years has been a driver

and conductor on the railway, to testify whether in his opinion the pin was "safe;" since he should have testified only as to facts, leaving it to the jury to draw inferences therefrom.

3. Evidence that soon after the accident the railway company substituted a new and safer pin in all its cars, is incompetent as an admission of prior negligence.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action for personal injuries by one Sappenfield against the Main Street & Agricultural Park Railroad Company. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

Stephen M. White, for appellant. Dnpy & Bentley and R. Dunnigan, for respondent.

HARRISON, J. The defendant is the proprietor of a street railroad in the city of Los Angeles, and the plaintiff was employed by it as a driver upon one of its cars. On the 22d of November, 1888, while engaged in the service of the defendant, the plaintiff was driving a horse called "Dan," which was hitched to car No. 4 of the defendant's line of street-cars, and while driving along Main street, near Tenth, the horse became detached from the car, and dragged the plaintiff over the dash-board, throwing him upon the track, where he was run over by the car, and received serious injury, necessitating the amputation of one of his legs. For the damage thus sustained he brought this action against the defendant, alleging that it had been caused by its negligence in furnishing him with an unsafe and ungovernable horse, and a car "whose appliances and attachments" were in an unsafe and dangerous condition. The case was tried by a jury, and a verdict rendered in favor of the plaintiff. From the judgment entered thereon, and from an order denying a new trial, the defendant has appealed to this court.

For the purpose of establishing that the appliances and attachments of the car were unsafe and dangerous, it was shown that the single-tree by which the horse was hitched to the car was fastened to the draw-head of the car by a straight pin. This pin had a ring at the top, through which a chain kept it attached to the draw-head, and was five and five-eighths inches in length and three-fourths of an inch in diameter, and the holes in the two bars in the draw-head, through which it was inserted for the purpose of holding the single-tree, were thirteen-sixteenths of an inch in diameter. Testimony was given at the trial to the effect that on a few occasions the straight pin had worked out of its hole while the car was in motion, letting loose the single-tree, and giving the horse an opportunity to escape; but it was not shown that any accident or injury had ever resulted therefrom prior to the present instance, although the cars made several hundred trips each day. It was also shown that there was another kind of pin in use, called a "safety-pin," which was provided with a device to prevent it from working out of the holes in the draw-head. This safety-pin was upon two of the cars

of the defendant which it occasionally used, that had been manufactured for it in St. Louis a few months previous to the accident, and upon two other of its cars, which had recently been manufactured for it in Los Angeles. It was also shown that the straight pin had been in use by the defendant for several years, and was the same kind of pin that was generally in use upon street-cars, as well in San Francisco as in Los Angeles, although two of the lines in Los Angeles had a short time previously adopted the safety-pin upon a few of their cars.

1. The theory upon which the plaintiff's case was tried was that the defendant was negligent in continuing the use of the straight pin, and in not having furnished the car in question with the safety-pin; and at the close of the testimony the court, at his request, gave to the jury the following instruction: "It is the duty of one who employs another in his business to furnish to such employee such tools, implements, appliances, and machinery as may be needed in the work to be done for the employer, in good order, of sound material, and in safe condition for use, such as will be reasonably best calculated to insure safety in their use by the employee, and such as combine the greatest safety with practical use. The employee has the right to expect this, and in using such implements, appliances, or machinery the employee has the right to, and may, rely upon it that the tools, implements, and machinery given and furnished to him by his employer to use in his business are such as are required by the law." This instruction was erroneous in declaring that the obligation upon the master required him to furnish such appliances "as combine the greatest safety with practical use." By this the jury were told that the appliances required must be such as in practical use will be found to afford the greatest safety,—that is, those appliances which from experience are found to combine all the provisions for safety that are capable of being used. The instruction is substantially the same as one given in the case of *Treadwell v. Whittier*, 80 Cal. 599, 22 Pac. Rep. 266, which was approved by this court; but the circumstances which rendered such instruction proper in that case do not exist here. The court in that case was defining the duties of the proprietor of a passenger elevator, and likening them to the duties imposed upon the carrier of passengers, which require him to keep pace with modern improvement and invention, and adopt such newly-invented appliances as will secure the safety of those whom he carries. The relations of the defendant to the plaintiff in this case differ materially from those existing between the carrier and its passengers, for, instead of being in any respect an insurer of his safety, the defendant held to the plaintiff only the ordinary relations of a master to his servant. The relative liability of a carrier to its passengers and to its employees is stated by the court of appeals in New York in *Warner v. Railroad Co.*, 39 N. Y. 471, as follows: "We are not now dealing, it must be remembered, with the liability which a rail-

road corporation assumes in respect to the safety and security of passengers transported on their road for a compensation, and in regard to whom they become absolute insurers against all defects which the highest degree of vigilance would detect or provide against. The liability here, if there is any, is measured by that lower standard which all the authorities recognize in the case of an employee, and which is answered if the care bestowed accords with that skill and prudence which men exercise in the transaction of their accustomed business."

The ground of the plaintiff's cause of action is negligence of the employer in failing to supply him with suitable appliances, with which to do the work for which he is employed. This liability of the master is based upon personal negligence,—that is, a negligence by himself or those to whom the matter has been delegated in the selection of suitable appliances for the use of the servant. He is not required to furnish appliances which are absolutely safe, nor is he bound to furnish the best that can possibly be obtained. He is, however, under obligation to exercise reasonable and ordinary diligence in their selection, and to furnish to his servant such as are reasonably safe, and adapted to perform the work for which they are designed, and which, with ordinary care and prudence on the part of the servant, render it reasonably probable that they can be used by him in the ordinary exercise of his employment without danger to himself. If the master has exercised proper care in their selection,—such care as a prudent man would exercise if his own person or life were exposed to the danger that would result from their use,—and has thereafter kept them in suitable condition and repair, he is not liable for an accident that may happen to the servant from their ordinary use. After the master has exercised this care, the incidental risks that result from the use of such appliances are assumed by the servant, and are supposed to have been taken into account in fixing the amount of his wages. Whether in any case the employer has been negligent in the selection or care of the appliances furnished by him to those in his service is a question of fact to be determined from all the circumstances and surroundings of that case. The burden is on the plaintiff to show some fault on the part of the master. The mere fact of the injury or accident does not raise a presumption of negligence; and, as his negligence is to be measured by his knowledge or means of knowledge, it must be shown that the master knew or had notice that the appliance was defective. It is not sufficient to show that there were better or safer ones to be had, but it must be shown that the one supplied had some radical fault, or that its use had become so generally obsolete, or supplanted by others of superior character, that its adoption or retention would itself indicate negligence. The master is not bound to adopt every latest improvement in machinery, nor is he liable for an accident which would not have occurred if such improvements had been adopted. If, at the time

of its selection, the appliance in question was the only one in general use, or was the one which was generally used, and was reasonably adapted to the purpose for which it was employed, its selection or its subsequent retention would not of itself indicate negligence; nor would the fact that better ones were used by others, or that later devices had overcome defects that experience had shown this one possessed, be proof of negligence in the continuance of its use. Nor does the circumstance that the appliance has defects, which do not render it positively unsafe, indicate any negligence in its selection, unless it be also shown that when selected ordinary care would have either disclosed or could have obviated these defects. It is a well-settled rule that when an appliance or machine, not obviously dangerous, has been in daily use for a long time, and has uniformly proved safe and efficient, its use may be continued without the imputation of imprudence or carelessness. *Wonder v. Railroad Co.*, 32 Md. 411; *Railroad Co. v. McCormick*, 74 Ind. 440; *Railroad Co. v. Orr*, 84 Ind. 55; *Payne v. Reese*, 100 Pa. St. 306; *Coal Co. v. Hayes*, 128 Pa. St. 294, 18 Atl. Rep. 387; *Railroad Co. v. Probst*, 83 Ala. 518, 3 South. Rep. 764; *Burke v. Witherbee*, 98 N. Y. 565; *Probst v. Delameter*, 100 N. Y. 266, 3 N. E. Rep. 184; *Stringham v. Hilton*, 111 N. Y. 188, 18 N. E. Rep. 870; *Kern v. Sugar-Refining Co.*, 125 N. Y. 50, 25 N. E. Rep. 1071; *Railroad Co. v. Glidersleeve*, 33 Mich. 133; *Railroad Co. v. Smithson*, 45 Mich. 212, 7 N. W. Rep. 791; *Railroad Co. v. Wagner*, 33 Kan. 666, 7 Pac. Rep. 204; *Wood, Mast. & Serv.* § 331; *Civil Code*, § 1971. "When a master employs a servant to do a particular kind of work with particular kinds of implements and machinery, the master does not agree that the implements and machinery are free from danger in their use, but he agrees that such implements and machinery to be used by such servant are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, and that he will use ordinary care and prudence in keeping them in such condition and fitness; and the servant agrees that he will use such implements with care and prudence; and if, under such conditions and circumstances, harm or injury come to the servant, it must be ranked among the accidents, the risks of which the servant must be deemed to have assumed when he entered into such service." *Railroad Co. v. McCormick*, supra. "An employer is not bound to furnish for his workmen the 'safest' machinery, nor to provide the 'best methods' for its operation, in order to save himself from responsibility for accident resulting from its use. If the machinery be of an ordinary character, and such as can with reasonable care be used without danger to the employe, it is all that can be required from the employer. This is the limit of his responsibility, and the sum total of his duty." *Payne v. Reese*, supra. "A master is not bound to change his machinery in order to apply every new invention or supposed improvement in appliances; and he may even have in use a machine or an appliance for its operation shown to be

less safe than another in general use, without being liable to his servants for the consequences of the use of it. If the servant thinks proper to operate such machine, it is at his own risk, and all that he can require is that he shall not be deceived as to the degree of danger that he incurs." *Wonder v. Railroad Co.*, supra.

The error in giving the foregoing instruction was not obviated by the instruction subsequently given at the instance of the defendant, wherein the law applicable to the case was properly presented. The jury could not determine which of the two propositions was correct. They were bound to accept all the propositions that the court instructed them upon as a correct statement of the law by which they were to be guided; and, if the several instructions are inconsistent or contradictory, it is impossible to tell which was adopted by them in reaching their verdict. *Brown v. McAllister*, 39 Cal. 573; *Childester v. Ditch Co.*, 53 Cal. 56.

2. One McNally was called as a witness by plaintiff, and testified that he had worked for the defendant about two years, mostly as driver and conductor, commencing in July, 1887, and continuing until the latter part of March, 1889; and, having testified with reference to the different kinds of coupling-pin used by the defendant, was asked by the plaintiff the following question: "From your experience in driving those cars and using those pins, would you say that was a safe pin, — the straight pin?" The defendant objected to this interrogatory, upon the ground that no foundation had been laid therefor, and because it was not a proper subject for expert testimony. The objection was overruled, to which the defendant excepted, and the witness thereupon answered: "It is not safe, for the reason that there is nothing to hold it in the draw-head of the car. They are liable to work out or bulge out at most any time, and in that case the chances are that the horse gets away." The defendant's counsel thereupon moved to strike out the answer of the witness to the effect that the chances are that the horse gets away, upon the ground that the matter therein involved is not a proper subject for expert testimony, and that the answer was incompetent, irrelevant, and immaterial. The court overruled the objection, to which the defendant excepted. Section 1870, *Code Civil Proc.*, (subd. 9,) provides that the opinion of a witness may be given "on a question of science, art, or trade, when he is skilled therein." The general rule, however, is that witnesses must testify to facts, and not to opinions, and that, whenever the question to be determined is the result of the common experience of all men of ordinary education, or is to be inferred from particular facts, the inference is to be drawn by the jury, and not by the witness. When the inquiry relates to a subject whose nature is not such as to require any peculiar habits or study in order to qualify one to understand it, or when all the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury, the opinion of the witness is not to be received

in evidence. If the relation between the facts and their probable results can be determined without any special skill or training, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury. If the circumstances out of which the negligence is said to arise have been established by proof, or can be shown, the ultimate fact of negligence is an inference to be drawn therefrom by the jury, and is not to be established by the opinions of others. *Shafter v. Evans*, 53 Cal. 32; *Enright v. Railroad Co.*, 33 Cal. 236; *Ferguson v. Hubbell*, 97 N. Y. 507; *Hart v. Bridge Co.*, 84 N. Y. 56; *City of Chicago v. McGiven*, 78 Ill. 349; *Glass Co. v. Lowell*, 7 Cush. 321; *White v. Bailon*, 8 Allen, 408; *Muldorney v. Railroad Co.*, 36 Iowa, 473. Whether this pin was "safe"—that is, unattended with personal risk to the driver—was an issue in the case for the jury to determine from all the circumstances that might be shown. All the facts upon which the opinion of the witness was founded could be readily laid before the jury, and they could draw the conclusion from these facts as readily and correctly as he. It required no special training or experience to determine whether a straight pin, put through the holes of the draw-head, was adapted to perform the duties for which it was intended. The pin, single-tree, and draw-head were all before the jury, and, as men of ordinary experience, they were capable of determining their sufficiency and safety. It required no peculiar education to determine the effect of the constant tension which the ordinary pulling of the horse would produce upon the pin while it was in the holes of the draw-head. It had been testified that while driving the car it had at times come out by working up under such tension, and it was open to their observation that it might work out, and the jury was capable of determining what would be the effect if it should come out. Whether, if it did come out, it was safe or unsafe, was a conclusion to be drawn by them, and the opinion of the witness was not to be substituted for theirs, nor was their verdict to be based upon his opinion. The fact that the court should allow the witness to give this testimony would of necessity have great weight with the jury, and have a tendency to overcome any doubt they might entertain as to the capacity of the pin, thus prejudicing the defendant by giving to the jury this inadmissible evidence as a ground for their verdict.

8. Against the objections of the defendant the court permitted the plaintiff to offer testimony that shortly after the accident the defendant caused the straight pin to be replaced by the safety-pin upon its several cars. There are some authorities, chiefly in Pennsylvania, which hold that evidence of this kind is admissible as being an admission by the defendant of his negligence in not having previously provided appliances of a suitable character; but the weight of authority is against its admissibility, and the reasons urged in its favor do not commend themselves to our judgment. The employer is chargeable with negligence in this regard only upon

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proof that he knew or had notice that the appliance which he had furnished was unsafe or unsuitable to its purpose, and it might be that the very accident which gave occasion for the suit first brought to his notice the defect or insecurity of the appliance. If, however, it be held that the fact of his immediately seeking to obviate this defect, or remove this insecurity, by a change in the character of the appliance, is evidence that the accident resulted from his negligence, we would have the contradiction of imputing to him a knowledge of such defect prior to the occurring of the accident, which he did not acquire until after the accident had occurred. The negligence of the employer, which renders him responsible for the accident, depends upon what he did and knew before the accident, and must be established by facts and circumstances which preceded it, and not by acts done by him after its occurrence. The knowledge on his part from which negligence is to be inferred must be established by evidence, independent of any subsequent act in changing the appliance; and any defect in such evidence cannot be supplemented by such act. It would be unjust to hold that, because the employer seeks by all the aid he gets from the light of experience to make his implement free from danger, he is therefore to be charged with negligence in the use of all prior appliances, even though they were adopted with the best light then under his control. We have seen that the employer is not chargeable with negligence merely because he does not adopt every new invention immediately upon its production, but the rule contended for by the appellant would make such adoption an admission that he was negligent prior thereto, although the improvement may have been for the first time thus brought to his knowledge, and its adoption may have had no connection with the accident. Such a rule puts an unfair interpretation on human conduct, and virtually holds out an inducement for continued negligence. It would be a harsh rule to hold that in all cases of accident resulting from defective appliances the employer is to be held accountable for a negligence which is established solely by his efforts to avoid its recurrence; that precautions taken subsequent to an accident are admissions that he was previously negligent. He may have exercised all the care which the law requires, and yet, in the light of a new experience, after an unexpected accident has occurred, he may adopt additional safeguards. To hold that the adoption of such new appliances, which experience has demonstrated are more efficient than those previously in use, or which invention has developed from observing the defects in those originally adopted, shall be an admission that he was negligent prior thereto, would prevent the very conduct in employers which they should be urged to follow. *Nalley v. Carpet Co.*, 51 Conn. 524; *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. Rep. 358; *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. Rep. 309. This subject and the authorities bearing thereon are very fully discussed in *Nalley v. Carpet Co.*, supra, in which the court uses the following

language: "The fact that an accident has happened, and some person has been injured, immediately puts a party on a higher plane of diligence and duty, from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend, rather than to condemn, the person so acting. If the subsequent act is made to reflect back upon the prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence, which has no business there, not being in existence at the time." For these errors the judgment of the court below and the order denying a new trial are reversed.

We concur: GAROUTTE, J.; PATERSON, J.

91 Cal. 136

HINCKLEY *et al.* v. FIELD'S BISCUIT & CRACKER CO. *et al.* (No. 13,230.)

(Supreme Court of California. Sept. 10, 1891.)

MECHANICS' LIENS—"OWNERS" OF PROPERTY—WHO ARE CONTRACTORS.

1. Code Civil Proc. Cal. § 1183, relative to mechanics' liens, provides that, if the amount of a written contract between the "owner" and his "contractor" exceeds \$1,000, the contract must be filed with the county recorder; otherwise it shall be wholly void. *Held*, that a trustee who holds the legal title to land under a contract whereby he is to build a factory on the land, and then convey the whole property to the *cestui que trust*, is the "owner," within section 1183, though he has already received the consideration of the contract.

2. A person who agrees to set up a steam plant in a factory under a written contract is not a "contractor" within section 1183, where the only work to be done on the premises is incidental to the delivery of the machinery and placing it in position.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by one Hinckley and another against Field's Biscuit & Cracker Company and another to enforce a mechanic's lien. Demurrer to the complaint sustained. Plaintiff appeals. Reversed.

Wm. H. H. Hart, (Aylett R. Cotton, of counsel,) for appellants. *Pillsbury & Blanding*, *R. Percy Wright*, and *Willard T. Barton*, for respondents.

DE HAVEN, J. In the court below a demurrer to the complaint was sustained, and judgment thereupon entered in favor of the defendants. The plaintiffs appeal.

The question to be considered here is whether the ruling of the court in sustaining the demurrer was correct. The demurrer was upon the general ground that the complaint did not state facts sufficient to constitute a cause of action, and also for ambiguity. The allegations of the complaint, so far as necessary to be stated, are: That on February 28, 1887, the defendant Field was the owner of record of the land upon which stands the building against which it is sought to enforce the lien, but that he held the same in trust for the Field's Biscuit & Cracker Company, a defendant herein; that upon that day said Field entered into a contract with

said company, whereby, in consideration of the issuance to him of 800 shares of its capital stock, he agreed to complete and deliver to the company, equipped and furnished with the latest improvements, a factory, to be under his direction, constructed on said land, and, as soon as completed, the same, with its appurtenances, to be conveyed to it; that immediately after the execution of this contract the company issued and delivered to Field 800 shares of its capital stock in full payment for said land and for the building and machinery to be constructed thereon by him, and on November 5, 1887, the said Field conveyed to the company the land and improvements thereon. The complaint further avers that upon April 11, 1887, the said Field, "as such contractor of and for the said defendant Field's Biscuit and Cracker Company, employed plaintiffs herein to build, manufacture, and construct at their own works, and deliver and put in place upon foundations prepared by said Arthur Field in said structure, building, and factory," a steam plant, consisting of boilers, engine, heater, feed-pipes, etc., for the agreed price of \$5,600, and that said contract was duly performed by plaintiffs. It is not alleged that this contract was recorded, but it is averred that the agreement between Field and the Field's Biscuit & Cracker Company was never recorded. Plaintiff's claim of lien was filed for record within the time given by law. The respondents insist that Field was the owner of the property upon which a lien is claimed at the time he contracted with plaintiffs to furnish for said factory the steam plant referred to in the complaint; and, as the price agreed upon to be paid therefor exceeded \$1,000, and the contract was not recorded, that the contract was wholly void, under section 1183 of the Code of Civil Procedure, and no recovery can be had by plaintiffs thereunder.

1. Section 1183 of the Code of Civil Procedure provides that "mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists," etc., shall have a lien upon the property upon which they have bestowed labor or furnished materials; and, "in case of a contract for the work between the reputed owner and his contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons except the contractor to the extent of the whole contract price; and, after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor." The section then provides that all such contracts (that is, those between the owner and his contractor) shall be in writing when the amount agreed to be paid thereunder exceeds \$1,000, and before work is commenced thereunder must be filed in the office of the recorder of the proper county; "otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto." The position assumed by respondents in support of their demurrer rests upon these two propositions: (1) That Field was the owner of the building he was constructing; and (2) that plaintiffs

were contractors within the meaning of section 1183 of the Code of Civil Procedure, —and the failure to sustain either is fatal to the judgment appealed from. We agree with respondents upon the first point, that Field was the owner, and not a contractor, as that word is used in the section of the Code just referred to. His relation to the Field's Biscuit & Cracker Company was that of vendor, and the factory was constructed for himself, that he might convey it, and the land upon which it stood, in accordance with his agreement to do so. It is very true that the Field's Biscuit & Cracker Company was the equitable owner, having paid the agreed price therefor, but, as the building was erected by its consent, and under agreement that its vendor should retain the legal title until its completion, he was, for all practical purposes pertaining to its construction, the owner within the meaning of the law relating to mechanics' liens, and the equitable estate was equally bound with the legal title to satisfy the liens of mechanics or material-men, growing out of contracts made with him in the construction of the building.

2. But, assuming this to be so, the question still remains, were the plaintiffs contractors, as that word is used in section 1183 of the Code of Civil Procedure, where it speaks of a "contract for the work between the owner and his contractor?" If so, their contract, not having been recorded, was wholly void, and the demurrer was properly sustained. We are of the opinion that upon the facts alleged plaintiffs were not such contractors, but were material-men. Although one may furnish materials to be used in the construction of a building under an express contract, he does not become a contractor, as that term is used in the law relating to mechanics' liens. That law recognizes a clear distinction between contractors, subcontractors, material-men, and mechanics, and these different words to designate distinct classes of persons. All are referred to as being entitled to liens, and the priority of their several liens is declared; and it is quite clear to us that the word "contractor," in sections 1183 and 1184 of the Code of Civil Procedure, does not refer to a material-man. The section, in requiring the contract "between the owner and his contractor" to be in writing, and recorded, has for its object the giving of notice of the terms of the contract to those who may be employed by or furnish materials to the contractor in the course of its performance, so as to enable them to judge whether the contract price to which they have a right to look for their security is sufficient for that purpose. But the reason for giving this notice does not apply to the case of one who contracts only to furnish materials, as his employees have no lien upon the price which he is to receive therefor, and for that reason the statute does not require that contracts under which materials are furnished shall be in writing and recorded. And this view of the law is sustained by the reasoning of Mr. Justice SHARPSTEIN, in the case of *Sparks v. Mining Co.*, 55 Cal. 392, in defining the words "original contractor," as

found in section 1187 of the Code of Civil Procedure. In this case there can be no doubt that the plaintiffs were simply material-men. Under their contract they were to manufacture at their own shop the boiler, engine, heater, feed-pipes, and necessary attachments, and deliver them finished and complete, and properly set them in the building; but the work done by them on the premises of defendants in placing them in position was only the completion of their contract to deliver such finished machinery, and did not convert them into contractors for the erection of the factory, or any part of it, within the true intent of the statute. The contract was essentially one to furnish materials for the factory, and not a building contract.

3. What has been said disposes of the second ground of demurrer, to the effect that the contract was void because not complying with section 1184 of the Code of Civil Procedure, as that section only refers to the contract of the contractor.

4. We do not think the complaint is ambiguous in the respects pointed out by the demurrer. We are satisfied that the complaint states a cause of action, and if the defendants have any defense to the action it is not disclosed by the complaint. In reaching this conclusion we have not overlooked the fact that the plaintiffs allege in general terms that Field was a contractor, and as such contracted with plaintiffs. But the complaint avers specifically all the facts in regard to the ownership of the property, and the relation to it of defendants Field and the Field's Biscuit & Cracker Company, and the allegation that Field was contractor may be disregarded. Judgment reversed, with directions to overrule the demurrers interposed by defendants.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

91 Cal. 98

PEOPLE v. AH JAKE. (No. 20,738.)

(Supreme Court of California. Sept. 8, 1891.)

HOMICIDE — INSTRUCTIONS — BURDEN OF PROOF — CONFLICTING EVIDENCE.

1. In a prosecution for murder the court instructed that the burden of proof was on the defendant to show the absence of malice, unless the prosecution "shows that the crime only amounted to manslaughter, or that defendant was justifiable or excusable." *Held*, that while, standing alone, the instruction ignored the question of mitigating circumstances which may have been proved, yet, as the charge as a whole stated the law correctly, and that the evidence of the prosecution "tends to show" manslaughter, it was not erroneous.

2. The court instructed that "when the people rely upon circumstantial evidence to convict the defendant, every link in the chain of circumstances, necessary to a conviction, must be established by the people to a moral certainty, and beyond all reasonable doubt." *Held* that, where the instruction covered the subject-matter of a special instruction asked for, relating to the particular facts in the case, it was not error to refuse to give the special instruction.

3. Where the evidence upon which defendant was convicted is unsatisfactory, but was substantially conflicting, the verdict will not be disturbed on the ground that the evidence was insufficient to support it.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; EDWIN SHEARER, Judge.

Prosecution against Ah Jake for murder. Verdict of guilty of murder in the second degree, and judgment thereon. Defendant moved for a new trial, which being denied, he appeals from the judgment and the order denying the motion. Affirmed.

Gillis & Tapsgott, for appellant. *I. A. Reynolds and Atty. Gen. Hart*, for the People.

FITZGERALD, C. The defendant, who was accused by information of the crime of murder, was convicted of murder in the second degree, and sentenced to imprisonment in the state prison for the term of 13 years. This appeal is taken from the judgment and the order denying his motion for a new trial.

The errors complained of relate to the rulings of the court upon the admission and rejection of testimony against the objections and exceptions of the defendant, and upon the giving of the second instruction for the people and the refusal of the fourth instruction asked for by the defendant.

The first of these instructions is claimed to be erroneous on the ground "that it does not state the law correctly," and the objection is especially urged against that part of it which reads as follows: "The burden of proof will be thrown on the defendant to show the absence or want of malice unless the proof on the part of the prosecution shows that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." While it is true that this isolated instruction ignores the circumstances of mitigation which may have been proved on the part of the prosecution, tending to show "that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable," yet the charge of the court must be considered as a whole, and when so considered, will be found, as we think, to state the law correctly, and to be clearly applicable to the facts of the case. The words "tends to show" were twice used in this same connection by the court in other portions of its charge to the jury.

The fourth instruction asked by the defendant, and refused by the court, is as follows: "Where circumstantial evidence is depended on by the people to convict a defendant, it is necessary for them to establish every link in the chain of circumstances, beyond all reasonable doubt, and to the entire satisfaction of the jury. Therefore, if the jury believe from the testimony that one of the necessary links in the necessary chain of circumstances in this case was that the deceased was killed without any club in his hand, then, before you can convict the defendant, you must be entirely satisfied that the deceased at the time he was killed had no club in his hand; and if you should find that he did have a club in his hand at the time he was killed then you will acquit the defendant, or if you should be in reasonable doubt as to whether or not he had a club in his hand

at the time he was killed, then you will give the defendant the benefit of the doubt and acquit him. Or if you should find that one of the necessary links in the chain of circumstances necessary to convict in this case was that the defendant was seen running away from the deceased at the time of the killing, then you will have to be satisfied beyond all reasonable doubt that the witness Sing was the party who was in the house at the time of the killing, and who ran to the door immediately after the killing, and that he is the party who ran down to the claim and gave the alarm, and that he was not in the claim at the time of the shooting; or if you have any doubts as to his being the said party,—then you should give the defendant the benefit of the doubt and acquit him." This instruction was properly refused, as the subject-matter thereof was given to the jury in instruction No. 9, to-wit: "When the people rely upon circumstantial evidence to convict the defendant, every link in the chain of circumstances, necessary to a conviction, must be established by the people to a moral certainty, and beyond all reasonable doubt." It was for the jury to decide whether or not any special piece of evidence or circumstance was a necessary link in the chain, and, if decided that such evidence or circumstance was a necessary link, then the instruction just quoted plainly told them that to their minds as jurors such link must be established to a moral certainty and beyond all reasonable doubt. The exceptions taken by appellant to the rulings of the court upon the admission and rejection of evidence, and assigned as error, are very numerous; but, as they are either harmless or untenable, we do not deem it necessary to notice them. We are constrained to say, however, that the evidence upon which the defendant was convicted of the crime of murder in the second degree is not to our entire satisfaction, but, as it is on the whole substantially conflicting, the verdict, under the well-established rule of the court, will not be disturbed on the ground of the insufficiency of the evidence to support it. We therefore recommend that the judgment and order be affirmed.

We concur: **BELCHER, C.; VANCILIEF, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(91 Cal. 153)

GRANT V. OLIVER. (No. 13,104.)¹

(*Supreme Court of California.* Sept. 12, 1891.)

LOST DEED—PRELIMINARY PROOF—ACKNOWLEDGMENT—MEXICAN GRANT—RECITAL IN PATENT.

1. The record of a deed could not properly be received in an action tried in 1888 without the preliminary proof then required by Code Civil Proc. Cal. § 1951, which provided that a certified copy of the record of an instrument affecting real estate, duly acknowledged, may be read in evidence with like effect as the original, on proof by affidavit or otherwise that the original is not in the possession or under the control of the party producing the certified copy; the preliminary proof having been dispensed with by an amendment of section 1951 in 1889.

¹ Motion to modify judgment denied, 97 Pac. Rep. 861.

2. Where the execution of a deed is proved, and there is no question of actual or constructive notice involved, it is immaterial that the certificate of acknowledgment was not made by the notary until two years after the acknowledgment was taken, since the deed would be valid as between the parties without such certificate.

3. The fact that the lands on which a homestead claim was filed were within the exterior limits of a private Mexican grant will not invalidate the claim where it appears that the grant was a float, which was finally so located within such limits as to exclude the land claimed.

4. Where the land department has jurisdiction of the parties and subject-matter, its determination of their rights is final.

5. An offer by defendant to show that the land in controversy was within the exterior boundaries of a Mexican grant when the declaratory statement of plaintiff's grantor was presented, and not, therefore, subject to homestead entry, was properly excluded as too indefinite.

6. A recital in a patent that plaintiff's claim to the land in controversy was established "pursuant to the act of congress of May 20, 1862, to secure homesteads to actual settlers on the public domain, and the acts supplemental thereto," does not impose on him the burden of showing that the homestead was not acquired under laws requiring actual settlement and residence by the claimant.

Department 2. Appeal from superior court, Alameda county; NOBLE HAMILTON, Judge.

Action by Grant against Oliver to recover possession of real estate. Judgment for plaintiff, and defendant appeals. Reversed.

E. W. Ashby, (Thompson & Thompson, of counsel,) for appellant. Moore & Reed, for respondent.

PATERSON, J. This is an action to recover the possession of 80 acres of land situated in the county of Alameda. The answer denies all the allegations of the complaint. Defendant filed a cross-complaint, setting forth that he settled on the lands in controversy with his family, claiming the same under the pre-emption laws of the United States, prior to July 8, 1878, and continuously since that date has resided and made valuable improvements thereon. The defendant then proceeds to show that Thomas' application for a homestead was filed at a time when the lands in controversy were not subject to sale under the land laws of the United States because they were within the exterior boundaries of a Mexican grant; but, notwithstanding this fact, the claim of Thomas, plaintiff's grantor, was approved by the officers of the land department, in violation of law. It is alleged that the name of Thomas was fraudulently used for the benefit of one Benson, and that the commissioner of the general land-office and the secretary of the interior, in violation of the legal and equitable claims of the defendant, neglected to read, examine, or weigh the evidence taken before them on appeal from the decision of the register and receiver, awarding the land to Thomas, and without an examination of the record signed and filed written opinions adverse to the claim of defendant, which had been compiled and fabricated by clerks and subordinates. It is further alleged that Thomas never executed any power of attorney to Dey, who

as attorney in fact executed and delivered to the plaintiff the deed upon which he relies. The prayer is that plaintiff take nothing by this action; that the patent from the United States to Thomas be declared void, and that, upon defendant making payment to the receiver of \$200, the purchase price of the land in controversy, the president of the United States be required to issue and deliver to him a patent for the land.

There is no merit in the cross-complaint, and the plaintiff's demurrer to the same was properly sustained. There is nothing in the cross-complaint which takes the case out of the general rule that the action of the land department, acting within the scope of its authority, is binding. The land in controversy was within the jurisdiction of the land-officers; the merits of the defendant's claim were presented to the commissioner of the general land-office on appeal from the decision of the register and receiver awarding the lands to Thomas, and to the secretary of the interior on appeal from the decision of the commissioner, and both of those officers decided adversely to the claim. On July 8, 1878, the official plat of the township was filed in the land-office of the district in which the lands were situated; and on that day the application of Thomas for an additional homestead was filed with the register and receiver. Defendant's pre-emption claim was filed July 12, 1878. It is alleged that the lands were not subject to sale under the laws of the United States when Thomas' application was filed, because they were "within the granted and confirmed exterior boundaries of the well-known private Mexican grant, Laguna de los Palos Colorados;" but subsequent allegations show that on appeal to the circuit court from the decree of confirmation entered in the district court the grant was held to be a float of three square leagues, and no more, and that it did not attach to any specific land until it was located by the surveyor within the exterior boundaries of the larger tract described, and the survey was finally approved by the officers of the land department. The decree of the circuit court was entered December 4, 1874, and the field-notes and plat of the survey were approved by the commissioner of the general land-office in April, 1878, and by the secretary of the interior on August 10, 1878. The land in controversy was excluded from the survey. The grant being a float, only the quantity actually granted was reserved during the examination as to the validity of the grant, "the remainder was at the disposal of the government as part of the public domain." *U. S. v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. Rep. 1177.

The allegations of the cross-complaint with respect to the conduct of the officers of the land department are so absurd that we do not deem it necessary to notice them. If they were true, and could be proved, the defendant would not be entitled to the relief he claims in this action.

It is claimed that defendant's continuous possession of the land from a date prior to the filing of the homestead claim on behalf of Thomas prevented the ini-

tiation or acquisition of any homestead claim. These are matters, however, which the land department heard, considered, and determined. That department of the government had jurisdiction of the subject-matter and of the persons, and its adjudication is final. It is not a case of an entire want of power, like the cases cited by appellant.

The patent from the United States to Thomas recites that the claim of Thomas to the land was established "pursuant to the act of congress approved the 20th of May, 1862, 'to secure homesteads to actual settlers on the public domain,' and the acts supplemental thereto." If the homestead was acquired under section 2306, Rev. St. U. S., as the defendant states in his cross-complaint, the court did not err in overruling the objection to the power of attorney, and the title of Thomas passed by the deed from his attorney in fact to plaintiff. *Rose v. Lumber Co.*, 73 Cal. 385, 15 Pac. Rep. 19. While we cannot consider the matters alleged in the cross-complaint in determining whether the court erred, we may safely assume, as the case must be reversed on another point, that defendant has stated the facts correctly. Furthermore, "pursuant to the act of congress approved May 20, 1862, * * * and the acts supplemental thereto," is a general recital, which doubtless was intended to cover all the acts of congress relating to homesteads. Certainly the recital did not throw upon the plaintiff the burden of showing that the homestead was not initiated and acquired under the laws requiring actual settlement and residence by the claimant.

The offer of the defendant to prove "that this property was within the exterior boundaries of a Mexican grant at the time of the presentation of a declaratory statement by Thomas," was properly rejected. Assuming that a patent can be attacked under the general issue of ownership in actions of this kind, the offer was too uncertain and indefinite to entitle it to consideration. If the Mexican grant was a float, as defendant has shown it to be in the cross-complaint, which was put out of the pleadings on demurrer, the fact he offered to show could have no effect. Standing alone it was immaterial.

Plaintiff, at the trial, offered in evidence the record of the deed from Thomas and wife, by Dey, their attorney in fact, to plaintiff. The county recorder was called as a witness, and identified the book as a record of his office. Defendant objected to the admission of the evidence on the ground that the original deed had not been accounted for, and on the further ground that the certificate of acknowledgment showed that the deed was acknowledged on August 24, 1885, and the certificate of the notary was not made until October 11, 1887. We do not think that the second ground of the objection stated was well taken. If the original deed had been offered in evidence, and its execution had been proved, as it was proved by the testimony of the notary and Dey, it would have been immaterial if there had been no certificate of acknowl-

edgment whatever; the deed would be valid as between Thomas and the plaintiff, and there is no question of notice, actual or constructive, involved in the transaction. We think, however, that the court erred in admitting the record in evidence without proof of the loss of the original, or the inability of the plaintiff to produce it. In 1889 the legislature amended section 1951, Code Civil Proc., so as to permit proof of a private writing, acknowledged or proved by the introduction of the original record of such writing, "without further proof;" but at the time this action was tried—April 18, 1888—such a record was admissible in evidence only "on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy." Sections 1919, 1920, Code Civil Proc., cited by respondent, are not in point. They relate to proof of public writings. Where a private writing is required for any purpose to be recorded, proof of the public recordation may be made by the introduction in evidence of the record itself, or by a certified copy thereof, under section 1919, supra; but proof of the writing itself, where there is a question as to its existence or validity, must be made in the manner required by section 1951. Sections 1919 and 1920 have been in the Code from the time of its adoption. Section 1951 was added as a new section in 1874. Before the adoption of the new section—1951—in 1874, it was held that section 1919 applied to cases of this kind. *Vance v. Kohlberg*, 50 Cal. 348. As section 1951 applies specifically to "every instrument conveying or affecting real property, acknowledged or proved and certified," it is apparent that it was intended to change the rule laid down in the case cited. Judgment and order reversed, and cause remanded for a new trial.

We concur: MCFARLAND, J.; DE HAVEN, J.

91 Cal. 191

DYER v. LEACH et al. (No. 18,844.)

(Supreme Court of California. Sept. 14, 1891.)

TRUSTEE—NOTICE OF APPOINTMENT—RULINGS ON EVIDENCE.

1. Civil Code Cal. § 2287, provides that the "superior court may appoint a trustee whenever there is a vacancy and the declaration of trust does not provide a practical method of appointment." *Held*, that notice of an appointment by the court to fill a vacancy occasioned by the death of a trustee in a deed of trust was within the discretion of the court, and failure to give such notice to the trustor did not invalidate a sale by the trustee so appointed.

2. Whether the trial court erred in excluding the pleadings in another action will not be considered on appeal, where the nature of the action and the parties to it are not shown.

Department 2. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Action of ejectment by O. T. Dyer against George Leach and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Paris & Fox and W. J. McIntyre, for ap-

pellants. *H. C. Hibbard and Curtis & Otis*, for respondent.

MCFARLAND, J. Action of ejectment to recover a certain tract of land. Judgment went for plaintiff, and defendants appeal.

George Leach, being the owner of the land in question, executed a deed of trust of the same to E. Conway, trustee. The object of the trust was to secure a promissory note for \$3,358, made by Leach to the Riverside Banking Company, as well as certain other moneys. It was provided in the deed that, if the money should not be paid when due, the trustee should sell the land, after notice, and in the manner provided therein, and execute a deed to the purchaser. It also provides that there shall be a trustee as successor of said Conway, in case of the death, resignation, or removal of the latter; but it does not provide for the manner in which such successor shall be appointed. Afterwards said Conway died; and, the money secured by the trust being due and unpaid, said banking company made written application to the superior court for the appointment of a trustee, and the court appointed as such trustee H. C. Hibbard. Hibbard proceeded under the trust and sold and conveyed the land to one Rosenthal, who conveyed to plaintiff Dyer. The defendants, other than Leach, are persons who claim parts of the land under him.

It is not contended by appellants that Hibbard did not sell the land in accordance with the deed of trust, or that he in any way violated it. It is contended, however, that all proceedings by him, and his sale of the land, were invalid, because his appointment was made by the superior court without notice to the trustor, Leach, or his grantees. It does not appear that any injustice has been done, and the point seems to be entirely technical. As the attack made here upon the order of the court appointing Hibbard trustee is collateral, it cannot be successful unless such order is absolutely void. But we do not think it void. The current of authorities is to the point that in such a case it is discretionary with the court what, if any, notice shall be given. Our Code requires no notice. Section 2287 of the Civil Code provides that "the superior court may appoint a trustee whenever there is a vacancy, and the declaration of trust does not provide a practical method of appointment." Section 2251 provides that "the mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission." Section 2252 provides that "when a trustee is appointed by a court * * * such court * * * is the trustor within the meaning of the last section." These are the only provisions applicable to the question to which our attention has been called. The theory of the law is that upon the death of the trustee the trust vests in the court, and, in the absence of a statutory provision, notice is not necessary to confer jurisdiction. In *Milbank v. Crane*, 25 How. Pr. 193, it is said that the jurisdiction in such a case is "a quasi jurisdiction *in rem*, a power over the trust, and is not acquired by the serv-

ice of process upon the *cestui que trust* or other person interested in the trust fund or its preservation. It is undoubtedly proper and usual in most cases to call those more immediately interested before the court, that they may be heard in the appointment of a new trustee; but this is in the discretion of the court. * * * This being so, the appointment of the new trustee is valid, even though it should be thought to be irregular, or even improvident or indiscreet, to make the appointment without formal notice to and summons to those interested." To the same point are the cases of *Hawley v. Ross*, 7 Paige, Ch. 103, and *In re Robinson*, 37 N. Y. 261. We have considered the point upon the theory that no notice was given of Hibbard's appointment, but it is doubtful if the record shows such want of notice.

Appellants contend that the court erred in sustaining an objection to their offer to introduce the pleadings in a certain action entitled "*Riverside Banking Company vs. George Leach et als.*;" the objection made being that it was not between the same parties and was irrelevant and incompetent; that there was no *lis pendens*, etc. As to this point it is sufficient to say that there is nothing in the record to show the character of that action, what it was about, or who the parties were. There are no other points necessary to be noticed. The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

91 Cal. 15

CARTY v. CONNOLLY. (No. 14,340.)

(Supreme Court of California. Sept. 3, 1891.)

SETTING ASIDE DEED — CONSTRUCTIVE FRAUD — CAPACITY OF GRANTOR — CONSIDERATION.

1. In an action to set aside a deed for inadequacy of consideration it may be shown in defense that the consideration was different in kind from that recited therein.

2. A few days before her death, the grantor, in consideration of natural affection, executed a deed to her brother to all of a tract of land in which he owned an equitable half interest, the title being in her name, in order that he might then and there acquire an indefeasible title thereto. There was no expressed reservation in the deed or otherwise of any right in the property conditioned on the grantor's recovery or otherwise, nor any restriction as to its operation. *Held*, that it was not a gift *causa mortis*.

3. Where the grantor, at the time of executing a deed to her brother, was in full possession of her faculties, understood what she was doing, made the deed voluntarily and without persuasion or coercion, and because of her uninfluenced desire to do so, the deed will not be deemed constructively fraudulent as to other brothers and sisters because the grantor was in a weak physical condition, and the deed transferred all of her property to the brother then living with her, to the injury of the others, who resided at a distance.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Action by Ellen Carty against Patrick Connolly to set aside a deed executed by Mary Connolly to defendant. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. Foote and Henley, Swift & Rigby,

(James D. Thorton, of counsel,) for appellant. S. M. White, for respondent.

GAROUTTE, J. This is an equitable action by the plaintiff, a sister of the defendant, asking that a certain deed to the premises described in the complaint be set aside upon the ground that at the time it was executed by Mary Connolly, another sister of defendant, she was acting under undue influence, and was also of such feeble mind as to be unable to understand the nature of the transaction. Upon August 26, 1887, Mary Connolly sustained serious injuries from an accidental burning, from which injuries her death resulted upon the 18th day of the following month. The deceased and her brother Patrick, the defendant, had resided upon the land in dispute for many years, and it had been acquired by their mutual efforts. The legal title to the entire property was vested in Mary, though Patrick had paid for one-half of it, and was the equitable owner thereof. At the time of the transfer to Patrick, which was the 7th day of September, a mortgage rested upon the property in the sum of \$14,000, which by the terms of the deed the respondent assumed to pay. The value of the realty was \$56,000, and there was no pecuniary consideration for the transfer other than the assumption of the payment of the aforesaid mortgage. The deceased died intestate, and the plaintiff is one of the heirs at law. Findings of fact were entered in favor of the defendant, and plaintiff has appealed from the judgment and order denying her motion for a new trial.

The grounds upon which she relies to set aside this conveyance are (1) constructive fraud; (2) undue influence. Constructive fraud is defined by section 1573 of the Civil Code to consist "(1) in any breach of duty which, without an actual fraudulent intent, gives an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, (2) in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." The foregoing definition is in substantial accord with the views of standard authors upon the question. Appellant insists that constructive fraud is apparent in this transaction from the gross inadequacy of the consideration. The pecuniary consideration recited in the deed is five dollars, and, if we understand appellant's position, it is that, where a deed is attacked upon the ground of inadequacy of consideration, the party in defense of the deed will not be allowed to show the true consideration to be love and affection; or in other words a consideration different *in specie* cannot be proved. There is no merit in appellant's position upon this point, and the case of *Coles v. Soulsby*, 21 Cal. 81, cited in her brief, is conclusive against her. In that case, referring to this identical question, the court says: "It is not a valid objection to the admissibility of the evidence that it showed a consideration different from that expressed in the deed. The consideration clause of a deed is not conclusive. It estops the grantor from al-

leging that he executed the deed without consideration. It cannot be contradicted, so as to defeat the operation of the conveyance according to the purposes therein designated, unless it be on the ground of fraud; but with this exception it is open to explanation, and may be varied by parol proof. A limitation, it is true, is placed by some adjudicated cases upon the character of the proof admitted; that it must be restricted to establishing a consideration of the same species with that expressed, (citing cases.) The limitation, however, does not appear to rest upon any sound principle." In addition, it might be added, the defendant, grantee in the deed, assumed the payment of a \$14,000 mortgage, and a promise to pay the debt due from the grantor to a third party is a valuable consideration. *Gladwin v. Garrison*, 13 Cal. 332; *Saunderson v. Broadwell*, 82 Cal. 133, 23 Pac. Rep. 36. The trial court found that the consideration for the deed to defendant was love and affection, and the assumption of the aforesaid mortgage. There is nothing, either in the facts or the law, to undermine the force and effect of such finding.

Appellant insists that the deed is of a testamentary character, and is inoperative unless proved as a will; in other words, the transaction was in the nature of a *donatio causa mortis*,—and insists that the following allegation of respondent's answer is an admission to that effect: "That on the 7th day of September, 1887, said deceased, believing that an injury from which she was then suffering would terminate fatally, and for the purpose of fully conveying to this defendant all of the interest in said property which was his as a matter of right, and for the purpose of further vesting in him all her interest in said property, did, in consideration of the premises, and in view of the circumstances surrounding said deceased and this defendant, make, execute, and deliver to defendant a grant," etc. We have serious doubts whether the complaint is broad enough to justify such proof. The theory of the complaint is that the deceased had not sufficient mental capacity to make the deed, and was acting under undue influence at the time, and no intimation can be found in any allegation thereof that the delivery of the deed was incomplete, or that the transfer was in the nature of a gift *causa mortis*, or that the instrument was intended as a will: but, aside from that, this allegation of the answer does not justify the effect insisted upon by appellant, and certainly is not sufficient to raise the implication that, in case of a recovery from such illness, the deed was to be void, or, in case of death, the instrument was to be deemed and treated as a last will and testament. The authorities are not in line with such conclusion, and we might advance our position to the point of saying that we know of no reason, either in equity or law, why a person of perfect mental capacity, acting freely and voluntarily, who is sick with mortal illness, is not entirely competent to make a voluntary conveyance of his property as fully and completely as when experiencing the enjoyments of perfect health, even though such conveyance

should seem to the world unreasonable, unjust, and unnatural. It is not a question of physical condition, of pain or absence of pain, of long life or short life, but it is a question of mental capacity, and the free and untrammelled action of the mind. Those are the ultimate facts; and the belief existing in the grantor's mind that he is suffering from a mortal illness is but an incident throwing whatever light it may possess upon the true solution of the ultimate facts, and the power and brightness of that light will fluctuate with the varied circumstances and surroundings of each particular case. The findings of the court are full and complete, and upon this branch of the case, under present investigation, the court found "she [meaning the grantor] executed said deed to said defendant in consideration of the love and affection she bore him, and because it was her will and wish that he should own in fee-simple the whole of the property therein described, and that he should then and there acquire an indefeasible title thereto;" and again, the court found "there was no expressed reservation, either in said deed or by words used at the time of delivery, or prior or subsequent to the execution thereof, of any right in or to the property conveyed conditioned upon the grantor's recovery or otherwise." Nor was there any restriction of any character with reference to the operation of said deed, but the same was, upon being executed, duly delivered to defendant, and accepted by him, and the title to all the property therein described did thereupon vest in said defendant." The foregoing findings are fully supported by the evidence and completely dispose of this question, although, if authority were necessary, the case of *Mowry v. Heney*, 86 Cal. 471, 25 Pac. Rep. 17, and the authorities therein cited, conclude the subject.

If we clearly understand appellant's third position, it is that constructive fraud should be inferred in this case from the fact of the physical weakness of the deceased at and prior to the date of the deed; that she transferred all her property to the one brother who was living with her at the time, to the injury of brothers and sisters who were residing in distant places; indeed, that constructive fraud should be inferred from the conditions and relations of the immediate parties to the transaction. The law upon this subject of constructive fraud, so far as it bears upon the questions involved in this case, is clearly and conclusively stated in 2 Pom. Eq. Jur. § 928: "The fact that a conveyance or other transaction was made without professional advice or consultation with friends, and was improvident, even coupled with an inadequacy of price, is not of itself a sufficient ground for relief, provided the parties were both able to judge and act independently, and did act upon equal terms, and fully understood the nature of the transaction, and there was no undue influence or circumstance of oppression. When the accompanying incidents are inequitable, and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the bene-

fit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative. It would not be correct to say that such facts constitute an absolute and necessary ground for equitable interposition. They operate to throw the heavy burden of proof upon the party seeking to enforce the transaction or claiming the benefits of it, to show that the other acted voluntarily, knowingly, intentionally, and deliberately, with full knowledge of the nature and effects of his acts, and that his consent was not obtained by any oppression, undue influence, or undue advantage taken of his condition, situation, or necessities. If the party upon whom the burden rested should succeed in thus showing the perfect good faith in the transaction, it would be sustained; if he should fail, equity would grant such relief, affirmative or defensive, as might be appropriate." In this case the court found, among other things: "The deceased, at the time of the execution of the deed last named, was in full possession of her mental faculties, and thoroughly understood what she was doing; made said deed voluntarily, and without any solicitation, coercion, influence, or persuasion; nor was said deceased, at the time of the making of said deed, or ever, under the control or dominion of this defendant or of any one, nor under any duress or fear occasioned by or through him, or otherwise, but she was at such time perfectly free, and knew she was perfectly free, to do what she wanted, and she did make said deed acting for herself, and because it was her uninfluenced desire so to do." There were other findings of a similar import, and they were all supported by the evidence, which largely preponderated in their favor. Under the law as laid down by *Pomeroy*, supra, when taken in connection with the findings of the court, which are warranted by the evidence, we conclude that the element of constructive fraud is no longer in the case, and as to actual fraud in the matter of undue influence the record fails to disclose it either in the evidence or findings. We have examined the errors of law relied upon by appellant as having occurred during the progress of the trial, and find them not well taken. Let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

91 Cal. 119

IRWIN v. McDOWELL. (No. 14,303.)

(*Supreme Court of California*. Sept. 10, 1891.)
ATTACHING MORTGAGED PROPERTY—LIABILITY OF
SHERIFF—DAMAGES.

1. Under Civil Code Cal. §§ 2908, 2909, which provide that an officer cannot attach mortgaged personal property at the suit of a creditor of the mortgagor without first tendering to the mortgagee, or depositing for him, with the county clerk or treasurer, the amount due on the mortgage, a sheriff, who, at the suit of the mortgagor's creditor, attaches a mortgaged crop of grain, and places a keeper in charge thereof, makes himself liable as for a conversion, although he does not remove the same, and releases the attachment two

days after an action commenced against him by the mortgagee.

2. The measure of damages in an action by the mortgagee against the sheriff is the value of the property at the time it was taken and compensation for time and money expended in recovering it under Civil Code Cal. §§ 3336, 3338.

3. Where the findings of the court do not disclose whether or not the mortgagee had the benefit of the property after it was released from the attachment a judgment in his favor for one cent damages will be set aside.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. PIERCK, Judge.

Action by I. I. Irwin against S. A. McDowell, a sheriff, for conversion. Judgment in the court below being rendered in favor of the plaintiff on one count only, he appeals. Reversed.

M. S. Babcock and M. L. Short, for appellant. *Hunsaker, Britt & Goodrich*, for respondent.

BELCHER, C. This is an action to recover from the defendant the sum of \$3,000 and interest thereon, the payment of which is alleged to have been secured by a chattel mortgage. The facts stated in the complaint are in substance as follows: On the 23d day of November, 1889, one Robert L. Coutts executed to the plaintiff a mortgage on a crop of wheat, barley, and oats, then being planted on land in San Diego county, and to be harvested in the year 1890. The mortgage was properly verified, acknowledged, and recorded, and was given to secure payment of the mortgagor's promissory note for \$1,600 and interest, and such further advances as the mortgagee might make to the mortgagor, not exceeding \$1,400. Further advances were made to the amount of \$1,400, thus making the whole debt secured \$3,000, no part of which, except a portion of the interest, had been paid. On the 13th day of August, 1890, the defendant, as sheriff of the county of San Diego, wrongfully and unlawfully levied upon the mortgaged crop a writ of attachment issued in favor of one Cave J. Coutts against the mortgagor, and before making the levy he did not pay or tender to plaintiff, or to any one for him, nor deposit with the county clerk or treasurer, the amount of the mortgage debt, or any part thereof, nor had he ever done so. Therefore judgment was asked for \$3,000 and interest. The defendant, by his answer, admitted most of the averments of the complaint, and then set up facts to excuse the levy, and exonerate him from damages. The case was tried by the court without a jury, and, among other things, the court found that there was due and unpaid on the mortgage debt, for principal and interest, the sum of \$3,126.-49; that the levy was made on the property by the defendant's deputy, and a keeper placed in charge thereof, on the 18th day of August, 1890; that on the next day the plaintiff demanded of the deputy the possession and return to him of the property attached, and that the deputy admitted he knew the property was mortgaged to the plaintiff, but refused to release it; that the action was commenced on the 15th day of August, 1890, and

thereafter, on the 16th or 17th day of the same month, defendant directed his deputy to release the property, and thereupon it was delivered to the mortgagor, Robert L. Coutts, and defendant notified one of the attorneys of the plaintiff that he had released it; that at the time the levy was made the property was situate in an open field where raised, and was never removed therefrom by defendant or by his authority, and that he had then no actual personal knowledge that it was covered by the mortgage; that the total value of the property attached did not exceed the sum of \$650; and, as a conclusion of law, that plaintiff was entitled to a judgment for one cent damages and costs. Judgment was accordingly so entered, and the case is brought here for review on the judgment roll.

The appellant contends that personal property covered by a mortgage cannot lawfully be taken under process against the mortgagor without first paying or tendering to the mortgagee, or depositing for him, the amount of his mortgage debt, and that, if it be so taken, the detriment proximately caused by the seizure is the full amount of the debt; and hence that damages should have been awarded to the plaintiff for the sum found by the court to be due and unpaid, namely, \$3,126.-29. The statutory provisions bearing on the subject are found in the Civil Code, and are as follows: "Sec. 2968. Personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of the mortgagor. Sec. 2969. Before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee." "Sec. 3336. The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion, with interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and, (2) a fair compensation for the time and money properly expended in pursuit of the property." "Sec. 3338. One having a lien on personal property cannot recover greater damages for its conversion from one having a right thereto superior to his, after his lien is discharged, than the amount secured by the lien, and the compensation allowed by section 3336 for loss of time and expenses." From these sections it clearly appears that an officer has no right to take mortgaged personal property under process against the mortgagor, unless he first complies with the requirements of section 2969; and if he does so he makes himself liable as for a conversion. In *Rider v. Edgar*, 54 Cal. 127, which was an action of this kind, it was held that any unlawful interference with the property, or exercise of dominion over it, by which the owner is damaged, such as the levy of an attachment upon it and the appointment of a keeper, was a tak-

ing which made the officer liable, although the property was not moved or otherwise disturbed and though it was released before any demand from the plaintiff.

Assuming, then, as we must, that the defendant in this case made himself liable by his levy, the question is, what is the measure of the damages which can be recovered against him? In ordinary cases the measure of damages for a conversion is the full value of the property converted, with interest, compensation, etc. This rule, however, does not apply to its full extent in a case like this. When, as here, the action is brought by a mortgagee, he can recover only "the amount secured by the lien and the compensation allowed by section 3336 for loss of time and expenses," though the property may be of much greater value. What is the amount secured by the lien? The answer must be, the full amount of the mortgage debt, if the property is worth enough to pay it, and, if not, then such sum or amount only as it is worth. It would seem absurd to say, if the mortgage debt was a thousand dollars and the mortgaged property was worth only a hundred dollars, that the full amount of the debt was secured. As the court found that the total value of the property attached did not exceed the sum of \$650, it follows, in our opinion, that the plaintiff was not entitled to recover from the defendant the full amount of the debt. The cases of *Wood v. Franks*, 56 Cal. 217; *Wood v. Franks*, 67 Cal. 32, 7 Pac. Rep. 50; and *Sherman v. Finch*, 71 Cal. 68, 11 Pac. Rep. 847,—relied upon by appellant, are not in conflict with what has been said. In neither of those cases was any question raised as to the value of the mortgaged property, or its sufficiency to pay the mortgage debt in full.

The plaintiff was, however, entitled to a judgment against the defendant, if he was damaged by the taking, for the amount of damages which he actually sustained. The levy of the attachment and the appointment of a keeper were sufficient, as we have seen, to constitute a conversion; and the action was commenced before the release. What became of the property after it was released does not appear. The court finds only that it was delivered to the mortgagor, and was never removed from the open field, where it was situate, by the defendant or by his authority. The plaintiff may have taken it back and applied its proceeds to the payment of his debt, or he may have refused to do so, and relied on his claim for damages. If he took it back he sustained no damages; and, if not, the damages could not have exceeded the value of the property. In the absence of any finding as to whether the plaintiff had the benefit of the property after its release or not, the judgment cannot be sustained. In our opinion, the judgment should be reversed, and the cause remanded for a new trial.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is re-

versed, and the cause remanded for a new trial.

DE HAVEN, J. I concur in the judgment and in the reasoning of the foregoing opinion. I think, however, the decision in this case cannot be reconciled with the cases of *Wood v. Franks*, 56 Cal. 217, and *Sherman v. Finch*, 71 Cal. 68, 11 Pac. Rep. 847. In my judgment, those cases were wrongly decided, and I have no hesitancy in concurring in this judgment, which, in effect, overrules them.

91 Cal. 278
BOGART v. CROSBY *et al.* (No. 14,169.)
(*Supreme Court of California*. Sept. 19, 1891.)

LIMITATION OF ACTIONS—AMENDMENT OF COMPLAINT—MONEY HAD AND RECEIVED.

1. A real-estate agent by verbal authority negotiated a sale of defendant's land to plaintiff, which was afterwards rescinded by mutual consent, and plaintiff demanded the return of the money deposited on the contract. To avoid controversy with the agent as to his commission, defendant returned the money to him, telling plaintiff that he must settle with the agent. *Held*, that defendant was liable to plaintiff for the money deposited.

2. The complaint in an action against a firm of real-estate agents to recover money deposited on a verbal contract of sale which had been rescinded was amended by making the owners of the land defendants, and alleging that defendants were an association of two or more persons doing business under a common name. A second amended complaint was filed, alleging that only the agents constituted the association, and both amendments charged all the defendants with having received the deposit from plaintiff, and to his use. *Held*, that the last amendment did not state a new cause of action, and was not barred because not filed in two years from the time the cause of action accrued, under Code Civil Proc. Cal. § 339, subd. 1, providing that an action on an unwritten contract, obligation, or liability shall be brought within two years.

Department 2. Appeal from superior court, San Diego county: JOHN R. AIKEN, Judge.

Action by Bogart against Crosby & Van Haren and others to recover money received by defendants to plaintiff's use. Judgment for plaintiff, and defendants appeal. Affirmed.

H. D. Cassidy, for appellants. Dakin & Story, for respondent.

DE HAVEN, J. This appeal is by the defendants Remondino, Daggett, and Witfield from a judgment against them in favor of plaintiff. It appears that defendants Crosby & Van Haren were verbally authorized by appellants to sell for them a certain tract of land in San Diego, and, acting under this authority, they agreed to sell the same to plaintiff, and received from him the sum of \$300 as a deposit on the contract. No deed could be made at the time on account of the absence of the appellant Remondino, the plaintiff being assured by defendant Van Haren that he would return within two weeks. After waiting about three weeks, the plaintiff notified Witfield, one of the appellants, that owing to the long delay and uncertainty as to the time when Remondino would return he would not complete the purchase, and demanded a return of the

money paid by him as a deposit. Witfield made no objection to the refusal of the plaintiff to complete the purchase, for the reason, as he states, that he considered the land worth more than plaintiff was to pay for it, and so informed plaintiff that he would return his check to Crosby & Van Haren, and he might settle with them. The reason for this action seems to have been that appellants did not wish to pay their agents commissions for their services, and, to avoid controversy upon this point, turned the money over to them, and left the plaintiff to settle with such agents. The appellants soon thereafter sold the land to another person, and it does not appear that it was sold for any less than plaintiff was to pay, or that defendants have suffered any damage by reason of the refusal of plaintiff to complete the purchase. This action was first brought against Crosby & Van Haren alone. On October 19, 1889, an amended complaint was filed, by which appellants were also made defendants; this complaint alleging that "defendant is an association of two or more persons doing business * * * under the common name of Crosby & Van Haren." On October 24, 1889, a second amended complaint was filed, in which only Crosby & Van Haren were alleged to be an association under the name of Crosby & Van Haren, and all of the defendants were charged with having received from plaintiff, and to his use, the sum of \$300.

It is claimed by appellants that the cause of action stated in the last amended complaint is, as against appellants, essentially different from that alleged in the first amended complaint, and that, as it was not filed within two years after the cause of action accrued, the same is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. We do not agree with appellants in this contention. The difference between the first and second amended complaints is not so marked that the latter can be deemed the statement of an entirely new and different cause of action against the appellants. In both amended complaints the appellants are charged with having received from plaintiff, and to his use, the money sued for, and with a refusal to pay it to plaintiff when demanded.

Upon the facts of the case there can be no doubt of plaintiff's right to maintain this action against appellants. The money of plaintiff came into their hands, and we know of no principle of law which will justify them in their refusal to return it to him upon the state of facts disclosed by the evidence in this case. The appellants were never legally bound to make any conveyance to plaintiff at all, and he certainly had a right to withdraw his offer to purchase at the time and under the circumstances shown, and was under no obligation to settle any claim for commissions which Crosby & Van Haren might have against appellants, growing out of their part in the transaction. Judgment and order affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.

^{91 Cal. 228}
CITY OF PASADENA v. STIMSON *et al.* (No. 18,938.)

(Supreme Court of California. Sept. 16, 1891.)

EMINENT DOMAIN — CONSTITUTIONAL LAW — NUISANCE — APPEAL.

1. Civil Code Cal. § 1001, provides that any "person" may, without further legislative action, acquire private property for any use specified in Code Civil Proc. § 1233, either by consent of the owner or by condemnation proceedings had under the provisions of Code Civil Proc. §§ 1238-1263. Civil Code, § 14, provides that the word "person" used in the Code shall include a corporation. St. 1883, p. 93, relative to cities of the sixth class, provides (section 870) that when it shall become necessary for the city or town to take private property for public use, "and the board of trustees cannot agree with the owner thereof," the trustees may direct proceedings to be taken under Code Civil Proc. §§ 1237-1263, to procure the same. *Held*, that St. 1883, p. 93, by prescribing a condition precedent to the exercise of eminent domain by cities of the sixth class, destroys the uniform operation of Civil Code, § 1001, in contravention of Const. Cal. art. 1, § 11.

2. Such statute is also repugnant to Const. Cal. art. 4, § 25, which provides that "the legislature shall not pass local or special laws in cases where a general law can be made applicable." *People v. Henshaw*, 76 Cal. 442, 18 Pac. Rep. 413, and *Abel v. Clark*, 84 Cal. 226, 24 Pac. Rep. 883, distinguished.

3. Under Code Civil Proc. § 1244, providing that the complaint in condemnation proceedings for a right of way must show the "location, general route, and termini, and must be accompanied with a map thereof," a complaint to condemn land for a sewer already partially built, which states the termini of the whole sewer, need not state the exact spot to which it has been already constructed; and the phrase "along and east of the center line" of a certain avenue sufficiently shows the location of the proposed sewer.

4. Under Code Civil Proc., which provides (section 1238, subd. 8) that private property may be taken for sewerage in any city or town, whether incorporated or unincorporated, and (section 1241, subd. 2) that before property can be taken it must appear that the taking is necessary to a use authorized by law, it is only necessary to show that the property to be taken is necessary for the sewer, and not that the sewer is necessary for the town.

5. Under Civil Code, § 3482, providing that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance," a sewer, the construction of which is authorized by section 1238, though a necessary evil, is not a nuisance *per se*; and in proceedings to condemn land for a right of way therefor it is unnecessary to show that the proposed route is least injurious to private rights.

6. Where no motion for a new trial was made, and a specification of particulars does not appear in the bill of exceptions, but only in the brief of counsel, the supreme court will not consider the sufficiency of the evidence to sustain the judgment.

7. Code Civil Proc. Cal. § 1241, subd. 8, providing that before property already appropriated to some public use can be taken it must appear that the public use to which it is to be applied is a more necessary public use, does not apply to condemnation proceedings to subject a highway to a right of way for a sewer, since the second servitude will not disturb the first.

8. In condemnation proceedings by a city of 8,000 inhabitants the court will take judicial notice that the city was incorporated, and, though it was averred, it need not be proved.

9. Failure to show that the city attorney and special attorneys for the city who commenced such proceedings had no authority therefor, is immaterial when there is abundant evidence that their action was afterwards ratified.

10. Under the original complaint, which failed

to specify the kind of man-holes with which the proposed sewer was to be furnished, evidence was introduced that perforated man-holes allowed noxious and dangerous gases to escape. The complaint was then amended so as to provide that the man-holes should be so constructed as to prevent the escape of such gases "unless temporarily in making repairs." *Held*, that it was error to then strike out the above evidence, and direct a verdict of nominal damages only in favor of adjoining property, since the property might be substantially injured by the temporary escape of sewer-gas.

11. Evidence that the city had agreed to allow an hotel outside the city limits to use the sewer was properly excluded, since that fact would not render the proposed use less a public use.

12. Evidence that a witness had surveyed a route 1,432 feet shorter than that proposed, on a better grade, through lands not thickly settled, was admissible.

13. Evidence that the sewer farm to which the sewer was to extend would become a nuisance was inadmissible, as involving a question not in this proceeding.

In bank. Appeal from superior court, Los Angeles county: LUCIEN SHAW, Judge.

Proceedings by the city of Pasadena against Charles W. Stimson and another to condemn a right of way for a sewer. Decree for plaintiff. Defendants appeal. Reversed.

Graves, O'Melveny & Shankland, for appellants. *Haynes & Mitchell, A. R. Metcalfe, and F. J. Polley*, for respondent.

BEATTY, C. J. Proceeding under section 1237 et seq. of the Code of Civil Procedure, to condemn a right of way for an outfall sewer from the city of Pasadena to a tract of land outside of the city limits, known as the "Sewer Farm." Appeal by defendants from a decree of condemnation.

The city of Pasadena, a municipal corporation in the county of Los Angeles, for the purpose, as it alleges, of promoting the health, comfort, and convenience of its inhabitants, is engaged in constructing a system of sewerage, whereby it proposes to discharge the city sewerage upon a farm distant about four and a half miles from the city limits. It has obtained from the county of Los Angeles the right of way for the necessary outfall sewer along certain county roads, from the boundaries of the city to a point at or near the intersection of the Monterey road and Garfield avenue, which is the principal, or one of the principal, streets of the neighboring town of Alhambra. From this point the proposed route of the sewer is along said Garfield avenue, east of its center line, through the town of Alhambra, to another county road, and thence along said road to the sewer farm. This proceeding is against the owners of lots fronting on the east side of Garfield avenue, who, in support of their appeal from the decree of condemnation, assign numerous errors in the rulings of the superior court. They contend that the court erred in overruling their demurrer to the complaint, in denying their motion for a nonsuit, in admitting and excluding testimony at the trial, in permitting an amendment of the complaint after the plaintiff had closed its case, and in instructing the jury. Under each of these heads various particulars are specified.

We shall not, however, be compelled to notice these separate points *seriatim*, as our views with respect to one or two general propositions will dispose of most of them, either by deciding them or demonstrating their immateriality.

One main proposition upon which the appellants rely is that a municipal corporation of the fifth or sixth class must, as a condition precedent to invoking the exercise of the power of eminent domain, make an unavailing effort to agree with the owner of the property or right which it seeks to acquire; and, consequently, that it must, in any condemnation proceeding, allege and prove that it has made such effort. The complaint in this case contained no allegation as to the class of corporations to which the plaintiff belongs, nor did it contain any allegation of an effort to agree. On the trial no evidence was offered to show how plaintiff was incorporated,—whether by special charter or under the general law,—nor to what class it would belong if incorporated under the general law; but the court, without evidence, took notice of the fact that Pasadena is a city of the sixth class, duly incorporated under the general law. St. 1883, p. 98. By section 870 of that law—which is one of the sections relating to cities of the sixth class—it is provided as follows: "Whenever it shall become necessary for the city or town to take or damage private property for the purpose of establishing, laying out, extending, and widening streets and other public highways and places within the city or town, or for the purpose of rights of way for drains, sewers, and aqueducts, and for the purpose of widening, straightening, or diverting the channels of streams and the improvement of water-fronts, and the board of trustees cannot agree with the owner thereof as to the price to be paid, the trustees may direct proceedings to be taken under section one thousand two hundred and thirty-seven and following sections, to and including section one thousand two hundred and sixty-three of the Code of Civil Procedure, to procure the same." The defendants, relying upon the condition mentioned in this section,—an inability to agree with the owner,—demurred to the complaint, specially for uncertainty, because it did not set forth the manner in which plaintiff was incorporated, nor to what class of corporations it belonged; and generally, on the ground that it did not state sufficient facts, because, assuming that it was a corporation of the sixth class, it did not allege an effort to agree. They also moved for a nonsuit at the close of plaintiff's case, upon the ground, among others, that there was no evidence of an effort to agree.

From this statement it is apparent that all these various points arising upon the orders of the court overruling the demurrer and denying a nonsuit will be effectually disposed of if it is held that the plaintiff was not bound to make an effort to agree with the owners of the land before instituting its proceeding to condemn. There is no doubt of the authority of the legislature in regulating the exercise of the power of eminent domain to make

an unavailing effort on the part of the person in charge of the use, to agree with the owner of the property it seeks to acquire,—a condition precedent to the institution of any proceeding to condemn; and there is no doubt that an intention to impose such a condition has been inferred in many instances, in this state and elsewhere, from language no stronger than that which is contained in section 870 of the municipal incorporation act above quoted; so that, if the solution of the question before us depended solely upon the construction of that section, we should have no hesitation in holding that the superior court erred in overruling the demurrer and the motion for a nonsuit. But there is a question whether said section, in the sense in which appellants seek to apply it, is constitutional,—whether, in other words, it is not a special law, by which the legislature has attempted to make a forbidden discrimination against two classes of municipal corporations, by imposing upon them alone a burdensome condition to the exercise of a right common to all public and private corporations, and to all natural persons *sui juris* in the state. By section 1001 of the Civil Code it is provided as follows: "Any person may, without further legislative action, acquire private property for any use specified in section 1233 of the Code of Civil Procedure, either by consent of the owner or by proceedings had under the provisions of title 7, pt. 3, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title 'is an agent of the state,' or a 'person in charge of such use,' within the meaning of those terms as used in such title." A corporation, whether private or public, is a person. Civil Code, § 14.¹ It follows, therefore, that under this general law—general in the widest and fullest sense of the term—any public or private corporation, or any natural person, may, for any of the uses defined in section 1233 of the Code of Civil Procedure, acquire private property without the consent of the owner, by means of the proceedings prescribed in part 3, tit. 7, of said Code. Sections 1237–1263. It is conceded that there is no provision in this law requiring a previous effort to agree; and apparently it is not controverted that every person in the state, natural and artificial, is exempt from such condition, excepting only municipal corporations of the fifth and sixth classes. Can the legislature make such a discrimination? "All laws of a general nature shall have a uniform operation." Const. art. 1, § 11. "The legislature shall not pass local or special laws in cases where a general law can be made applicable." Id. art. 4, § 25. It seems to us perfectly clear that the clause of the incorporation act requiring cities of the fifth and sixth classes to make an effort to agree, while all other persons are exempt from such condition, is in plain and direct conflict with both of these constitutional

inhibitions. It destroys the uniform operation of a general law, and is special in a case where a general law not only can be made applicable, but in which a general law had been enacted, and in which there is no conceivable reason for discrimination. It is true that the legislature is empowered by section 6 of article 11 of the constitution to classify cities and towns in proportion to population for the purpose of incorporation and organization, and it is undoubtedly true that a law limited to these purposes is not unconstitutional, because it makes different regulations for the different classes. But the mode of exercising the power of eminent domain, and the conditions upon which it may be invoked, are no part of municipal organizations. They are the subject of general laws applicable to every person alike, and the legislature has no power to make arbitrary discriminations in this respect between different classes of persons.

We do not regard the decision in *People v. Henshaw*, 76 Cal. 442, 18 Pac. Rep. 413, as being at all in conflict with this view. The only point involved in that case that touches the question under discussion was made in support of the proposition that the "Whitney Act"—so called—was local and special, for the reason that it applied to some cities and not to others. The author of the prevailing opinion answered this point by reference to the power conferred upon the legislature by the constitution to classify cities and towns according to population. He assumed that the class of cities to which the Whitney act was made applicable was identical with the second class, as defined in the general incorporation act, and upon that assumption concluded that, as cities having a large population require different legislation from those containing fewer inhabitants, the Whitney act, though applying to only one class, was nevertheless constitutional. But it must be borne in mind that the subject of the Whitney act (a police court) was peculiarly a matter pertaining to municipal organizations, and still more peculiarly a matter as to which cities of large population require different provision from that suitable to cities or towns of small population. It is to be observed, also, that the care taken by the court to distinguish *People v. Henshaw* from those cases in which laws had been held unconstitutional on account of arbitrary discriminations between persons standing in the same relation to the subjects of legislation, is an emphatic recognition of the doctrine we have announced.

Neither is the vaccination case—*Abeel v. Clark*, 84 Cal. 226, 24 Pac. Rep. 383—opposed to our views. A single expression in the commissioner's opinion in that case, separated from its context, and considered without reference to the point to be decided, might seem to warrant the proposition for which appellants are contending here, viz., that a law is not special if it applies equally to all members of any single class defined by the legislature, no matter how arbitrary and senseless the classification may be. But it is a familiar

¹ Civil Code Cal. § 14, provides that the word "person" used in the Code shall include a corporation.

rule that expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and that they cannot be safely applied in their largest and most universal sense to dissimilar cases. Now, in *Abeel v. Clark* the court was considering the constitutionality of a law making previous vaccination a condition of admission to the public schools of the state. The public schools are an institution, the existence of which is recognized by the constitution itself. Those who attend the public schools stand in a relation to the institution different from that of persons who do not attend. This difference exists independent of legislation. In the nature of things, attendance upon the public schools must be subject to regulations necessary for the safety and welfare of the whole body of pupils, and a law which applies equally to all who seek admittance is in the fullest sense a general law, because it applies to all who bring themselves into the same relation with the state. There is a broad and palpable distinction between such a law and one which annexes to the exercise of a universal right by a particular class of persons, arbitrarily selected, conditions from which all other persons similarly situated are exempt. This distinction is, I think, clearly recognized in *Ex parte Smith*, 38 Cal. 710, and is entirely consistent with the decision in *Brooks v. Hyde*, 37 Cal. 386, where it was held that laws must operate uniformly upon all persons standing in the same relation to the law in respect to the privileges and immunities conferred by it or the acts which it prohibits. In *Earle v. Board*, 55 Cal. 489, and in *Miller v. Kister*, 68 Cal. 142, 8 Pac. Rep. 813, the decision went upon the ground that the legislature has no power to exempt classes of persons arbitrarily defined from the operation of a general law; and these cases were both carefully distinguished from *People v. Henshaw*, in the prevailing opinion in that case. The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. From this conclusion it necessarily follows that cities of the fifth and sixth classes, equally with all other natural and artificial persons, may maintain proceedings to condemn private property for public use without a previous effort to agree.

In reaching this conclusion we have not overlooked the argument of appellants that, since the plaintiff in such proceedings is always a mere agent of the state, and acting in its behalf, he cannot question the conditions upon which his principal authorizes him to act. We think this rather a fanciful argument, and that it is based upon a supposed analogy which has no real existence. It is, in a very mod-

ified sense, that the state is the principal and the plaintiff the agent in cases like this. Such may be the theoretical view, but practically it is the reverse of the truth. The party directly and beneficially interested is the person in charge of the use, or the particular community affected by the improvement; and the attitude of the state is merely passive. The law is designed for the benefit of local communities, and they have a right to enjoy it on equal terms.

Another ground upon which it is contended that the superior court erred in overruling the demurrer to the complaint is that the complaint does not show with certainty, so that the same may be identified, the location of the general route, or the termini, or either of them, of said sewer. But the complaint does clearly show that the termini of the sewer are the city of Pasadena and the sewer farm, which is described as consisting of certain subdivisions of the government survey. It also shows not only the general route, but the particular route, and is accompanied by a map of so much of the route as is involved in this proceeding. Code Civil Proc. § 1244, subd. 4.¹ The particular specifications of insufficiency under this head seem to rest upon the points—*First*, that the exact spot at or near the intersection of the Monterey road and Garfield avenue, to which the outfall sewer has already been constructed, is not described in the complaint, or delineated on the map; *second*, that the name of the county road from the opposite extremity of Garfield avenue to San Marino avenue is not given; and, *third*, that "along and east of the center line" of the avenue is not a sufficiently exact description of the location of the proposed sewer. We think these objections are without merit. There is no law and there is no reason requiring such minute exactitude in these particulars.

One ground of the motion for the nonsuit was that the necessity of the proposed sewer had not been shown. The legislature has defined the public uses for which private property may be taken, and, among others, is "sewerage of any incorporated city, city and county, or of any village or town, whether incorporated or unincorporated," etc. Code Civil Proc. § 1238, subd. 8. When a city or town decides for itself—as it may do—that a sewer is desirable, it is not bound to prove that such sewer is necessary, but only that the taking of the property it seeks to condemn is necessary for the construction of the sewer. When it shows that the use to which the property is to be applied is a public use, (and that is shown by the statute in this case,) the inquiry on that head is closed. *Id.* § 1241.² But the point of

Code Civil Proc. Cal. § 1244, subd. 4, provides that the complaint in condemnation proceedings for a right of way must show the "location, general route, and termini, and must be accompanied with a map thereof."

² Code Civil Proc. Cal. § 1241, provides that before property can be taken it must appear that the use to which it is to be applied is authorized by law, and that the taking is necessary to such use.

the objection here is that it does not appear from any official record of the proceedings of the board of trustees of Pasadena that they have ever adopted the plan of an outfall sewer from the city to the sewer farm. We think, however, that the terms of the two ordinances, Nos. 66 and 69, the matters submitted to the vote of the people, and the result of the voting, contain ample proof of the adoption of the system of sewerage described in the complaint. The first ordinance declares the necessity, among other things, of acquiring, constructing, and completing a system of sewers, and of borrowing money for the purpose. The second ordinance recites the passage and substance of the first, sets forth in detail the system of surveys which has been adopted, embracing the sewerage farm, and proceeds: "(4) Outfall sewer, to be located on Garfield avenue, or any other street to the track of the Southern Pacific Railway Co., south of Alhambra; thence running in a southeasterly direction to the sewerage farm." After setting forth the full details of the various proposed improvements, and an itemized estimate of their cost, the ordinance provides for a special election, at which the question of issuing bonds of the city shall be submitted. The evidence shows that such election was regularly held, and resulted in a vote of 197 for and 5 against the proposition. This, we repeat, furnishes ample proof of the adoption of the system described in the complaint. It was not necessary that the ordinance should be more specific than it was as to the route of the sewer from the city to the sewer farm. Indeed, it would have been improper for the city and its electors to tie themselves to a particular route. If, as appellants contend, the final selection of a route does not rest with them.

Another ground of the motion for a nonsuit was that the proposed sewer will be a nuisance affecting injuriously the health of the people of Alhambra, and that there was no evidence tending to show that the proposed route along Garfield avenue was most compatible with the public good, and least injurious to private rights. There was no evidence that the sewer, as it was proposed to construct it, would be more of a nuisance than any sewer would be. So far as appears, the sewer was well planned, according to current sanitary views. Certainly there was nothing tending to show that it was an improper kind of sewer, and therefore it could not be regarded as a nuisance *per se*. A sewer in the neighborhood of dwellings may be an evil, but it is evident that the legislature regards it as a necessary evil, since it allows private property to be taken for the construction of sewers. Sewers are in fact a necessary evil; but when they are planned and constructed with reasonable regard to the results of sanitary teachings they are authorized by statute, and "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Civil Code, § 3482. In short, the plaintiff, being a city with sewage to dispose of, and having a sewer farm to

which it has apparently a right to conduct it, has necessarily the right to construct such a sewer as the statute (section 1238, Code Civil Proc.) contemplates, and such a sewer cannot be a nuisance in the strict sense of the term. That it may occasion loss or injury to others for which they will be entitled to compensation is a different proposition, which will be considered in another connection.

We do not think a failure to prove that the location of the sewer was most compatible with the greatest public good and least private injury was a ground for a nonsuit. The state or its agents in charge of a public use must necessarily survey and locate the land to be taken, and are by statute expressly authorized to do so. Code Civil Proc. § 1242. Exercising, as they do, a public function under express statutory authority, it would seem that in this particular their acts should, in the absence of evidence to the contrary, be presumed correct and lawful. The selection of a particular route is committed in the first instance to the person in charge of the use, and unless there is something to show an abuse of the discretion, the propriety of his selection ought not to be questioned, for certainly it must be presumed that the state or its agent has made the best choice for the public; and if this occasions peculiar and unnecessary damage to the owners of the property affected the proof of such damage should come from them. And we think that when an attempt is made to show that the location made is unnecessarily injurious the proof ought to be clear and convincing, for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so *ad infinitum*. The improvement could never be secured, because, whatever location was proposed, it could be defeated by showing another just as good. We think there was no error in denying the motion for nonsuit.

As to the alleged insufficiency of the evidence to sustain the judgment, we find no specification of particulars in the bill of exceptions, and do not think such specifications can be made for the first time in the brief of counsel, even if they could be reviewed in the absence of a motion for a new trial. But, waiving this objection, we do not think any of the exceptions of the appellants to the sufficiency of the evidence are valid.

1. It is not necessary to prove the incorporation of the plaintiff. Being a city or town of 8,000 inhabitants, it was immaterial whether the plaintiff was incorporated or not; and, if it had been material, the court was correct in taking notice of the fact without proof, and even without averment. Here, however, it was averred. St. 1889, p. 372.

2. This point—that there was no evidence that the taking was necessary—has been disposed of.

3. It was clearly shown that the sewer, when constructed, would not interfere with the use of the highway, and that during its construction such use would not

be seriously interrupted. Therefore it was not necessary to show that the new use was superior to the one to which the property was already appropriated. Section 1241, subd. 3, Code Civil Proc.,¹ has no application to a case where the same land can be subjected to a second servitude without disturbing the first.

4. This point—that there was no evidence that the route proposed was most compatible with the greatest public good and least private injury—has already been discussed, and we have held that, as to this matter, the burden of proof is on the defendants. We cite, as bearing upon this point, *Railroad Co. v. Kip*, 46 N. Y. 553.

5. It is objected that there is no evidence that the trustees of the city of Pasadena directed the commencement of these proceedings. But the proceeding was commenced by the city attorney and special attorneys for the city, whose authority need not be shown unless properly drawn in question. The attorney for a party is never required to prove his retainer or his instruction to commence a proceeding unless his authority is directly attacked, and this rule is just as applicable to suits instituted in the name and on behalf of municipal corporations as to suits by private corporations or natural persons. Besides, there is abundant proof of circumstances tending to show that, if the attorneys of plaintiff were not formally authorized in advance by resolution of the board of trustees to commence this proceeding, their action in so doing has been fully ratified.

As to the alleged errors in the rulings of the court upon offers of evidence, most of them have been disposed of in what has been already said. Some, however, remain to be noticed. It is unnecessary to decide whether the court erred in permitting the amendment to the complaint relating to man-holes. If it was an error we cannot see how defendants were injured by it, unless it operated as a surprise, which entitled them to a continuance. But it does not appear that they asked for any continuance on that ground, and it is to be presumed they were entirely willing to go on with the trial under the amended complaint.

But we think the superior court did err in striking out the evidence offered by the defendants of damages to abutting property. This ruling was made after the amendment to the complaint just referred to. The original complaint did not specify the character of man-holes with which the proposed sewer was to be furnished, but it seems to have been assumed at the trial that perforated man-holes, designed for ventilation of the sewer, were to be constructed, and the defendants introduced testimony of experts to prove that through these man-holes sewer-gas would escape and flow over the adjoining premises, producing effects certainly offensive, and probably dangerous. In view of this

¹ Code Civil Proc. Cal. § 1241, subd. 3, provides that before property already appropriated to some public use can be taken, it must appear that the public use to which it is to be applied is a more necessary public use.

testimony, and for the purpose of obviating its effect, the plaintiff offered and was allowed to amend its complaint by adding the following: "That in the construction of said sewer along Garfield avenue from the Monterey road to the line of the Southern Pacific Railroad, man-holes will be constructed at reasonable distances, for the purpose of necessary repairs, or removing obstructions from the sewer, but such man-holes are to be constructed in such manner, and so closed, as to prevent the escape of noxious gases and odors, unless temporarily in making such necessary repairs, or in removing obstructions from the sewer, and for such time only as may be reasonably necessary for such purpose." The court thereupon struck out all the evidence of damage from sewer-gas, and by various rulings held that no question as to damages to adjoining property remained in the case, and instructed the jury to find a verdict for nominal damages to the land to be taken for the laying of the pipe. The error in this ruling did not, however, consist, as appellants contend, in assuming that the plaintiff could and would construct such a sewer as it described; for in this proceeding the plaintiff can acquire no right to construct any other sort of a sewer, and by the decree its right is strictly limited to the laying of a sewer in exact accordance with the specifications contained in the complaint. The court was so far right, therefore, in holding, as it did in effect, that the damage to the defendants could not be estimated upon the assumption that the sewer, when constructed, would cause greater discomfort or inconvenience than the sewer described in the complaint and in the decree. The plaintiff, in order to justify its future proceedings under any decree of condemnation in this suit, must construct its sewer in accordance with the terms of the decree, and it must operate it in a careful, skillful, and proper manner. If it does not, it will be liable for damages for its neglect in these particulars, and the persons damaged, though parties to this proceeding, will not be concluded by the damages allowed herein. *Lewis*, Em. Dom. §§ 481, 482; 1 *Rorer*, R. R. pp. 323, 324. The error of the court was in assuming that no damage to abutting property could arise from the construction and proper operation of the sewer proposed. The temporary escape of sewer-gas during the time reasonably necessary for making repairs to the sewer or removing obstructions may occasion substantial injury. At least it cannot be said as matter of law that it will not, and therefore it was error to strike out the testimony adduced by the defendants as to the offensive and dangerous properties of sewer-gas, and to instruct the jury to find merely nominal damages.

The court did not err in excluding evidence that the proposed sewer was to be used by the Raymond Hotel. The use is none the less a public use because the city has arranged to allow an hotel outside the corporate limits to share in the benefit of its improvement.

We think the court erred also in excluding the testimony of Gervase Purcell. It would certainly have tended to prove that

the route selected for the proposed sewer was not so good as one that might have been selected, and that it would cause a greater private injury. The offered testimony was to the effect that the witness had surveyed a route 1,432 feet shorter than that proposed, upon a better grade, through lands not thickly settled. We do not say that this testimony would have been conclusive, but it was competent and relevant to a material issue in the case, and should have been admitted, subject to the right of the plaintiff to introduce evidence in rebuttal.

The superior court did not err in excluding the testimony offered for the purpose of showing that the sewer farm would become a nuisance by being made the receptacle of the sewerage of Pasadena. That is a question not involved in this proceeding. If the sewer farm ever becomes a nuisance, the decree in this proceeding will not stand in the way of its abatement.

Neither did the court err in refusing the request of certain defendants to decree to the plaintiff a limited use of the sewer in common with those whose lands were to be taken. The pleadings and proofs in the case would not have justified such a decree. For the errors above specified the judgment is reversed, and the cause remanded for a new trial.

We concur: SHARPSTEIN, J.; DE HAVEN, J.; HARRISON, J.; PATERSON, J.; GAROUTTE, J.

McFARLAND, J. I concur in the judgment of reversal for the reasons which are given for such reversal in the opinion of the chief justice, but I am not prepared to concur in the whole of said opinion.

91 Cal. 218

PEOPLE *ex rel.* ROBERTS *v.* BEAUDRY *et al.*
(No. 14,172.)

(Supreme Court of California. Sept. 16, 1891.)

STREETS—DEDICATION—POWERS OF ATTORNEY
GENERAL—EVIDENCE.

1. The attorney general has authority to maintain an action in the name of the people to abate a nuisance caused by obstructions in the streets of a city.

2. The record of an action by the city to recover possession of a street, in which the title was adjudged against it, is competent evidence in a subsequent suit by the attorney general against the same defendants and their grantees to declare such street a public highway, and to abate a nuisance caused by alleged obstructions therein maintained by defendants.

3. A city ordinance adopting an official map of the city in which a certain street is clearly marked out and defined through land owned by the city is sufficient evidence of the dedication of such street as a public highway in the absence of a contrary showing, though it was not actually constructed and made ready for travel at the time.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by the people of California, by George A. Johnson, attorney general, *ex rel.* John Roberts, against Prudent Beaudry and others, to declare a certain street in Los Angeles to be a public highway, and to abate an alleged nuisance, caused by obstructions therein. Decree

for plaintiff, and defendants appeal. Reversed.

Chapman & Hendrick, for appellants. W. H. Hart, Atty. Gen., R. Dunnigan, and Andrew Glassell, for respondent.

BEICHER, C. It is alleged in the complaint in this case that a certain described strip of land was on the 1st day of October, 1868, and ever since has been, a part and portion of a public street in the city of Los Angeles, now commonly known as "Buena Vista Street;" that defendants, on or about the 1st day of April, 1871, erected and maintained, and still do maintain, on that part of the street described, certain buildings, posts, fences, and other things, which ever since they were so erected have obstructed, and still do obstruct, the said street, and hinder and prevent the people of the state of California from the free use thereof as a public street, and are public nuisances, and illegal obstructions thereon; and the prayer is that the strip of land described as being a part of Buena Vista street be declared and decreed to be a common public street and highway, free for the travel of all persons, and that the defendants be ordered and decreed to remove therefrom the buildings, houses, and fences and all obstructions whatsoever now obstructing or that may obstruct the free use of said street, and be enjoined from again erecting the same or any other obstructions thereon. The defendants Beaudry and Ramsaur alone answered. They deny that the land described in the complaint, or any portion thereof, is now or was on the 1st day of October, 1868, or ever was, any part or portion of the public street in the city of Los Angeles known as "Buena Vista Street," or of any public street or highway whatever; deny that on the 1st day of April, 1871, or at any other time, they erected and maintained, or still do maintain, on any part of Buena Vista street, or on any other street in the said city, any buildings, posts, fences, or other things; deny that any buildings, posts, fences, or other things erected or maintained by them have obstructed or do obstruct the said street or any other street, or hinder or prevent the people of the state, or any of them, from the free use of the same as a common public street, or at all.

When the case was called for trial, the defendants objected to the introduction of any evidence on the part of the plaintiff, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The objection was overruled, and an exception reserved. It was then admitted that a patent had been issued by the United States to the city of Los Angeles, conveying the lands within the city limits, upon confirmation of the claim of the city authorities that the city was the successor of a Mexican pueblo, and that the strip described in the complaint was within the boundaries of the lands so conveyed; also that the city was incorporated by an act of the legislature, passed April 4, 1850, according to the provisions of the general law for the incorporation of cities, and with all the

rights which had formerly pertained to the said pueblo. The plaintiff then introduced in evidence a map, and an ordinance passed by the mayor and common council of the city, and approved November 17, 1868, adopting the map, and declaring it to be an official map of the city. There is written on the map: "Official map, No. 3, of Los Angeles city," and "map of a tract of land situate between Temple, Buena Vista, Eternity, and Short streets and the land of the Protestant Cemetery, in the city and county of Los Angeles, state of California, subdivided in July and August, 1868, by order of the mayor and common council of Los Angeles city." As represented, Buena Vista and Eternity streets are continuations of the same street, and the tract of land referred to lies on the westerly side of them, and is intersected by other streets, and subdivided into blocks and lots. All the streets are marked out by colored lines, and Buena Vista street has written on it, "N. 43½, E. 60 feet wide." The map also shows another street called "New High Street," which runs parallel with Buena Vista and Eternity streets, and is easterly therefrom, but the land between the last-named streets is not subdivided or marked. The plaintiff also introduced in evidence a diagram, made by the city engineer, showing Buena Vista street as laid down on map No. 3, and the strip in controversy, on which defendants are alleged to have intruded. The strip is on the eastern side of the street, and at its south end extends into the street 21.97 feet, and at other points about the same distance. It was proved by the engineer that the diagram was a correct representation of the premises, and by him and other witnesses that the defendants had had the portions of the strip respectively claimed by them inclosed as parts of their adjacent lots for a considerable number of years. Upon this evidence the plaintiff rested, and it was claimed that the adoption and filing of map No. 3 constituted a dedication to the public as a public street of all the land represented thereon as Buena Vista street.

The defendants then introduced in evidence two deeds, made by the "mayor and common council of the city of Los Angeles" to Hiram McLaughlin, one in 1856 and the other in 1857. The deeds conveyed two adjoining parcels of land on the west side of New High street, which were described, and for a more particular description reference was made to a map made by one Waldemar, deputy county surveyor. And in connection with the deeds it was proved that defendant Beaudry, in April, 1868, succeeded through sundry mesne conveyances to the title of McLaughlin to the two parcels, and that about the same time he inclosed them with a fence. It was proved that the land was then hilly, wild, and unimproved, and that there was then no road of any kind where Buena Vista street is now located. The defendants next introduced in evidence the copy of a map of the tract of land conveyed to McLaughlin, as aforesaid, showing that the same had been subdivided into lots, two of which were marked lots 13 and 15. At the head of

this map is a statement that the land was "subdivided August 23, 1868, under the direction of Mr. P. Beaudry, by George Hanson," the county surveyor; and at the foot of it is a certificate, signed by the county recorder, that the map is "a true copy of the original, recorded November 11, 1868, at 10 hrs., at request of P. Beaudry." It was then admitted that the defendant Beaudry still retained whatever title he had acquired to lots 13 and 15 in the tract which is now called the "Arcadia tract," and that the fence referred to as inclosing the said property claimed to be a part of Buena Vista street ran along the western boundary of the said lots. It was also admitted that defendant Ramsaur had succeeded to the title to another lot described on the map. The defendants next offered in evidence the judgment roll in an action commenced in the superior court of Los Angeles county on the 31st day of March, 1884, by the city of Los Angeles against Prudent Beaudry and Victor Beaudry. The complaint was in the ordinary form in ejectment to recover possession of lots 13 and 15 of the Arcadia tract. The defendants, by their answer, denied all the averments of the complaint, and to show that the plaintiff had no title to the demanded premises set up the conveyances to McLaughlin, hereinbefore referred to. They alleged that these conveyances were intended to and did include the demanded premises, and that they and their grantors had owned, possessed, and paid taxes on the same since the date of the deeds to McLaughlin. They further alleged that in one of the deeds to McLaughlin there was a mistake in one of the courses named, and they asked to have the deed reformed and corrected in this respect. After trial the court found all the facts as alleged in the defendants' answer, and on the 17th of April, 1885, judgment was entered reforming one of the deeds to McLaughlin as prayed for, and adjudging that one of the defendants was the owner of the lots sued for, and that the plaintiff take nothing by its action. In connection with the offer of this judgment roll in evidence counsel stated that "the defendants proposed to show that lots 13 and 15 of the Arcadia tract included the property, or a considerable portion of the property, in controversy in this action, and being the property next to Mr. Glassell's lot; that the line of the Arcadia tract on the westerly side corresponded with Mr. Beaudry's fence as it was located in 1868, and has been there ever since." The plaintiff objected to the offered evidence, upon the ground that the parties and the issues in that action were not the same as in this, and hence the evidence was inadmissible. The court sustained the objection, and the defendants excepted to the ruling. The case was then submitted for decision, and the court found that all the allegations of the complaint were true, and all the allegations of the answer were untrue, and entered judgment accordingly. From that judgment, and an order denying a new trial, the defendants Beaudry and Ramsaur appeal.

1. The appellants contend that the at-

torney general had no authority to institute the action, and hence that it should have been dismissed. But the obstructions complained of, if they were upon a public street, and of the character alleged, constituted public nuisances; and it has often been held that the attorney general may bring an action in the name of the people to enjoin or abate such nuisances. *People v. Davidson*, 30 Cal. 388; *People v. Mining Co.*, 66 Cal. 138, 4 Pac. Rep. 1152; *People v. Pope*, 53 Cal. 437; *People v. Blake*, 60 Cal. 497; *People v. Reed*, 81 Cal. 70, 22 Pac. Rep. 474; *People v. Loan Society*, 84 Cal. 634, 24 Pac. Rep. 295. The four cases last cited were similar to this one, and this contention cannot, therefore, be sustained.

2. It is also contended that there was no evidence showing that Buena Vista street was ever dedicated to the public as a public highway. But the city had power to lay out and dedicate streets, and on map No. 3 Buena Vista street was clearly marked out and defined. It would seem, therefore, that when the ordinance was passed and the map adopted and filed as an official map of the city, it must have been intended that the streets represented on the map should thereafter be public streets of the city. It was not necessary that they should have been actually constructed and made ready for travel at that time. We think, therefore, if the city owned the land represented as Buena Vista street, that the ordinance and map, in the absence of any showing to the contrary, should be held sufficient evidence of a dedication of the land to the public as a public street.

3. It is further contended that the court erred in refusing to admit in evidence the judgment roll offered by appellants. The ruling seems to us erroneous for the following reasons: The principal question involved in that case was as to whether or not the deeds made by the city to McLaughlin in 1856 and 1875, conveyed the demanded premises, and it was conclusively determined by the judgment that they did. The reformation of one of the courses related back to the date of the deed, and made it read as it would have read if correctly written at the time. Now, if the land so conveyed included, as claimed, the strip of land in controversy here, then it necessarily follows that the city could not in 1868 dedicate that strip as a part of a public street, because it had no title to it. One of the issues in this case was whether or not the strip was a part of the street, and its determination depended upon whether the city owned the land at the time of its attempted dedication. Upon this issue the judgment roll in the other case, as it seems to us, was relevant evidence, and should have been admitted. In legal effect the parties and the issues in the two cases were the same. But counsel for respondent say: "It will be observed that this point only affects the case of the appellant Beaudry, as the other appellant, Ramsaur, was not in any respect a party in or to that judgment roll." It is true that Ramsaur was not a party to the former action, but he holds another lot of the same tract, under Beau-

dry, and his right to it depends upon the title which was then litigated. Under these circumstances, we think the record admissible in his favor as well as in Beaudry's. We advise that the judgment and order be reversed and the cause remanded for a new trial.

We concur: VANCILIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

PATERSON, J., (*concurring*.) It is unnecessary to determine in this action whether a judgment entered in an action between the city and an individual is a bar to an action by the people against another or the same defendant, where the question at issue in each case is whether the land in controversy has been dedicated to public use as a street. The judgment referred to in the foregoing opinion was admissible, because it was one of the monuments of defendants' title.

81 Cal. 223

BONETTI v. TREAT *et al.* (No. 14,353.)

(*Supreme Court of California*. Sept. 16, 1891.)

ASSIGNMENT OF LEASE — LIABILITIES OF PARTIES.

1. Where the assignee of a lessee covenants "to pay all rent that may fall due from time to time by virtue of the provisions of the lease," and enters into possession of the premises by consent of the lessor, the relation of landlord and tenant is created between him and the lessor, and his holding is by privity of estate; and, his liability being created by the covenant of the lease, he cannot, by an abandonment of the premises, divest himself of such liability.

2. Nor does the acceptance by the lessor of the assignee as a tenant release the lessee from his covenant to pay rent, but his liability continues by privity of contract until the lease is terminated.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. COPE, Judge.

Action by Bonetti against Treat and Porter for rent. Verdict and judgment for plaintiff. Defendant Porter appeals. Affirmed.

Philip Stewart and Richards & Carrier, for appellant. *B. F. Thomas*, for respondent.

FITZGERALD, C. Action for rent alleged to be due and unpaid on certain demised premises described in the complaint. The answer specifically denies the material allegations of the complaint, and avers the neglect and refusal of plaintiff to obtain his lessor's consent to the assignment, after having expressly agreed to do so, rescission of the lease, and surrender of the premises by the defendant Treat, and the acceptance of and entry thereon by plaintiff.

The facts disclosed by the testimony of the witnesses for the plaintiff are as follows: On the 9th day of January, 1888, the plaintiff executed to the defendant Treat, in conjunction with one Pierce, a written lease of the premises therein described for the term of five years from the 1st day of August, 1888, at the annual rent

of \$1,800 for the first year, and \$2,000 for each and every year thereafter, payable in two equal installments, semi-annually, in advance, on the 1st days of February and August of each year during the term of the lease. Subsequent to the execution of the lease, but on the same day, Pierce executed, with the consent of the plaintiff, a written assignment of all his right, title, and interest in the demised premises to the defendant Porter, who, as part of the consideration "of such sale or transfer, agreed to pay all rent that may fall due from time to time by virtue of the provisions of said lease." Porter immediately entered into possession of the premises as assignee under the assignment of the lease, and paid by his individual check a part, if not all, of the first installment of rent. Treat and Porter continued their joint occupancy of the premises until the latter part of July of that year, when they, without the knowledge or consent of the plaintiff, wholly abandoned the possession of the same; and afterwards, upon demand being made for the rent due and payable on the 1st day of August, 1889, they refused to pay the same. The reason given by the defendant Treat to plaintiff for the abandonment of the possession of the premises and the refusal to pay the rent when it became due was to the effect that Porter declined to pay any further rent until plaintiff obtained the consent of his lessor to the assignment, and that he (Treat) could not do anything alone. The evidence shows that plaintiff never promised or agreed to furnish such consent to Porter or to any one for him. In the early part of August, 1889, the defendant Treat delivered the keys of the house and surrendered the premises to plaintiff, in pursuance of an agreement entered into between them, by which Treat agreed to turn over to him the "dairy fixtures" on the place, and to pay in addition thereto the sum of \$200. Treat having failed and refused to perform any part of his agreement, the plaintiff handed the keys to his attorney, with instructions to turn them over to Treat, unless he complied with his agreement. The attorney called upon Treat, and made the demand of him, in accordance with such instructions, and, upon Treat failing to accede thereto, offered to return to him the keys, which he refused to accept, saying "that he did not want them; that he had surrendered them, and had no use for them." Afterwards, on the 2d day of September following, plaintiff served written notice on Treat and Pierce, mailed another to Porter, and posted one on the dairy-house on the premises, demanding the payment of the rent or the delivery to him of the possession of the premises on or before the 8th day of September, 1889. Plaintiff re-entered into possession about the last of October following.

At the conclusion of the plaintiff's testimony the defendant Porter moved for a judgment of nonsuit upon the following grounds: "The evidence shows that he is not a party to the lease of plaintiff to Treat and Pierce; that plaintiff refused and never did release Pierce from said lease as lessee, and defendant Porter never

executed the same; that the plaintiff never accepted defendant Porter as lessee upon the original lease; that the defendant Porter, as well as the defendant Treat, surrendered the premises within one year from the date of their occupation of said premises upon the terms specified in said lease, having first paid all rents for the use and occupation thereof during said period; that defendant Porter's tenancy as assignee of said Pierce, if the court holds that he was such, before the 1st day of August, 1889, terminated, and he had then ceased to be beneficially or in any way interested in said leasehold, or said premises, the subject thereof; that by mutual consent of the parties the relations of landlord and tenant existing between plaintiff and defendants was determined, and said lease rescinded, and defendants surrendered possession of all the premises, and plaintiff went into possession thereof; that the plaintiff himself elected to rescind and work a forfeiture of said lease, and notified defendants to pay the accruing rent in advance, or to surrender possession of the premises, and did consummate and execute said rescission, and did take possession of said premises; that at the time of the commencement of this action said lease set forth in the complaint was fully rescinded, determined, and canceled, and no cause of action existed for the enforcement of its covenants. The court denied the motion, and the defendant Porter excepted." The case was tried by a jury, and a verdict found in favor of the plaintiff, and from the judgment rendered thereon this appeal is taken by the defendant Porter upon the judgment roll alone.

The only error complained of relates to the ruling of the court denying the motion of the defendant Porter for judgment of nonsuit. Porter's covenant, contained in the assignment to him, "to pay all rent that may fall due from time to time by virtue of the provisions of the lease," and his entry into possession as assignee under the assignment, created the relation of landlord and tenant between him and the lessor, and his holding was by privity of estate, and not by privity of contract, as claimed by respondent. The lessor was not a party to, nor was he in any way benefited by, the contract of assignment. The liability of Porter to the lessor was, therefore, created solely by the covenant of the lease to pay the rent, which is a covenant running with the land, and not by the contract of assignment, the non-performance of which is enforceable only by the lessee. The assignee is answerable for the rent during his ownership of the term under the assignment, and his liability therefor arises out of the privity of estate, and this without reference to any obligation assumed by him in the contract of assignment. Nor did the assignment to Porter and the acceptance by the lessor of him as tenant release Pierce from his covenant to pay the rent, but his liability to the lessor continues, notwithstanding the assignment by privity of contract, to the end of the term of the lease, unless sooner terminated.

The evidence shows that Porter, shortly before the installment of rent sued for

became due, abandoned the possession of the premises, and refused to pay the rent, upon the pretext that the plaintiff had failed to furnish, as he agreed to do, the consent of his lessor to the assignment. This, of course, was a mere subterfuge. The contention that by the abandonment of the possession of the premises by Porter he parted with the beneficial interest, and yielded the possession to the beneficial owner, is unsupported by reason or authority. The legal title and the possession of the leasehold were in Treat and Porter, and he (Porter) could only divest himself thereof and dissolve the privity of estate by a reassignment in writing to the lessee, or by assignment of his interest to another, accompanied by surrender of possession, or by the working of a forfeiture of the lease for breach of its covenants, and re-entry for such breach, as provided for by the terms thereof. The surrender of the premises by Treat was conditional, and the condition was never fulfilled, nor was it in writing, as required by the statute of frauds; therefore such surrender did not operate as a dissolution of the tenancy. As the tenancy was only terminated by the lessor's notice to quit or pay the rent, and re-entry of possession under the right reserved by the lease for breach of its covenants, the motion for judgment of nonsuit was properly denied, for the reason that there was evidence tending to show the liability of appellant for that part of the rent at least which had accrued up to the time of the re-entry, and the sufficiency of it was properly left to the jury.

The only error assigned, as we have stated, was the refusal of the court to grant the motion for a nonsuit. As the case was one which had to be submitted to the jury on the evidence, if defendants desired to limit the recovery in any event to the amount of rent which had accrued at the time of the re-entry, it was their duty to ask the court to submit to the jury proper instructions upon that matter. Upon the record before us no error can be predicated. We therefore recommend that the judgment appealed from be affirmed.

I concur: VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

PEOPLE v. CHUM CUM YOOK. (No. 20,668.)
(Supreme Court of California. Sept. 2, 1891.)

APPEAL—FAILURE TO FILE BRIEFS—AFFIRMANCE.

Where an appeal is submitted upon briefs to be filed, and the time for filing them has passed, and no briefs are filed by appellant, the judgment appealed from will be affirmed.

Appeal from superior court, city and county of San Francisco.

BEATTY, C. J. This cause having heretofore been submitted upon briefs to be filed by counsel, and the time within which such briefs were to be filed having long since passed, and no briefs on behalf of ap-

pellant having been filed, it is now, therefore, ordered the judgment and orders appealed from be affirmed.

(1 Colo. A. 24)

ARNETT *et al.* v. COFFEY.

(Court of Appeals of Colorado. June 23, 1891.)

FRAUDULENT CONVEYANCE—EXISTING DEBT—LIMITATIONS—EVIDENCE—AVERMENT OF FRAUD.

1. Property of a debtor, alleged to have been transferred to his wife in fraud of creditors, cannot be subjected to a judgment against him unless it is shown that the debt existed prior to the transfer, or that the transfer was made with the intention of defrauding subsequent creditors.

2. In such case, the pleadings in the action in which judgment was recovered against the debtor are not competent evidence against the wife to show when the debt was incurred.

3. Where land is transferred prior to the rendition of a judgment against the grantor a bill cannot be maintained against the grantee to subject the land to the judgment unless a lien thereon has been acquired by levy of execution, or by filing a transcript with the recorder, as provided by Code Civil Proc. Colo. 1883, § 207, providing that from the time a judgment is docketed and a transcript of the docket filed with the county recorder it shall become a lien on the debtor's land.

4. Under Gen. St. Colo. 1883, § 2174, providing that bills for relief on the ground of fraud shall be filed within three years after discovery of the facts constituting it, an action to subject to a judgment land alleged to have been fraudulently transferred more than three years prior to its commencement cannot be maintained, where it is not shown when the fraud was discovered, and there is no averment of the nature of the discovery and the facts ascertained.

Appeal from district court, Boulder county; SYLVESTER S. DOWNER, Judge.

Action by Henry N. Coffey against Anthony Arnett and Mary G. Arnett to cancel an alleged fraudulent conveyance. Decree for plaintiff, and defendants appeal. Reversed.

In 1889, Henry N. Coffey brought this suit against Anthony Arnett and Mary G., his wife, to cancel sundry conveyances, which apparently vested the title to the described property in the wife. The bill set up that Coffey had obtained judgment against Arnett in the district court of Boulder county on September 14, 1888, for \$680.80, and that prior to the rendition of judgment, and at the time when the indebtedness was incurred upon which judgment was rendered, Anthony Arnett was the owner of certain real property. There was no other statement in the bill as to the date when the indebtedness accrued, or as to the circumstances under which it arose. The usual allegation of the issuance of a *f. fa.* and its return unsatisfied was in the bill. The plaintiff then averred "that he had been informed and believed, and so on information and belief charged the truth to be, that each, all, and every of the said above-mentioned conveyances, and every one of them, was and were not real, but was and were mere sham, and made with the intention of delaying and defrauding plaintiffs," etc. He charged that no consideration was paid by any of the grantees, who became the grantors of the wife, who likewise obtained title without paying anything for the property. The dates of the several transfers were given, from which it appeared that part of the property was conveyed to one

Jones in July, 1877, and that the conveyance from Arnett to Woodworth, and the conveyances by them to their grantees, and thence to Mrs. Arnett, were executed and delivered at various dates between that time and December, 1877. These various deeds and their dates were admitted, though the answer specifically denied the allegation of fraud and want of consideration, and, in the usual form adopted in answers in equity, made affirmative allegation that the conveyances were made in good faith and for a valuable consideration. To avoid the statute of limitations with reference to bills for relief on the ground of fraud the following allegation was made: "That he first learned and became possessed of the information that the said various conveyances hereinbefore charged and set forth were and are fraudulent within the three months last passed, and that he first learned and became possessed of the knowledge of the facts constituting the aforesaid fraudulent transactions of the said defendant Anthony Arnett in the aforesaid conveyances during the month of November, 1888." No other allegation on the subject appears in the bill. Issue was taken upon this averment, but upon the trial no proof was offered upon the subject. At the trial the only evidence offered as to the time when the indebtedness put into judgment in 1888 was incurred was the pleadings in that suit. That was a suit of Coffey against Arnett alone. The complaint in that case stated that in 1873 Coffey and others were interested with Mr. Arnett in the "Big Thing" lode, and that, in order to facilitate the procurement of the government title to the property, he and his co-owners deeded to Arnett, with the stipulation that Arnett should procure the patent and then redeed to the parties their respective interests. It averred the procurement of the patent in 1875, and the subsequent sale, in 1883, of the particular property to Jones and Yankee for \$5,000, and sought to recover the one-twelfth of the money paid by them therefor. It is needless to state the defenses set up further than to say that issue was taken upon all the averments, and that the proceedings resulted in the judgment which is the basis of this bill. On the trial of the present case evidence was introduced tending to show that the transfers from Mr. Arnett to Jones, and from him to Sweet, and from Sweet and Woodworth to Mrs. Arnett, were without consideration, and that they were made for the purpose of avoiding the liability supposed to exist against Mr. Arnett upon an official bond. The evidence offered by the plaintiff demonstrated that Woodworth paid a consideration for the title which he took, though the amount of it was not proven. A demurrer was originally interposed to the bill upon various grounds, and, among others, that it did not state facts sufficient to constitute a cause of action. It was overruled, and this order was followed by the answer. The decree vacated the various conveyances from Arnett to Jones and Arnett to Woodworth, set aside the various deeds whereby Mrs. Arnett acquired

title, and directed that the entire property should be subjected to the payment of Coffey's judgment.

William E. Beck and O. A. F. Greene, for appellants. George S. Adams, for appellee.

BISSELL, J., (after stating the facts.) It is universally agreed that as against existing creditors a debtor may not make a voluntary conveyance. To bring the case within this well-recognized principle it must be shown by both allegation and proof that the debt to which the property is said to be subject existed at the time of the conveyance, unless there be present an intention to defraud creditors whose rights are shortly expected to arise, and whose rights may thereafter supervene. *Wilcoxon v. Morgan*, 2 Colo. 473; *Sexton v. Wheaton*, 8 Wheat. 229; *Jackson v. Jackson*, 91 U. S. 122. As against Anthony Arnett it is tolerably clear that Coffey's claim did exist prior to the time of the several conveyances which he made. While no evidence whatever was offered upon that subject, other than what may be drawn from the record of the case of *Coffey v. Arnett*, as against him this seems to be ample for the purpose. In that suit an issue was fairly tendered as to the time and manner in which Arnett acquired the title to Coffey's one-twelfth interest in the lode. From the verdict in that case it must be assumed that Arnett took the title in trust and under an obligation to reconvey when he received the government patent. This obligation existed in 1873, prior to the date of the various conveyances which he made. In cases where the judgment is silent as to the issue upon which it was rendered it is entirely competent to resort to the pleadings for the purpose of determining what issue was tendered, and which may be said to be conclusively settled by the judgment. *Hinde's Lessee v. Longworth*, 11 Wheat. 199. This does not enable the plaintiff to recover. In the absence of any other proof than what is furnished by this judgment and the pleadings, the complainant, as against Mrs. Arnett, still remains a subsequent creditor. According to his own allegations, the various deeds from Mr. Arnett and the meane conveyances which vested the title in Mrs. Arnett antedated the judgment; and, while the pleadings in that suit may, as against Arnett, demonstrate that the plaintiff was a creditor prior to these various transfers, they do not now avail as against the wife, who was not a party to the record. When, therefore, it appeared from the plaintiff's own proof that Mrs. Arnett acquired title many years prior to the rendition of judgment, he was bound to show, as against her, by competent testimony, that he was a creditor before the date on which she acquired title. *Niller v. Johnson*, 27 Md. 6.

The right of a judgment creditor to come into a court of equity to remove a fraudulent obstruction to the collection of his judgment, and to enforce a claim against property which ought to be subject thereto, is well established; but in a case like the present it is requisite that the judgment shall be made a lien upon the property which is to be subjected to it. Where

the writ is thus operative, the lien may possibly be acquired by the execution, but otherwise the judgment must be either a lien under the statute when entered, or must be made one by the taking of those steps which the statute points out. That in some way the lien must be acquired and exist at the time that the bill is filed is clearly settled. *Barnes v. Belgly*, 9 Colo. 475, 12 Pac. Rep. 906; *Newman v. Willetts*, 52 Ill. 98; *Miller v. Davidson*, 3 Gilman 518; *Cornell v. Radway*, 22 Wis. 260; *Bank v. Newton*, 13 Colo. 245, 22 Pac. Rep. 444; *Evans v. Hill*, 13 Hun. 464. Under the statutes¹ existing in this state at the time Coffey recovered his judgment in 1888 the judgment creditor could only obtain a lien on realty by filing a transcript of the docket with the recorder of the county. While equitable interests may undoubtedly be subjected to execution, and the title which the purchaser obtains may be made the subject of a bill to remove a cloud upon his title, or to obtain a decree which shall establish his right to the property, these proceedings seem to be wholly unnecessary, provided the creditor makes his judgment a lien according to the form and course of the statute. *McFarran v. Knox*, 5 Colo. 217; 13 Colo. and 22 Pac. Rep., supra; *Bobb v. Woodward*, 50 Mo. 95. Since the creditor pursued neither of these courses, and neither had the execution levied upon the interest, and the interest sold and the title transferred to him, nor took the necessary steps to make the judgment a lien, he was wholly without right to the relief which he sought.

All bills filed for relief on the ground of fraud must, in this state, be filed within three years of the date at which the fraud was discovered.² When the time is limited by statute, all the authorities concur in holding that the complaint must state when the fraud was discovered, and that this averment must be supported by sufficient proof. *Pike v. Smith*, 5 Colo. 146; *Carr v. Hilton*, 1 Curt. 390; *Sublette v. Tinney*, 9 Cal. 424. The averments must be distinct, full, and specific, not only as to the time when the fraud was discovered, but also as to the nature and character of the discovery, and the facts which were ascertained. These allegations, and competent proof upon the subject, are alike requisite to the maintenance of the action. *De Mares v. Gilpin*, 15 Colo. 77, 24 Pac. Rep. 568; *Wood v. Carpenter*, 101 U. S. 135; *Manning v. Tin Co.*, 7 Sawy. 418, 9 Fed. Rep. 726. Tested by these rules, the plaintiff is absolutely without right of recovery.

¹ Code Civil Proc. Colo. § 207: "Immediately after entering the judgment the clerk shall make the proper entries of the judgment under appropriate heads in the docket kept by him. From the time the judgment is docketed, and a transcript of the docket filed with the recorder of the county, it shall become a lien upon the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until said lien expires."

² Gen. St. Colo. 1888, § 2174: "Bills for relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party of the facts constituting such fraud, and not afterwards."

He filed his bill to set aside the various transfers made by Arnett on the ground of fraud, and, in order to maintain his action at the time he brought it, alleged that he discovered the fraud within three months of the commencement of his case. Issue was taken upon this allegation. The plaintiff produced no evidence in support of it. The record is absolutely silent upon this proposition; and since, under the law established by the foregoing authorities, both the averment and the proof are indispensable, it follows that the plaintiff is without right of recovery upon the case which he made. The judgment must be reversed.

(6 N. M. 292)

BOARD OF EDUCATION OF EAST LAS VEGAS
et al. v. LAFORGA, County Treasurer.

(Supreme Court of New Mexico. Aug. 21, 1891.)

SCHOOL FUNDS—LIQUOR LICENSE MONEY—CONSTRUCTION OF STATUTES.

Acts N. M. 1891, c. 9, relating to the sale of intoxicating liquors, passed February 2d, to take effect May 1st, provides in section 8 that all moneys arising from licenses shall go into the hands of the county treasurer, "to be covered into the general school fund of the county." Chapter 25, providing a public school system, was passed 10 days later, to take effect immediately, and provides in section 85 that all money arising from liquor licenses shall be paid in the county treasury "to the account of the several school-districts wherein such money is collected." Held that, as the former act made no provision for distributing the fund, it would be presumed that the legislature then had in mind the passage of the latter, and hence the license money should be placed to the credit of the several school-districts, and not to the general school fund of the county.

Appeal from district court, San Miguel county; JAMES O'BRIEN, Judge.

Mandamus by the board of education of the town of East Las Vegas and Daniel Hoskins, town treasurer and *ex officio* treasurer of said board, against Jesus L. Laforga, county treasurer of San Miguel county, to compel him to place certain moneys to the credit of said board. Judgment for plaintiffs. Defendant appeals. Affirmed.

E. L. Bartlett, Sol. Gen., for appellant.
E. V. Long, for appellees.

McFIE, J. This is a proceeding by *mandamus*, wherein the board of education of the town of East Las Vegas seeks to compel the treasurer of the county of San Miguel to place to the account or credit of said board all moneys now in his hands, or which may hereafter be received by him, derived from license for the sale of intoxicating liquors within said town, and that said moneys be paid, when collected, to Daniel Hoskins, treasurer of said board. Alternative writ having issued, all formalities were waived, and upon the hearing of the court below a peremptory writ was awarded, in accordance with the prayer of the petition. To reverse the judgment of the court below the cause is brought to this court by appeal. The sole question submitted to this court is whether the money derived from liquor licenses collected in the school-district of East Las Vegas belonged to the general school fund, to be apportioned and dis-

tributed to all of the school-districts of the county of San Miguel, as provided in section 13, c. 25, Laws 1891, as contended by the appellant, or whether such funds are upon their receipt to be placed to the credit of and paid to the school-district of East Las Vegas, as provided in section 35, c. 25, Laws 1891. The appellant relies upon section 3, c. 9, of the Laws of 1891, which is as follows: "Sec. 3. Every license herein provided for shall be issued for the period of twelve months by the clerk of the board of county commissioners, upon order of such board, or by the city or town clerk or recorder, upon order of the mayor, city, or town council or board of trustees, as the case may be, and shall by such clerk or recorder be turned over to the applicant for said license upon the payment of said license fee by said applicant into the hands of the county treasurer, to be covered into the general school fund of the county: provided, that any officer who shall deliver to the applicant any such license until the tax thereon has been paid as herein provided shall forfeit to the said school fund double the amount of said license, to be recovered upon the official bond of said officer." The last clause of this section, it is insisted, provides that the license fund shall be paid to the county treasurer, to be covered into the general school funds of the county. Without examining into the merits of this contention for the present, we will first inquire as to the intention of the legislature in enacting chapter 9. It will be observed that chapter 9 is entitled "An act licensing the sale of intoxicating liquors and regulating the same." The entire chapter is devoted to the subject of license, having no reference by title to school purposes. It provides a graduated system of license, ranging in amounts from \$100 to \$400, and erects the legal machinery necessary to carry the system into successful operation. The legislative mind was therefore, at the time of the passage of what is known as the "High License Law," absorbed in the perfection of the law licensing and regulating the sale of intoxicating liquors, aside from all other subjects. Section 3 is the only section of the entire act that refers to schools or school funds, and that section is couched in very general terms. In adopting the license system, a large fund would necessarily be derived from it, which fund must be devoted to some proper purpose, and must have a custodian. The legislature determines that this fund shall be devoted to school purposes, and, while the language used is that it is to be covered into the general school fund of the county, it still remains apparent that this language is used in a general sense, and substantially says that the license fund shall be devoted to school purposes. But a single section is used for this purpose, and that section is one of accumulation and not of distribution. Under this section the license fund is placed in the hands of the county treasurers of the respective counties, without any provision whatever for its disbursement, and from this fact, and the further fact, of which we take judicial knowledge, that a few

days later the same legislature passed an act for the disbursement of school funds, we have a right to presume that the legislature had in mind the subsequent act of distribution, and therefore remitted the whole subject of the distribution of the license and other school funds to the further action of the legislature.

This view we find fully sustained by an examination of chapter 25, Laws 1891. Passing to the consideration of chapter 25, Laws 1891, we find the appellees relying upon section 35 of that chapter. It is undoubted that the legislature intended, by enactment of chapter 25 of the Laws of 1891, to provide a comprehensive public school system for the territory, and to do this it was necessary to provide the details for the successful operation of the system. It was necessary to provide for the necessary officers, for the necessary funds, and for the distribution of all available funds for the support of the system. An examination of chapter 25 discloses that all of these subjects were elaborated in a minute, intelligent, and creditable manner. The matter of provision for funds and of the distribution of them being alone before us in this case, we have examined these provisions with some care. Section 4 provides that the territorial board of education shall apportion the territorial school funds to the various counties, according to the number of children over 5 and under 21 years residing in the respective counties, and that the territorial treasurer shall draw his warrant in favor of the respective county treasurers for that amount appropriated to each county. This provision clearly refers to the territorial three-mill tax for school purposes, provided by law. After the fund passes to the county treasurer section 13 provides for its apportionment to the different school-districts of the county, according to the number of children of school age in their respective districts. This fund, therefore, must be apportioned to all organized school-districts in the county. Some importance is sought to be attached in the argument of the appellant to the words, "together with all the county school fund for the same purpose." Counsel for appellees contends that the poll-tax provided for in section 36 is referred to, while counsel for appellant suggests that the license fund is meant. As to whether the poll-tax constitutes that fund, or whether there is or is not any such fund in the county treasury, we are not called upon to decide in this proceeding; but we are satisfied that the license fund was not contemplated by that section of the act, nor was it intended to dispose of the license fund in that unrestricted manner. The license fund is clearly within the provisions of section 35, c. 25, Laws 1891, and is as follows: "Sec. 35. That the following are hereby declared to be and remain temporary funds for common school purposes: *First.* The proceeds of all sales of intestates' estates which escheat to the territory. *Second.* All forfeitures or recoveries on bonds of county, precinct, or territorial school officers. *Third.* The proceeds of all fines collected for violations of the penal laws.

Fourth. The proceeds of the sales of lost goods or estrays. *Fifth.* All moneys arising from licenses imposed upon wholesale and retail liquor dealers, distilleries, breweries, wine-presses, gambling tables or games of chance, which now pay license, or may hereafter be required to pay license. All the moneys arising from the above-enumerated sources, when collected, shall be paid into the county treasury to the account of the several school-districts wherein such sums are collected, officers collecting and paying in the same taking the county treasurer's receipt therefor. Should there be more than one school-district in any precinct, said amount collected shall be divided among the several school-districts *pro rata*, according to the scholastic census of said district as furnished to the county school superintendent for the current year." This section refers specifically to license fund, directs the manner of its distribution, and to whom it shall be credited. There was no provision for the distribution of this fund in the act creating it; therefore there can be no conflict between that act and section 35, which provides for a distribution of the fund. It is very evident that the legislature, in drafting section 35, had in mind the former act, because it refers to the specific fund thereby created, adopts the provision that the county treasurer shall be the custodian, and then specifically directs that the treasurer shall place the funds to the credit of the school-districts from which the money is collected. While the phraseology of that part of the section is not the best that could have been used, still that is obviously the meaning of the language. Appellees insist that the word "account" in the latter part of section 35 is used in a special sense, and is not equivalent to the word "credit;" that the language of that section means simply that an account shall be taken of the money received from school-districts; but we cannot agree to that construction. It is refined, but not persuasive. The language, "shall be paid into the county treasury to the account of the several school-districts wherein such sums are collected," clearly indicates that the legislature intended that the funds arising from licenses, fines, and other sources referred to in section 35, should inure to the benefit of schools in the districts wherein or by which the money is paid into the county treasury; that such money shall be placed to the account or credit of such district as soon as paid into the county treasury, and thereby become available only to the district from which the money was received; that the word "account" as used by the legislature is equivalent to the word "credit." We find additional evidence in section 42. In that section fines are provided for, and as to the money collected from those fines section 42 says: "All fines so collected shall be paid into the county treasury, and placed to the credit of the school-district in which the offense occurs." Section 35, in referring to fines as well as licenses, uses the same language as section 42, except the word "account" is used instead of the word "credit." It could not have been the intention

of the legislature to place fines collected under section 42 to the credit of the district from which they come, and do otherwise with the fines collected under section 35. Further, we see no reason for taking an account of funds derived from licenses collected in the different school-districts unless it be for the purpose of giving such districts the benefit of such funds, and we cannot believe that the legislature required a meaningless thing to be done.

It is further contended by the counsel for appellant that although chapter 9 was enacted prior to chapter 25, it did not take effect until May 1, 1891, while chapter 25 became a law February 12, 1891. There is no conflict between these acts, and both may remain in full force and effect. If, however, there was a conflict between section 3, c. 9, and section 35, c. 25, section 3 would be repealed to the extent of the conflict—*First*, because it is general, whereas section 35 is specific; and, *second*, because section 35 is the latest expression of the legislative will upon the subject. Counsel for appellant cite authorities to the effect that where a law is passed to take effect *in futuro* it became operative upon the day when it takes effect. Such is the law, but it is not the law applicable to this case. In case the last act passed by the legislature upon a given subject takes effect in the future, while a former act upon the same subject takes effect upon its passage, the provisions for the former act will prevail until the taking effect of the last act, because the latter act is the latest expression of the legislature; but if the former act takes effect last it will not prevail over a later expression of the legislative will. The reason is obvious. The last expression of the legislative will must prevail. If a mistake has been made in a former act, even during the same session, they have the power, and it is the duty, of the legislature to correct it. If for any reason the legislature desire to change a former law, they have the power to do so by a subsequent act; but, if the contention of the appellant is sustained, the last expression of the legislative will would be defeated by a former expression, which would be contrary both to reason and the law. The high license law did not take effect until May 1, 1891, while the public school law took effect upon its passage and approval, February 12, 1891. Appellant admits that the high license law was passed by the legislature February 2, 1891, 10 days prior to the passage of the school law, but contends that, as it did not take effect until May 1st, it became after that date the later and controlling law. We cannot give our assent to this view, as in effect it would prevent a legislature from correcting its errors or mistakes, and all that would be necessary to prevent a legislature from correcting vicious legislation would be to secure the postponement of the taking effect of the obnoxious act until after the adjournment of the session of the legislature. It is very evident that the legislature, in providing that the high license law should take effect May 1st, was simply to fix a

time when the new license system should commence, and give a reasonable time for preparation for compliance with its terms. Chapter 77, Laws 1891, is amendatory of chapter 25, § 1, and provides that the three-mill tax shall be paid direct to the county treasury, instead of to the territorial treasurer, as provided in chapter 25. Section 9, c. 77, provides for boards of education in incorporated cities and towns. The appellees are within the provisions of this act, and entitled to the relief sought in this proceeding. The court below properly granted the peremptory writ of *mandamus*, and the judgment of the court below is affirmed.

LEE, FREEMAN, and SEEDS, JJ., concur.

O'BRIEN, C. J., took no part in this case.

(6 N.M. 88)

COLER v. BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY.

(*Supreme Court of New Mexico.* Aug. 12, 1891.)

VALIDITY OF STIPULATION—CONSTRUCTION—EVIDENCE OF INSTRUMENT SUED ON—ASSUMPSIT—INTEREST ON RAILROAD AID BONDS—OVERISSUE OF BONDS.

1. In an action against a county to recover interest on its bonds, the attorneys stipulated that "the pleadings, bill of particulars, and other proceedings shall be deemed and considered hereby amended, so as to embrace the plaintiff's claim on coupons clipped from bonds aforesaid to the amount of \$19,915, * * * with interest thereon, * * * as well as the plaintiff's claim already specified in the papers on file herein." *Held*, that the stipulation was valid, and, where there was a recovery, judgment might be entered for the amount stipulated into the pleadings. FREEMAN, J., dissenting.

2. A stipulation in such case that "bond No. 45, produced by the plaintiff, is one of the bonds from which the coupons in question are detached, said bonds being issued in several series, and all of them in form, tenor, and recitals substantially like said bond No. 45," does not imply that the bonds of the several series are of like date and mature at the same time.

3. Where there was no plea denying under oath the execution of the coupons sued on, the coupons are admissible in evidence under common money counts, without further proof of their execution, under Comp. Laws N. M. § 1878, which provides that notes and other instruments in writing, not barred by the statute, shall be sufficient evidence to enable plaintiff to recover judgment thereon, unless defendant or his agent shall deny the same under oath.

4. A resolution of the county board that, as the county has not funds to meet the interest due on certain bonds issued to the N. M. & S. F. R. Co., "be it resolved, that the chairman of the county commissioners be, and he is hereby, authorized to make the necessary loan, in order to meet said interest when due," is a formal official recognition of the bonds, and an admission of the obligation to pay the interest when due, and such admission may be proven in an action to recover interest due, under the common counts.

5. Act N. M. 1872, § 1, provides that the people of any county may pledge the credit of such county to issue bonds to assist in the construction of any railroad passing through the county, not exceeding for any such road 5 per centum of the assessed value of the property of the county, as the electors may determine in meetings or elections, and the terms and conditions of such pledge of credit may also be determined as hereinafter provided, and the rate of interest on such bonds shall not be "more than * * * per centum per annum." Section 2 provides that the probate

judge or commissioners who may be hereafter provided for may call an election, on request of 15 electors of the county, which request shall specify the amount to be raised or pledged, the rate of interest to be paid, etc., and, in publishing a notice of the meetings or elections to be held, there shall be published with the notice a copy of the request. *Held*, that the clause in the first section as to the rate of interest on such bonds is imperfect, and, where the electors of a county have fixed the rate of interest to be paid on bonds as provided for in section 2, such rate is valid, in the absence of a usury statute.

6. Section 3 provides that, should it be determined at such elections to aid in the construction of any railroad, the probate judge of such county, or any commissioners who may by law be provided for, shall execute bonds under their seal of office, in conformity with the vote given at such elections. Act N. M. 1876 (Comp. Laws N. M. § 834) provides that "the powers of a county, as a body politic and corporate, shall be exercised by a board of county commissioners." *Held* that, where bonds were issued after the act of 1876 took effect, the fact that they were signed by the county commissioners and the probate judge of the county was not sufficient notice of irregularity in their issue to put a purchaser on inquiry, as the act of the commissioners was the act of the county in its corporate capacity, and the signature of the probate judge was a mere surplusage.

7. Under section 4, which provides that it shall be the duty of the proper officers levying the usual taxes for territorial and county purposes, under the general law of taxation, to raise by taxation such sums of money annually as may be sufficient to pay the principal and interest of such bonds as the same shall become due, etc., the statute of limitations will not run against an action to recover interest on bonds issued, where assessments were made and the money collected with which to pay such interest, but which interest was not paid when due by reason of misappropriation of the funds.

8. Where a bond, duly executed by a county, contains a recital that it "is issued in full conformity to and compliance with the statutes of the territory of New Mexico, empowering and authorizing counties to issue bonds to assist in the construction of railroads passing through all or any portion of said county," and has passed into the hands of an innocent purchaser for value, the county is estopped from denying the validity of the bond upon the ground that bonds were issued in excess of the amount allowed to be issued for such purposes by the act under which the bond was issued, where there is no constitutional limitation placed upon the amount of such bonds. FREEMAN, J., dissenting.

9. Where such bond states on its face the purpose for which it was issued, and that purpose is a legal one, and the recital shows a compliance with the law, it becomes a negotiable security, and cannot be impeached in the hands of a *bona fide* holder, except for want of jurisdiction in the board of county commissioners. FREEMAN, J., dissenting.

10. Where such bond, in the hands of a *bona fide* holder, is sought to be avoided on the ground that bonds were issued in excess of the 5 per centum allowed by the act of 1872, the burden of proof is upon the county to show that such *bona fide* holder had knowledge of the overissue. FREEMAN, J., dissenting.

11. A book which purports to be the assessor's register, or lists of assessments of a county for one year, which contains erasures and alterations, and which was not certified or verified as required by law, is not evidence of the assessed value of the property of the county at the date of such book.

12. The fact that there was a record which purported to be the assessor's register or assessment list, which was uncertified and unverified, as required by law, is not constructive notice to a purchaser of county bonds of the assessed value of the property in the county.

13. Where county bonds regular on their face,

and payable to bearer, have been floated for value, and the interest coupons have been produced in a suit to recover interest due, and received in evidence, that is a *prima facie* presumption that plaintiff became the holder of the coupons for value.

14. Under Act N. M. 1872, authorizing the people of any county to issue county bonds to assist in the construction of any railroad passing through the county, "not exceeding five per centum of the assessed value of the property of the county" bonds to the extent of 5 per centum may be issued to each road traversing the county, when so ordered by a vote of the people.

15. Where county bonds have been issued to aid in the construction of a railroad passing through the county, as provided by the act of 1872, a failure to pay interest thereon does not affect the negotiability of the security.

16. An action on detached interest coupons of bonds issued by a county is founded on written instruments, and is not within the statute of limitation, (Comp. Laws N. M. § 1863,) which provides that actions "founded upon accounts and unwritten contracts" shall be brought within four years.

Appeal from district court, Santa Fe county; WILLIAM H. WHITEMAN, Judge.

Action by William N. Cole, Jr., against the board of county commissioners of the county of Santa Fe, to recover on interest coupons. Judgment for plaintiff. Defendant appeals. Affirmed.

Laughlin, Gildersleeve & Preston, Thomas Smith, Dist. Atty., R. E. Twitchell, and N. B. Field, for appellant. Catron, Knaebel & Clancy, for appellee.

McFIE, J. This was a suit to recover the amount of overdue interest coupons on bonds issued by the appellant in aid of railroads. On the 31st of December, 1887, plaintiff filed in the district court in and for Santa Fe county a declaration containing ten counts. Nine of the ten counts were special counts in substantially the same language, and setting forth that the cause of action arose upon a large number of interest coupons, the different numbers and amounts being set forth in the several special counts, copies of the interest coupons being attached to and filed with the declaration. A demurrer was sustained to all the special counts, and the plaintiff elected to go to trial on the remaining count of the declaration, the common money count, the bill of particulars, and the stipulation as amendatory thereto. The defendant demanded the filing of a bill of particulars, and the rule was discharged by the plaintiff, by referring to the coupons on file with the declaration as a sufficient bill of particulars. The defendant filed six pleas: *First*, the general issue; *second*, plea of four years' statute of limitation; *third*, plea of six years' statute of limitation; and the *fourth*, *fifth*, and *sixth* pleas set forth substantially that the promises and undertakings alleged by the plaintiff, if any such were made, were illegal and void for want of authority in the probate judge and the county commissioners of Santa Fe county to call or hold an election for the purpose of granting aid to railroads; that the amount of the bonds issued was excessive; that the bonds bore an unauthorized rate of interest; that the county had no authority to issue or deliver the

bonds; that they were not issued in accordance with the vote of the people; that the recitals did not recite the conditions upon which the bonds were voted; and that the railroad had not been constructed. The plaintiff joined issue on the first plea; replied to the second and third, in substance, that the obligations were not barred by the statute; and to the fourth, fifth, and sixth pleas of the defendant the plaintiff replied, in substance, that the action was founded upon coupons and contracts in writing for the payment of the interest upon certain bonds which on their face purported to be bonds of the county of Santa Fe, issued in full conformity to and compliance with the statutes of the territory of New Mexico, authorized by the vote of the qualified electors, and that the plaintiff had purchased said coupons for a valuable consideration, and without notice of the matters alleged in the defendant's pleas. Rejoinders to each of the replications filed by the plaintiff to the defendant's fourth, fifth, and sixth pleas were filed by the defendant, but demurrers were sustained to each of them, and the defendant afterwards filed amended rejoinders, in which it substantially rejoined, to each of the plaintiff's said replications, that the action was not founded upon certain coupons or contracts in writing, that the plaintiff did not purchase such coupons for a valuable consideration, and denied that the plaintiff purchased the same without notice. The plaintiff joined issue.

Before proceeding to the trial of the cause, and as bearing upon the question of pleading, a stipulation was filed, as follows: "William N. Cole, Jr., vs. The Board of County Commissioners of Santa Fe County. In the district court, county of Santa Fe, July term, 1889. It is hereby stipulated by the respective parties to the above-entitled action as follows: The defendant admits that bond No. 45, produced by the plaintiff, is one of the bonds from which the coupons in question are detached, said bonds being issued in several series, and all of them in form, tenor, and recitals substantially like said bond No. 45. The pleadings, bill of particulars, and other proceedings shall be deemed and considered as hereby amended so as to embrace the plaintiff's claim on coupons clipped from the bonds aforesaid, to the amount of \$19,915.00, of which \$4,165.00 matured January 1st, 1888; \$5,250.00 matured July 1st, 1888; \$5,250.00, January 1st, 1889; and \$5,250.00 matured July 1st, 1889, with the interest thereon from said several and respective dates of maturity, as well as the plaintiff's claim already specified in the papers on file herein, and also so as to conform to the facts as to the form and recitals of the said bonds, as hereinbefore referred to. The defendant also admits that the county of Santa Fe levied taxes for the years 1881, 1882, 1883, 1884, 1885, 1886, and 1887 expressly for the payment of the interest accruing in those years upon and according to the tenor of the bonds, to which the said coupons were attached; that such taxes amounted to \$88,579.00; that of the proceeds of such taxes \$36,400.00 were paid on account of

the said interest, the said county upon such payment taking up and canceling coupons for a like amount, clipped from the said bonds; that a large sum of money, part of the proceeds of such taxation, was, by the said county, diverted from the purpose aforesaid for which it was raised, and appropriated to other county purposes; that the levy of the said taxes in each of the said years is evidenced by the written records of said county, subscribed in its behalf by its county commissioners, and attested by the proper clerk; that the said bonds and attached coupons were, upon their delivery to and acceptance by the New Mexico & Southern Pacific Railroad Company, sold by that corporation for value, and purchased by divers persons, and in the year 1888, and from time to time thereafter, the plaintiff acquired the said coupons and bonds for value. R. E. TWITCHELL, District Attorney. N. B. LAUGHLIN, THOMAS SMITH, GILDERSLEEVE & PRESTON, of Counsel. CATRON, KNAEBEL & CLANCY, Plaintiff's Attorneys."

Upon the issues thus made up the cause proceeded to trial on the 16th day of August, 1889. The trial resulted in a verdict for the plaintiff, under the instructions of the court, and a judgment was entered upon the verdict for the sum of \$78,395.02. To reverse this judgment the appellant brings the cause to this court.

The legislative assembly for the territory of New Mexico, in the year 1872, passed an act to encourage the building of railroads in the territory of New Mexico, and authorizing the counties of the territory to issue bonds, or other evidence of debt, to aid in the construction of railroads, and to receive stock or other securities for the benefit of such counties. The act is as follows: "An act authorizing counties to aid in the construction of railroads. Be it enacted by the legislative assembly of the territory of New Mexico: Section 1. That it shall be lawful for the people of any county in this territory to pledge the credit of such county to borrow money, to issue bonds or other evidences of debt, to assist in the construction of any railroad passing through all or a portion of said county, for such amount or amounts of money, not exceeding for any such road five per centum of the assessed value of the real and personal property of such county, as the electors of said county may determine in meetings or elections that may be held in the various precincts of such county for that purpose, and at said meetings or elections the terms and conditions of such pledge of credit may also be determined as hereinafter provided in this act. The amount of bonds or other evidences [of debt] that may become due in any year shall not exceed two per centum of the assessed value of the property of such county at the time of issuing such bonds or other evidences of debt. Nor shall the rate of interest upon such bonds or other evidence of debt be more than ——— per centum per annum. Sec. 2. It shall be the duty of the probate judge or commissioner who may be hereafter provided by law, as the case may be, to call a meeting or election of the electors of the various pre-

dicts of said county who own taxable property, upon the written or printed, or in part written or printed, request of fifteen owners of property, electors and taxpayers of such county, which request shall specify the amount which has to be raised or pledged, and the manner of raising and pledging the same by bonds or otherwise, the rate of interest which has to be paid, the time or times of the payment, and such other matters as they may consider for the welfare and security of the people of the county, and in publishing notices of the meetings or elections to be held in such county there shall also be published with such notice a copy of the request and names upon the same, for which they call the meetings or elections. The questions submitted to the electors shall be those contained in the call for the meetings or elections, and those who vote upon the question of aid shall vote a ticket upon which is written or printed, or part written and part printed, the words, 'Aid for railroads, yes;' and those who vote in the negative shall vote a ticket on which is written or printed, or part written or printed, the words, 'Aid for railroads, no.' The elections or meetings to determine the question of aid shall be held at the usual places of voting in the precincts of the county, to be called in the same manner, at the same hours of the day the polls shall be opened, and shall be closed at the same time and manner, and the tickets shall be counted by the same inspectors and persons, and they shall make returns of the same, certified, delivered, or returned in the same manner to all intents and purposes, as correct as is possible, as in the case of annual elections heretofore held for the election of officers, except that four notices of elections, printed in both languages, Spanish and English, shall be published at least fifteen days before the day of the election, in some conspicuous place in every and each precinct in the county, and shall be published in some periodical published in the county. Sec. 3. Should it be determined at such meetings or elections to aid in the construction of a railroad, and should it so appear from the proper returns of such meetings or elections held in such precincts as aforesaid, which returns shall be made, certified, and delivered by the proper inspectors, to the same person or persons, and in the same manner, that ordinary returns of election of county officers are certified, made, and delivered, within ten days after [wards], that such meetings or elections are held, it shall be the duty of the probate judge of such county, or of any commissioner or commissioners who may by law be provided for, elected, or appointed for that purpose, to execute bonds or other evidences of debt, under their seal of office, attested to by the clerk of the probate court, in conformity with the vote given at such elections or meetings of said county, and to require of the railroad company for whose benefit the aid has been voted such stock or other security for the same as can by such vote be required, as a condition precedent for the delivery of such bonds or other evidences of debt, and to do all other acts necessary to comply with

the vote of the electors of such county, and all moneys, certificates, securities, or other things inuring to said county under this act, and by virtue of the conditions of such vote of said electors, shall be deposited with said probate judge or commissioners, as the case may be, and by him or them shall be kept in safety until delivered, in conformity with the law, to the proper person at any time entitled thereto, or to the successor in office of said probate judge or commissioners as aforesaid. Sec. 4. It shall be the duty of the proper officer levying the usual taxes for territorial and county purposes, under the general law of taxation, to raise by taxation such sums of money, annually and from year to year, as may be sufficient from time to time to pay the principal and interest of such bonds or evidence of debt as regularly as the same shall become due, and in time to meet promptly the debt and interest: provided, that no bonds or other evidences of debt created under this act shall be sold for less than their par value; no such bonds or other evidences of debt shall be paid or delivered to any railroad company, nor to any person or persons for the use of such company, nor shall they be permitted to leave the hands of said judge or commissioners, except upon the certificate of the governor that the railroad to which such aid has been conceded has been completed in the county where such aid was voted, whether it shall be entirely for such part of the county as the road has to pass, or in such proportion to all the distance agreeably to the amount of bonds or other evidences of debt delivered shall show to the whole sum voted. Sec. 5. This act shall take effect from and after its passage. Approved February 1, 1872."

In the year 1876, and prior to the issuing of the bonds and coupons in question in this case, the legislature of New Mexico passed what is known as the "County Commissioners' Act." By this act it was evidently intended that the government of the county should pass from the probate judge to the boards of county commissioners provided for by the act, and the following provisions of that act are cited in support of this view: Section 332, Comp. Laws: "Each organized county in this territory shall be a body corporate and politic, and as such shall be empowered for the following purposes: * * * (4) To make all contracts and do all other acts in reference to the property and concerns necessary to the exercise of its corporate or administrative powers. (5) To exercise such other additional powers as may be specifically conferred by law." Section 334: "The powers of a county, as a body politic and corporate, shall be exercised by a board of county commissioners." Section 345: "The board of county commissioners shall have power at any session: * * * (2) To examine and settle all accounts of receipts and expenses of the county, and to examine and settle and allow all accounts chargeable against the county, and when so settled there may be issued county orders therefor, as provided by law. * * * (5) To represent the county and have the care of the county property, and the management of the interests of the

county, in all cases where no other provision is made by law. * * * (8) To grant all licenses as may be provided by law, and every officer and person now required by law to make a return or render an account to the judges of probate, except in matters pertaining to probate, shall make and render the same to the various boards of county commissioners in the manner now required by law. (9) * * * The votes cast in any election shall be canvassed and counted within the time now prescribed by law, and the said boards of commissioners shall discharge all the duties and shall exercise all the powers now exercised by the several probate judges relative to elections as now required by law, and shall be subject to the same penalties for any failure in the discharge of their duties and abuse or usurpation of power." Section 365: "All collectors, sheriffs, treasurers, clerks, constables, and all other persons responsible for money belonging to the county, shall render their accounts to settle with the board of county commissioners."

The bonds from which the coupons sued on in this case were detached, were issued in professed conformity to the provisions of the act of 1872, above referred to, as modified by the provisions of the county commissioners' act of 1876. They were issued in several series. Each bond stated the number of bonds in the series of which such bond was a part. The bonds were for \$1,000 each. The bonds do not show upon their face the total amount of the entire series, nor the value assessed, or otherwise, of the property of the county of Santa Fe. Every bond contained recitals declaring it to have been issued in pursuance of the proper statute. The recitals are in the following language, viz.: "This bond is one of a series of — bonds, each of like tenor, date, and amount, and of like date of maturity, issued in payment of a concession of — thousand dollars of bonds of the county of Santa Fe, payable 34 years after date to assist in the construction of a railroad by the New Mexico and Southern Pacific Railroad Company, passing through a portion of said county of Santa Fe, in the territory of New Mexico, and is issued in full conformity to and compliance with the statutes of the territory of New Mexico, empowering and authorizing counties to issue bonds to assist in the construction of railroads passing through all or any portion of said county, having been duly authorized by vote of the qualified electors who own taxable property in said county of Santa Fe, at an election duly called and held on the 4th day of October, A. D. 1879, and the governor of the territory of New Mexico having duly certified that the railroad to which such aid has been ceded has been completed in said county of Santa Fe, in full compliance with the terms of such concessions. In witness whereof, the undersigned, the probate judge and the board of county commissioners of the county of Santa Fe, in the territory of New Mexico, pursuant to and in full compliance with the statute in such case made and provided, have signed and executed this bond, and have caused the

same to be attested by the clerk of the probate court of said county, and *ex officio* clerk of said board of county commissioners, under the seals of said probate court and of said board of county commissioners, this ——— day of ———, 1880."

Each bond bore the county seal, and they were signed by the several county commissioners, the probate judge, and were attested by the probate clerk. It was unnecessary for the county commissioners and the probate judge to join in the execution. We are of the opinion that although, at the time of the passage of the statute authorizing such bonds, only the probate judge was authorized to represent the county in the execution, yet the county commissioners' act of 1876, taken in connection with the railroad aid act of 1872, transferred the powers of the probate judge, under the last-mentioned act, to the board of county commissioners. *Kaukakee Co. v. Aetna Life Ins. Co.*, 106 U. S. 668, 2 Sup. Ct. Rep. 80. We attach no importance to the fact that the probate judge united with the county commissioners in the proceeding.

Counsel for appellant insist that the fact that the probate judge signed the bonds was of itself notice of an irregularity in their issue, sufficient to put purchasers on inquiry; but we regard such fact as suggesting only an inquiry as to why the probate judge so acted. The inquiry, if pursued, would have led only to a reading and interpretation of the statutes under which the proceedings were had, and the only inference which a purchaser could draw from the union of the several official signatures on the bonds would have been that they were employed to satisfy all the requirements of the statute in case it should be held that subsequent legislation did not divest the probate judge of his former functions respecting such proceedings. The purchaser, instead of being led to conclude that the numerous signatures were suspicious circumstances, would be impressed with the evident care taken to remove objections. In carrying out the provisions of the act of 1872 by issuing bonds as therein provided for, the act of the probate judge would have been the act of the county itself in its corporate capacity; but in carrying out the provisions of that act, by issuing bonds in aid of railroads authorized by that act after the passage of the county commissioners' act of 1876, we are of the opinion that the act of the county commissioners would be the act of the county itself in its corporate capacity; and therefore, at the time the bonds to which the coupons involved in this case were attached were issued, it was not necessary for the probate judge to attach his official signature to them, but that his signature was harmless surplusage, and vitiated nothing otherwise valid.

Counsel for appellant also claim that the bonds ought not to bear 7 per cent. interest, but should have drawn 6 per cent. This claim is based on an imperfect clause in the first section of the act of 1872: "Nor shall the rate of interest upon such bonds or other evidences of debt be more than ——— per centum per annum."

This clause is imperfect and meaningless, and the court cannot by judicial construction fill the blank. It is unnecessary to examine the question of what, if any, significance should be given to the clause had it been the only provision concerning interest contained in the statute, for the next section clearly declares that the proposition to be submitted to the qualified electors should specify the rate of interest which is to be paid. The latter clause leaves the determination of the rate of interest to the people of the county. Here, the rule that, in case of repugnancy between statutory clauses, the latter shall control, is of service. Following that rule, the definite clause in the second section must control the imperfect clause in the first section. This construction is also aided by the practical interpretation of the statute by the county officers for a series of years in dealing with the very bonds in question. The county, by the vote of the people, fixed 7 per cent. as the rate of interest, but that interest was afterwards paid by taxes levied during several consecutive years. Another statute, passed at the same session of the legislature as was the railroad aid act, abolished usury, and left all persons free to contract concerning the rate of interest. Chapter 19, Laws 1872. The objection to the introduction of the coupons in evidence because they bore 7 per cent. interest was properly overruled. Six per cent. interest only was computed upon coupons overdue.

Appellant insists that some of the coupons sued upon were barred by the statute of limitation, a matter which, if sustained, would go to the question of a reduction of the judgment. One batch of the coupons in question matured in the year 1881, more than six years before the commencement of the action; some others of the coupons matured more than four years before such commencement. The appellant pleaded both the six-years and the four-years statute of limitations, and insists that, the declaration being on the common counts only, the four-years period of the statute is applicable, and cites in support of such contention some cases in the Vermont Reports. In our opinion, the action is essentially founded on written instruments, and therefore the four-years period of limitation¹ is not applicable. The common counts in the declaration could be proven either by oral or by written promises. *Lyon v. Bertram*, 20 How. 149-156. A copy of one of the bonds was filed in the action, as well as copies of the coupons, and these copies were also put into the case as part of the declaration by the appellee's bill of particulars. 1 Tidd, Pr. p. 599; *Benedict v. Swain*, 43 N. H. 34; and *Nauvoo v. Ritter*, 97 U. S. 391. The declaration and subsequent pleadings, read with the bill of particulars, show clearly that the coupons lay at the foundation of the action. This was the obvious, meritorious fact, and it is not to be overcome by the mere fiction of law that an implied

¹ Comp. Laws N. M. § 1668, provides that actions "founded upon accounts and unwritten contracts" shall be brought within four years.

promise was raised upon the express written promises. If the action was in one sense founded on the implied promise, it was in another sense also founded upon the underlying express promises upon which both the implied promise and the action itself were necessarily established. In *Supervisors v. Hubbard*, 45 Ill. 139, the common counts only were included in the declaration. The court treated the action as founded on the coupons involved. Moreover, the stipulation concedes, in effect, that the coupons lay at the foundation of the litigation. The stipulation, as well as the county's recognition of the bonds and coupons, sufficiently proves their due execution, even without resort to the statutory presumption. The coupons which matured in the year 1881 would be barred but for two reasons: *First*, it is stipulated that taxes were levied for the payment of those coupons; and, *secondly*, the board of county commissioners, before the six-years statute could attach, recognized the interest due on these bonds as a continuing liability. The county board, at its regular session, June 7, 1886, passed a resolution in the following language: "Whereas, it appears that there are not sufficient funds in the treasury of the county to meet the interest due on the bonds issued for the redemption of county warrants and bonds issued to the New Mexico & Southern Pacific Railroad Company, in aid of the construction of the branch thereof, be it resolved, that the chairman of the county commissioners be, and he is hereby, authorized to make the necessary loan in order to meet said interest when due, and said chairman is hereby authorized to issue a warrant for the payment of the interest on said loan. B. SELIGMAN, Chairman. JOHN GRAY, Clerk." This was a formal, official recognition of the bonds, as well as an admission of the obligation to pay the interest due on the bonds, and was provable both as an acknowledgment and as an account stated, under the common counts. The county board appears also to have admitted the accruing interest upon these county bonds at a session of the board held December 2, 1885. The county appears to have collected \$88,579, proceeds of taxation, applicable to the payment of the interest coupons on the bonds in question, in the years 1881, 1882, 1883, 1884, 1885, 1886, and 1887, and \$36,400 of the amount collected was in fact applied to the payment of the interest accruing on these bonds. Some of the interest money so levied by taxation appears to have been collected and diverted to other uses by the county. Enough appears to have been misappropriated to have paid the coupons which matured six years before the action. The precise time of such conversion does not appear in the case. If it was more than six years before the action, the appellant should have shown that fact. The amount was recoverable under the common counts, no objection being made on the trial of a variance between the proofs and the bill of particulars. It was also urged that the stipulation of the attorneys was *ultra vires*, and that notwithstanding the stipulation, the

coupons, amounting to \$19,915, which matured after the filing of the declaration, could not be considered in the case. This objection was not made in the court below, so far as the record discloses, and is therefore not available here. The stipulation is lawful on its face, and no application was made below for leave to withdraw it. Every presumption of authority attends the signatures of attorneys. *Osborn v. Bank*, 9 Wheat. 829; *Hill v. Mendenhall*, 21 Wall. 454. This presumption would extend to a mere voluntary appearance, and a voluntary appearance in a new action for the recovery of the payment of additional coupons would have had no higher efficacy than the stipulation entered into in the pending action. It was not necessary to interline or recopy the declaration so as to embrace the amendments. The stipulation imported an immediate amendment by force of its own terms, and the amendment, being specific in character, and not general, was perfectly regular. *Walden's Lessee v. Craig's Heirs*, 14 Pet. 147. The stipulation was admitted in evidence by the court below, and we think properly so. When it was offered, a general, but not specific, objection was made to its introduction; but an examination of the record discloses the fact that at no time during the trial of the cause was it suggested that the stipulation did not recite facts. Indeed, it was admitted by the appellant that the stipulation correctly stated facts. On page 59 of the record, Mr. Preston, one of the counsel for appellant who signed this stipulation, said: "We admit that the matters contained in the stipulation are facts, but deny that they are proper evidence." Mr. Smith, also of counsel for appellant, and who signed the stipulation, says on page 59 of the record: "We admit it to be a fact that taxes were levied for the payment of these bonds. The moment it shall be attempted to introduce that fact in evidence we will object, because we think it is immaterial. By admitting that this bond is a sample of the others, we do not admit that this bond is properly admissible in evidence. We admit that taxes were levied, but deny that it is proper evidence." This stipulation was signed by counsel regularly employed by the county of Santa Fe, as shown by the record, and the recorded proceedings of the board of county commissioners for Santa Fe county. It was also signed by the legal representative of the county, the district attorney, and the evident purpose was to simplify the issues by the admission of existing facts; and we see no reason why the defendant should be relieved from admitting the truth and the actual facts as they existed at the time the stipulation was entered into. This stipulation was evidently intended to remove from the case technicalities, in order that the cause might be tried upon its merits; the real purpose being to determine whether the bonds of the county were valid or void. Hence the stipulation provides that the pleadings should be considered as "hereby amended" so as to embrace all the coupons due up to the time of the trial, it being immaterial to the appellant, the amount of the

judgment not exceeding amount due. If the bonds and the coupons sued on were held to be valid obligations of the county. Therefore a technical examination of the pleadings in the cause seems to have been unnecessary, either in the court below or in this court. This court has already indicated its unwillingness to encourage technical objections respecting pleadings when made for the first time on appeal, after the parties have gone to trial acquiescently on an assumed issue of facts, holding that even the entire absence of a plea is immaterial, if the defendant goes to trial and controverts the plaintiff's claim by proof. We take notice of the fact that counsel who signed the stipulation in the court below are counsel in this court in this case, which, at least, suggests that counsel are not liable to the charge of having misrepresented the county in signing the stipulation. "The appearance of a regularly licensed practitioner of a chancery court is always received as evidence of his authority, and this, although he acts for a corporation." *Osborn v. Bank, 9 Wheat. 829.* "A record which shows an appearance by an attorney will bind the party until it is proven that the attorney acted without authority." *Hill v. Mendenhall, 21 Wall. 454.* "The authority of the attorney general of a state is presumed." *Pennsylvania v. Bridge Co., 13 How. 519.* We see no reason why the principle in this case does not apply to the district attorney or legal representative of a county.

It is insisted by the appellant that the court erred in admitting the coupons in evidence in the court below. We have already disposed of this objection, in so far as to hold that the coupons lay at the foundation of the action, and that the action was therefore founded upon written instruments, which may be received in evidence under the common money counts. By the pleadings, the bill of particulars, and the stipulation it is undoubted that the coupons were the real cause of action in this case. There was no plea denying under oath the execution of the instruments sued on, and hence they were admissible in evidence without any further proof of their execution, under the provisions of the Compiled Laws of New Mexico.¹ One of the bonds was admitted in evidence, not because it was really a part of the cause of action, but it was properly admissible as furnishing the substratum on which the coupons rested. *Supervisors v. Hubbard, 45 Ill. 141.*

Proceeding, then, to the consideration of the main issue, the fundamental questions in this case are—*First*, whether the bonds to which the coupons sued on were attached were illegal in their inception; and, *secondly*, whether such illegality, if it existed, is available as a defense against the appellee. If the county of Santa Fe

was utterly without power to issue the bonds, the bonds are bad, no matter into whose hands they may have passed. The utmost good faith could not avail a purchaser in such a case. But, if the bonds were issued within the apparent scope of a lawful power, and their recitals import the performance of all the conditions precedent, then irregularities in the exercise of the power, although they might perhaps have avoided the bonds as between the county and the railroad company, afford no defense against a subsequent *bona fide* holder. In such case, the county, as against one presumed by law to be a *bona fide* holder, must, by affirmative proof, bring home to him knowledge of the irregularities in order to avoid the securities. The bonds state on their face the purpose for which they were issued, and that purpose being a legal one, and the recitals being ample in their showing of compliance with the law, they must be considered negotiable securities, not impeachable in the hands of *bona fide* holders except for want of jurisdiction in the board of county commissioners. The appellant insists that upon the trial it offered to show absolute want of power in the county to issue the bonds, but was prevented from making that showing by the erroneous ruling of the trial court. The essential point made is that the county was prohibited by law from issuing bonds of the kind in question in an amount exceeding 5 per cent. of the assessed value of the property of the county, and, on account of the terms of the stipulation of the attorneys filed in the cause, this point is supplemented by the criticism that, assuming all the bonds to be in terms like the one produced and referred to in the stipulation, they must all come due in the same year, namely, 34 years from date, and that thus the amount of principal payable in one year would exceed 2 per centum of the assessed value of the property of the county at the time of issuing the bonds, contrary to a further prohibition of the first section of the statute. A reference to the terms of the stipulation does not sustain the latter point. The stipulation recites that the bond No. 45 is one of the bonds from which the coupons were detached, the said bonds being issued in several series, and all of them in "form, tenor, and recitals substantially like the said bond No. 45." It is not stipulated that they are dated alike, nor that they mature at the same time; it is stated that they were in several series. The presumption is that the bonds were legally issued; therefore that the different series matured in different years, so as to be within the terms of the statute. But these propositions both involve the same legal principle. If the proceedings looking to the county aid contemplated an overissue of the bonds, and no representations by recitals could protect an innocent purchaser, of course the bonds would be void, and the coupons fall with them. The real objection of the county to the payment of the bonds is found right here in the case. Great ability has been shown by counsel in pressing this subject upon the attention of the court, and we have given it great consideration. We have come to the con-

¹ Comp. Laws N. M. § 1878: "Accounts duly verified by the oath of the party claiming the same, or his agent, and promissory notes and other instruments in writing, not barred by the provisions of this act, shall be sufficient evidence in any suit to enable the plaintiff to recover judgment for the amount thereof, unless the defendant or his agent shall deny the same under oath."

clusion, however, that, even were the objection that there was an overissue not otherwise untenable, the county failed at the trial to tender legal evidence of the assessed value of the property of the county at the time the bonds originated. It seemed to have been assumed by the counsel for the county at the trial that the assessed value to be proved was the last assessment for purposes of taxation prior to the railroad aid proceedings, and they accordingly produced what purported to be the assessor's register, or list of assessments for the year 1879; but that book contained erasures, interpolations, alterations, and was objected to on that as well as other grounds. Besides, it was not certified or verified, as required by law, at the time. Prince, St. p. 534. If the railroad aid act referred to the last assessment for purposes of taxation, it intended a valid assessment, not a vague, unofficial, illegal document or book. An assessment is a serious thing. It exists only pursuant to law. A pretended assessment, made in defiance of law, is no assessment at all. 1 Desty, Tax'n, pp. 557-581; Cooley, Tax'n, 259-289. The book of assessments made by the assessor in the year 1879, offered on the trial below, being mutilated, and unverified or certified as required by law, was not a valid assessment, and the court was warranted in making that one of the reasons for its rejection as evidence in the case, for the reason that such a record was incompetent to prove a valid assessment, such as would bind a *bona fide* purchaser for value of negotiable securities, upon the principle of constructive notice, nor was it conclusive of value, as the county commissioners had power to alter it, either by increasing or diminishing. The case mainly relied on by the appellant, that of Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. Rep. 315, is based upon the theory that an assessment, such as referred to in the Nebraska constitution, is a record of which all the world has constructive notice. The court in its opinion refers to two factors present to the purchaser in that case,—one, the assessment, of which he had constructive notice by the record; the other, the extent of the county indebtedness occasioned by the bonds, of which he had actual notice by the statement of the total amount of such indebtedness upon the face of each bond. The validity of the record and total amount of the assessment in that case was unquestioned, and, each bond showing upon its face the total amount of the issue, it became simply a matter of arithmetical calculation on the part of the purchaser, and which the purchaser was bound to make, to demonstrate the invalidity of the bonds. The reasoning in that case has no application to a pretended assessment, unverified and uncertified, as required by law, and one which cannot operate as constructive notice any better than an unlawfully recorded deed of real estate. We thus find, even if the principle of the Dixon County Case could be effective under such a statute as that in question here, it could not be in the absence of proof of a lawful assessment of record. It is not to be inferred from anything said in the opinion of the court

in that case that, in the absence of constructive notice by a lawful record, a purchaser of municipal bonds, containing recitals as broad as these appearing here, is put upon inquiry as to the actual amount of taxable property in a county, and of every fact (*allunde*) which might properly be considered by an assessor or by a board of commissioners in coming to a determination or estimate on the subject of taxable values. Such facts are proper to be considered by the county officials in forming their own conclusions as to the amount of taxable property, but the bond purchaser is not called upon to exercise his judgment upon that. This is certainly the effect of the decision in Marcy v. Town of Oswego, 92 U. S. 637, and in many other similar cases.

In the case of Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. Rep. 315, the facts are essentially different from those of the case here. The statute of Nebraska, authorizing donations to be made to railroads, authorized the issue of bonds to an amount not exceeding 10 per cent. of the assessed valuation of all the taxable property in the county, with the proviso requiring submission of the question of issuing bonds to a vote of the legal voters for the county in the manner provided by law. That act of the legislature was afterwards amended on the 17th day of February, 1875, so as to require a two-thirds majority of the votes cast at the election, instead of a mere majority, to authorize the issuance of bonds. It will be observed that the statute prohibited the issue of bonds exceeding in amount 10 per cent. of the taxable value of the property in the county. The constitution of Nebraska took effect November 1, 1875. The constitution followed the statute by authorizing donations to railroads, authorized by a vote of the electors. In its first proviso it restricted such donations to not exceeding 10 per cent. of the assessed valuation of such county, but in the second proviso to the constitution there was this provision: "That any city or county may, by a two-thirds vote, increase such indebtedness 5 per cent. in addition to such 10 per cent.; and no bonds or other evidences of indebtedness so issued shall be valid unless the same shall have indorsed thereon a certificate signed by the secretary and auditor of state, showing the same is issued pursuant to law." The county of Dixon issued bonds exceeding 10 per cent. of the admitted assessed valuation of the property of the county, but less than 15 per cent.; and upon the trial it was insisted that, although the statute only authorized the issuing of bonds to the extent of 10 per cent. of the assessed valuation of the property of Dixon county, the constitution by its second proviso had the effect of enlarging the statute by construction, and thereby legalized the issuing of bonds in excess of the limit prescribed by the statute. The court held in that case that the adoption of the constitution had no such effect, and refused to give it the construction asked for, in support of the bonds; holding that the object of the constitutional amendment was to restrict and

prohibit, rather than enlarge, the powers conferred by the statute of Nebraska. In this case there is no restrictive or prohibitive constitutional provision. The powers granted the county of Santa Fe in this case were purely statutory, and this case clearly falls within the principle of the numerous cases decided by the supreme court of the United States, where bonds were issued in professed conformity to statutory enactments. It will also be observed that in this case the statute does not restrict the county to the granting of aid or subscription for stock to one railroad.

The appellant erroneously assumes that the 5 per cent. limit relates to the amount of aid extended to any railroad corporation, whereas the statute uses the word "railroad," *cualquiera ferrocarril*. The statute deals with the subject of aid to construction, or to a railroad, as aid to a definite, tangible thing *in rem*, rather than aid to a corporation *as such*. Consistently with the statute, the same corporation which had secured 5 per cent. of aid in the construction of one road might lawfully receive aid in the construction of another road, it being plain that the statute permitted 5 per cent. of aid to the construction of a road by one company, and also a like amount of aid in the construction of another road; but, on principle, it makes no difference whether the various roads are constructed by one or several companies. In either case, the county gets the benefit of the railroad improvement in increased facilities for trade and communication, increased population, and increased amount of taxable real estate within its jurisdiction; which undoubtedly was the object sought to be obtained by the legislature in the passage of the railroad aid act. It accorded aid to the building of railroads, regardless of the owners. In the case of County Com'rs of Santa Fe Co. v. New Mexico & S. P. R. Co., 3 N. M. 120, 2 Pac. Rep. 376, in considering the validity of a statute of New Mexico exempting railroad property from taxation for six years after completion, Judge BRISTOL, in delivering the opinion of the court, used the following language, which we deem equally applicable to the present case, as the statute should be construed according to its intent as well as its language: "At that time the territory of New Mexico was the most inaccessible portion of the dominion of the United States to enterprise and commerce. Every branch of industry was languishing, as it had been for centuries, for lack of cheap and rapid transportation to the leading marts of the country. To expend millions in constructing long lines of railway to and through this remote region was a hazardous undertaking; an experiment; a venture which any but the boldest minds would readily shrink from. At that date not a foot of railroad had been constructed anywhere within the borders of New Mexico. It was under this condition of things that the territory, through its legislative assembly, made a bid for railroads under fair and explicit terms, and upon a consideration of great public importance. As plainly as it could be ex-

pressed by acts of the legislative assembly the territory said to all railroad corporations then existing under the laws of the territory, or thereafter to be organized under such laws, that, in consideration of the public benefits to be derived from the construction and operation of railroads within the territory, upon the completion of any such railroad by any such corporation, its corporate property therein and connected therewith shall be exempt from taxation for six years after such completion." Again, the record discloses the reason why the bonds in this case were authorized to be issued in series, and that there were in fact several series, in that the act evidently contemplated that the bonds might be issued and delivered at different times as the construction progressed. Each bond issued bore upon its face the number of bonds in the series only, and not the entire number of bonds issued in the several series. And it may be further observed that neither of the series issued exceeded in amount the statutory limit, admitting that there was a valid record of the assessed value, and that the purchaser was chargeable with notice of that record. In this case the purchaser of one of the bonds in any one of the series could not ascertain or determine by comparing it with the assessed value of the property of the county of Santa Fe that there had been an overissue of such bonds, or that they had not been issued in strict conformity to the law under which they professed upon their face to have been issued. There is a marked difference between this case and the case of Dixon Co. v. Field, in this respect. In the case of Dixon County each bond showed the entire amount of the bonds issued, (\$87,000,) and the purchaser, having the assessed value of the property of Dixon county in one hand, and in the other one of the bonds issued by the county, could ascertain in a moment that there had been an overissue, and consequently an absence of power in the county to issue them. The two factors in the case of Dixon County against Field were necessarily before the purchaser of the bonds, even in the open market, but the two factors were not present to the purchaser in the open market of the bonds in this case; and more especially is this true when it is admitted by the stipulation that these bonds, and the coupons attached to them, "were, upon their delivery to and acceptance by the New Mexico & Southern Pacific Railroad Company, sold by that corporation for value, and purchased by divers persons; and in the year 1883, and from time to time thereafter, the plaintiff acquired the said coupons and bonds for value."

It will be observed that the electors of the county were clothed with the power to determine the conditions precedent to the issuance of the bonds, except as to the result of the vote, at the election to be held; whether aid shall be given to any railroad or not, and, if so, to what extent, when payable, and the rate of interest; the points from which and to which the railroad shall be constructed, and the terms upon which the aid is granted; and,

If the electors so determine, the law further declares that it "shall be the duty of the probate judge, commissioner or commissioners," or, in other words, the legally constituted authorities of the county, who were clothed with the power to determine the result of the vote, to issue the aid as determined by the vote. The law further provides that the authorities of the county whose duty it was to issue the bonds shall deliver them upon the certificate of the governor as to the completion of part or all of the road, and they shall have the power to require of the railroad company constructing the road, in consideration of the delivery of such bonds, such an amount of stock or other security as may be deemed for the welfare or security of the county. The record discloses that the propositions were submitted upon the request of 15 owners of property, electors and tax-payers of the county; and there appears to be no question as to the legality of the elections or the result of the vote, nor that the bonds were issued in conformity to the result of said elections, in the amount, time of payment, interest to be paid, etc. Two separate propositions, two different railroads, constructed from different points within the county, were submitted and voted upon. The certificates of the governor are shown in the record of the completion of different portions of the road, at different times; these certificates having been made evidently for the purpose of authorizing the delivery of the bonds for the portions of the road constructed. The act provided that the bonds should be delivered to the railroad company constructing the road, and, in the absence of any proof to the contrary, it must be assumed that they were so delivered; nor is it disclosed by the record that the plaintiff in this case was in any way connected with the railroad company that received the bonds, nor that he had any knowledge of the bonds or coupons in question, except such as the law imputed to him. It is a general rule that when the holder of a negotiable instrument regular on its face and payable to bearer produces it in a suit to recover its contents, and the same has been received in evidence, that is a *prima facie* presumption that he became the holder of it for value at its date, and in the usual course of business. *Murray v. Lardner*, 2 Wall. 110; *Bank v. Neal*, 22 How. 96; *Collins v. Gilbert*, 94 U. S. 753; *Brown v. Spofford*, 95 U. S. 474. "Municipal bonds payable to bearer are subject to the same rules as other negotiable paper." *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep. 704. In the present case there is nothing to rebut the presumption arising from the production of the coupons, that the plaintiff was the *prima facie* holder of them for value. The bonds and coupons having been floated for value immediately upon their delivery by the county, every subsequent purchaser, whether or not he gave value, whether or not he had notice of any infirmity in the origin of the securities, was clothed with the immunity of his assignor; and even the first purchaser for value cannot be impeached as acting *mala fides*, merely because some of the interest accrued on unmatured

bonds is in arrears, failure to pay interest, not affecting the negotiability of that class of securities. Obligations of municipalities in the form of those in suit here are placed by numerous decisions of the supreme court of the United States on the footing of negotiable paper. *Cromwell v. County of Sac*, 96 U. S. 51.

Coupon bonds of the ordinary kind, payable to bearer, pass by delivery, and a purchaser of them in good faith is not affected by want of title in the vendor. The burden of proof on a question of such faith lies on the party who assails the possession. Possession of such paper carries the title with it to the holder. Possession and title are one and inseparable. *Murray v. Lardner*, 2 Wall. 121. The plaintiff was the *bona fide* holder for value of the coupons sued on in this case, and the only defense available for the appellant in this case was the absolute want of power in the corporate authority of the county of Santa Fe to issue the bonds and the coupons involved in this suit. In *Town of Coloma v. Eaves*, 92 U. S. 484, it is held that, "where it may be gathered from the legislative enactment that the officers of the municipality are invested with the power to decide whether the condition precedent has been complied with, their recital that it has been made upon the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal," the real question involved being whether in the particular case under consideration a fair construction of the law authorized the officers issuing the bonds to ascertain, determine, and certify the existence of the facts upon which their power, by the terms of the law, was made to depend.

That there was a clear and explicit legislative enactment authorizing the county of Santa Fe to issue bonds in the aid of the construction of railroads constructed within the limits of the county, at the time the bonds and coupons involved in this case were issued, there can be no serious question. By the provisions of the railroad aid act the county itself, by a vote of its properly qualified electors, was clothed with the power to determine in what manner and to what extent aid should be given to the constructions of railroads within the county. The law provides that in the proclamations of election all of the propositions to be voted upon and determined by the electors shall be stated and published, the total amount to be issued, the time of payment, the rate of interest, the railroad to which aid is to be granted, and all other matters necessary to fully inform the elector of the matters to be determined by the vote of the people. The county itself, through its electors, determined all questions precedent to the issuing of the bonds, and it then became the duty of the corporate authorities of the county, which at that time was the board of county commissioners, to carry out the provisions of the law, and to issue the bonds provided for by the vote of the people. The corporate authorities represent the county, and their

act is the act of the county itself, to the extent of its corporate powers, and the people put in motion the machinery that compelled the corporate authorities to act, to the extent of issuing the bonds involved in this proceeding. In this way the bonds originated, and, so far as the record discloses, no effort was ever made to prevent their issuance or delivery to the railroad company, or prevent their being negotiated, and in that way they became commercial paper upon the open market. The bonds being lawful and negotiable on their face, and the appellee and the prior purchasers who bought them when they were sold by the railroad company upon their delivery to the company by the county being entitled to the presumption protecting innocent holders of commercial paper, the appellant, without showing or offering to show that the appellee's assignors were cognizant of any irregularities, could not be permitted to prove them on the trial, unless they indicated absolute want of power in the county.

We consider the defense, and evidence in support of it, tendered by the appellant, to show the alleged want of power to have been incompetent. But suppose that the rejected evidence had been admitted, how could it have helped the appellant? No constitutional limitation is involved in this case. In New Mexico it was perfectly competent for the legislature to confer upon the county and its officers the power to pass upon all the facts and conditions preliminary to the execution of the bonds. The supreme court of the United States still adheres to the doctrine of the cases of *Town of Coloma v. Eaves*, 92 U. S. 484; *Marcy v. Township of Oswego*, 92 U. S. 637; *Humboldt Tp. v. Long*, Id. 642; *Wilson v. Salamanca*, 99 U. S. 504; *Dallas Co. v. McKenzie*, 110 U. S. 686, 4 Sup. Ct. Rep. 184,—and other similar decisions, by which it was held that the railroad aid statutes similar to the New Mexico statute conferred by implication upon the county or township officials the power to consider and adjudicate all such preliminary matters, and to recite their determination on the bonds in terms creating an estoppel against the county or municipality. The language used in the opinion of the court in *Comanche Co. v. Lewis*, 133 U. S. 206, 10 Sup. Ct. Rep. 286, is applicable to the recitals on the bonds in question. In that opinion Mr. Justice BREWER says: "The recital that the bond was executed and issued in pursuance of and in accordance with that act, [the authorizing statute.] and also in accordance with the vote of the majority of the qualified electors, is, within the repeated rulings of this court, sufficient to validate the bonds in the hands of a *bona fide* holder." In the case of *Township of Bernards v. Morrison*, decided March 3, 1896, and reported in 10 Sup. Ct. Rep. 333, the court says, by Mr. Justice BREWER: "It were useless to refer to the long list of cases in which recitals like these have been held sufficient to sustain bonds in the hands of *bona fide* holders. While it is true that the act does not in terms say that these commissioners had the right

to have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named." In the case of *Oregon v. Jennings*, 119 U. S. 74-92, 7 Sup. Ct. Rep. 124, the rule is thus stated by Mr. Justice BLATCHFORD: "Within the numerous decisions of this court on the subject, the supervisor and the town-clerk, they being named in the statute as the officers to sign the bonds, and the corporate authorities to act for the town in issuing them to the company, were the persons intrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed, and then certify to that effect in the bonds. The town is estopped from asserting, as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with. Whatever may be the hardships of this particular case, to sustain the defendants would go far towards destroying the market value of municipal bonds." Several of the cases above cited expressly hold that under such statutes the defense of an overissue cannot be set up against such recitals. The *Dallas County Case*, 110 U. S. 686, 4 Sup. Ct. Rep. 184, was decided almost at the same time with the *Dixon County Case*, and it follows the prior cases on the subject, the chief justice saying that "in those cases it was expressly decided that municipal bonds were not invalid in the hands of a *bona fide* holder, by reason of their having been voted and issued in excess of the statutory limit, if the recitals imported a valid issue." In *Supervisors v. Schenck*, 5 Wall. 772, in giving the opinion of the court, Mr. Justice CLIFFORD says: "Argument of the defendants proceeds upon the ground that, if they can show that the order for the election emanated from the wrong source, the plaintiff, although an innocent holder for value, cannot recover; but it is clear that in a case like the present, where the power to issue bonds was fully vested in the corporation, the proposition cannot be sustained. On the contrary, it is settled law that a negotiable security of a corporation, which upon its face appears to have been duly issued by such corporation, in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof without notice, although such security was in point of fact issued for a purpose and at a place not authorized by the charter of the corporation." In *Mayor v. Lord*, 9 Wall. 409, Mr. Justice SWAYNE said: "In that event, if the bonds could have been properly issued under any circumstances, he [an innocent purchaser] had a right to presume they were so issued, and as against him the city is estopped to deny their validity." In *Mercer County Case*, 1 Wall. 92, 93, Mr. Justice GRIER says: "The bonds declare on their face that the faith and credit and property of the county are solemnly pledged under the authority of certain acts of the assembly, and that in pursuance of said acts the bonds were signed by the commissioners of the county. They are on their face a complete and perfect exhibit, no defect in form

or substance, and the evidence offered is to show the recitals on the bonds are not true; not that no law exists to authorize their issue, but that the bonds were not made in pursuance of the acts of the assembly authorizing them." In the case of *Commissioners v. Aspinwall*, 21 How. 545, it is said that, "where the bonds on their face import compliance with the law under which they were issued, the purchaser is not bound to look further. The decision of the board of county commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of the parties had attached, but, after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. These securities are treated as negotiable in the commercial usages of the civilized world, and have received the sanction of judicial recognition. Although we doubt not the facts stated as to the atrocious frauds which have been practiced in some counties in issuing and obtaining these bonds, we cannot agree to overrule our own decisions, and change the law to suit hard cases." In *City of Lexington v. Butler*, 14 Wall. 282, the court say: "The repeated decisions of this court have established the rule that, when a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which gave the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." In *San Antonio v. Mehaffy*, 96 U. S. 312, the court said: "The holder of commercial paper, in the absence of proof to the contrary, is presumed to have taken it under due, for a valuable consideration, and without notice of any objection to which it was liable. * * * This shuts the door, as a matter of law, to all inquiry touching the regularity of the proceedings of the officers charged with the duty of subscribing and making payment in the way prescribed. The rule in such case is that, if the municipality could have had the power, under any circumstances, to issue the securities, the *bona fide* holder has the right to presume they were issued under the circumstances which gave the authority, and they are no more liable to be impeached in his hands for any infirmity than any other commercial paper."

Three cases have been cited by the appellant, and apparently relied upon, in support of the proposition that the recitals do not work an estoppel. In each of the cases a constitutional limitation was involved. In the case of *Buchanan v. City of Litchfield*, 102 U. S. 278, the bonds contained no estopping recitals, and did not even contain a statement of the purpose for which they were issued. Hence the court said in that case that, "when a municipal bond does not bear upon its face a statement of the lawful purpose for which it was issued, or recitals estopping the municipality, it is necessary for the

plaintiff, in a suit upon the bonds or upon the interest coupons, to aver and prove that they were issued under legislative authority, and in the mode and for the purposes provided by law." The case of *Dixon Co. v. Field* we have already referred to. The third case, *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654, also involved a constitutional limitation. In the opinion of the court it is said: "The question here is distinguishable from that in the cases relied on by the counsel for the defendant in error. In this case the standard of validity is created by the constitution. In this standard two factors are to be considered,—one the amount of the assessed value; and the other the ratio between the assessed value and the debt proposed. These being the exactions of the constitution itself, it is not within the power of the legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose findings shall be taken in lieu of the facts. In the case of *Sherman Co. v. Simon*, 109 U. S. 735, 3 Sup. Ct. Rep. 502, and others like it, the question was one of estoppel, as against the exaction imposed by the legislature; and the holding was that the legislature, being the source of the exaction, had created a board authorized to determine whether its exaction had been complied with, and that its finding was conclusive to a *bona fide* purchaser. So, also, in *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. Rep. 124, the condition violated was not one imposed by the constitution, but one fixed by the subscription contract of the people." In the case of *Potter v. Chaffee Co.*, 33 Fed. Rep. 615, Mr. Justice BREWER, in deciding the case, uses the following language with reference to the case of *Dixon Co. v. Field*: "I suppose the universal voice of the bar would affirm that the supreme court had settled beyond any question that recitals as full and complete as these estopped a county from denying the validity of the bonds in the hands of a *bona fide* purchaser. It has been supposed by some that this case of *Dixon Co. v. Field* has reversed prior decisions, and established a new rule. I am frank to say that I think it is quite difficult to appreciate the distinction which Mr. Justice MATTHEWS draws between that case and the case of *Marcy v. Township of Oswego*, 92 U. S. 637, but, even with the rule as laid down in *Dixon Co. v. Field*, it will not avail the defendant in this case." The court does not overrule the case of *Marcy v. Oswego*, 92 U. S., and numerous other cases of a similar import, but distinctly says that the decision is in harmony with the decision in the case of *Marcy v. Oswego*. In giving the opinion of the court in the case of *Dalles Co. v. McKenzie*, 110 U. S. 686, 4 Sup. Ct. Rep. 184, (the case being decided at the same term as that of *Dixon Co. v. Field*.) Mr. Chief Justice WAITE says: "In *Marcy v. Oswego*, 92 U. S. 637, and *Humboldt Tp. v. Long*, id. 642, and also in *Wilson v. Salamanca*, 99 U. S. 504, it was expressly decided that municipal bonds were not invalid in the hands of a *bona fide* holder by reason of their having been voted and issued in excess of the

statutory limit, if the recitals imported a valid issue. It is an admitted fact in this case that McKenzie, the defendant in error, is a *bona fide* holder for value of the coupons sued on; and the recitals, which are almost in the exact language of *Wilson v. Salamanca*, supra, imply authority for the issue of the bonds from which they were cut. Consequently in this case the excessive issue is no defense." This matter of an excessive issue is the real defense in this case here. It is urged by the appellant that, by reason of an excessive issue, there was a want of power in the county of Santa Fe to issue the bonds and coupons in question in this case. It seems to us that these cases are decisive of this one. The recitals in the present case certainly imported a valid issue, and we hold the bonds to be valid on the same grounds upon which similar bonds were held valid in the cases cited. They were floated on the faith of the law, as expounded by the supreme court at the time they were issued, and that law protects them. The bonds not having been affected by any constitutional or other jurisdictional invalidity, the appellee is protected, not only by the recitals, but by the recognition of the bonds by the county as valid and subsisting securities for a long series of years. The failure to take any steps in equity or otherwise to redress any wrong done the county by their issue, or to avoid their negotiation, and the actual levy and collection of taxes for the payment of the interest from year to year, and the payment of \$36,000 of the interest upon these very securities, furnish additional grounds of estoppel, according to numerous authorities. *Commissioners v. Beal*, 113 U. S. 227, 5 Sup. Ct. Rep. 433; *Supervisors v. Schenck*, 5 Wall. 772. When the bonds were issued and delivered, in pursuance of the vote of the people of Santa Fe county, a contract was entered into to which the county was a party. The object sought was obtained when the railroad to which the aid was granted was constructed and the bonds were delivered. The acquiescence shown by the appellant by its failure to take any steps to avoid the contract or the securities, or prevent their negotiation, and its recognition of the validity of the contract entered into by the issuance of bonds and the coupons attached to them, as shown by the levy and collection of the taxes for the specific purpose of paying the interest thereon, removes from this court any desire which it might, under other circumstances, have to relieve the county from its legal obligation, and upon the facts presented in this record we decline to do so. The judgment, it is true, provides for the issue of execution, but that is a mere irregularity which will not work a reversal of this case. The judgment is enforceable by tax levy as a part of the general levy, or by special levy, as already decided by this court in *Laughlin v. County of Santa Fe*, 5 Pac. Rep. 817, the provision for the payment of the principal and interest of the bonds as contained in the railroad act entering into the contract, and not having been repealed when the bonds were issued. *County Court v. U. S.*, 105 U. S. 788. Holding that the defense set up in this case

was unavailing, and the evidence rejected in the court below was inadmissible, and therefore properly excluded, we agree with the trial judge in his ruling that the case below presented a state of facts upon which the appellee was entitled to the verdict rendered under the instructions of the court. *Armijo v. Town Co.*, 3 N. M. 244, 5 Pac. Rep. 709; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569. The judgment appealed from is therefore affirmed, with costs against the appellant.

O'BRIEN, C. J., and SEEDS and LEE, JJ., concur.

FREEMAN, J., (*dissenting*.) I regret that I am not able to agree with the majority of the court in the conclusions reached in this important case. Failing in this, however, I do not feel at liberty to content myself with a mere dissent, without assigning any reasons therefor. I shall not attempt, however, to enter into any elaborate discussion of the questions involved. Waiving all questions growing out of the pleadings, I shall confine myself to a mere statement of my views as to the principal questions involved and decided. While this case was argued and submitted at the last term of the court, a conclusion was not reached by the majority until the meeting of the present term. In the preparation of the following dissenting opinion, therefore, I have been able to avail myself of a few hours only which could be spared from the current work of the term. I offer this as an apology for the somewhat desultory form in which my views are presented.

As I understand it, the doctrine held by a majority of the court may be stated substantially as follows: (1) Where it appears that the legislature of the territory has authorized the municipal authorities of a town or county to issue evidences of indebtedness on conditions prescribed in the act, there being no constitutional limitation, and the authorities have issued such evidences of debt, reciting on the face of such instruments all the facts constituting a compliance with the terms of the enabling act, then an innocent purchaser for value of such obligations is entitled to recover the full amount, without regard to the question as to whether any or all of the conditions imposed by the legislature have been complied with. (2) That the purchaser of such bonds has only to take them in the one hand, and the enabling act in the other, and, reading them side by side, if the former on their face appear to have been issued in conformity with the latter he need go no further in his investigations. (3) That if the legislature should authorize the officers composing the municipal authorities of the county to issue evidences of debt on certain conditions prescribed, as, for example, in pursuance of an election held for that purpose, wherein it should appear that three-fourths of the qualified voters had voted in favor of such issue, and such officers should afterwards issue bonds purporting on their face that they were issued in pursuance of the act of the legislature, and in pursuance of an election

held under and by virtue of said act, wherein three-fourths of the qualified voters had voted in favor of such issue, that such pretended bonds would be valid against the county in the hands of an innocent purchaser without notice, although, as a matter of fact, no such election had ever been held, and the said board of officers had never been authorized to issue such pretended bonds, and although the bonds had been issued without either the consent or knowledge of a single qualified voter or tax-payer of the county. (4) That, to constitute a dealer in municipal bonds an innocent purchaser without notice, he has nothing to do but to see that the recitals on the bond agree with the recitals in the enabling act; that he is not affected with any infirmity, no matter what the character or extent of the infirmity may be; that, if he finds that the officers of the municipality were authorized to act under any circumstances, he has a right to assume that they acted within the scope of their authority; and that no amount or extent of abuse of that authority will affect the validity of the securities in his hands. (5) That, while absolute want of authority may be pleaded as a defense in such cases, abuse of authority cannot be relied upon, unless such abuse appears on the face of the pretended bond itself. (6) That a municipal bond issued in direct violation of the law is just as valid in the hands of an innocent holder for value as a bond issued in pursuance of law, provided, always, that the fraudulent bond appears on its face to have been issued in pursuance of lawful authority. (7) That the purchaser of a municipal bond is not bound to take notice of the existence or non-existence of any fact affecting the validity of the bond, unless such fact appears on the face of the bond or in the body of the enabling act, although such fact may exist in the form of a public record, accessible to the general public. (8) That an act of the legislature authorizing the issuance of bonds in the aggregate amount of 5 per cent. of the taxable property of the county, provided three-fourths of the qualified voters at an election held for that purpose vote in favor thereof, will validate the issue of bonds aggregating in amount 10, 50, or 100 per cent. of the taxable property, the only requirement being that the bond recite on its face that it is issued in pursuance of the act of the legislature. (9) That in such cases the purchaser is not bound to take notice of the fact that the bond belongs to a series, the aggregate of which implies a confiscation of every dollar of property belonging to the people of the county, although such fact might have been ascertained by an examination of the public records of the county. (10) That such a bond would be good in the hands of an innocent purchaser without notice of the "infirmity," although as a matter of fact no such election had in fact been held, and although as a matter of fact it had been issued without the knowledge of a single tax-payer of the county. (11) In a suit on such fraudulent bond it is no defense to show that the purchaser thereof by proper diligence

might have advised himself of its fraudulent character; that nothing short of actual notice can be shown.

I do not believe that these propositions are sound, although there are many decisions of the courts which seem to give color to them. These decisions have been collated in the able opinion concurred in by a majority of the court. Some of them, I admit, go to the full extent of supporting this doctrine; but those have been, in effect, overruled by the later and better considered cases. I shall not attempt an elaborate discussion of these questions, or to review all of the authorities cited by the majority of the court in support of them. The leading case relied on to sustain this view is that of *Knox Co. v. Aspinwall*, 21 How. 544. This decision was rested upon two propositions, substantially as follows: (1) That if proper public officers, acting within the scope of their official power, issue evidences of debt, such securities are entitled to the weight of a conclusive presumption that the officers issuing them have acted in the discharge of their duty; and in the hands of an innocent purchaser for value such securities are good against the county, although they may not have been issued with authority of law. (2) That if the legislature authorizes the board of the county or other municipal officers to issue evidences of debt on the occurring of a contingency, such as the casting of a popular vote therefor, and empowers such officers, or creates a board of officers, to determine the happening of such contingency or the result of such election, then the decision of such board, unless attacked in a direct proceeding, is final and binding upon the public. "The purchaser of bonds," say the court, "had a right to assume that the vote of the county which was made a precedent condition to the grant of the power had been obtained from the fact of subscription * * * The bonds on their face import a compliance with the law. * * * The purchaser was not required to look further," etc. This decision has never in terms been overruled, but until a comparatively recent period was followed as a precedent. I say that it has never in terms been overruled, but it has been worn away by the attrition of popular judicial discontent, until there remains now not a vestige of the first proposition. Let us see if this latter statement is not only substantially, but literally, correct. Suppose a board of rascally county commissioners should get together, and without any authority whatever issue county bonds, reciting merely on such bonds that they were issued by virtue of lawful authority, etc., there is not a respectable court anywhere that would hold that the county might not defend in a suit brought to collect such bonds, by showing that the commissioners were not authorized by law to issue such bonds; and yet that is precisely what the supreme court in the *Aspinwall Case* said could not be done. I speak reverently, and with great respect, when I say that this case is an illustration of the rule that no man can rise above error, and of the danger of accepting any propo-

sition literally as a precedent. A long line of decisions follow this as a precedent. It was long the custom to refer to the Aspinwall as a well-considered case, and yet it was left for Justice MILLER, in his masterly dissenting opinion in the case of Humboldt Tp. v. Long, 92 U. S. 646, to bring prominently into notice for the first time the fact that Justice NELSON in the Aspinwall Case supported his opinion by an erroneous conception of the doctrine laid down in the case of Bank v. Turquand, 6 El. & Bl. 327. Speaking on this point, Justice MILLER said: "The original case on which this ruling [that county bonds, though issued without authority of law, may still be collected] is based is Knox Co. v. Aspinwall, 21 How. 539. It has, I admit, been frequently cited and followed in this court since then, but the reasoning on which it was founded has never been examined or defended until now, (1875;) it has simply been followed. The case of Town of Coloma v. Eaves, 92 U. S. 484, decided a few days ago, is the first attempt to defend it on principle that has been made. How far that has been successful I will not undertake to say. Of one thing I feel very sure, that if the English judges who decided the case of Bank v. Turquand, on the authority of which Knox Co. v. Aspinwall was based, were here to-day, they would be filled with astonishment at this result of their decision. The bank in that case was not a corporation. It was a joint-stock company in the nature of a partnership. The action was against the manager as such, and the question concerned his power to borrow money. This power depended, in this particular case, on a resolution of the company. The charter or deed of settlement gave the power, and when it was exercised the court held that the lender was not bound to examine the records of the company to see if the resolution had been legally sufficient. That was a private partnership. Its papers and records were not open to public inspection. The manager and directors were not officers of the law, whose powers were defined by statute, nor was the existence of the condition on which the power depended to be ascertained by the inspection of public and official records, made and kept by officers of the law for that very purpose. In all these material circumstances, that case differed widely from those now before us."

It occurs to me that much of the confusion and many of the contradictions that have grown out of the construction given to the power of municipal officers to bind the people by recitals on bonds issued by such officers have grown out of a failure to discriminate between those facts the existence of which must be ascertained by such officers and those facts the existence of which is or may be known to all men. When such officers are authorized to issue bonds on certain conditions, as, for example, on the application of a given number of tax-payers, or on a certain result of an election, the power to determine when the condition exists, or the event has occurred, or the contingency has "happened," must be lodged in some officer or board of officers; and the determination

of such officers or board, unless attacked by a proper proceeding, must be accepted as conclusive evidence of such fact; it is a final determination of the matter properly submitted, and cannot be questioned collaterally. A different rule controls, however, in the ascertainment of a pre-existent or co-existent fact; a fact that exists independently of any action; a fact that does not depend upon a contingency; one that does not depend upon the "happening" of an event such as the result of an election. When, therefore, the act authorizing the issuance of bonds limits the amount issued to a certain per cent. of the taxable property, it seems to me that the limitation is an element of the authority to act, and that a disregard of this limitation vitiates the action of the board. The reason given, why the recitals on the bond that the conditions necessary to its validity have been kept is conclusive of that fact, is that these conditions, or the result of these contingencies, or the happening of these events, are peculiarly within the knowledge of the party or parties authorized to make the recital. "The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision, and beyond those a *bona fide* purchaser is not required to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by law confided to others,—to those most competent to decide it,—and which the purchaser is, in general, in no condition to decide for himself." Town of Coloma v. Eaves, 92 U. S. 490.

But the amount of taxable property within a county is not "an event" or a "contingency." It is an independent fact, the ascertainment of which is within the reach of every one. It is a fact disclosed by record, open to the inspection of all. In the case under consideration, the appellant offered to show that the issue of bonds in controversy was in excess of the amount authorized by the act of the legislature, but he was not allowed to make that proof. Under the well-recognized rule of pleading, this is an admission of the fact that the issue of the bonds was excessive. Various objections were made at the trial to the introduction of evidence to show that the issue of bonds was excessive. Everything in the shape of record was offered and rejected. The appellant then proposed to show by tax-payers themselves that the issue was excessive; so that it was not the character of the proof offered, but the character of the thing to be proven, that was objected to. The ruling of the court below, as appears by the record, was to the effect that the amount of taxable property in the county was an immaterial matter, and could not, therefore, be shown by any character of proof. It is said, however, that this is no

longer an open question; that the supreme court of the United States has held that an overissue of bonds cannot be shown by the county as a defense against recovery, unless such overissue is in violation of a constitutional limitation; and, as there is no such authority in this territory as a constitution, (unless the enabling act may be termed a constitution,) that, therefore, county and municipal corporations are not subject to the control of any higher power in this regard. I admit the force of this contention. It is something more than ingenious; it is plausible; but to my mind it is unsatisfactory. It is unsatisfactory, because it involves the corollary that a municipal corporation created by the legislature, drawing all its powers from that body, may do not only what it is not authorized to do, but that which it was absolutely forbidden to do.

In view of the great reliance placed upon the doctrine that the county is, by the action of the board of commissioners and the recital on its bonds, estopped from setting up the defense of overissue, it is interesting, if not instructive, to inquire how this doctrine found its way into our decisions. The first decision of the supreme court, so far as I can ascertain, which undertakes to give a reason why an overissue does not invalidate the bonds, is that of *Humboldt Tp. v. Long*, 92 U. S., and the reasoning is found at the bottom of page 645. Omitting the reasons given, the court cites *Marcy v. Oswego*, 637, of the same book, as authority for the rule. Now, if we turn to the case last cited, we shall find that the question of overissue was the only matter before the court. It was admitted that the bonds were issued in strict compliance with the act of the legislature, unless they were voted and issued in excess of the amount authorized by the act. It was shown that the recitals on the bonds were to the effect that they were issued in accordance with the act; that the bonds were registered, etc. Justice STRONG, after reciting the facts in the case, said: "In view of these facts, and of the decisions heretofore made by this court, the first question certified to us cannot be considered an open one. We have recently reviewed the subject in *Town of Coloma v. Eaves*, supra, and reassert what had been decided before," etc. Here it will be observed that the court refers to decisions "heretofore made by this court," and particularly to the case of *Town of Coloma v. Eaves*, supra. Turning, now, to the case last cited, as authority for this proposition, we find that the question of overissue was not even remotely involved. The only question involved was as to the validity of the election, which was attacked on the ground of a want of legal and proper notice. The syllabus in that case is taken from the body of the opinion, and is in the exact words of Justice STRONG, who delivered the opinion of the court. I shall presently give this syllabus in full, and that for the important consideration that it is a very carefully prepared statement of the rule as laid down by Justice STRONG himself. On page 491 of

the book, after reciting the rule laid down by Judge DILLON, and criticizing it as a "very cautious statement of the doctrine," he states the rule as follows: "Where the legislative authority has been given to a municipality or to its officers to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent had been complied with, their recital that it has been made in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal."

Now, with great respect, I submit that this rule fails to sustain the doctrine that an overissue cannot be shown as a defense. In the case under consideration the amount authorized to be issued was limited to 5 per cent. of the taxable property. In what sense, "may it be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide" as to the amount of taxable property in the county, so that their decision should become "conclusive of the fact, and binding upon the municipality?" In what possible sense is the amount of taxable property a "contingency" or an "event," the "happening" of which is to be certified to, or a condition precedent "that has been complied with?" I submit, therefore, that this pernicious doctrine that, under authority of an act of the legislature authorizing them to issue bonds to the extent of 5 per cent. of the taxable property of the county, the board of county commissioners may bind the county in an unlimited issue,—may bankrupt and ruin the county by an overissue,—is, like the kindred doctrine laid down in the *Aspinwall Case*, that the recital of the officers themselves that the bonds were issued in accordance with the law was binding upon the county in the absence of lawful authority, a parasite that has grown out of the misconstruction of the rule laid down in *Town of Coloma v. Eaves*, 92 U. S. 492, just as the *Aspinwall Case* was the result of the misconstruction of the English case of *Bank v. Turquand*, 6 El. & Bl. 327.

The doctrine of estoppel by recitals had its origin and owes its existence to the consideration that the recitals are made by the parties who are by law vested with the means to determine, and the authority to announce, the performance of the condition or the happening of the contingency upon which the authority for the issuance of the bonds is made to depend, "and this is more emphatically true when the fact is peculiarly within the knowledge of the persons to whom the power to issue the bonds has been conditionally granted." *Marcy v. Oswego*, 92 U. S. 639. If an unlimited overissue will not in any event, except in the case of constitutional limitations, affect the validity of the transaction, then these county officers are invest-

ed with the power of confiscation, and this power is given by construction merely,—a construction drawn from the case of *Marcy v. Oswego*, which was itself a construction of a former decision, which rested the doctrine on a still earlier case, wherein the question did not arise. I assert with great respect that this extraordinary doctrine that a board of county commissioners supposed to be the creatures of the law and servants of the people may, under authority of a law authorizing them to issue bonds to the amount of 5 per cent., bind the people to the payment of 50 per cent., has never been upheld by the supreme court, as a matter of first impression. I have already adverted to the doctrine that recitals, to be regarded as estoppels, should be confined strictly to the matters entrusted solely to the officers whose recitals are relied upon. In view of the extraordinary results reached by the attempted application of the doctrine of estoppel by recitals, the views of the supreme court as laid down in *Bank v. Porter Tp.*, 110 U. S. 614, 4 Sup. Ct. Rep. 254 et seq., are instructive. I quote: "It is, however contended that by the settled doctrines of this court the township is estopped, by the recitals of the bonds in suit, to make its present defense. The bonds, upon their face, purport to have been issued 'in pursuance of the provisions of the several acts of the general assembly of the state of Ohio, and of a vote of the qualified electors in said township of Porter, taken in pursuance thereof.' These recitals, counsel argue, import a compliance, in all respects, with the law; and therefore the township will not be allowed, against a *bona fide* holder for value, to say that the circumstances did not exist which authorized it to issue the bonds. It is not to be denied that there are general expressions in some former opinions which, apart from their special facts, would seem to afford support to this proposition in the general terms in which it is presented. But this court said in *Cohens v. Virginia*, 6 Wheat. 399, and again in *Carroll v. Lessee*, 16 How. 287, that it was 'a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.' 'An examination of the cases in which those general expressions are found will show that the court has never intended to adjudge that mere recitals by the officers of a municipal corporation in bonds issued in aid of a railroad corporation preclude an inquiry, even where the rights of a *bona fide* holder were involved, as to the existence of legislative authority to issue them.' A reference to a few of the adjudged cases will serve to illustrate the rule which has controlled the cases involving the validity of municipal bonds. In *Knox Co. v. Aspinwall*, 21 How. 542, power was given to county commissioners to subscribe stock to be paid for by county bonds, in aid of a railroad corporation, the power to be exercised if the electors, at an election duly

called, should approve the subscription. It was adjudged that, as the power existed, and since the statute committed to the board of commissioners authority to decide whether the election was properly held, and whether the subscription was approved by a majority of the electors, the recital in bonds executed by those commissioners, that they were issued in pursuance of the statute giving the power, estopped the county from alleging or proving, to the prejudice of a *bona fide* holder, that requisite notices of the election had not been given. In *Bissell v. Jeffersonville*, 24 How. 299, the court found that there was power to issue the bonds, and that after they were issued and delivered to the railroad company it was too late, as against a *bona fide* holder, to call in question the determination of the facts which the law prescribed as the basis of the exercise of the power granted, and which the city authorities were authorized and required to determine before bonds were issued. Probably the fullest statement of the settled doctrine of this court is found in *Coloma v. Eaves*, 92 U. S. 491. In that case the authority to make the subscription was made by the statute to depend upon the result of the submission of the question to a popular vote, and its approval by a majority of the legal votes cast. But whether the statute in these particulars was complied with was left to the decision of certain persons who held official relations with the municipality in whose behalf the proposed subscription was to be made. It was in reference to such a case that the court said: 'When legislative authority has been given to a municipality or to its officers to subscribe to the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been made in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.' This doctrine was reaffirmed in *Buchanan v. Litchfield*, 102 U. S. 290, and in other cases, and we perceive no just ground to doubt its correctness, or to regard it as now open to question in this court. But we are of opinion that the rule as thus stated does not support the position which counsel for plaintiff in error take in the present case. The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a *bona fide* holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were is-

sued; not merely for themselves, as the ground of their own action in issuing the bonds, but equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it."

The majority of the court give great weight to what appears to be the *bona fides* of the several transactions out of which this litigation has arisen. The appellee is represented as a *bona fide* purchaser without notice, etc., and the contention is that the bonds were issued in different series, so that it would be impossible for the purchaser to ascertain from the recital the amount issued, or the amount of taxable property of the county. And the further fact that these bonds were made payable to bearer is relied on to bring them within the rule applicable to ordinary commercial paper, to the extent that their possession implies the presence of all the conditions necessary to a recovery. This seemingly equitable view of the question is discussed in the case of *Marsh v. Fulton Co.*, 10 Wall. 676. The facts in that case were substantially these: Under authority of the act of the legislature, the county had voted aid to the Mississippi & Wabash Railroad Company. The legislature afterwards changed the charter of the company by dividing the road into three sections. Thereafter the board of supervisors, in pursuance of the power conferred upon the board by an election, proceeded to enter the subscription of stock on the books of the "Central Division of the Mississippi & Wabash Railroad Company," and issued bonds payable to that company or bearer. Afterwards, interest was paid on these bonds. County agents were appointed to attend at the meeting of stockholders, which agents voted for the officers of the company, and in various ways the county recognized the validity of the bonds. It would appear that if by any possibility the holder of a bond could acquire, by mere force of equity, a right to insist upon the payment of his bond, this case would afford an illustration of the rule. The legislature had authorized the county to issue the bonds; the line of road sought to be aided had been laid out; the road had been built; the bonds had been issued; the interest had been paid; county officers had been allowed to control in part the operations of the road. No other irregularity intervened, except that the road was divided into three divisions. In the case at bar the legislature had authorized the county to vote aid to any railroad, limiting the amount of aid to 5 per cent. of the amount of taxable property. The bonds under consideration had been issued as the result of two elections held on the same day, or what was in reality one election, at which a proposition was agreed to extending county aid to a single railroad company. The manner of calling and holding this election, the division of the propositions so as to appear to keep within the limitations of the act, was a palpable evasion of the well-known limitations imposed by the act, under which the county proposed to act, and the purchaser of the bonds in ques-

tion must have obtained them with a knowledge of this evasion. In the case, however, to which I have just referred, no such effort at evasion appears to have occurred, and yet the supreme court in the suit brought against the county on one of these bonds held that the plaintiff could not recover. The following is taken from the opinion of the court: "But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might not for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed,—where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law, even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd's Acceptances*, 7 Wall. 676. In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued.'

It is insisted by the majority that great weight ought to be given to the presumption that the appellee was an innocent purchaser for value, without notice of any infirmity attending the issue of these bonds, and attention is directed to the fact that the bonds were issued in such series, and were so indefinite in their recitals, as to render it impossible for the purchaser upon inspection to determine by such inspection that they were issued in violation of law. I am not able to agree with this conclusion. On the contrary, it appears to me that these very facts were suspicious circumstances that ought to have put the purchaser upon inquiry. The fact that two elections were held on the same day, at the same hour and the same place; that at these two elections were submitted two propositions, authorizing the issuance of two amounts of bonds to the same corporation,—is of itself a circumstance that ought to have put the purchaser upon inquiry. It has been repeatedly held that when an intended purchaser is put upon inquiry he must follow out that inquiry by

all the means reasonably within his reach. He knew that these bonds were issued by public officers; that these officers were acting under a limited authority; he knew that they had no authority to bond the county beyond the sum of 5 per cent. of the taxable property. He had access to the assessment rolls. He could have ascertained that the sum of the bonds proposed to be issued was largely in excess of the amount authorized; and this fact would have advised him of the fraudulent process by which the officers of the county sought to avoid the limitations imposed upon them by the legislature. In a long line of decisions sustaining the validity of illegally issued bonds, it was the avowed purpose of the court to maintain the public credit of municipalities, but, behind this bulwark erected by the supreme court for a purpose so admirable, the most flagrant schemes of public plunder sought shelter. The dishonest speculator in public securities had but to conspire with dishonest county officers to procure the issue of fraudulent county bonds, which should contain on their face the fatal "recital" that they were issued in pursuance of a certain statute, and the work of plunder, the graceless theft, was accomplished. That it may appear that this statement is correct, let the record speak. In the case of *Comanche Co. v. Lewis*, 133 U. S. 201, 10 Sup. Ct. Rep. 286, the county which it was sought to plunder was organized, as it was admitted of record, "solely for purposes of plunder, by a set of men intending to secure a *de facto* organization, and issue the bonds of said county, register and sell them to distant purchasers ignorant of the facts, and enrich the schemers, while plundering the future inhabitants and tax-payers of the counties; and upon the consummation of said scheme, in the spring or early summer of 1874, all of said schemers, together with those who were the said *de facto* officers of the said county, left said county, and never returned, and said county remained with said organization, totally abandoned, until in February, 1885, when said county was, upon memorial presented and census taken, organized as in cases of unorganized counties." Here a large and uninhabited section of the state was, 12 years prior to its legal organization as a county, incumbered with a debt that its future inhabitants must pay, for the bonds were held to be valid. I cannot but regard this decision as the greatest possible tribute paid by a great tribunal to the doctrine of *stare decisis*. The reasons and arguments adduced in support of the decision demand and receive our highest respect, because they emanate from that great tribunal, our supreme court, but I seriously doubt if any fair-minded lawyer ever contemplated the result with entire satisfaction.

I shall conclude what I have to say on this branch of the case by quotation from the dissenting opinion of Justice MILLER in the case of *Humboldt Tp. v. Long*, already referred to: "The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the

frauds of municipal officers. It is that, wherever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with; and especially and particularly if they make a false recital of the fact on which the power depends in the paper they issue, this false recital has the effect of creating a power which had no existence without it." With great deference, and with some hesitation, I have ventured the foregoing discussion of this question, and have indulged in comment upon the decisions of the supreme court of the United States. I am not to be reminded that the decisions of that court are binding upon this, nor that it would be a palpable violation of every element of good taste and proper decorum for a member of this court, or for the court itself, to question the authority of these decisions. Such is not my purpose. I propose to demonstrate, if I can, the proposition that the conclusion I have reached in the case under consideration is in harmony with the later decisions of the supreme court.

Before proceeding, however, I desire to advert briefly to another feature of this case. It has been sought to bind the county, not only by the recitals on the bond, but by an agreement entered into between the attorneys for the appellant and those of the appellee, and offered and received in evidence in the court below. Much importance has been attached to this agreement, which may be found on page 76 of the record. I cannot accept the construction given to it by the majority of the court. It is an admission as to matters of fact made by the attorneys for the appellant. If at the time this admission was made it was intended to have the effect contended for by the appellee, and agreed to by a majority of the court, then it was a fraud practiced upon the people of this county by the attorneys for the appellant, and ought not to be allowed to stand. Under this pretended agreement, the appellee was allowed to take a judgment for a large amount, confessedly not due at the date of the institution of the suit. I shall not enter into a discussion of the question as to how far a client is bound by the admissions of his attorney. It seems to me that in this case a proper distinction has not been observed between the authority of an attorney representing a municipal corporation and one representing a private corporation or individual. In this as in other branches of this case the majority have not given due consideration to the fact that the only real parties interested are the complainant on the one side and the tax-payers on the other. The men who employed these attorneys who made these admissions of record were themselves but the agents of the real parties in interest. It is too clear for argument that an attorney employed by the officers of a municipal corporation to protect the rights of the tax-payers of

such municipality has no authority to go into court, and confess judgment against his clients. The county commissioners themselves had no authority to do anything or to take any steps that would validate these bonds. Ordinarily the principal is bound by the acts of his agent, if such agent act within the scope of his authority; but it must be borne in mind that these attorneys were themselves but the agents of agents. They were the servants of the commissioners, who were in turn the servants of the public. "It is not, in our opinion, competent for the authorities of a town to agree that its void bonds shall be made valid by putting that agreement in the form of a judicial decree." *Kelly v. Town of Milan*, 21 Fed. Rep. 869. In the same case it is further said: "In a case like that we are now considering, an agreement that would impose, without legislative authority, a tax upon the citizens of the municipality to pay bonds that were void, is itself a fraud, no matter how well intentioned, or how much the parties believed in their power to make it." The opinion in this case was rendered by Judge HAMMOND, and concurred in fully by Associate Justice MATTHEWS of the supreme court. I do not mean to impute to the attorneys in this case any fraudulent purpose. On the contrary, it was insisted by them in the court below that such was not a proper construction of the stipulation, and they earnestly protested against allowing the stipulation, with this construction, to go to the jury.

I have endeavored to give respectful consideration to the numerous decisions of the supreme court cited by the majority of the court in support of the propositions sought to be maintained. I have endeavored to show that one of the most dangerous features of this doctrine of "estoppel by recitals" found its way into an early decision of the court by inadvertence. The doctrine that a county officer can bind the people of the county by a mere recital, while it has never been overruled, is not now regarded as the law. I am now about to show that not only has this feature of the *Aspinwall* Case been allowed to fall into disuse, but that other propositions contained in that decision, and supported by such an array of authorities as has been presented by the majority of the court in this case, have, in effect, been overruled by later decisions of the supreme court. I say, in effect, for they, I admit, have not been overruled in express terms; but the doctrine laid down by that court in the case of *Dixon Co. v. Field*, to which I shall presently advert, is so absolutely inconsistent with the doctrine of the case of *Knox Co. v. Aspinwall*, as to render it as thoroughly impossible that both should be the law as that daylight and darkness should exist at the same hour and the same place.

In the case of *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315, the question was again before the supreme court of the United States. I shall offer no apology for quoting somewhat *in extenso* from the opinion of the court in this case. The facts upon which the opinion was rendered were substantially as follows, as found

by the court: The party bringing the suit against the county was an innocent holder for value of coupons sued on, and of the bonds to which they belonged. The bonds were executed in proper form, under the seal of the county, and were issued as a donation to a railroad company. Each bond contained the recital that it was issued under and in pursuance of the order of the county commissioners of the county of Dixon, state of Nebraska, and that the issue was authorized by an election held in said county under and by virtue of a general statute of the said state of Nebraska, which statute was referred to and set out. On the back of each bond was the certificate of the county clerk, reciting that this issue of bonds was the only one ever made by the county; that the question of issuing them was submitted to the county by resolution of the county commissioners, etc. There was also indorsed on each bond the certificate of the secretary and auditor of the state of Nebraska, reciting that it was issued in pursuance of law, etc. Justice MATTHEWS, in delivering the opinion of the court, wherein it was decided that the county was not chargeable, said: "Recurring, then, to a consideration of the recitals in the bonds, we assume, for the purpose of this argument, that they are, in legal effect, equivalent to a representation or warranty or certificate on the part of the county officers that everything necessary by law to be done has been done, and every fact necessary by law to have existed did exist, to make the bonds lawful and binding. Of course, this does not extend to or cover matters of law. All parties are equally bound to know the law; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law. Otherwise it would always be within the power of a municipal body to which power was denied to usurp the forbidden authority by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself. And the estoppel does not arise except on matters of fact which the corporate officers had authority by law to determine and to certify. It is not necessary, it is true, that the recitals should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds had been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify. A determination and statement as to the whole series, where more than one is involved, is a determination and certificate as to each essential particular. But it still remains that there must be authority vested in the officers by law as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence, and to guaranty to those dealing with them the truth and conclusiveness of their admissions. In such a case, the meaning

of the law granting power to issue bonds is that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence by the officers or body designated by law to issue the bonds upon such a contingency. This becomes very plain when we suppose the case on such a power granted to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case it would not be contended that a recital of the facts in the instrument itself, contrary to the finding of those charged by law with that duty, would have any legal effect. So, if a fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be that the authority to act at all depended upon the actual objective existence of the requisite fact as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow that all persons claiming under the exercise of such a power might be put to proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument. This principle is the essence of the rule declared upon this point by this court, in the well-considered words of Mr. Justice STRONG in *Town of Coloma v. Eaves*, 92 U. S. 484, where he states (page 491) that it is 'where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with' that 'their recital that it has been made in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.' The converse is embraced in the proposition, and is equally true. If the officers authorized to issue bonds upon a condition are not the appointed tribunal to decide the fact which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel claimed to arise upon the recitals in the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground in the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject. This is the rule which has been constantly applied by this court in the numerous cases in which it has been involved. The differences in the result of the judgments have depended upon the question whether in the particular case under consideration a fair construction of the law authorized the officers issuing the bonds to ascertain, determine, and

certify the existence of the facts upon which the power, by the terms of the law, was made to depend; not including, of course, that class of cases in which the controversy is related, not to conditions precedent, on which the right to act at all depended, but upon conditions affecting only the mode of exercising a power admitted to have come into being. *Marcy v. Oswego*, 92 U. S. 637; *Commissioners v. Bolles*, 94 U. S. 104; *Commissioners v. Clark*, 94 U. S. 278; *County of Warren v. Marcy*, 97 U. S. 96; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep. 704. In the present case there was no power at all conferred to issue bonds in excess of an amount equal to 10 per cent. upon the assessed valuation of the taxable property in the county. In determining the limit of power, there were necessarily two factors,—the amount of the whole bonds to be issued, and the amount of the assessed value of the property for purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was \$87,000. The holder of each bond was apprized of that fact. The amount of the assessed value of the taxable property in the county is not stated; but *ex vi termini* it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment, or determination as to that fact is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions and the performance of their duties, but the information is for themselves alone. All the world besides must have it from the same source and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it."

The doctrine laid down in this case was afterwards adopted and approved in the case of *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. Rep. 651; also in the case of *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654. I am aware that the distinction drawn by the court between the three cases last cited and the cases cited by the majority of the court, wherein the recitals have been held to operate as an estoppel on the county, is that the doctrine in the latter was applied to the cases of bonds issued in contravention of statutory restrictions, whereas in the former the restriction was constitutional. I admit that the distinction exists, but, whatever may be the force of its application, it cannot destroy or impair the truth of the proposition settled in a long line of deci-

ions reaffirmed in the Dixon County Case, that the recital of the officer, in order to constitute it an estoppel, must be confined to such matter as is committed alone to his charge. It will be observed that the only cases in which the supreme court has determined that the recitals contained in the bond are to be regarded as estoppels are those in which the people of the particular state have chosen to commit the whole question to the legislature, and have not undertaken to restrict the legislature by any constitutional enactment. The decisions proceeded upon the ground that, the legislature being thus unrestricted by any constitutional limitation, and having committed the authority to act in this regard to the board of county officers, the people are bound by such action. In the case at bar there is a distinction which in my mind relieves the court from the operation of this rule. In this case is involved the right of a municipality created by the territorial legislature to violate the terms imposed by an act of the legislature. Here we have no constitution, the enabling act being sometimes called a constitution. It serves many of the purposes of a constitution, but it is nevertheless not a constitution. A constitution is the highest form of organic power erected by the people, who are themselves the subjects of that power. On the contrary, the people of the territory had no voice or hand in the matter of creating the organic act. Whatever of sovereignty may reside in the people of the territory is represented by the legislature. It is the highest branch of organized local authority. If a corporation created by the legislature may violate the charter of its existence, there is no power on earth interested in its affairs which can control its operation. The people of this territory cannot call a constitutional convention for the purpose of imposing limitations upon the power of the legislature, or the power of municipal corporations. It follows, therefore, that if the municipalities may openly violate acts of limitation passed by the legislature, there remains to the people but one escape from their absolute control, and that is by means of destroying them altogether. It is not my purpose to go into any elaborate discussion of the distinction between the powers of the territory and those of the state. "A territory, under the constitution and laws of the United States, is an inchoate state,—a portion of the country not included within the limits of the United States, and not yet admitted as a state into the United States, but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers, appointed by the president and senate of the United States." *Ex parte Morgan*, 20 Fed. Rep. 305. "The territorial status is one of pupillage, at best, and may include the mere child as well as the adolescent youth." *Nelson v. U. S.*, 30 Fed. Rep. 115. In the case of *Clinton v. Engelbrecht*, 13 Wall. 443, it was said: "The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers

of self-government consistent with the supremacy and supervision of the United States." So, also, in the case of *Hornbuckle v. Toombs*, 18 Wall. 655, it was said: "The powers thus exercised by the legislature are nearly as extensive as those exercised by state legislatures." Thus it will be seen that, wherever reference is made to territorial governments by comparison, they are represented as exercising prerogatives inferior to those conferred upon the state.

It may be said that the distinction drawn between the power of the territorial legislature and that of the state legislature is more technical than substantial; but I respectfully suggest that it is as substantial as that drawn by the supreme court of the United States in the case of municipalities acting under legislative enactments in the presence of constitutional provisions on the one hand, and on the other that of similar corporations acting under the provisions of legislative enactments, in the absence of such restrictions. With Justice BREWER, I am at loss to understand the real grounds for this distinction. It has been formally established, however, by the supreme court, and is a part of the law of the land, and I can see nothing in reason or authority which forbids the application of a similar doctrine to the cases of municipal corporations of a territory acting under and by virtue of the authority of the territorial legislature. In the case of the state, the highest local authority is the constitution; in the case of the territory, the highest organized local authority is that of the legislature. If a bond issued by the municipal authorities of a state, in violation of the highest organic law of the state, is void, I cannot understand why it is that a bond issued by a municipal corporation of a territory, in violation of the highest expressed authority of the territory, is not also void.

But, in the view that I have taken of the law, we are not left to the somewhat uncertain rules of construction. The power of municipal corporations of a territory to issue bonds has been the subject of congressional legislation. By acts approved March 2, 1867, June 10, 1872, (Rev. St. § 1889,) it was provided "the legislative assemblies of the several territories shall not grant private charters or special privileges, but they may, by general incorporation act, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, or in the construction and operation of railroads," etc. A question having arisen as to whether this act of congress did not take away entirely the power of the legislature to grant charters, congress passed an act, the substance of which, or so much thereof as is applicable to the matter under consideration, is as follows: "That the words 'the legislative assemblies of the several territories shall not grant private charters or special privileges,' in section 1889, Rev. St., shall not be construed as prohibiting the legislative assemblies of the several territories of the United States from creating towns or other municipal corporations, * * * and conferring on them * * * powers

and privileges necessary to their local administration. * * * But nothing herein shall have the effect * * * to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs." Act June 8, 1878, (20 St. 101.)

The only remaining question to be determined is whether a county is a municipal corporation, within the meaning of this act. That a county is a corporation will be admitted; that it is not, within the strict sense of that term, a municipal corporation, is conceded. I think, however, that an examination of the authorities will lead us to the conclusion that, within the scope of the inhibition contained in the act of congress just referred to, counties may be regarded as municipal corporations. It is very true that Mr. Dillon, in his treatise of the Law of Municipal Corporations, has undertaken to distinguish between "political," "public," and "civil," "municipal," and *quasi* corporations, wherein he holds that a "school-district or county, properly speaking, is not, while the city is, a municipal corporation." Volume 1, p. 22. The references do not sustain the text, while the latter part of the section shows that the learned author was engaged in drawing a distinction in the nature of a preface to the following pages of his work; for he continues by saying: "The phrase 'municipal corporation,' in the contemplation of this treatise, has reference to incorporated villages, towns, and cities, with powers of local administration, as distinguished from other public corporations, such as counties and *quasi* corporations." If we examine the authorities, we shall find that the distinctions drawn as to different kinds of corporations have grown out of the particular function sought to be invoked, or the particular liability sought to be imposed; *e. g.*, a county, unlike most of municipal corporations, is not responsible for the tort-feasance of its officers and agents, because such officers and agents are, in a large sense, the officers and agents of the state,—of the people, in their political capacity. Nevertheless a county is for many purposes a municipal corporation. The supreme court of Maryland, in the case of Talbot Co. Com'rs v. Commissioners of Queen Anne's Co., gave utterance to the following: "A county is one of the public territorial divisions of the state, erected and organized for public political purposes connected with the administration of the state government, and especially charged with the superintendence and administration of the local affairs of the community, and having in its nature and objects a municipal organization," etc. 50 Md. 246. The supreme court of Iowa treats the subject as follows: "The word 'municipal,' as originally used, in strictness applied to cities only. But the word has now a more extended meaning, and, when applied to corporations, the words 'political,' 'municipal,' and 'public' are used interchangeably. A municipal corporation is defined to be 'a public corporation,' created by government for particular purposes, and

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having subordinate and local powers of legislation, *e. g.*, a county, city," etc." Curry v. District Tp. of Sioux City, 62 Iowa, 102, 17 N. W. Rep. 191, citing Bouv. Law Dict.; Winspear v. District Tp. of Holman, 37 Iowa, 542; Land Co. v. Carroll Co., 39 Iowa, 151. To show the diversity of understanding as to what constitutes a municipal corporation, I quote from a decision of the supreme court of Wisconsin to this effect: "Towns are often called, in common parlance, and sometimes unguardedly in statutes, 'municipal corporations,' in connection with counties, cities, and villages." Eaton v. Supervisors, 44 Wis. 498. The supreme court of Missouri, in defining a corporation for municipal purposes, says: "A corporation for municipal purposes is either a municipality such as a city or town, created especially for local self-government, with delegated legislative powers, or it may be a subdivision of the state, for governmental purposes, such as a county, a school, or road-districts," etc. State v. Leffingwell, 54 Mo. 458. Mr. Bouvier gives the following definition of a "municipal corporation": "A municipal corporation is a public corporation, created by government for political purposes, and having subordinate and local powers of legislation, *e. g.*, a county, town, city." Citing as authority for this definition 2 Kent, Comm. 275; Ang. & A. Corp. 929. There is another decision, however, that, so far as the decision of a state court can be regarded as authority, settles this question beyond controversy. I refer to the case of Dowlan v. County of Sibley, decided by the supreme court of Minnesota, and reported at page 430, 36 Minn., and page 517, 31 N. W. Rep. This was an appeal to the district court from the determination of county commissioners in proceedings for the establishment of a public ditch. From the judgment of the district court it was appealed to the supreme court of the state. DICKINSON, J., in rendering the opinion of the court, after quoting the provision of the state constitution as follows, "that the legislature may by general law or special act authorize municipal corporations to levy assessments for local improvements," etc., said: "The question now presented is whether the words 'municipal corporations,' as here employed, should be deemed to include counties. At the time of the adoption of this amendment, counties might, with propriety, be termed political corporations. The statute declared them to be such. Gen. St. 1866, c. 8, § 75. They were not, however, in the proper and more general use of the term, municipal corporations; yet, for the purposes of general designation, it is not uncommon to use that term in a sense including such *quasi* corporations as counties and towns, and so sometimes to distinguish public or political corporations or functions from those which would be termed private. Thus, in our own decisions, may be found such language as this: 'A municipal corporation, —a city, county, or town,' (Harrington v. Town of Plainview, 27 Minn. 224-229, 6 N. W. Rep. 777;) 'a county or other municipal corporation,' (County of Blue Earth

v. Railroad Co., 28 Minn. 503-507, 11 N. W. Rep. 73.) See, also Winspear v. District Tp. of Holman, 37 Iowa, 542; Ex parte Selma & G. R. Co., 45 Ala. 696-732." After referring to the case of State v. Leffingwell, 54 Mo. 458, to which I have already referred, the learned judge continues: "A late amendment to our constitution prohibits the enactment of special or private laws 'granting to any individual, association, or corporation, except municipal, any special or exclusive privilege, immunity, or franchise whatever.' We feel no doubt that here the exception of 'municipal' corporations has a meaning broad enough to include counties and towns," etc. "Nor, again, is it apparent why the power of the legislature in the particular here involved should be unrestricted as respects incorporated municipalities, and wholly denied as to counties and towns. Our consideration of this question has led us to the conclusion that the words 'municipal corporations' in the proviso under consideration may reasonably be construed as having the broad, rather than the restricted, sense, and as including such *quasi* corporations as counties and towns." In view of the foregoing, I think a proper definition of the "counties" may be given, as follows: A "county," when it represents a subdivision of the state in the exercise of those functions of government common to all the people of the state, *e. g.*, in the organization of courts and the administration of the law, may be regarded as a public corporation of a *quasi* political character. But when it deals with matters which relate alone to the internal policy of the community of a strictly municipal character, such as the issuance of commercial obligations upon which it may be sued as if it were a private individual, it is a municipal corporation.

If my construction of the act of June 8, 1878, is correct, it is conclusive of this controversy. This act was passed just 20 months before a combination composed of the officers of the Southern Pacific Railroad Company and the county officials of Santa Fe county attempted to fasten a debt of about \$500,000 (for the principal and interest amounts to that sum) on a people two-thirds of whom were unable to understand the language in which the pretended contract was written. The act of congress was passed to prevent the perpetration of such wrongs. It was no doubt intended to operate, and did operate, as a disapproval, and therefore as an abrogation, of the act of the legislature of this territory which authorized the issuance of bonds of this character. It is not the province of the courts to deal with the policy of congress, otherwise much might be said in commendation of this wise legislation. We have seen territories referred to as being in "a state of pupillage." This term is peculiarly applicable to this territory. In a very striking sense it is the pupil and ward of the nation. Pastoral in their habits, conservative in their aspirations, a very large portion of its population live in their mountain homes, and follow their flocks as did their fathers before them. It is the business of the courts to protect

them, and to see that their homes and their property are not confiscated to satisfy the greed of corporations.

(6 N.M. 288)

VEEDER V. FISK. (No. 499.)

(Supreme Court of New Mexico. Aug. 21, 1891.)

REPLEVIN—ORDER OF RESTITUTION—RIGHTS OF STRANGER TO THE RECORD.

Where an order for the restitution of property involved in a replevin suit to plaintiff, in whose favor judgment has been rendered, affects a stranger to the record, his remedy is not by summary proceedings affecting the judgment, but by an independent action.

Appeal from district court, San Miguel county; JAMES O'BRIEN, Judge.

Replevin by John D. W. Veeder against Calvin Fisk. Plaintiff recovered judgment, and an order was entered for the restoration of the property to him. The order was vacated, and plaintiff appeals. Reversed.

This is an action to recover possession of certain chattels and personal property detained by the defendant. A writ of replevin directed to the sheriff had been issued in behalf of plaintiff. The sheriff executed the writ, and delivered the property to the plaintiff, in whose hands it remained four days. The sheriff then took from the possession of plaintiff a portion of the property, *viz.*, one Mosler, Bomen & Co. safe, the property in controversy, and delivered it to one C. L. Houghton. Plaintiff recovered a judgment, and an order was made for the return of the property to him. The clerk thereupon issued an order in the nature of a writ of restitution directed to the sheriff, requiring him to return the safe to plaintiff. The sheriff, who was not a party to the action, and had not intervened nor claimed any interest in the controversy prior to the judgment, moved for leave to show cause why he should be discharged from the order of restitution. Over the objection of plaintiff the sheriff was allowed to file affidavits to support his motion for a discharge, and the court, after considering the motion and affidavit, vacated the order for the restitution of the property.

John D. W. Veeder, *per se.* W. J. Mills, for appellee.

PER CURIAM. The judgment below is regular on its face, and it was not opened or set aside. The order for restitution duly followed the judgment, being a necessary incident. If its execution injuriously affected a stranger to the record, he had an obvious remedy by an independent action, but no right to any summary proceedings affecting the judgment or its result. Therefore the order vacating the order for restitution was by inadvertence irregularly made, and must be reversed, and the case is remanded to the district court for further action not inconsistent with this opinion.

(Cal. 385)

HUGHES V. DUNLAP. (No. 14,114.)

(Supreme Court of California. Sept. 26, 1891.)

TRIAL—REJECTING FINDINGS OF JURY—INJUNCTION AND DAMAGES.

Since, in California, where a legal and an equitable remedy are sought in the same action,

each remedy must be governed by the same law that would apply if the other remedy had not been asked, it is error for the court, in an action for an injunction and for past damages, to reject, without motion for a new trial, the findings of the jury as to both remedies, since, in so far as damages are asked, the remedy is legal, and plaintiff is entitled to a jury trial.

Department 2. Appeal from superior court, Kern county; R. E. ARICK, Judge.

Action by Hiram Hughes against Calvin Dunlap for an injunction and damages. Judgment for plaintiff. Defendant appeals. Reversed.

Alvin Fay, for appellant. *B. Brundage*, for respondent.

MCFARLAND, J. In the complaint plaintiff avers that he is the owner and in possession of a large tract of land, valuable mainly for pasturage, for which purpose he has it inclosed by a substantial fence; that "during the last two months" defendant has torn down and destroyed said fence at various points, and threatens to continue to do so, to plaintiff's damage in the sum of \$5,000. It is further averred that defendant is insolvent, and that if he continues to destroy and keep open said fence, he will cause plaintiff irreparable damage. The prayer is for judgment for \$5,000 damage, and an injunction to restrain defendant from continuing said acts. The answer of defendant contains a denial of the averments of the complaint, and for a separate defense avers that there are, and for more than 25 years have been, certain public roads over and through said land; that recently plaintiff had built fences across said public roads; that defendant is road-overseer of the district; and that in discharge of his duties as such he had removed the said fences where they crossed and obstructed said roads, but had not interfered with said fences at any other place. At the trial a jury was impaneled on motion of defendant, and certain issues of fact were referred to the jury concerning the existence of public roads over the land; what damage, if any, was done plaintiff by the acts of defendant, etc. The jury returned a verdict on all such issues favorable to defendant, and found that there were certain public roads where defendant had removed the fences, and that plaintiff had suffered no damage. Afterwards the court made findings in which it states that it "refuses to adopt said findings of the jury, and rejects each and every thereof," and proceeds to find all the issues which had been passed on by the jury the other way and favorably to plaintiff, and finds that plaintiff was damaged by said acts of defendant in the sum of \$100. Upon these findings judgment was rendered against defendant for \$100 damage and costs, and perpetually enjoining him from opening or interfering with said fences. From this judgment, and from an order denying a new trial, defendant appeals.

The first point made by appellant is that the court erred in disregarding the verdict of the jury and setting it aside without the proceeding of a motion for a new trial. This point is certainly well taken; so far, at least, as the issue of dam-

ages is concerned. It has long since been held that under our system a legal and equitable remedy may be sought in the same action; but each remedy must be governed by the same law that would apply to it if the other remedy had not also been asked for. An action to recover damages for past trespasses is as clearly a legal remedy as any that could be named, and it is an action in which a party cannot be deprived of a jury trial. For this reason, therefore, the judgment and order must be reversed.

The question whether or not the defendant was entitled to have other issues in the case submitted to a jury has not been discussed by counsel for appellant; and it is a question too important to be finally disposed of without the fullest argument and consideration. There is a disposition to assume that the right to a jury trial is determined entirely by the form of action which the plaintiff chooses to adopt. We had occasion, in *Donahue v. Meister*, (Cal.) 25 Pac. Rep. 1096, to say that such a position is not tenable. If two coterminous owners of land have a dispute about the ownership of a piece of land lying along the common boundary, and one brings an action of ejectment to recover it, undoubtedly the other would be entitled to a jury on the trial of the cause. But suppose he chooses to bring an action for an injunction, averring that the other party is cutting timber, or committing some other waste, on the disputed territory, and praying to have him enjoined from so doing, without asking for damages; would the defendant, in that case, be deprived of the right to a jury trial? In the case at bar, if the plaintiff had merely asked for damages caused by the alleged acts of the defendant, the action would have been the common action of trespass; in which defendant, of course, would have been entitled to a jury. Does the fact that he also prayed for an injunction take away from him the right to have the real issues of fact tried by a jury? Of course, it is always for the judge sitting as a chancellor to determine whether, when certain rights are established, he will grant an equitable remedy prayed for, or compel a party to be satisfied with his legal remedy; but when the asserted rights upon which any remedy must rest are legal rights, and cognizable in a court of law, must not those rights be determined according to the methods of a common-law court? And, in such a case, can a party be deprived of his constitutional privilege of a jury? "The writ of injunction, being largely a preventive remedy, will not ordinarily be granted when the parties are in dispute concerning their legal rights, until the right is established at law; and if the right for which protection is sought is dependent upon disputed questions of law which have never been settled by the courts of the state, and concerning which there is an actual and existing dispute, equity will withhold relief until the questions of law have been determined by the proper courts." High, Inj. § 8. In Pom. Eq. Jur. § 116, it is said, on the subject of the blending of legal and equitable remedies under our system, as follows: "A com-

plete amalgamation, however, is not possible, so long as the jury trial is retained in legal actions. There is certainly no impossibility, nor even difficulty, in requiring a jury to decide the issues of fact upon which the right to many kinds of equitable remedies depends. This is the province of a jury in legal actions; the court pronouncing the judgment upon their verdict. A jury is clearly incompetent to frame and deliver a decree according to the doctrines and methods of equity; but there can be no real obstacle in the way of its ascertaining the facts by its verdict, and leaving the court to shape the decree and award the relief based upon these facts, in many species of equitable remedies."

We have made the above remarks and quotations for the purpose of calling attention to the subject; for the right of a jury trial in cases in form equitable has not been very clearly defined. The action for trespass upon real property, with a prayer for an injunction, was very common in the early history of this state. It was frequently used to determine mining and water rights, and it was generally conceded that either party had the right to a jury trial. See *Gates v. Kieff*, 7 Cal. 124; *Mining Co. v. Clarkin*, 14 Cal. 543; *More v. Massini*, 32 Cal. 594. The general subject is, no doubt, full of difficulties, and we have thus alluded to it, so that we may not be considered as holding, in the case at bar, that the issue of damages is the only one as to which the appellant was entitled to a jury. There are no other points in the case necessary to be noticed. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; DE HAVEN, J.

(91 Cal. 307)

JOHNSON v KING et al. (No. 14,321.)

(Supreme Court of California. Sept. 21, 1891.)

FORECLOSURE—DEFICIENCY JUDGMENT—APPEAL—BOND—LIABILITY OF SURETY.

Where a deficiency judgment on foreclosure was rendered against the mortgagor, and an appeal was taken by a defendant who was in possession and desired to prevent a sale pending the appeal, the surety on an appeal-bond, stipulating that appellant will pay any deficiency arising on the foreclosure sale, is liable for such deficiency under Code Civil Proc. Cal. § 945, providing that a judgment of foreclosure shall not be stayed unless there be an undertaking "on the part of the appellant" that he will not commit waste during his possession of the property, and that, "when the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency."

Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Action by Nat Johnson against King and others on an appeal-bond. Judgment for plaintiff, and defendants appeal. Affirmed.

Chas. R. Gray, for appellants. Harris & Gregg, for respondent.

McFARLAND, J. This is an action against the sureties on an undertaking on appeal. Judgment was rendered for plaintiff on the pleadings, and defendants ap-

peal. The action on which the undertaking was given was brought by plaintiff herein against one Winders, one McDuffee, and several other defendants, to foreclose a mortgage executed by said Winders to plaintiff. McDuffee was in possession of the mortgaged premises at the time the action was commenced. Judgment was rendered in that action, foreclosing the mortgage against all the defendants, with the usual provisions for a deficiency judgment against the mortgagor. McDuffee appealed from the judgment and from an order denying a new trial; and for the purpose of staying execution the defendants in the present action executed an undertaking in the statutory form on the part of said McDuffee, in which they undertook that, if the judgment should be affirmed, or the appeal dismissed, "said appellant will pay any deficiency arising upon the sale of the premises described in said judgment." The judgment and order appealed from were afterwards affirmed, and after the sale of the premises there was a deficiency within the penal sum of the undertaking, for which the judgment in the case at bar was rendered.

The only point made by appellant which seems necessary to be noticed is that, because McDuffee was not the mortgagor in the foreclosure suit, and because no deficiency judgment could be rendered against him, therefore the parties on the undertaking are not liable to pay such deficiency. It seems to be contended that such an undertaking can be legally given only by the party against whom the deficiency judgment could be rendered. But the undertaking is an independent obligation, founded on the provisions of the statute which apply to the "appellant," whoever he may be. Section 945, Code Civil Proc. provides that a judgment of foreclosure shall not be stayed unless there be an undertaking "on the part of the appellant * * * to the effect that during the possession of such property by the appellant he will not commit waste," etc.; and that, "when the judgment is for the sale of mortgaged premises and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." This language clearly applies to a defendant who appeals, whether he be the mortgagor or a party who claims the mortgaged premises and desires to prevent a sale and enjoy the property during the pendency of the appeal. There are no other points made by appellants which require special notice. Judgment affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.

(91 Cal. 194)

FOSS et al. v. HINKELL. (No. 14,014.)

(Supreme Court of California. Sept. 14, 1891.)

PUBLIC LANDS—MEXICAN GRANTS—LANDS SUB JUDICE.

Where the claim to the Mexican grant of Rancho San Jose was confirmed in 1854, and its boundaries established, the lands, being within the exterior limits of the claimed grant, but outside the fixed boundaries, were not *sub judice*, because the patent was not issued until 1875; and a patent of such outlying lands, issued to the S.

P. R. Co., under Acts Cong. July 27, 1866, and March 3, 1871, is valid. McFARLAND, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action of ejectment by Carrie L. Foss and Frank Foss against Joseph Hinkell. Judgment for defendant. Plaintiffs moved for a new trial, which being denied, they appealed from the judgment and the order denying the motion. Reversed.

Edwin Baxter, for appellants. Will D. Gould and James H. Blunc, for respondent.

HARRISON, J. Upon the former appeal in this case (78 Cal. 158, 20 Pac. Rep. 393) the cause was remanded, with directions to the court below "to find on the testimony already introduced, and such further testimony as may be introduced by either party, whether or not the land in suit was, on the 3d day of April, 1871, within the exterior boundaries of the Rancho San Jose, as granted by the Mexican government, and on such findings to enter judgment." In pursuance of this direction, the court, upon such evidence as was offered upon this issue at the subsequent trial, found "that the land in suit was, on the 3d day of April, 1871, within the exterior boundaries of the Rancho San Jose, as granted by the Mexican government," and rendered judgment for the defendant. Plaintiffs moved for a new trial, and from the order denying their motion, as well as from the judgment, they have appealed to this court.

It is insisted upon the part of the respondent that this court, by the following language, used in its opinion upon the former appeal, viz.: "What the exterior limits of such granted rancho were must be determined by the *expediente* of the grant issued by the Mexican government, including petition, diseno, and grant, the boundaries designated in which may be identified by parol evidence,"—thereby limited the testimony upon which the court below was to make its finding upon this issue. These were, however, words of definition, rather than of enumeration, and must be read in connection with the subsequent direction to the court to make its finding "on the testimony already introduced, and such further testimony as may be introduced by either party." The former appeal was taken upon the judgment roll alone, and, as the "testimony already introduced" was not then before this court, it cannot be presumed that it intended to make any reference to the character of the evidence already taken, or to limit the character of the "further testimony" which might be introduced by either party for the purpose of enabling the court below to make its finding upon this issue. It then appeared from the findings that on the 3d day of April, 1871, the date when the route of the Southern Pacific Railroad was definitely located, the land in question was within the "claimed exterior limits" of a valid Mexican grant of the Rancho San Jose, and by reason thereof was *sub judice*. This finding was based upon another finding that by the

Thompson survey, made in 1868, the lands in controversy were included within the exterior limits of said rancho until said survey was rejected in 1875: while by the Hancock survey, which had been previously made, and which was afterwards substantially approved, and a patent thereon issued in 1875, the lands were excluded from the exterior limits of the rancho. This court, in its opinion, held that whether the land in controversy was *sub judice* was the ultimate fact which the court below should have found, saying: "The exterior limits of the rancho do not depend on any survey made of it." The record then before this court did not disclose the character of the grant,—whether it was a grant of quantity within exterior limits, or a grant of a specific tract, either by name or with definite boundaries; and the court, in its direction, did nothing more than indicate that the issue could be found upon any competent evidence.

By the record which is now brought before us on this appeal it appears that the grant was of a specific tract of which juridical possession had been given by the Mexican government, and that the final decree of confirmation by the United States was of the land embraced within the boundaries described in said juridical possession. From the testimony before the court it appeared that in April, 1837, the Mexican government made a grant to Ygnacio Palomares and Ricardo Vejar of the "place called 'San Jose,'" and that in August of that year juridical possession thereof was given them, with the following specific boundaries, viz.: "Commencing at the foot of a black willow tree, which was taken for a corner, and between the limbs of which a dry stick was placed in the form of a cross; thence from east towards the west 9,700 varas to the foot of the hills called 'Las Lomas de la Puente,' taking for a landmark a large walnut tree on the slope of a small hill on the side of the road which passes from the said San Jose to La Puente, making a cut [*caladura*] on one of its limbs with a hatchet; thence in a direction about from south to north 10,400 varas to the arroyo [*creek*] of San Jose, opposite a high hill, where a large oak was taken as a boundary, in which they fixed the head of a beet, and chopped some of its limbs; thence in a direction from west to east 10,600 varas to the arroyo [*creek*] of San Antonio, taking for a corner some young cotton-wood trees which are near each other, marking crosses in the bark; thence about from north to south 9,700 varas to the foot of the black willow, the place of beginning." In 1852 the grantees presented to the land commission their petition for a confirmation of the grant, and on the 31st of January, 1854, the commission adjudged the claim to be valid. From this decision the United States took an appeal to the district court for the southern district of California, and that court affirmed the decision of the land commission, in its decree specifically designating the lands of which confirmation was made by the same boundaries as those given by the act of juridical possession. The attorney general

having given notice that the United States would not prosecute an appeal therefrom, the district court, at its December term, 1858, decreed that the claimants might proceed upon its said decree as upon a final decree, and thereafter, viz., January 20, 1875, a patent for said lands was issued to the claimants.

Upon this testimony, as soon as it was shown to the court that the land in controversy is not included within the lines of the patent, the court should have found that it was not, on the 3d day of April, 1871, "within the boundaries of the Rancho San Jose, as granted by the Mexican government." The only lands which were "granted" by the Mexican government are those which were included within the natural boundaries fixed by the juridical possession. That was a segregation or location by the Mexican government, and a determination by that government of the land within the limits of the *diseño*, which it had granted, and was binding upon this government. "By this proceeding—called in the language of the country 'the delivery of juridical possession'—the land was separated from the public domain, and what was previously a grant of quantity became a grant of a specific tract. The record of a proceeding of this nature must necessarily control the action of the officers of the United States in surveying land claimed under a confirmed Mexican grant." *Graham v. U. S.*, 4 Wall, 259. "This proceeding involved an ascertainment and settlement of the boundaries of the lands granted by the appropriate officers of the government specially designated for that purpose, and has all the force and efficacy of a judicial determination to bind the former government, and is equally binding upon the officers of our government." *U. S. v. Pico*, 5 Wall, 536. "Where the original grant does not locate the subject of the grant, as where a number of square leagues is granted to be located within a certain district, the delivery of possession within the district renders the title complete, and defines the location of the grant. The cases referred to by the plaintiff were grants of specific ranches, plantations, or places having well-known names; and the boundaries designated in the acts of possession ascertained their actual extent and limits, and hence were controlling when a question of title arose." *Pinkerton v. Ledoux*, 129 U. S. 346, 9 Sup. Ct. Rep. 399. In the decree of confirmation, rendered by the district court, these lands were specifically described by the same natural boundaries as those designated in the act of juridical possession; and this decree was a final determination by the United States that these boundaries were the exterior limits of the grant, and that the lands outside of those limits were, so far as the claimants were concerned, public land. "Where the grant was by metes and bounds, or where proceedings before the Mexican authorities, such as took place upon a juridical delivery of possession, had established the boundaries, or where from any other source, pending the proceedings for a confirmation, the boundaries were indicated, it was proper for the board to de-

clare them in its decrees." *U. S. v. Sepulveda*, 1 Wall, 104. Where the decree of confirmation is by metes and bounds, the survey must conform to the decree. *Higuera v. U. S.*, 5 Wall, 827. "The decree is a finality, not only on the question of title, but as to the boundaries which it specifies." *U. S. v. Halleck*, 1 Wall, 439. The subsequent survey, upon which the patent was issued, was the ascertainment of these natural boundaries. It was necessary that they should be delineated upon the surface of the earth with their relation to the sectional lines of the government surveys before the patent could issue, but the issuance of the patent upon the lines of that survey became the authentic record that those lines were the correct boundaries of the grant as made by the Mexican government. Although the patent was not issued until 1875, yet the boundaries of the land for which it was issued were definitely fixed when the district court rendered its decree of confirmation, and at no time thereafter was the land in question *sub judice*.

This evidence, viz., the act of juridical possession, the decree of confirmation, in which the land confirmed was specifically described, and the patent issued thereon, was conclusive upon the court in determining the issue before it. All the other evidence that was offered could have no weight or effect in impairing its conclusiveness. By the *expediente* it appeared that the land granted was a place within the boundaries of the *diseño*; and after the juridical possession was given, the *diseño* ceased to have any function in determining the land that was granted, but for all purposes connected with the grant was merged in the act of juridical possession. Neither the Hancock survey nor the Thompson survey, nor the evidence of any surveyor, was competent to defeat the effect of the patent, or to show that any lands not included therein had been granted by the Mexican government, for the reason that it had already been established by the decree of the court that only the lands embraced in the patent had been so granted. It may be observed with reference to the testimony of the surveyors Moore and Bernell, that they did not testify that the land in question was within the boundaries of the juridical possession, or of the land described in the decree of the district court; their testimony being that it was within the limits of the *diseño*, the map of partition, and the Thompson survey.

It is urged by the respondent that notwithstanding it appears from the terms of the decree of confirmation, as well as from the patent, that the Rancho San Jose, "as granted," did not include the land in controversy, yet the grant including this land was *sub judice* until the final rejection of the Thompson survey, for the reason that it was included therein, and therefore was claimed to be within the exterior limits of the grant. We cannot assent to this proposition. Lands are not *sub judice* unless the claim to them is pending and undetermined before some tribunal competent to pass upon their validity. The question of the extent to which a claim for

lands under a Mexican grant would render them *sub judice* was discussed in *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228, and in the opinion of the court in that case Justice MILLER says: "Those Mexican claims were often described, or attempted to be described, by specific boundaries. They were often claims for a definite quantity of land within much larger out-boundaries, and they were frequently described by the name of a place or ranch. To the extent of the claim, when the grant was for land with specific boundaries, or known by a particular name, and to the extent of the quantity claimed within out-boundaries containing a greater area, they are excluded from the grant to the railroad company. Indeed, this exclusion did not depend upon the validity of the claim asserted, or its final establishment, but upon the fact that there existed a claim of a right under a grant by the Mexican government which was yet undetermined, and to which, therefore, the phrase 'public lands' could not attach, and which the statute did not include, although it might be found within limits prescribed on each side of the road when located." From this opinion it will be seen that the claim, in order to render the land *sub judice*, must be based upon a right yet undetermined, and must also be limited to the lands within the boundaries of the grant, whether it be for quantity or for a specific tract. The mere claim that lands are within the exterior limits of a grant, after there has been a final determination that they are not so included, will not make them *sub judice*. As a claim for lands outside of the exterior boundaries of a grant of quantity would have no effect, so, where the grant is for a place with specific boundaries, no right can be created by a claim for lands not included within those boundaries. In the ordinary case of a grant of quantity within exterior limits the claim will embrace all the lands within those boundaries until the segregation of the quantity which was granted by the Mexican government, for until then, although the validity of the claim has been established, its extent has not been fixed. In *U. S. v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, it was held that in such a case the treaty obligations of the government are satisfied so long as it reserves within these exterior limits a quantity sufficient to satisfy the claim, and that in the mean time the United States may make valid grants of the residue. When, however, the grant is of all the land within certain natural boundaries, or when juridical possession with natural boundaries has been given of the land granted, the claim must be limited to the land within those boundaries; and when the boundaries, as well as the validity of the grant, have been determined by the decree of confirmation, the claim is thereafter limited to those boundaries. By such decree the claim passes into a judgment, and the subsequent survey is but the execution of that judgment. The *Fossat Case*, 2 Wall. 649. In the present case the lands in controversy are more than a mile distant from the lines established in the decree, and there could be no *bona fide* claim

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that they could be included within any survey of the grant as defined in the decree of confirmation. It follows that after the decree of confirmation of the Rancho San Jose became final, in 1858, no claim under that grant to any lands outside of the boundaries named in the decree would render them *sub judice*, or prevent their passing to the railroad company on the 3d day of April, 1871, as a portion of the public land granted to it by the United States. The judgment and order denying a new trial are reversed, and the cause is remanded, with directions to the court below to make the finding directed by this court at the former trial, in conformity with the principles contained in this opinion, and thereupon to enter judgment.

We concur: BEATTY, C. J.; PATERSON, J.; GAROUTTE, J.

McFARLAND, J. I dissent, and adhere to the opinion rendered in department, February 2, 1891, affirming the judgment. 25 Pac. Rep. 762. On the former appeal (78 Cal. 158, 20 Pac. Rep. 393) this court reversed the judgment, with directions to the court below to find on the one issue whether the land in contest was within the exterior boundaries of the Rancho San Jose, as granted by the Mexican government; and it stated certain principles by which the lower court should be governed in determining that issue. The court below followed those directions, and was governed by those principles, and found that said land was within said boundaries; and I do not think that the evidence was insufficient to support that finding. It may be the law that the exception in railroad grants applies only to Mexican grants, which expressly designate a certain quantity of land within larger exterior boundaries; and it may be that in other cases, where the boundaries named in the original grant are uncertain and vague, although the grant has been in good faith claimed, possessed, and recognized up to certain lines for more than a quarter of a century, still the railroad grant will take all that is excluded from the final United States patent. The opposite views of this question are fully presented in the two separate opinions of Judges SAWYER and ROSS (involving this same San Jose grant) in *U. S. v. Railroad Co.*, 14 Sawy. 620, 45 Fed. Rep. 596; and I do not think that it has been yet definitely settled by *Doolan v. Carr*, or any other adjudicated case. But that question need not be discussed in the case at bar, for the law of this case was declared on the former appeal. I think that the judgment should be affirmed.

3 Cal. Unrep. 431

MARSH v. HENDY, (LANGLEY *et al.*, Interveners. No. 14,147.)

(Supreme Court of California. Sept. 19, 1891.)

SWAMP LAND—APPLICATION BEFORE SEGREGATION.—ACTUAL SETTLERS.

1. The swamp lands granted to the state are not subject to application for purchase until they have been segregated to the state by a United States survey, and an application filed prior to such segregation confers no rights on the applicant. *Buchanan v. Nagle*, 26 Pac. Rep. 512.

2. Const. Cal. art. 17, § 8, providing that state lands which are "suitable for cultivation" shall be granted only to actual settlers, applies to swamp lands granted to the state when such lands are suitable for cultivation, and can be reclaimed and cultivated by an actual settler. *Fulton v. Brannan*, 26 Pac. Rep. 506, followed.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by Archibald Marsh against John H. Hendy to determine a contest as to the right to purchase from the state certain swamp lands. J. R. Langley and others intervene. Judgment being entered in the court below against both plaintiff and defendant, each moved for a new trial, which being refused, they appeal from the judgment and orders denying the motions. Affirmed.

Freeman & Gates, for appellant. *Garber & Bishop*, for respondent. *W. B. Wallace*, for interveners.

BELCHER, C. This is an action to determine a contest, arising in the state land-office, as to the right to purchase from the state a certain section of swamp and overflowed land in Tulare county. During the pendency of the action other parties were permitted to intervene for the purpose of showing that neither the plaintiff nor defendant was entitled to make the purchase. After trial the court below found, among other things, that when the defendant made his application to purchase the section in controversy the land had not been segregated as swamp and overflowed land by authority of the United States; that when the plaintiff made his application to purchase the section the land was, and ever since had been, suitable for cultivation; that neither the plaintiff nor defendant had ever been an actual settler upon the land; and, as a conclusion of law, that neither of them was entitled to purchase the same from the state. Judgment was accordingly so entered. Both parties moved for a new trial, and their motions were denied, and they then appealed from the judgment and orders denying their motions. Since the appeals were taken several other cases involving all the questions arising herein have been considered and passed upon by this court. See *Wren v. Mangan*, 88 Cal. 274, 26 Pac. Rep. 100; *Fulton v. Brannan*, 88 Cal. 454, 26 Pac. Rep. 506; *McNee v. Lynch*, 88 Cal. 519, 26 Pac. Rep. 508; *Buchanan v. Nagle*, 88 Cal. 591, 26 Pac. Rep. 512; *Belcher v. Farren*, 26 Pac. Rep. 791. These cases are decisive of this, and upon their authority we advise that the judgment and orders appealed from be affirmed.

We concur: TEMPLE, C., VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

91 Cal. 206

MONTGOMERY v. SAYRE. (No. 13,911.)
(*Supreme Court of California*. Sept. 15, 1891.)

SETTING ASIDE SPECIAL FINDINGS.

Code Civil Proc. Cal. § 623, provides that, in an action for the recovery of money only, or

specific real property, the jury, in their discretion, may render a general or special verdict. Section 624 declares that a special verdict is that by which the jury find the facts only, leaving the judgment to the court. Section 662 provides that the verdict of a jury may be vacated and a new trial granted by the court on its own motion, when there has been such a plain disregard by the jury of the instructions of the court or the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice. *Held*, that where, in an action on a note, the record shows that, after the jury had made special findings fatal to plaintiff's recovery, the trial proceeded before the judge upon issues not submitted to the jury, and more evidence was introduced, the judge had no authority, in the absence of an express waiver of the findings by defendant, to set them aside, and render judgment for plaintiff, without first granting a new trial. 25 Pac. Rep. 552, reversed.

In bank. On rehearing.

Action on a promissory note by A. Montgomery against A. L. Sayre, executor. Judgment for plaintiff. Defendant appeals. Affirmed. A rehearing was granted. Reversed. For prior report, see 25 Pac. Rep. 552.

GAROUTTE, J. This cause was originally decided by the court in department, and, a rehearing having been granted, it is now before the court in bank. It was an action on a promissory note executed by defendant's testator to the plaintiff. It was given to secure the payment of the note of the Pioneer Gold Mining Company to the plaintiff for \$110,000. This last note was indorsed by William S. Chapman. It was further secured by a mortgage on the Pioneer mine, executed by said company. The above facts appear, and are not disputed. It further appears that there was a prior mortgage executed by the company on the Pioneer mine, on which a suit for foreclosure was brought, and in this suit the plaintiff, who was one of the defendants therein, filed a cross-complaint, asking that his mortgage be foreclosed. This was done, and an order of sale issued directing the proceeds of the sale of the mine under the decree to be applied, first, to the payment of the prior mortgage, and the remainder upon the plaintiff's mortgage. The sheriff's return of sale showed a deficiency due on the second debt to plaintiff amounting to \$61,534.13. Judgment for this deficiency was docketed against the mortgagor company and W. S. Chapman. This action was brought on the note to recover the amount claimed to be due thereon, to be paid by defendant in due course of administration. It is set up in the answer that the \$110,000 note had been fully paid, and it was denied that any sum remained due and unpaid thereon. Other allegations of the complaint were denied. These need not be stated.

As an affirmative defense, the defendant set up by his answer the following: "(1) That a transcript of the docket of the deficiency judgment docketed against the Pioneer Mining Company and W. S. Chapman, the maker and indorser of the mortgage note, was filed with the recorder of Fresno county in November, 1887, and thus the judgment became a lien upon all

the real property of said W. S. Chapman in said Fresno county. (2) That at and before the filing of said transcript Chapman owned certain real property described, situated in said county, which was held in the name of W. F. Goad, trustee for plaintiff, Montgomery, for further security for debts due Montgomery from Chapman. (3) That the said lien of said judgment was never enforced against said property of said Chapman, but that said Montgomery, Chapman, and Goad, after the death of said A. L. Sayre, sold and conveyed by deed to Thomas E. Hughes all of said real property for \$95,000, paid by Hughes to Montgomery, which was received by Montgomery as payment from Chapman to him in full for all obligations, except the judgment aforesaid, which then amounted to less than \$36,000, and that Montgomery thereupon released said land from the lien of said judgment. (4) That said real estate was then worth \$140,000, and if sold at its real value would have realized enough to pay all debts due Montgomery from Chapman, including said deficiency judgment. (5) That said Montgomery released said land from the lien of said judgment, and released said Chapman from the obligation of said judgment, without the consent of defendant."

The case was tried by a jury on the 24th of April, 1889, and the following verdict rendered: "Question 1. What was the value, May 15, 1888, of the following lands, viz., [referring to the lands of Chapman in Fresno county]? Answer. \$136,800. C. C. HARRIS, Foreman. Q. 2. Did the plaintiff, A. Montgomery, on or about May 15, 1888, release W. S. Chapman from all liability under the judgment in the complaint herein mentioned? A. Yes. C. C. HARRIS, Foreman."

This verdict, it appears, was in answer to special questions, embracing special issues, submitted to the jury by the questions above given. There was no other verdict, and no general verdict, nor does it appear that any general verdict was demanded by either party. It appears from the record that the trial proceeded after the return of the verdict, both parties introduced evidence, and on the 24th and 25th of April, 1889, it is stated, "said trial was completed, and submitted to the court for decision and judgment, with the privilege to the parties to file briefs herein, which was done." The court subsequently rendered its decision finding on all the issues in the case, disregarding the verdict, treating it as non-existent, and in fact finding contrary to the answers of the jury on the questions submitted to them, and rendered judgment for plaintiff for a sum of money. The defendant appeals from such judgment.

The foregoing facts are taken from the record, and upon them the merits of this appeal must be determined. The findings of fact by the court upon which the judgment in this action is based are directly opposed to the special findings of the jury. The jury found that the lands of Chapman in Fresno county were worth \$136,800. The court found that \$95,000 was the reasonable value of said lands. The jury found that plaintiff, A. Montgomery, did

release W. S. Chapman from all liability under the judgment in the complaint mentioned. The court found that plaintiff, Montgomery, did not agree to release, and did not release, said Chapman from all or any liability under said judgment. These are vital issues in the action, for Sayre was in law a surety, and "a guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." Section 2819, Civil Code. And section 2840, subd. 1, provides that "a surety is exonerated in like manner with a guarantor."

If the court had the power to make the findings that it made upon these questions, then the judgment has ample support, but, if the verdict rendered is to be given any effect, then the judgment must be for the defendant. This is an action for the recovery of money, an action strictly at law, the defenses are legal defenses, and the verdict cannot be deemed as merely advisory to the court, as is the practice in equity cases. It seems from the record that all the issues involved in the case were not submitted to the jury, and for that reason the verdict may be termed an incomplete and imperfect special verdict. Section 624, Code Civil Proc.¹ If the court had adopted the special findings of the jury, and then had proceeded to take evidence and make findings upon the remaining issues in the case, and had made its judgment based upon all of such findings, it would have been presumed that a jury had been expressly waived as to the issues tried and determined by the court. This was the *status* of the record in *Shepherd v. Jones*, 71 Cal. 224, 16 Pac. Rep. 711, and the court said: "Conceding that this method of procedure was irregular, still no objection appears to have been taken to it by either side, and we must presume that it was adopted by consent." This being an action at law, the defendant was entitled to have the issues made tried by a jury. A jury was impaneled, tried some of these issues, and found facts fatal to plaintiff's right of recovery; and it is only upon the one theory that, after this verdict was rendered, defendant stipulated that it should be set aside, a jury trial waived, and the entire cause tried by the court, that the judgment in this action can be sustained. If the question were, did the defendant waive his right to a trial by jury? the record being silent upon the question, and the case having been tried and determined by the court, there would be no difficulty, for the authorities are explicit to the end that such would be the presumption. *Tunnel Co. v. McKenzie*, 67 Cal. 490, 8 Pac. Rep. 22. But this is not a

¹ Code Civil Proc. Cal. § 624, declares that a special verdict is that in which the jury find the facts only, leaving the judgment to the court. Section 625 provides that, in an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict.

question of a waiver of a jury trial, for a jury was had, evidence taken, and a verdict rendered upon vital issues. This court will indulge in all proper intendments necessary in order to support the validity of a judgment where an appeal is presented to us solely upon the judgment roll; but we think upon the face of this record there is sufficient to indicate that this trial in the lower court took not only a novel, but inconsistent and unlawful course. To support this judgment we are required to presume that defendant voluntarily relinquished the verdict of a jury, which verdict formed a perfect legal defense to plaintiff's right of recovery, then waived a trial by jury, and risked the chances of adverse findings upon the same issues with others by the judge. We think the presumption violent, and entirely too weak to form a foundation upon which to test the merits of a cause involving large property rights.

A fair interpretation of the recitals in the record is that both parties proceeded and introduced evidence upon the issues not submitted to the jury, but which were necessary to a full and final determination of the cause, in accordance with *Shepherd v. Jones*, supra. If such were the fact, this verdict was alive at the conclusion of the evidence, and could only have been rendered nugatory by some act of the court subsequent to that event, and, allowing the court all the power that the law allows, it was still wanting in power to render a judgment at the time contrary to the verdict. Section 662 of the Code of Civil Procedure¹ provides "that a verdict of a jury may be vacated and a new trial granted by the court in which the action is pending on its own motion, when," etc. In this case a jury was impaneled, and a verdict rendered as to certain issues, and it is unnecessary to closely scrutinize that verdict to ascertain whether it is defective and informal, or complete and perfect. It was the verdict of a jury placed in the box to try the cause, and it cannot be disregarded until set aside and vacated by the court. And we have already seen the court made findings directly contrary to this verdict, and this action of the court was, in effect, to vacate and set it aside. It is immaterial whether such action was had by reason of defects and informalities in the verdict, or whether the evidence was such as to indicate that it was rendered through passion or prejudice; the result would be the same, and that result would be that a new trial should have been ordered. Such is necessarily the law, for if it were otherwise parties would be deprived of their right to a trial by jury. When the court set aside and vacated the verdict it was its duty to order a new trial. It had no power to proceed to determine the cause. "As the court cannot enter a verdict con-

trary to the will of the jury," (*Hine v. Robbins*, 8 Conn. 347,) so it cannot substitute its judgment for theirs, and assume the power to decide issues of fact once submitted to the jury. We conclude, therefore, that the verdict was set aside and vacated by the court, and that the court had no power to proceed and determine the cause, but should have ordered a new trial. Let the judgment be reversed, and the cause remanded.

We concur: BEATTY, C. J.; DE HAVEN, J.; MCFARLAND, J.; PATERSON, J.; HARRISON, J.

91 Cal. 260

VISHER v. SMITH *et al.* (No. 14,104.)

(*Supreme Court of California.* Sept. 18, 1891.)

CLAIM AND DELIVERY—PLEADING—TITLE AND POSSESSION.

1. In an action against warehousemen to recover a quantity of barley, the complaint alleged that plaintiff delivered the barley to defendants for storage, and set out the warehouse receipt, which recited that the barley was deliverable to plaintiff on return of the receipt; that plaintiff tendered the storage charges; and that on a certain day he presented the receipt to defendants, and demanded a return of the barley, which defendants refused, without giving any reason therefor. *Held*, that the complaint was not objectionable on the ground that it did not allege that plaintiff was the owner and entitled to the possession, since it stated the particular facts which entitled him to possession, and thus specially pleaded his title.

2. Where the complaint set forth the receipt and contract of defendants to deliver the barley, and alleged defendants' refusal to redeliver on demand without their offering any excuse, the complaint is not subject to the objection that it does not allege that, at the commencement of the action, defendants were actually or constructively in possession of the property.

Commissioners' decision. Department

1. Appeal from superior court, San Joaquin county; JOSEPH H. BUDD, Judge.

Action by P. Visher against J. W. Smith and H. E. Wright, copartners, for the possession or price of a quantity of barley stored with the defendants. Judgment for defendants. Plaintiff appeals. Reversed.

Carter & Smith, for appellant. *Loutitt, Woods & Levinsky*, for respondents.

FITZGERALD, C. The complaint in this action substantially alleges that the defendants were at the times named therein engaged as copartners in the business of warehousemen, and as such doing a general storage business. That "prior to the 3d day of July, 1888," plaintiff delivered to the defendants for storage, and stored with them, 1,040 sacks of barley, in consideration and acknowledgment of which the defendants then and there executed to plaintiff a receipt and contract in the words and figures following, to-wit:

"No. 36. Stockton, Cal., July 3, 1888.

"Received on storage in Bagg's warehouse, awaiting transportation for account of P. Visher, the following described merchandise, at the rate of \$0.75 per ton, for the season ending June 1, 1889, deliverable (damage by the elements excepted) only on the return of this receipt and charges paid.

¹ Code Civil Proc. § 662, provides that the verdict of a jury may also be vacated and a new trial granted by the court on its own motion, "where there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice."

Marks.	File No.	One thousand and forty
	151.	sacks of barley, weighing one hundred thousand and fifteen lbs.

"Sacks 1,040.

"Weighing 100,015 lbs.

"[Signed] SMITH & WRIGHT."

—That plaintiff is now, and ever since its delivery to him by defendants has been, the owner and holder of said receipt. That storage was paid by plaintiff on the barley for the season ending June 1, 1889. That on or about the 2d day of September, 1890, he produced said receipt, and presented it to the defendants, without any indorsement thereon, and in the same condition as when executed, and at the same time tendered to them all charges due for storage on said barley for the seasons ending June 1, 1890, and June 1, 1891, and then and there demanded the delivery of the barley to him, also offering to surrender and give up the receipt upon the delivery thereof. The defendants refused to deliver the barley without giving any excuse or reason therefor. Plaintiff demands judgment against the defendants for the recovery of the possession of the barley, or for the sum of \$1,350, the alleged value thereof, in case delivery cannot be had. The complaint was demurred to on the ground that it "does not state facts sufficient to constitute a cause of action." The demurrer was sustained by the court, and, upon plaintiff refusing to amend his complaint, judgment final was rendered in favor of the defendants. The case comes here by appeal upon the judgment roll alone. It is objected by respondents that the complaint is insufficient, "because it contains no averment that at the time of the commencement of the action plaintiff was the owner and entitled to the possession of the property claimed." The complaint, instead of alleging generally that plaintiff is the owner and entitled to the immediate and exclusive possession of the barley, states the particular facts which entitle him to such possession, and thus specially pleads his title thereto.

It is further objected "that the complaint does not allege that defendants at the time of the commencement of the action were in the possession, either actually or constructively, of the property claimed." The possession of the barley by the defendants, and their obligation to redeliver, is shown by the receipt and contract set out in the complaint, from which, and their subsequent refusal to deliver it upon plaintiff's demand without giving any excuse or reason therefor, the law will presume the barley to have been in the defendants' possession at the time of the commencement of the action, and the wrongful detention thereof follows as a necessary conclusion from the refusal to deliver under such circumstances. While the complaint is not in all respects as artificially drawn nor as precise and direct in its statement of facts as it might have been, and while there are defects of form that could have been taken advantage of by special demurrer, still, upon the facts stated, we are of the opinion that the complaint is sufficient as against a general demurrer. We therefore recommend that

the judgment be reversed, with directions to the court below to overrule the demurrer.

We concur: VANCLIFF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with directions to the court below to overrule the demurrer.

98 Cal. 88

McDANIEL *et al.* v. PATTISON *et al.* (No. 14,280.)

(Supreme Court of California. Sept. 16, 1891.)

EQUITY JURISDICTION—PROBATE OF WILL—SETTING ASIDE DEED.

A bill in chancery by certain devisees of a will alleged that another devisee fraudulently suppressed the will, and altered a deed, whereby testator had conveyed to him a small portion of land, so as to include the entire property of the testator, and demanded that the deed be set aside and the property distributed in accordance with the will, which, it was alleged, could not be probated under Code Civil Proc. Cal. § 1339, providing that no will shall be proved as lost or destroyed unless its provisions are clearly and distinctly proved by at least two credible witnesses. *Held*, that the chancery court has no jurisdiction to probate a will, though such relief is sought only incidentally to the main equitable relief; and the fact that the devisees are also heirs at law will not enable them to obtain the relief demanded, since, having alleged a will, their rights arise only from it.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

Action by Sarah E. McDaniel and others against J. H. W. Pattison and another, to set aside certain deeds, etc. Judgment for plaintiffs. Defendants appeal. Reversed.

J. L. Murphey and Anderson, Fitzgerald & Anderson, for appellants. Chapman & Hendricks, for respondents.

GABOUTTE, J. Plaintiffs are the daughter and children of another daughter of A. M. Pattison, deceased, and the defendants are the widow and son of said deceased. This was an action to cancel and annul certain deeds, to-wit: (1) A deed executed by A. M. Pattison (now deceased) to J. H. W. Pattison, except as to two certain lots in the Orchard tract; (2) a deed executed by defendant J. H. W. Pattison and wife to defendant Mary Pattison, widow of A. M. Pattison, deceased; (3) a deed executed by Mary Pattison, widow, to J. H. W. Pattison. In addition to the foregoing, plaintiffs also asked that the property belonging to A. M. Pattison at the time of his death be declared vested in the plaintiffs and defendants, as follows: "That said Mary Pattison, widow, shall have a life-estate therein, and after her death that the same shall vest in the children of herself and said deceased in equal undivided one-third interests." There is other relief prayed for, concerning an accounting for moneys of the said deceased, held by J. H. W. Pattison, unnecessary to mention in detail.

Among other matters, the complaint alleges "that A. M. Pattison died April 5, 1885, a resident of Los Angeles county,

Cal., and plaintiffs and defendants are his heirs at law; that upon the 4th of March, 1885, said Pattison was seised in fee of valuable real estate in Los Angeles city, and in Carthage, Mo.; that on the 5th day of September, 1884, said Pattison made a will, by which all of his property was left to his widow for life, and after her death to pass in three equal shares, one to plaintiff McDaniel, one to plaintiffs the children of a deceased daughter, and the third to defendant J. H. W. Pattison; that said will was his last will and testament, was unrevoked at the time of his death, and has not been probated, but was fraudulently destroyed or suppressed by defendant J. H. W. Pattison; that upon the 4th day of March, 1885, said deceased made a deed to defendant J. H. W. Pattison, conveying two lots in the Orchard tract, and said defendant fraudulently altered said deed, so as to include all the real estate of his father, said Pattison, deceased, both in Missouri and California; that afterwards, said defendant Pattison made a deed to his mother, defendant Mary Pattison, purporting to convey all of the property fraudulently inserted in the said prior deed, and that subsequently thereto the mother, Mary Pattison, made a deed purporting to convey a portion of said property back to her son, the said defendant; that the said mother was old and feeble, under the influence of her son, and that these deeds were altered, made, and procured to be made by said son, J. H. W. Pattison, for the purpose of defrauding plaintiffs; that said defendant has taken possession of six thousand dollars in money of the estate, and has made no account thereof," etc. The defendants jointly answer, and deny the allegations of the complaint, especially those pertaining to the alleged fraud of the defendant J. H. W. Pattison. Judgment was rendered for the plaintiffs as prayed for, and this is an appeal from that judgment, and the order denying defendants' motion for a new trial.

We have in the complaint in this case an allegation that plaintiffs are heirs at law of the deceased, Pattison, and also the further allegation that they are devisees under an unprobated fraudulently destroyed last will and testament. In this cause plaintiffs appear to have relied chiefly upon their standing as devisees under this alleged will, rather than as heirs at law, and it is from this position that the trial court viewed the action, for we find its decree vesting title to the property of A. M. Pattison, deceased, according to the alleged provisions of the will. Counsel for appellants, with great vigor and learning, assail the jurisdiction of the court to hear and determine the matters involved herein, "insisting that an adjudication of such matters necessarily involves the probate of a will and distribution thereunder; that the trial court did in fact probate the will, and according to its provisions decreed title thereunder; that these are matters solely and exclusively within the jurisdiction of the superior court as a court of probate; and that a court of equity had no jurisdiction whatever to adjudicate upon them."

Respondents insist "that this action is not brought for the purpose of probating a will; that is a matter, while necessary for the determination of the case, merely incidental to the main relief sought, to-wit, the annulment of certain deeds and a decree quieting title. They insist that an heir has fraudulently destroyed or suppressed a will and fabricated a deed, and thereby made it appear that the testator has conveyed to him all the property he had in the world; that owing to the peculiar facts of this case, as disclosed by the evidence, it is impossible that this destroyed will could ever be proved in the probate court; that the title of these plaintiffs, as devisees, vested immediately upon the death of the testator, and without the probate of the will; and when the defendant J. H. W. Pattison, by fraud, attempts to deprive them of it, under the circumstances as here disclosed, a court of equity has jurisdiction to administer relief."

Thus it will be seen that the jurisdiction of a court of equity to hear and determine these matters is the pivotal point in the case. While there was no demurrer filed to the complaint, yet appellants insist that plaintiffs do not state a cause of action, and that, therefore, the decree has not sufficient support upon which to stand. The evidence is much broader than the pleading, and conditions often arise where an inherently defective pleading may be cured by the evidence and findings of the court, but such is not the present case, for the findings of fact follow the pleading rather than the evidence. Plaintiffs rely upon their *status* as devisees under the will of A. M. Pattison, deceased, for the right to maintain this action. Their title to the realty, their right of action, the relief demanded and decreed, are all based by the complaint and judgment upon the alleged will, yet the complaint alleges that the will was not probated; neither does it give any reason or excuse why probate had not been had. To be sure it states that defendant J. H. W. Pattison had destroyed and suppressed it, but that adds no weight to their position, for the law expressly provides for the probating of lost and destroyed wills. Code Civil Proc. § 1338 et seq. In *Wood v. Mathews*, 53 Ala. 1, it was decided that "courts of law and equity in this country will not take cognizance of testamentary papers, or of the rights dependent on them, until after proper probate." And again, the court said: "The law of this state confers upon the courts of probate original and exclusive jurisdiction, not only of the probate of wills of personality, but of realty; and the only evidence of the existence of such will, which can be received in any other forum, is the sentence of that court declaring its authenticity and validity." In *Shepherd v. Nabors*, 6 Ala. 637, the question presented was whether the legatee of personal property could recover it at law until the will had been admitted to probate in the proper forum. The court quoted approvingly the following declaration of Lord Kenyon, in *Rex v. Inhabitants of Netherseal*, 4 Term. R. 258: "We cannot receive any other evi-

dence of there being a will in this case than such as would be sufficient in all other cases, where titles are derived under a will, and nothing but the probate or letters of administration with the will annexed are legal evidence of the will in all cases of personality." To the same effect is *Armstrong v. Lear*, 12 Wheat. 169; *Campbell v. Sheldon*, 13 Pick. 22; *Fothersee v. Lawrence*, 80 Miss. 416; *Olney v. Angell*, 5 R. I. 198.

In the case of *Castro v. Richardson*, 18 Cal. 480, this court said: "We understand it to be the settled doctrine of the courts of this country that, where the proceedings in probate are conclusive of the validity or the invalidity of the will, it cannot be received in evidence to maintain a title founded upon it until it has been admitted to probate." And again: "It is unnecessary for us to accumulate authorities upon this subject; there is no doubt that this is the prevailing doctrine wherever similar statutes exist and the matter has undergone consideration by the court." That case was an action of ejectment, and one of the links relied upon by plaintiff in setting out his chain of title was an unprobated will, and this court said, "The facts stated in the complaint do not make out a title in the plaintiff," and the judgment was reversed. By the same line of reasoning, how can it be said that plaintiffs, as devisees under an unprobated, destroyed will, have such title to realty as to maintain an action to set aside and cancel deeds to such realty upon the grounds of fraud? Their title rests upon this alleged unprobated will,—a will that has been fraudulently destroyed,—a fact in itself that weakens their position, for the difficulties arising in establishing its probate are largely increased. It is plaintiffs' muniment of title, yet until stamped as genuine by the seal of the proper tribunal it cannot be received in evidence in other courts, and no rights can be asserted under it. Of itself it can have no more effect in transferring or vesting title than a deed without delivery. Conceding it would fortify plaintiffs' position if facts were stated in their complaint showing why this will has not been probated, and why it cannot be probated by the regular course of proceeding in the tribunal established for such purposes, yet they have entirely failed so to do. Respondents' counsel insist that, even if they have not shown a right of action as devisees, yet they have alleged themselves to be heirs at law, and are therefore entitled to maintain the action in that capacity. In this case the coincidence arises that the heirs at law and devisees under the will are identical, still it does not follow, if the will under which they claim to hold as devisees has not been probated, that they have any rights to the testator's property as heirs at law. Plaintiffs allege that they are devisees under an unprobated will. If it had been a probated will, their position as heirs at law would have had no value whatever, and the fact that it has not been probated does not add strength to their position. As against the pleader, we assume this document to be a valid, genuine will, which would be

probated in the regular way if presented to the probate court; and until presented and probate rejected these plaintiffs, as heirs at law, have no rights in the property which can be maintained either in courts of law or equity. We conclude, therefore, that the complaint does not state a cause of action, and consequently the decree has no sufficient support.

Inasmuch as, if the case were reversed solely upon the foregoing ground, it would be remanded to the lower court for a new trial, with permission to the plaintiffs to amend their pleading, if they deemed such a course advisable, we feel constrained to take a broader view of this question, and determine whether a court of equity, under any state of facts, and especially under the state of facts as developed by the evidence in this case, viewed by the light of the laws of California, has jurisdiction to set up and prove a will, either directly or as incidental to other relief sought. The authorities already cited and principles announced oppose such doctrine, but let us look further. The right of jurisdiction in this case rests upon the following facts, which respondents insist are disclosed by the evidence: That A. M. Pattison died leaving a last will and testament; that defendant J. H. W. Pattison, a son, in pursuance of a scheme to defraud plaintiffs of their interest in the property, after his father's death destroyed the will; that in furtherance of this scheme he made false deeds to himself of the property, and procured, by undue influence, his mother, who was old and feeble, to make certain other deeds therefor; that the aforesaid will has not been probated, and cannot be probated in the regular channel, as there are only two persons acquainted with its provisions, and one of these is the defendant in fraud, who will not testify truthfully thereto, the statute requiring that its provisions be proven by the evidence of two credible witnesses. It appears from the foregoing that the plaintiffs are in a very unfortunate position, and that the defendant J. H. W. Pattison is a very bad man; yet is this the proper proceeding, in the proper court, to right these wrongs and punish the offender? It is difficult to comprehend why the power of the probate court has not been invoked to prove this will; its powers are full, ample, and complete; machinery is provided to force the truth from a false and scheming witness; and, finally, if probate were denied, as heirs at law, plaintiffs' rights would be amply protected, and thus their situation is much more pleasant than though they were not in the direct line of succession. We do not see how this action can be maintained even under the facts claimed.

In this state the provisions of the Code form a complete and perfect system, in relation to the probate of wills, whether those wills are in existence, or lost or destroyed. In the *Broderick Will Case*, found in 21 Wall. 517, the supreme court of the United States, in speaking of the law of California relating to probate of wills, said: "In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of jus-

tice and truth." In note 3 to section 1158 of Pomeroy's Equity Jurisprudence, the author says: "On the contrary, the doctrine seems to be general, if not universal, throughout the states, that a court of equity will not recognize nor act upon a will of land or of personal property until it has been admitted to probate." The case of *Gaines v. Chew*, 2 How. 619, a leading case upon this question, declares that, before any title could be set up under the will, it must be probated in the probate court, holding that in Louisiana the probate court had exclusive jurisdiction of those matters. In the opinion Justice McLEAN suggested that, if all other remedies failed, "it might be a matter of grave consideration, whether the inherent powers of a court of chancery might not afford a remedy, when the right was clear, by establishing the will of 1813." In the *Broderrick Will Case*, 21 Wall. 503, referring to this language, the supreme court of the United States said: "Of course, the latter expressions were *obiter dicta*, and can scarcely be said to have the support of any well-considered case." And again, the court say in the same case, referring to the law of this state: "On the establishment or non-establishment of the will depended the entire right of the parties, and that was a question entirely and exclusively within the jurisdiction of the probate court. In such a case a court of equity will not interfere, for it has no jurisdiction to do so. The probate court was fully competent to afford adequate relief."

The cause at bar is in the nature of an action to quiet title, yet in Pomeroy's Equity Jurisprudence, § 1158, the author says: "The rule is settled in England that a devisee in possession is entitled at any time to maintain a suit against the heir at law of the testator, for the purpose of establishing the will. * * * although the will creates no trusts, but gives the devisee a purely legal estate, and although it is not necessary to administer the estate under the direction of the court of chancery. * * * In both instances the suit is in the nature of a bill to quiet title. For obvious reasons, no such jurisdiction probably exists in any of the states, certainly not in the great majority of them." In the case of *Morningstar v. Selby*, 15 Ohio, 345, in which state the court of common pleas answers to our superior court, having both an equity and probate department, it was attempted to probate a fraudulently destroyed will upon the equity side of the court, there being no statutory provision, as in this state, providing for probate of lost and destroyed wills. After an exhaustive examination of the law upon the question, the court said: "Those authorities, carefully examined, will show that a court of chancery has no inherent power, either in England or America, to establish a lost will;" and, under the provisions of a constitution very similar in these respects to ours, held, that the probate court had exclusive jurisdiction of all matters pertaining to probate proceedings, and denied the application. This is the first instance arising in this state where it has

been sought to prove a will otherwise than by a decree of the probate court, and to that extent we move on untroubled ground. The fact that this will has been suppressed or destroyed in fraud, rather than lost through accident or mistake, does not affect the question of jurisdiction. No such distinction is recognized by the provision of the Code of Civil Procedure, and fraud, accident, and mistake demand equal attention, when knocking at the doors of a court of equity. In *Rosenberg v. Frank*, 58 Cal. 403, it was decided that, as to the probate of a will, the jurisdiction of the probate court is exclusive. At the same time in that case a divided court held that a court of equity had jurisdiction to construe a will, thereby encroaching upon the jurisdiction of the probate court to an extent not equaled in any other decision found in the Reports of this state. We might add, the correctness of the law there found, as to the jurisdiction of a court of equity to construe a will under the laws of this state, is not only doubted, but the effect of the decision is very much limited in *Siddall v. Harrison*, 73 Cal. 562, 15 Pac. Rep. 130.

The principles laid down and reasoning had in *Morningstar v. Selby*, supra, and cases there cited, also militate strongly against the doctrine. In *Re Bowen*, 34 Cal. 689, in speaking of the provision of our former constitution, the court said: "This is a comprehensive grant of probate jurisdiction, and, as there is nothing in the article granting concurrent jurisdiction, the grant to the probate court must be held exclusive." In *Castro v. Richardson*, previously cited, the court said, in speaking of probate of wills: "It was intended that the mode of proof pointed out by the statute should be uniformly pursued, and, to give effect to that intention, it is necessary to maintain the exclusive authority of the probate court." In *State v. McGlynn*, 20 Cal. 271, the court, in speaking of decrees in the matter of probate of wills, said: "It is necessary for the repose of society that it should be definitely settled by one judgment, and not be left to be buffeted about by different and possibly conflicting judgments of different courts." Respondents' counsel insist that the decree in this case simply probates the will for the purposes of this case, and as incidental to the main relief sought, yet, if the probate court has exclusive jurisdiction of the matter and the will has no life until probated, the decree would *pro tanto* repeal those principles of law. The conflict is irreconcilable, and the decree must fail.

It is quite evident that, if a court of chancery cannot entertain direct jurisdiction to establish a will, it can possess no jurisdiction to do so as incidental to jurisdiction over other matters. Such a course would lead to grave complications, would destroy the uniformity contemplated in the mode and manner of proof, and would be opposed to the system established by the constitution and statutory laws of California. Respondents insist that as the will has been destroyed, and as they are unable to prove its contents by two witnesses, as required by section 1339 of the Code of Civil Procedure, and for that rea-

son have no standing in the probate court, the court of chancery should take jurisdiction and admit it to probate. Conceding the jurisdiction of such court, we are not prepared to say the rule of evidence would not be the same, for, if it were otherwise, the safeguard thrown around the rights of heirs would be lost, and the statute rendered entirely nugatory. But the court has no such jurisdiction. A judgment of probate being a judgment *in rem*, a judgment binding every one who has any interest, it is of the soundest policy that one tribunal should have vested in it exclusive power to hear and determine, no matter what may be the nature or character of the will, and no matter what may be its situation or condition. Such, undoubtedly, was the end and object sought to be attained by the framers of our law in the enactment of a full, complete, and comprehensive probate procedure. Respondents have cited many cases holding that the fraud of the spoliator affords ground for the intervention of a court of equity, but we do not think they are the better authority, and the weight of authority is the other way. But whatever may be the conflict in the decisions of courts of other states, we think the doctrine contended for has no sufficient support in this state, and is opposed to the spirit of other jurisprudence upon probate matters. The law in this state does not look that way. Let the judgment and order denying a new trial be reversed, and the cause remanded.

I concur: HARRISON, J.

PATERSON, J. I concur. If the plaintiffs were heirs at law, I think they could maintain an action to set aside the deed under section 1452, Code Civil Proc. From their own showing, however, they are not heirs at law, but devisees; and until the will has been probated, and their status as devisees has been judicially fixed by the probate of the will, they cannot maintain an action. It is alleged in the complaint that the will was "fraudulently destroyed, or concealed, or suppressed, and was never admitted to probate or filed in the court, and is now in the control of said J. H. W. Pattison, unless the same has been destroyed by him." The finding of the court is in the same disjunctive, equivocal form. It may be that on petition for letters the defendant will produce the will. It does not appear that any attempt has been made to secure its production, and, taking the pleadings most strongly against the pleader, we must assume that it can be produced.

91 Cal. 231

KIESSIG v. ALLSPAUGH *et al.* (No. 14,405.)
(*Supreme Court of California.* Sept. 16, 1891.)

CONTRACTORS' BONDS—RIGHTS OF SURETIES.

In an action on a bond, it appeared that the principals and surety had executed it to plaintiff to secure him against claims or liens for labor or material used in the construction of a building which the principals in such bond had contracted to erect. The contract and bond were unrecorded. Plaintiff, by the contract referred to in the bond, was authorized to retain one-fourth of the price of construction until final settlement of the parties thereto. Upon completion of the

building, plaintiff paid the contractors the full amount. There was no evidence of the surety's assent to such payment. At the time of such payment there were existing valid liens for labor and material used in constructing the building, which plaintiff subsequently paid. Plaintiff sued the obligors in the bond for the amount of these liens. *Held*, that the surety was not liable, since the sum which the contract authorized plaintiff to retain was charged with a trust in favor of the surety, as security against the liens, and without his consent it could not be paid to his principals.

Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action by Kiessig against Allspaugh and Hall as principals, and Lundeen as surety, on a building contractor's bond. Judgment for plaintiff. Defendant Lundeen appeals. Reversed as to Lundeen.

Parish, Mossholder & Lewis, for appellant. *Carl Schutze*, for respondent.

DE HAVEN, J. The defendant, Lundeen, was a surety for his co-defendants, Allspaugh and Hall, upon a bond executed to plaintiff to indemnify and save him harmless against any claims or liens for material or labor used or employed by his principals in the construction of a building, which they had theretofore contracted to erect for plaintiff. The contract price for the construction of the building was \$8,000, and by the terms of the building contract the plaintiff was authorized to retain one-fourth of that sum in his hands until final settlement between the parties thereto. The complaint alleges "that after the time said house had been finished, and when final settlement was made as per contract aforesaid, there were good and valid claims and demands and liens for material and labor expended and used in the building, construction, and finishing said house, in excess of the contract price of said building, to the amount of one thousand eight hundred seventeen 25-100 dollars;" and that by reason of the failure of the contractors to discharge them the plaintiff was compelled to pay the same after having paid the full contract price for the house. This action is brought against the principals and sureties on the bond referred to, to recover the amount so paid by plaintiff. The plaintiff recovered judgment in the superior court, and from that judgment the defendant Lundeen prosecutes this appeal. The judgment cannot be sustained upon the facts. The appellant Lundeen was a surety, and as money sufficient to satisfy all of the liens mentioned in the complaint was, or ought to have been, in the hands of the plaintiff at the time of his settlement with the contractors, he should have so applied it, instead of paying it to the contractors. This balance was to be retained in his hands as an additional security against liens upon the building, and in equity he held the same also for the benefit of the sureties. It was a special fund to which they had a right to look for their indemnity, and in view of which it must be supposed that they assumed the obligation of sureties, as the original contract is referred to in the bond as the inducement or consideration for its

execution, and the plaintiff was not authorized to surrender it without their knowledge or consent, and, having done so, the appellant was discharged. *Bragg v. Shain*, 49 Cal. 131; *Taylor v. Jeter*, 23 Mo. 244. In this latter case the court used this language: "The contract duty of this builder was to furnish the materials and do the labor, and he failed in both respects when he allowed the building to be incumbered with these liens. The owner, having notice of them, and paying what, by the substantial terms of the contract, he was entitled to retain until they were removed, voluntarily abandoned an ample fund, which, according to the conditions of the contract, was to accumulate in his own hands as the primary security for its due performance, and in which the surety had an equal interest with himself. He must, therefore, bear the loss occasioned by his own negligence or folly." This is an elementary rule of law governing the relation of principal and surety, and is thus stated by the master of the rolls in *Law v. East India Co.*, 4 Ves. 829. "It cannot be contended, upon any principle that prevails with regard to principal and surety, that when the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can be called upon." The failure of the plaintiff to retain this balance, or to apply it for the satisfaction of the obligation for which the appellant was surety, does not present the case of a mere neglect upon the part of a creditor to insist upon a set-off in his favor, arising out of some other transaction, before paying what might be due on a particular contract, but was the neglect to resort to a fund already in his hands for his own protection, in the very matter for which the defendant was a surety, and which fund was therefore charged with a trust in favor of appellant, and its surrender without his consent constitutes a defense to this action. Judgment reversed as to appellant Lundeen.

We concur: MCFARLAND, J.; SHARPESTEIN, J.

91 Cal. 285

BLAISDELL v. McDOWELL. (No. 14,344.)
(Supreme Court of California. Sept. 19, 1891.)

VALIDITY OF CHATTEL MORTGAGE—SECURING
PURCHASE PRICE.

Civil Code Cal. § 2955, provides that "mortgages may be made upon * * * furniture in hotels, lodging or boarding houses, when mortgaged to secure the purchase money of the articles mortgaged." *Held*, that a mortgage given to secure money advanced to purchase the hotel furniture covered by the mortgage was valid.

Department 2. Appeal from superior court, San Diego county; GEORGE PETERBAUGH, Judge.

Action by S. G. Blaisdell against S. A. McDowell. Judgment for plaintiff. Defendant appeals. Affirmed.

L. L. Boone, for appellant. M. S. Babcock, for respondent.

MCFARLAND, J. The main question in this case—and the only one requiring no-

tice—is whether a certain mortgage of hotel furniture executed by George W. Butterfield and William P. Baker to Bryant Howard is valid, under section 2955 of the Civil Code. The facts in the case are these: Butterfield and Baker, being desirous of purchasing about \$1,500 worth of furniture for the Arlington Hotel, in San Diego, made arrangements with Bryant to advance the money with which to buy the furniture, agreeing to give him a mortgage on the same as security. It was specially understood between them that the money to be advanced by Bryant was to be used by Butterfield and Baker in purchasing said furniture. For this purpose Bryant deposited \$1,500 in bank to their credit, and they paid for the furniture by drawing checks against said deposit. When the furniture was in the hotel they gave the mortgage to Bryant, the mortgage being in form as provided by the Code, and duly recorded. Said section 2955 of the Civil Code provides that "mortgages may be made upon: * * *

Eighth, upholstery and furniture used in hotels, lodging or boarding houses, when mortgaged to secure the purchase money of the articles mortgaged;" and appellant (defendant in the court below) contends that the mortgage here in question was not given to secure the "purchase money" within the meaning of that section. His contention is that as, under the general rule, mortgages of personal property are void unless there is a change of possession, the statutory provision which alters that rule must be strictly construed, and applied only to cases where the mortgage runs directly from the purchaser to the seller to secure the amount agreed to be paid by the former to the latter. But, if the statute is to have a literally strict construction, it is difficult to see why the phrase "to secure the purchase money" does not as closely apply to money by which the purchase was made as to the case of a debt where no money was used. But the section of the Code in question should have a reasonable construction with a view of executing the evident design of the legislature in enacting it. While the language used should not be strained to include cases clearly not embraced by it, the meaning to be given to it should not be so narrowly circumscribed as to exclude cases clearly within it. The evident intent of the legislature was to encourage certain kinds of business by allowing persons to procure certain personal property necessary to the business, by giving a mortgage lien upon the property itself; and money advanced for the express and special purpose of procuring such property is as much within both the spirit and letter of the law as a debt incurred immediately to the seller. If Bryant had gone through the form of buying the furniture from the sellers, and selling it again to Butterfield and Baker, there could have been no question about the validity of the mortgage; but surely the law does not require such a vain thing to be done when it so clearly appears that the advance of the money and the purchase of the furniture were substantially one transaction. No other state has a

statute similar to the one here under review; but one or two authorities have been cited where, with respect to property exempt from execution, "purchase money" has been given a meaning similar to that contended for by appellant. We think, however, that the case at bar should be governed by the principle applied in *Lassen v. Vance*, 8 Cal. 271, which was a contest between a homestead claimant and one holding a mortgage for the money which he had advanced for the purchase of the land. In that case the court say: "The money of the plaintiff paid for the lot, and it would be an exceedingly harsh rule of law that would defeat his mortgage upon the very property purchased with the money furnished by himself." It is true that the court said that the deed and the mortgage were "simultaneous acts," but the same was practically the case with the purchase of the furniture in the case at bar. Judgment affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.

91 Cal. 274

STANTON v. FRENCH. (No. 14,819.)

(Supreme Court of California. Sept. 19, 1891.)

EXEMPTIONS—PEDDLERS—ATTORNEY'S FEE.

1. Where the debtor's principal business is that of a peddler, the fact that he occasionally uses in other ways the team and wagon employed therein will not deprive him of the benefit of Code Civil Proc. Cal. § 690, subd. 6, exempting from execution the two horses, wagon, and harness by the use of which a peddler habitually earns his living.

2. A bread-box, used by a debtor in his business as a peddler of bread, is not exempt, as it is not named in the list of articles exempted by Code Civil Proc. Cal. § 690.

3. In an action for the conversion of personal property, plaintiff asked judgment for \$350 as the value of the property alleged to have been converted, together with interest on such amount, and \$150 for attorney's fees incurred in the pursuit of the property. The court charged that before plaintiff could recover any amount as attorney's fees he must show by a preponderance of evidence that such amount was reasonable for the services rendered. There was no evidence as to the reasonableness of the attorney's fee. There was a verdict for plaintiff for \$375, which was less than the amount claimed as the value of the property and interest. Held, that it would be presumed on appeal that the jury followed the instructions of the court, and rejected the claim for attorney's fees.

Department 1. Appeal from superior court, Merced county; C. H. MARKS, Judge.

Action by John Stanton against H. W. French for conversion. Verdict and judgment for plaintiff, and defendant appeals. Modified and affirmed.

J. K. Law and Tupper & Tupper, for appellant. Frank H. Furrar, and Breckinbridge & Peck, for respondent.

GAROUTTE, J. This is an action in conversion, brought to recover the value of two horses, a wagon and harness, and a bread-box. The property was taken and sold by defendant as constable, under an execution against plaintiff and his wife. Plaintiff demanded a return of the property as exempt from execution, under subdivision

6, § 690, Code Civil Proc.,¹ claiming that as a peddler of bread he habitually earned his living by the use of said property. This is an appeal by defendant from the judgment and order denying his motion for a new trial. It is the second appeal to this court, the former decision being found in 83 Cal. 194, 23 Pac. Rep. 355.

Plaintiff bases his claim for exemption upon his status as a peddler of bread. In the list of property allowed peddlers by statute as exempt from execution we find no article answering in name or use to a bread-box, and a debtor's claims are limited by the words of the statute.

Upon an inspection of the record in the previous appeal, we find no material difference in the evidence there and that which is now before us, upon the matter of the ratification by plaintiff of the sale by the officer, and the former decision upon that point establishes the law of the case. It appears that plaintiff and his wife conducted a bakery upon a limited scale in the town of Merced; that they sold bread at the shop, and also the plaintiff daily peddled bread throughout the town and at the railroad depot upon the arrival of trains, etc. In the interim the plaintiff did odd jobs with his team for hire, but his principal business was peddling bread, with the use of his horses and wagon. Can it be said that plaintiff habitually earned his living by peddling? Webster defines "habitually" as "customarily;" "by frequent practice or use." It does not appear to mean "exclusively" or "entirely," and the fact that plaintiff may have to a limited extent applied his team to other uses, or that some portion of his living, however slight that portion might be, came from some other avenue of industry, would not deprive him of his rights as a peddler under the statute. This question, as well as the question as to the ownership of the bay horse, were questions of fact, and were submitted to the jury under proper instructions. There is sufficient evidence upon both matters to support the verdict, and it will not be disturbed by this court.

It does not seem necessary to enter into a discussion as to the liability of defendant for plaintiff's attorney's fees in this action. Plaintiff claimed the value of the property converted to have been \$350, and in addition thereto asked judgment for legal interest thereon from January 27, 1887, and damages in the sum of \$150 for attorney's fees incurred in the pursuit of the property. In his testimony he placed a value of \$35 upon the bread-box. The jury returned a verdict in favor of plaintiff for \$375. The court instructed the jury that before the plaintiff could recover any amount as attorney's fee he must show by a preponderance of evidence that such amount was a reasonable fee for the services rendered. There was no evidence whatever as to the reasonableness of the attorney's fee claimed, and it must be presumed that the jury followed

¹ Code Civil Proc. Cal. § 690, subd. 6, provides that there shall be exempt from execution "two horses * * * and their harness and one wagon, * * * by the use of which * * * a peddler * * * habitually earns his living. * * *

the instruction of the court, and by their verdict rejected all claims in that respect. Especially should such be deemed the fact when the evidence as to the value of the property converted, considered in connection with the interest due, would support a verdict for an amount considerably greater than the sum returned by the verdict of the jury. The matters already passed upon dispose of many of the exceptions to instructions refused by the court. The instructions given appear to be a full and complete presentation of the law upon all matters involved, and we see no ground upon which a successful exception thereto can be based. Let the cause be remanded, with directions to the lower court to modify the judgment by striking therefrom the sum of \$35, and in all other respects let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

91 Cal. 170

WINTERBURN *et al.* v. CHAMBERS *et al.*
(No. 13,405.)

(Supreme Court of California. Sept. 14, 1891.)

TENANTS IN COMMON—OUSTER AND ADVERSE POSSESSION—COLOR OF TITLE—APPEAL.

1. It appeared, in partition proceedings, that the husband of the deceased owner had theretofore sold the land as administrator under authority of an act of the legislature; that the sale had been approved by the court, and the price paid and deed given; that the purchaser had taken possession, and sold half of it at its full value; that he had inclosed the remaining half with a substantial fence, and occupied and cultivated it for eight years before his death; that he had paid the taxes, and caused it to be surveyed and assessed in his own name; and that he had made a testamentary disposition of it, as well as frequent and open declarations of his ownership of the entire tract. *Held* that, though he took only the one-third interest of the husband under the deed, his acts were nevertheless sufficient to charge the heirs with notice of his intention of ouster, and their titles were therefore extinguished.

2. A finding that the purchaser entered into and took possession of the land in his own right, and as owner of the entire tract, and not as a tenant in common with the heirs, and that he ousted and removed the said heirs, was not by its terms limited to an ouster resulting from the entry under the deed; but the finding of ouster must be regarded as distinct in itself, and, if there be evidence to support it, it must be upheld, and referred to such evidence, rather than to the finding.

3. The adverse possession of the grantees of such a purchaser was referable to the latter's ouster, and it did not need a finding that the grantees made an additional ouster.

4. The court found that the administrator was authorized to sell the "real estate of the deceased," and that he made a contract of sale "embracing all the land" in controversy, and gave a deed to the purchaser "purporting to convey to him the said land." It found also that, though the deed made him a tenant in common only with the heirs, this was without his knowledge or consent, and his entry was of such a character as to effect an ouster of said heirs. *Held*, that under these facts the deed was sufficient to give color of title to his entry, though the authority under which it purported to have been made was insufficient for that purpose.

5. Such findings must be assumed to have been sustained by the evidence, since no objection was made on that ground in the bill of exceptions.

6. The entry and claim of the purchaser were sufficient to constitute an ouster, though no notice thereof was brought home to the other tenants; and the fact that some of the tenants were minors at the time was immaterial, because of the running of the five-years statute of limitations after the last attained his majority.

Department 1. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

Action by Winterburn and others against Joseph L. Chambers and Charles R. Chambers for partition. There was judgment for defendants, and plaintiffs appeal. Affirmed.

Edward J. Pringle, for appellants. *E. B. & J. W. Mastick*, *J. D. Redding*, *W. F. Goad*, and *W. C. Belcher*, for respondents.

HARRISON, J. The plaintiffs seek in this action partition of a tract of land which belonged to their mother, of which they allege that the defendants are tenants in common with them by reason of conveyances from other heirs of their mother. The land in controversy belonged to Josefa Soto de Stokes, who died intestate September 18, 1855, leaving a husband, James Stokes, and 14 children, surviving her. An act of the legislature was passed March 25, 1857, authorizing her administrator to sell her real estate subject to the approval of the probate court of Monterey county, in which the administration of her estate was pending, and upon such approval to convey the same to the purchaser. March 16, 1858, "said James Stokes, professing to act under the authority of the said act, and as the administrator of said Josefa, made and entered into a contract with one R. J. Walsh, by the terms whereof he, as administrator of the estate of said Josefa Soto de Stokes, contracted to sell to said Walsh, and said Walsh contracted to buy," the tract of land described in the complaint, subject to the approval of said probate court. Upon receiving the report of said sale, said probate court approved the same; "and after such approval, and on the 21st of April, 1858, the said Stokes, still representing himself to be, and professing to act and acting as, administrator of the estate of his said deceased wife, and in his own right, made, executed, and delivered to said R. J. Walsh a deed of conveyance purporting to convey to him the said land in consideration of the sum of \$14,376.43." The said purchase price was the full value of the land at the time of the said sale, and the deed therefor was recorded in the office of the county recorder for Colusa county on the 12th day of August, 1858. At certain dates thereafter, viz., March 31, 1860, and June 11, 1863, Walsh took deeds purporting to convey the land from persons who had received conveyances from other heirs of Josefa, which were also recorded in said county recorder's office. Walsh, upon receiving the deed from the administrator, immediately entered into and took possession of the said land thereunder, and on the 13th day of August, 1858, sold the northerly half thereof to J. W. McIntosh, at the same price per acre at which he had purchased the same, and received from him a portion of the purchase money, and by a

written contract agreed to convey the same to him upon the payment of the balance of the purchase money, and at the same time delivered to him the possession of the said northerly half. No conveyance of the land was made to McIntosh until October 23, 1867, after the death of Walsh, when his executors, under the order of the probate court, conveyed this northerly half to him; but the court finds that "immediately upon his purchase from R. J. Walsh the said J. W. McIntosh entered into and took possession of the northerly half of the said tract of land, and during the years 1858 and 1859 inclosed all of said half except about 150 acres in a triangular shape on the westerly or back side, with a good, substantial fence, and thereafter continuously, up to the 23d day of September, 1868, kept the same so inclosed, and used the same for cultivation and pasturage, and paid all taxes and assessments levied thereon;" and also finds that such possession of said northerly tract was thereafter maintained by the defendant Lewis H. McIntosh, to whom John had sold and conveyed the same, September 23, 1868. Walsh died testate April 30, 1860, and thereafter, viz.: March 12, 1872, the probate court of Colusa county, in which administration of his estate was had, distributed the southerly half of said land to the defendants, Joseph L. Chambers and Charles R. Chambers, in accordance with the provisions of his will. The court also finds that "during the year 1858 said Walsh inclosed the southerly half of the said land with a good, substantial post and plank fence; and thereafter, up to the time of his death, maintained and kept the same so inclosed, and kept and held the open, notorious, actual, and exclusive possession of all the said southerly half of said land, adversely to all the world, and used the same for cultivation and pasturage, and paid all taxes and assessments levied thereon, and dealt with and used the same as his own property;" and also that after the death of Walsh his executors kept and maintained a similar possession until the entry of the decree of distribution in his estate, and that thereafter such possession was kept and maintained by the defendants Chambers. The court further finds: "(32) The said R. J. Walsh entered into and took possession of the land purporting to be conveyed to him by the said deed of April 21, 1858, in his own right, and as owner of the entire estate, and not as a tenant in common with the plaintiffs, or any or either of them, or with any other person, and ousted and removed the plaintiffs, Josephine Winterburn, Lucy Mills, Catherine Sherwood, Louisa Johnson, William Stokes, and Domingo Stokes, and all other persons having or claiming any right, title, or interest in or to such tract of land, or any part thereof, from the possession of said land, and every part thereof. (33) More than five years, to-wit, more than six years, elapsed between the time when the youngest of the plaintiffs arrived at majority, and the time of the commencement of this action, during all which time the defendants, Joseph L. Chambers and Charles R. Chambers, had and held, and claimed to hold, in

their own right absolutely, as the devisees of the said R. J. Walsh, deceased, and under the said decree of distribution made by the probate court of the county of Colusa, all the southerly half of the said land, and were at the time of the commencement of this action the owners in fee thereof; and all which time the defendant Lewis H. McIntosh had and held, and claimed to hold, absolutely in his own right, as the grantee of said Walsh, and under mesne conveyances sufficient in form to convey the whole title, all the northerly half of the said land, and he was at the time of the commencement of this action the owner in fee of the said northerly half." The present action was commenced on the 20th day of May, 1878, and at the time of its commencement the plaintiffs were of the following ages: Louisa Johnson, 47 years; Catherine Sherwood, 34 years; Josephine Winterburn, 31 years; Lucy Mills, 28 years; William Stokes, 32 years; and Domingo Stokes, through whom the plaintiff Eugene Sherwood claims, 38 years. As conclusions of law, the court found that, by virtue of such ouster and adverse possession, the title of the plaintiffs was extinguished, and their right of action barred by the statute of limitations. It also found the following as one of its conclusions of law, viz.: "That the said R. J. Walsh, under his deed of April 21, 1858, acquired title to only the undivided one-third of the land in his deed described, and became by operation of law, but without his consent or knowledge, a tenant in common with the children of the said Josefa Soto de Stokes, deceased; but that by his entry under said deed into the absolute and exclusive and adverse possession of said land, and his ouster of all his said co-tenants from the possession thereof, and by the maintenance of such exclusive and adverse possession by said Walsh, his grantees, administrators, devisees, and assigns, openly, notoriously, and continuously, under claim of absolute title, for more than five years after each and all the plaintiffs, and each and every of the surviving children of the said Josefa Soto de Stokes, had attained majority, all the right, title, and interest of the said plaintiffs, and of each of them, was extinguished. * * * Judgment was entered in favor of the defendants. A motion for a new trial made by the plaintiffs was denied, and from the judgment and order denying said motion the plaintiffs have appealed.

The basis of the judgment by the court below is that the plaintiffs were ousted from the land more than five years prior to the commencement of the action, and that, an adverse possession having been maintained under such ouster for more than said period of five years, their right of action is barred. This decision is assailed by the appellants upon two grounds, viz.: that the finding of ouster is, by the terms of the finding itself, limited to an ouster resulting from the entry by Walsh, under the deed of the administrator; and, *second*, that the evidence fails to show facts sufficient to constitute an ouster. We cannot agree with counsel for appellants that it was the intention

of the court by its finding of an ouster, in finding 32 above quoted, to limit such finding to an ouster by the mere entry by Walsh under the deed. The court does not in the finding itself limit the ouster to the mere entry and claim under the deed, nor does it, after finding such entry and claim, find that he thereby ousted and removed the plaintiffs, but the ouster is found as a fact distinct from such entry and claim. The court, moreover, in its conclusion of law above quoted, finds that Walsh, "by his entry under said deed into the absolute and exclusive and adverse possession of said land, and his ouster of all his co-tenants from the possession thereof, and by the maintenance of such exclusive and adverse possession," extinguished the title of the plaintiffs. It thus appears that the ouster found by the court does not depend upon the mere entry and claim; that, while the entry and claim are elements therein, they do not solely constitute the ouster. The findings must be read as a whole, and not merely according to their numerical division. Because it may be impracticable to embrace all the facts in a case under a single finding, it does not follow that each fact that is separately found is to be considered distinct and disconnected from all the others. Especially when a fact is the ultimate fact resulting from several others, is it improper to limit such conclusion. If the fact found may be sustained by evidence in the case, it must be referred to such evidence for its support, and not limited to the immediate connection in which it is placed in the findings, unless the language in which it is expressed compel such limitation. The finding of ouster must be regarded as a finding distinct in itself, and, if there is evidence in its support, it must be upheld and referred to such evidence, rather than to the facts in the finding in which it is declared. An ouster of one co-tenant by another is produced by acts of the same character as will produce any other ouster. In either case it is the "wrongful dispossession or exclusion of a party from real property who is entitled to the possession." In each case the same kind of possession is required, and it must be taken and held with the same hostile intent. In the case of a dispossession by a stranger, the fact that such stranger takes the actual and exclusive possession of the land is of itself a notice of the character of such possession, and of the intent with which it was done. In the case of the co-tenant, however, the intent with which the possession is taken is not manifested by the mere fact of possession, but must be established either by actual notice, or by acts or declarations so open and notorious, and of such a nature, that it may readily be presumed that the co-tenant out of possession is informed thereby of the hostile intent with which the possession is held. It is the intent which determines the character of the possession, but it is essential that this intent be in some mode, either by actual or presumptive notice, directly or indirectly, communicated to the other co-tenant. This intent is not the secret purpose of the occupants, but is the purpose

which the acts themselves manifest, and the acts done must be manifested to the person against whom the ouster is directed. It is not necessary that actual notice be shown to have reached the co-tenant in order to charge him with the effect of the ouster. The ouster must be complete, and it must be found that notice thereof was given; and, inasmuch as ouster is the ultimate fact to be found by the court, it is sufficient if it is sustained by the evidence, or is the necessary result from the probative facts which are found. Being a fact to be found from evidence, it is entitled to the same presumptions of correctness as attend any other finding of fact depending upon the weight or sufficiency of evidence.

It appears from the record herein that in March, 1858, Walsh made a contract with the administrator of the estate of Josefa for a purchase of the whole of the land described in the complaint at its full value, subject to the approval of the probate court of Monterey county; that the sale was approved by said court, and that in pursuance thereof a conveyance was made to him in the succeeding month, and that he paid the whole of the purchase price to the said administrator; that he thereupon immediately took possession of the whole tract of land, and in August following sold to McIntosh the northerly half of the tract at its full value, executed to him a contract of sale therefor, gave him the possession, and thereafter received from him the price for the same; and that McIntosh, upon receiving said contract of sale, took possession of the tract, and thereafter occupied the same as in his own right; that Walsh inclosed the southerly half of the tract with a substantial fence, and occupied and cultivated it openly and exclusively until his death in 1866; caused it to be surveyed, and also to be assessed in his own name, paid all the taxes thereon, made a testamentary disposition thereof, as well as frequent and open declarations of his purchase and ownership of the entire tract. These acts were sufficient to clearly indicate the intent on his part to claim the entire estate as his own to the exclusion of all other persons, and were also acts of such character and performed with sufficient publicity and notoriety to justify a presumption that they were communicated to and known by the plaintiffs. The fact that the deed to Walsh was not placed upon record until after he had made his contract of sale with McIntosh, and the entry by McIntosh upon the northern portion of the tract, is immaterial, and it is equally immaterial, for the purpose of characterizing his entry, whether the deed was recorded or not. The entry into possession of the tract by Walsh was itself a notice to the plaintiffs that he had some claim to the land. The mere possession was not of itself evidence of his claim, but it was notice to them sufficient to put them upon inquiry, and to charge them with the knowledge that would have been received from such inquiry. They knew that he was not one of the heirs of their mother, and that the immediate source of his claim to the land was different from theirs, and, when

they saw him in possession of the land, they were charged with notice of the character and purpose with which such possession was taken. They were not at liberty to presume that he was a claimant under one of their co-tenants, any more than that his entry was hostile to them all. Being informed of his entry, and presumptively of its character, they were charged with a knowledge of all the facts attending it which an inquiry would have called forth. "The possession of other persons than [their co-tenants] was enough to put [the plaintiffs] on inquiry, under the rule in *Fair v. Stevenot*, 29 Cal. 486. If they had inquired, they would have discovered the hostile character of the possession. This means of notice constituted notice." *Unger v. Mooney*, 63 Cal. 596. His entry upon the land was open and notorious, and it was as much a notice to them that he was entering with how and spear as it was that he entered under a deed of conveyance. Being thus put upon inquiry, and charged with the knowledge of the facts which such inquiry would have disclosed, they were informed that he had taken possession of the land under the purchase by him of the entire interest therein held by their mother at her death in accordance with the terms of the contract of sale made by him with the administrator of her estate, and that the same had been approved by the probate court, and that he had paid for the land its full value. Even if it be conceded that the deed to him purported to convey only the interest of Stokes, and although, in the absence of any other facts, his entry might have been presumed by them to have been in accordance with the deed, this fact would not have lulled them into the belief that he had succeeded to only that interest, and was their co-tenant, for the deed was not placed upon record until several months afterwards. His entry was an act distinct from the deed executed to him, and they were charged with notice that such entry was with hostile intent, and with a claim to the entire and exclusive ownership of the land. By such notice there was imputed to them information of not merely the language and terms of the deed, but of all the facts connected with his entry. The possession of Walsh did not appear to them to be that of one whom they knew to be a co-tenant, and they were not entitled to presume that his acts of possession were in recognition of their rights. A co-tenant out of possession, in order to avail himself of the presumption attending the acts of a stranger in possession, must show that such stranger is his co-tenant. There is no presumption of such co-tenancy, and, in the absence of such showing, he is chargeable with notice of the real character of his claim. Being chargeable with such notice, he is also chargeable with the knowledge that the acts done by him are done in consistency with his entry and his claim, whatever the same may be. The purchase by Walsh in 1860 and 1863 of other interests did not impair the character of his entry in 1858. He did not enter into possession of any portion of the land under the subsequent conveyances, and

his original entry can neither be qualified, nor his title impaired, by such purchase. He was buying in an outstanding claim, not as a co-tenant with the plaintiffs, but with a claim hostile to them from the beginning. After the ouster by Walsh, the adverse possession taken by the defendants under conveyance from him was referable to such ouster, and it was not requisite to find that they had made any additional ouster to that which was to be inferred from the ouster by Walsh, under whom they entered. Their possession under such entry was the adverse holding of a stranger to the title, and not referable to the entry of a co-tenant. Their entry was the basis of a new title, and, with an adverse holding for five years after the plaintiffs had attained majority, tolled their rights. We do not understand that appellants controvert the proposition that, if the evidence is sufficient to establish the ouster by Walsh, as found by the court, there has been an adverse possession thereunder for more than five years prior to the commencement of this action. We are of the opinion that the character of the acts of Walsh, as well as their notoriety, were such as to justify the court in a presumption that the plaintiffs had notice thereof, and that they constituted a sufficient basis for its finding of the ouster by Walsh. *Freem. Co-Ten.* §§ 221, 223; *Warfield v. Lindell*, 30 Mo. 282; *Lodge v. Patterson*, 8 Watts, 77; *Dikeman v. Parriah*, 6 Pa. St. 227.

It is, however, contended on behalf of the appellants that, inasmuch as by the terms of the deed from the administrator to Walsh, it must have appeared to him that there was thereby conveyed only an undivided interest in the land, his entry must be deemed to have been in accordance with the terms of the deed, and that his acts thereunder, being consistent with such entry, did not manifest any intent to claim the entire ownership. We think, however, that the facts presented by the record do not uphold this claim of the appellants. It may be conceded that the conveyance by Stokes as administrator, under the authority of the legislative act, was utterly unavailing to transfer to Walsh any title to the lands in controversy, and that the court correctly found that the only interest therein which he obtained by the deed was that which passed by the conveyance of Stokes in his own right, which was in fact the one-third which he took as surviving husband of Josefa. The court, however, found that, although by operation of law this deed made him only a tenant in common with the children of Josefa, yet such effect of the deed was without his knowledge or consent, and that his entry was of such a character as to operate as an ouster of said children. The court also found that under the act of the legislature Stokes was authorized as administrator to sell "the real estate of the deceased," and that, professing to act under the authority of that act, he made a contract with Walsh to sell a tract of land "embracing all the land involved in this action;" and that, after the approval of the sale by the probate court, he gave to Walsh a deed of

conveyance "purporting to convey to him the said land." Under these facts the deed to Walsh was sufficient to give color of title in support of his entry, notwithstanding the fact that the act under whose authority it purported to have been made was insufficient to confer authority therefor.

We must assume that these findings of fact are sustained by the evidence which was presented at the trial, as the plaintiffs have not in their bill of exceptions made any specifications of insufficiency in that respect. Upon an appeal it must be assumed by us that all findings of fact against which the bill of exceptions contains no specification of their being unsupported by the evidence have been correctly found. The fact that there is some evidence in the record bearing upon such finding, which is not in itself sufficient to support it, cannot be considered. It is only when the finding is directly challenged in this respect that we must assume that all the evidence bearing upon the subject before the court below which would sustain the finding is in the record. If the finding itself has not been objected to, there is no occasion for inserting such evidence in the bill of exceptions, and the respondent is not to be prejudiced by any failure to have it included therein. The appellants in their specifications of insufficiency of evidence do not question the correctness of the foregoing findings of fact, their specification being "the insufficiency of the evidence to justify the finding of fact that R. J. Walsh entered and took possession of the land purporting to be conveyed to him by said deed of April 21, 1858, in his own right, and as owner of the entire estate, and not as a tenant in common with the plaintiffs, or any or either of them, or with any other person." It is only the entry and taking possession in his own right which they allege is not sustained by the evidence, but, as the entry and taking possession are fully established by the evidence, their argument is limited to the character in which said entry was made, and the possession thereunder held and taken. Upon this point they urge that, although the entry may have been made with a purpose on the part of Walsh to oust the plaintiffs, yet such purpose is insufficient to constitute an ouster, unless notice thereof is brought home to the other tenants, so that they may be informed thereof and protect themselves; and they further urge that, inasmuch as some of the plaintiffs were infants both at the time of Walsh's entry and at his death, no notice to them could be available; and that consequently, as the only ouster found by the court is an ouster by Walsh, it is not sustained by the evidence.

The fact that some of the plaintiffs were infants at the time of the entry did not diminish the effect of the ouster. The entry by Walsh, and his subsequent acts under such entry, were not deprived of their hostile character, and did not fail to constitute an ouster, merely because the plaintiffs were at that time minors. An infant can be ousted from his possession by either a stranger or a co-tenant. The ouster

does not depend upon the fact that the notice of the entry with hostile intent has been either understood or comprehended by the disseisee, whether such entry be by a stranger or by a co-tenant. If in either case the disseisor should declare to the infant his intent to exclude him from the possession, and should physically remove him from the land, and thereafter hold the same openly and adversely, the ouster would not be suspended until the infant had attained majority, but would be complete at the date of the act and declaration. The effect which the notice will produce is not the test of its sufficiency, and the same acts and declarations which constitute an ouster apply to an infant as well as to an adult, whether such notice be actual or presumptive. The sufficiency of their notoriety is to be judged from the character with which they are made or performed, and not from the manner in which they are perceived. "To constitute a disseisin, it was never held to be requisite that notice should be sent to the disseisee, or that it must be proved that he had knowledge of the entry and ouster committed on his land." *Lodge v. Patterson*, supra. Ouster sets the statute of limitations running in favor of the disseisor, but protection is given to the infant by the provision of the statute that the adverse holding must continue from that date until the expiration of five years from his attaining majority. The sufficiency of the notice on the part of the disseisor at the time it was given is not to be diminished by anything occurring subsequent thereto. The knowledge that the infant would have had from the notice, if he had been capable of comprehending the same, is imputed to him as of the date of the notice as fully as if he were an adult, but the effect of such knowledge is suspended until his majority. The judgment and order denying a new trial are affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(91 Cal. 234)

KIESSIG v. ALLSPAUGH *et al.* (No. 14,325.)
(*Supreme Court of California*. Sept. 16, 1891.)

CONTRACTORS' BONDS—ENFORCEMENT.

Code Civil Proc. Cal. § 1183, provides that a building contract which is not recorded before work is commenced thereunder, when the contract price exceeds \$1,000, shall be void, and no recovery shall be had thereon by either party thereto. *Held*, that a bond in the sum of \$5,000, given by a contractor, with sureties to the obligee, who is the owner of a building, to secure him against any claims, demands, or liens for labor or materials furnished in the construction of such building, and which refers to a written contract, that has not been recorded, made between the principal obligor and obligee, is not within the meaning of the statute, and may be enforced without violating the provisions of the above section.

Department 2. Appeal from superior court, San Diego county; GEORGE PUTENBAUGH, Judge.

Action by Kiessig against Allspaugh, Hall, and others to recover on a building contractor's bond. Judgment for plaintiff. The defendant Hall, a principal on the bond, appeals. Affirmed.

Luce & McDonald, for appellant. *Carl Schutze*, for respondent.

DE HAVEN, J. On October 14, 1887, the plaintiff and the defendants Allspaugh and Hall entered into a contract, whereby said named defendants agreed to construct a house for the plaintiff, and furnish all materials therefor; and on the following day, and before the commencement of work under the building contract, they executed to plaintiff a bond with sureties, in these words: "Be it remembered that whereas, on the 14th day of October, 1887, Charles Kiessig, a resident of the said state and city, and A. M. Allspaugh and M. S. Hall, contractors and builders, also residents of said state and city, entered into a contract whereby, for a certain valuable consideration, the said A. M. Allspaugh and M. S. Hall, builders and contractors, have to build, construct, and finish a certain house, as is more fully set out and described in the contract, plans, and specifications signed and entered into on the day and year first aforesaid, all of which said contract, plans, and specifications are made a part hereof: Now, therefore, we, A. M. Allspaugh and M. S. Hall, as principal, and H. V. Poser and N. P. Lundeen, as sureties, bind ourselves, our heirs, executors, and successors, in the sum of five thousand dollars, to forever save and hold harmless the said Charles Kiessig against any claims, demands, or liens of all characters whatsoever for material or labor expended or used in the building, construction, and finishing said house." This bond was not recorded, nor was the building contract therein referred to. The contractors, however, completed the building according to the specified plans, and plaintiff paid them the full contract price therefor; but there were liens filed against it to the amount of \$1,817.25, which the contractors, Allspaugh and Hall, failed to discharge, and the plaintiff was compelled to pay them. This action is brought on the foregoing bond to recover the amount so paid. The court below found the facts as above stated, and rendered judgment in favor of plaintiff. This appeal is from that judgment, and is taken by the defendant Hall alone.

The appellant contends that there can be no recovery on the bond, because of the failure to record the building contract to which it refers; that, the original contract being void under the statute, this bond, which was given to secure in part the performance of such contract, is equally void, and incapable of enforcement. This contention is based upon section 1183 of the Code of Civil Procedure, which provides that a building contract which is not recorded before work is commenced thereunder, when the contract price exceeds \$1,000, "shall be wholly void, and no recovery shall be had thereon by either party thereto." But the bond upon which this action is brought is not the contract made between this plaintiff and appellant for the construction of the building, and is not within the letter of the section referred to. It was not made at the same time, has addi-

tional parties, and does not bind the contractors to erect any building. It refers to the prior contract as an inducement or consideration for its execution, and the parties signing it agree to hold the plaintiff harmless against certain liens which might be created by the principals in the bond in carrying out the other contract, and for which said principals would be personally liable to mechanics and material-men, but they do not undertake that the prior contract shall be fully performed by the contractors. They could have abandoned the work of construction at any time, or have failed to complete it within the time fixed or in the manner specified in the contract, and they would not have been liable for any damage therefor, by the terms of the bond, which is the foundation of this action. Indeed, its purpose is not to secure to plaintiff reimbursement for any damage, the right to recover which rests alone upon the building contract. Although the original contract could not be enforced, because not recorded, the contractor might nevertheless perform, and the plaintiff could accept such performance, and neither be guilty of any wrong in so doing; and if in performing the appellant incurred a personal liability for labor or materials, which was discharged by the plaintiff, in order to remove a lien from his own property, or at the request of the appellant, the obligation to repay plaintiff is created by law, and would exist independently of the building contract, and is not affected by any defect therein, and is a sufficient consideration to support the express undertaking of defendant to repay; and the bond may therefore be deemed so far an independent undertaking that the right to enforce it does not depend upon the subsequent or continued validity of the building contract. As already stated, this bond is not within the letter of section 1183 of the Code of Civil Procedure, and it may be added that it is not within its reason or spirit, and its enforcement is not in conflict with the policy of that section. We do not think that the appellant, after delivering this bond as an independent security, and thereby inducing the plaintiff to make full payment of the contract price for the construction of the building, is in a position to deny his liability upon it, and if, in order to support this action, it is necessary that the bond should be based upon a valid building contract, we should hold that the appellant is estopped to dispute the truth of the particular recital contained in the bond as to such fact. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

91 Cal. 265

PEOPLE v. JOHNSON. (No. 20,797.)

(Supreme Court of California. Sept. 18, 1891.)

EMBEZZLEMENT—EVIDENCE.

1. The evidence showed that defendant, pretending to illustrate the manner of drawings at the Louisiana Lottery, placed upon a table a paper covered with squares and figures, and induced witness to place his money upon the table with the understanding that it would be returned as soon as defendant had completed the illustra-

tion; that as soon as the money was placed upon the table defendant took the same, and refused to return it. *Held*, that the evidence established larceny, and would not support a conviction for embezzlement. *BEATTY, C. J.*, and *McFARLAND, J.*, dissenting.

2. It was error to allow an officer to testify as to a description of defendant furnished by the prosecuting witness before arrest.

In bank. Appeal from superior court, city and county of San Francisco; *J. MCM. SHAFTER, Judge.*

Prosecution of George A. Johnson for embezzlement. Verdict of guilty, and judgment thereon. Defendant moved for a new trial, which being refused, he appeals from the judgment and order denying the motion. *Reversed.*

M. S. Horan, for appellant. *Atty. Gen. Hart*, for the People.

DE HAVEN, J. The defendant was charged with embezzlement, and convicted. He appeals from the judgment and order denying his motion for a new trial.

1. The court erred in admitting the testimony of the witness Briggs, as to the description of the defendant given him by the prosecuting witness before the arrest of defendant. This was hearsay, and, considered with reference to the other evidence in the case, relating to the identity of defendant as the person who took the money alleged to have been embezzled, was a material error.

2. The verdict is against the evidence, as upon the facts shown defendant was guilty of larceny, and nothing else. The following is the testimony of the prosecuting witness as to the manner in which the defendant obtained his money: "We went in to get a drink, and while we were at the bar a man came up to us, and asked us if we would like to buy a Louisiana Lottery ticket. I said no; that I did not care about it, as I never gambled. He said he was the agent of the Louisiana Lottery Company, sent out on purpose to this coast to explain the way the drawings were had to the people, and if we would go into the back room he would explain it. I did not want to go into the back room, but this other man who was with me said, 'Let's go in and see;' so we went in. When we got in the back room there was a table there, and the defendant spread a paper on the table full of squares and figures, and said if I would put down a half a dollar or some money on the table he would explain it to us. I did not want to put any money on the table, but this other man said he would put in a half a dollar, and so I did the same, and afterwards I put in a dollar. After that was lost, I put in five dollars, and lost that. I then wanted to get out, but there were other men there who said, 'Go on and play,' and I was afraid to go out, as I put up twenty dollars, and afterwards twenty dollars more. After that was lost, I asked for my money, and didn't get it. The defendant at all times told me that I would get my money back as soon as he had explained the game." It is sometimes difficult to determine upon a trial for larceny whether the offense is larceny or embezzlement, when there has been a bailment of property to the de-

fendant, and thereafter a conversion by him. Upon such facts, when the charge is larceny, the prosecution is required to show that the defendant, when he received the property originally, intended to steal it. But no such difficulty is presented here, for there never was any bailment of the property, the prosecuting witness never consenting to part with the possession; indeed, even its bare custody for a temporary purpose was not given to defendant. The money was simply placed upon a table on some squares and figures, that defendant and his confederate might illustrate the manner in which the drawings of the Louisiana Lottery are had, and all of this was to be done in the presence of the prosecuting witness. He never contemplated or consented that the money should be taken from his sight by the defendant, or that it should be transferred from the table to the pockets of the defendant. Upon this state of facts, a finding that the possession of the money was intrusted to defendant by the prosecuting witness is entirely without any support, and the crime which defendant committed is described with absolute precision in *Loomis v. People*, 67 N. Y. 327: "It was a clear case of larceny, as marked and significant in its general features as if the prisoners had wrongfully seized and appropriated it when first produced." In the case of *Com. v. O'Malley*, 97 Mass. 585, the defendant was convicted of embezzlement, upon the following state of facts: The prosecuting witness had \$38 in bank-bills; the defendant asked her to loan him a dollar, and she agreed to do so, and showed him the roll of bills which she had just received in payment of her wages. He then asked her to let him take the money and count it, she not being able to read or write, and she let him take it for that purpose. He counted it over several times in her presence, and then refused to return it to her, and went off with the money. The trial court instructed the jury as follows: "If they were satisfied that the defendant, when he took the bills from the hands of the witness McDonald, had the guilty intent of entirely depriving her of them, and of converting them to his own use, and his taking the money to count was only a trick or device to obtain possession of the same, it would be larceny, and they must acquit him; but if they were satisfied beyond a reasonable doubt that he had no such intent at the time, but received the bills by her permission for the purpose of counting them for her, and receiving the dollar which she had consented to loan him, and, after the money came into his hands, he then first conceived the guilty purpose of defrauding her, they might find him guilty." The conviction for embezzlement was set aside by the supreme court, in an opinion which states with great clearness the distinction between larceny and embezzlement. The court there said: "We are of opinion that there was no evidence to sustain the indictment for embezzlement, and that the conviction was wrong. * * * To constitute the crime of embezzlement, the property which the defendant is accused of fraudulently and feloniously converting

to his own use must be shown to have been intrusted to him, so that it was in his possession, and not in the possession of the owner. But the facts reported in the bill of exceptions do not show that the possession of the owner of the money was ever divested. She allowed the defendant to take it for the purpose of counting it in her presence, and taking from it a dollar, which she consented to lend him. The money is alleged to have consisted of two ten-dollar bills, three five-dollar bills, one two-dollar bill, and a one-dollar bill, amounting in all to thirty-eight dollars. The one dollar he had a right to retain, but the rest of the money he was only authorized to count in her presence, and hand back to her. He had it in his hands, but not in his possession, any more than he would have had possession of a chair on which she might have invited him to sit. The distinction pointed out in the instructions of the court between his getting it into his hands with a felonious intent, or forming his intent after he had taken it, was therefore unimportant. The true distinction, upon principle and authority, is that stated by the cases upon the defendant's brief, that if the owner puts his property into the hands of another, to use or do some act in relation to it, in his presence, he does not part with the possession, and the conversion of it, *animo furandi*, is larceny." The law as thus declared is sustained in the following cases: *Smith v. People*, 53 N. Y. 111; *Loomis v. People*, 67 N. Y. 322; *People v. Call*, 1 Denio, 120; and many more which might be cited to the same effect. Indeed, our attention has not been called to any case which holds to the contrary. Judgment and order reversed.

We concur: HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.

McFARLAND, J. I concur in the judgment of reversal for admission of improper testimony, but I dissent from the view that the crime was necessarily larceny, and not embezzlement. It is contended by appellant that under the evidence he could not have been legally convicted of embezzlement, because the evidence, if it shows any crime, shows the crime of larceny, and not embezzlement. The distinction between larceny and the statutory crime of embezzlement is sometimes hard to draw. Our Code definition of the latter offense is very broad, being "the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. The weight of the definition rests upon the word "intrusted." Where the property is taken forcibly or furtively, or when the possession is gained by a trick or artifice, and the owner had no intent to yield possession, and "intrust" the property to another,—in such cases there is no embezzlement. Now, appellant argues this case upon the theory that the prosecuting witness laid his money on a table upon the representation of appellant that he merely wanted to point out and explain a certain lottery or game, and that when the money was put there appellant suddenly took it without the con-

sent of said witness. But the testimony does not clearly show such a state of facts. It is true that the witness says generally that defendant told him that he would get his money back; but he testifies that he first put in a half-dollar, "and afterwards I put in a dollar, and after that was lost I put in five [\$5] dollars, and lost that." He then "wanted to get out," but was induced to "go on and play," and he "put up" \$20, and \$20 more, and so on until he had put up altogether \$88.50; and then, as he says, "after that was lost, he asked for his money, but did not get it, except \$10, which was returned to him." What became of the coins, as one by one they were bet and lost. I think that the jury had the right to find that appellant, with the consent of the prosecuting witness, had full actual possession of the money; and whether it was "intrusted" to him was, I think, under all the circumstances, a question to be determined by the jury, under proper instructions of the court. And I see no error in the instructions on that point. The bill of exceptions in this case is so meager that we can hardly suppose it to contain all the evidence upon the points contested. In *People v. Fisher*, 51 Cal. 319, it was held that in a bill of exceptions in a criminal case it is not necessary "to specify the respects in which the evidence is alleged to be insufficient to sustain the verdict." Under this rule, district attorneys are, no doubt, often misinformed as to what points the bill of exceptions should, by amendments, be made full; and an amendment to the Code requiring specifications of the grounds of the alleged insufficiency of the evidence would be in furtherance of justice.

BEATTY, C. J. I concur in the judgment of reversal upon the ground that the superior court erred in admitting the testimony of the witness Briggs. The evidence of the prosecuting witness that the defendant was the person who defrauded him was extremely weak and unsatisfactory. He admitted that, on the examination of the prisoner in the police court, a short time after the occurrence, he had been unable to identify him, but claimed that he was then (at the trial) certain that he was the same person. Evidently the prosecution thought it necessary to strengthen their case on this point, for they called the witness Briggs, (an officer,) who was permitted to testify, against the objection of the defendant, to a description of the culprit, which he stated had been furnished by the prosecuting witness before the defendant was arrested. This was, of course, hearsay and incompetent, and, as it related to a vital issue in the case, upon which other sufficient testimony was lacking, it was necessarily prejudicial. But I dissent altogether from what appears to me the extremely technical views of the court as to the insufficiency of the evidence to sustain the verdict. I admit that the evidence proves a clear case of larceny, but I cannot concur in the conclusion that because it proves larceny it does not prove embezzlement. Assuming the defendant to have been properly identified as the

real culprit, the evidence shows that he fraudulently induced Wilkins to put his money on a table for the purpose of illustrating the mode of playing a game which he called the Louisiana Lottery, promising to give it back at the conclusion of the lecture. In pursuance of this plan, he first illustrated the loss of a half-dollar, next a dollar, then of five dollars, and finally of four twenty-dollar pieces in rapid succession. After this brilliant exposition of the beauties of the game, when Wilkins demanded his money back, according to the understanding upon which he had permitted the use of it, he was coolly informed by the defendant that the Louisiana Lottery did not do business in that way, and that if the money was returned they would surely put their business in other hands. Defendant did, however, magnanimously restore the sum of ten dollars when Wilkins threatened to call for the police. In short, the evidence leaves no room to doubt that the defendant intended from the beginning to make a felonious appropriation of the money, and the case cannot be distinguished in principle from that of *People v. Rae*, 66 Cal. 423, 6 Pac. Rep. 1, in which it was held that the facts constituted the crime of larceny. On the authority of that decision, it must be held, as appellant contends, that the evidence in this case made out a clear case of larceny. But does it follow that it will not sustain a conviction of embezzlement? "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. According to this definition, a fraudulent intention to appropriate the property at or before the time of its receipt is not necessary to constitute the offense, but it is in no wise inconsistent with it. It merely superadds an ingredient not essential to constitute the crime. But is it any the less embezzlement because it is that and something more? Or, rather, will not evidence which proves every element of the crime of embezzlement sustain a conviction of that crime merely because it proves the additional element contained in the crime of larceny? Under an indictment for murder, the defendant may be convicted of manslaughter, because the offense of manslaughter is embraced in murder, *i. e.*, murder is manslaughter with the added ingredient of malice aforethought. Upon the same principle it cannot be doubted that under an indictment for larceny, specifically alleging the facts proved in this case, the defendant could properly be convicted of embezzlement, if, upon the evidence, it was reasonably doubtful whether the fraudulent intent existed at the time he received the money. Pen. Code, § 1159. The converse of these propositions must be equally true. Upon an indictment for manslaughter, a verdict of guilty is sustained by the evidence, notwithstanding it may appear that the killing was malicious; and, if so, an information for embezzlement is sustained by the evidence, notwithstanding it may appear that the crime committed was all of embezzlement, and something more. Of course, if larceny were an offense of lesser grade or

subject to a lighter penalty than embezzlement, the conclusion would be different; but they are in fact of the same grade, and subject to precisely the same punishment. Pen. Code, § 514.

The particular kind of larceny proved in this case consists of three elements: (1) Money intrusted; (2) fraudulent conversion; (3) intent to defraud at the time the money is received. Embezzlement consists of two elements: (1) Money intrusted; (2) fraudulent conversion. That is to say, the two crimes are identical as to the first two ingredients. But it is held by the court that embezzlement is not proved, although both its elements are proved, because another element is proved which brings the offense within the definition of larceny; in other words, that, because the defendant might have been charged and convicted of a higher crime, he cannot be convicted of a lesser crime embraced in that which might have been charged. But the court holds that here there was never any "bailment" of the property. Possibly this is so, if the matter is regarded with reference to the civil rights and remedies of the parties. But the statute defining embezzlement does not speak of a "bailment." It only requires that property should be "intrusted" to another, and, in my opinion, it does not lie in the mouth of a thief, who has in fact been trusted in ignorance of his character and intentions, to say that, because he obtained possession of the property by a fraudulent trick, therefore he was not intrusted with it. I am aware that many cases may be found like those cited in the opinion of the court, in which the facts proved in this case have been held to constitute larceny, but, as I have endeavored to show, they also include embezzlement. The Massachusetts case is the only one that has ever been brought to my attention in which it has been decided that proof of the higher offense, or proof of the three ingredients of larceny, will not support a conviction of a crime composed of two of those ingredients. That decision may be accounted for by the fact that the defendant had been once acquitted on an indictment for larceny founded on the same facts afterwards proved on the trial for embezzlement; and it seems to have been assumed that the change made in designating the offense in the second indictment would prevent him from having the benefit of a plea of former acquittal. If this was so under the Massachusetts practice, it affords a ground of support to the decision which has no existence here. Under our law and practice, such fine-spun distinctions serve but one purpose. They do not tend in the slightest degree to shield the innocent, but only to furnish an additional loop-hole of escape for the guilty.

91 Cal. 296

BARRETT v. SOUTHERN PAC. CO. (No. 14, 331.)

(Supreme Court of California. Sept. 21, 1891.)

RAILROAD COMPANIES—INJURY TO CHILD—TURN-TABLE—NEGLIGENCE.

A railroad company is liable for injuries received by a child while playing upon a turn-

table upon its premises near a public street, which was not protected by any inclosure nor guarded by its employes, though it was provided with the customary fastenings to keep it from revolving, and the child was invited to play thereon by other children.

Department 2. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Action by Barrett against Southern Pacific Company for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

John D. Bickell, for appellant. *Holloway & Kendrick* and *Victor Montgomery*, for respondent.

DE HAVEN, J. This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The plaintiff recovered a judgment for \$8,500, and from this judgment, and an order denying its motion for a new trial, the defendant appeals.

It was shown upon the trial that defendant maintained a railroad turn-table upon its own premises in the town of Santa Ana. This table was about 150 yards from defendant's depot, and near its engine-house, and distant 72 feet from a public street, and was not protected by any inclosure, nor did the defendant employ any person whose special duty it was to guard it. It was provided with a latch and slot, such as is in common use on such tables, to keep it from revolving. There were several families with small children residing within a quarter of a mile from the place of its location, and previous to the time when plaintiff was hurt children had frequently played around and upon it, but when observed by the servants of defendant were never permitted to do so. At the date of plaintiff's injury he was eight years of age, and on that day he, with his younger brother, saw other boys playing with the turn-table, and, giving them some oranges for the privilege of a ride, got upon it, and while it was being revolved plaintiff's leg was caught between the table and the rail upon the head blocks, and so severely injured that it had to be amputated. The defendant moved for a nonsuit, which motion was denied. This ruling of the court, and certain instructions given to the jury, present the questions which arise upon this appeal.

The appellant contends that it was not guilty of negligence in thus maintaining upon its own premises, for necessary use in conducting its business, the turn-table in question, and which was fastened in the usual and customary manner of fastening such tables; that the plaintiff was wrongfully upon its premises, and therefore a trespasser, to whom the defendant did not owe the duty of protection from the injury received, and that the court should have so declared, and nonsuited the plaintiff. This view seems to be fully sustained by the case of *Frost v. Railroad Co.*, decided by the supreme court of New Hampshire, 9 Atl. Rep. 790. But, in our judgment, the rule as broadly announced and applied in that case cannot be main-

tained without a departure from well-settled principles. It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible consistently with its proper use. This rule, which only imposes a just restriction upon the owner of property, seems not to have been given due consideration in the case referred to. But this principle, as a standard of conduct, is of universal application, and the failure to observe it is, in respect to those who have a right to invoke its protection, a breach of duty, and, in a legal sense, constitutes negligence. Whether, in any given case, there has been such negligence upon the part of the owner of property, in the maintenance thereon of dangerous machinery, is a question of fact dependent upon the situation of the property and the attendant circumstances, because upon such facts will depend the degree of care which prudence would suggest as reasonably necessary to guard others against injury therefrom; "for negligence in a legal sense is no more than this: the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." Cooley, Torts, 630. And the question of defendant's negligence in this case was a matter to be decided by the jury in view of all the evidence, and with reference to this general principle as to the duty of the defendant. If defendant ought reasonably to have anticipated that, leaving this turn-table unguarded and exposed, an injury, such as plaintiff suffered, was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and if it had not intermeddled with defendant's property it would not have been hurt, and that the law imposes no duty upon the defendant to make its premises a safe playing ground for children. In the forum of law, as well as of common sense, a child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this, and the law requires him to govern his actions accordingly. It is a matter of common experience that children of tender years are guided in their actions by childish instincts, and are lacking in that discretion which, in those of more mature years, is ordinarily sufficient to enable them to appreciate and avoid danger; and, in proportion to this lack of judgment on their part, the care which must be observed towards them by others is increased; and it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery, which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment interposes no warning or defense. The following are some of the cases in which this has been held: *Railroad Co. v. Stout*, 17 Wall. 657; *Hydraulic*

Works Co. v. Orr, 83 Pa. St. 335; Powers v. Harlow, 53 Mich. 507, 19 N. W. Rep. 257; Nagle v. Railway Co., 75 Mo. 653; Koons v. Railway Co., 65 Mo. 592; Railway Co. v. Fitzsimmons, 22 Kan. 686; O'Malley v. Railway Co., (Minn.) 45 N. W. Rep. 441; Whirley v. Whiteman, 1 Head. 610. These cases, we think, lay down the true rule. The fact that the turn-table was latched in the way such tables are usually fastened, or according to the usual custom of other railroads, although a matter which the jury had a right to consider in passing upon the question whether defendant exercised ordinary care in the way it maintained the table, was not, of itself, conclusive proof of the fact. *Stout v. Railroad Co.*, 2 Dill. 294; *O'Malley v. Railway Co.*, supra. Nor is the liability of the defendant affected by the fact that the table was set in motion by the negligent act of other boys. This is so held in some of the cases above cited, and the same principle was announced by this court in *Pastene v. Adams*, 49 Cal. 87, in which case it was held that a person who had negligently piled lumber, which had remained in that condition for a long time, was not exempt from damages sustained by one on whom it fell because the lumber was made to fall by the negligence of a stranger. We see no error in the second instruction given at request of plaintiff. The portion to which exception was taken is not very well expressed, but we think, taken as a whole, the instruction states the law correctly. Judgment and order affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.
(91 Cal. 288)

ETCHEPARE v. AGUIRRE, Sheriff. (No. 14.-298.)

(Supreme Court of California. Sept. 21, 1891.)

CLAIM AND DELIVERY — VERDICT — JUDGMENT — CHANGE OF POSSESSION — INSTRUCTIONS — CROSS-EXAMINATION.

1. In an action to recover possession of personal property, or the value thereof, the verdict was as follows: "We * * * find for the defendant, and fix the value of the property at \$1,500." Held, that the verdict sufficiently complied with Code Civil Proc. Cal. § 627, which provides that if, in such actions, defendant by his answer claims a return of the property, the jury, if their verdict is in favor of defendant, and they "also find that he is entitled to a return thereof, must find the value of the property;" and it authorized a judgment for defendant "for a return of the property, or the value thereof," as prescribed by Code Civil Proc. Cal. § 627.

2. In an action to recover specific personal property, a judgment for defendant for the value of the property, or a return thereof, is defective, since judgment for the value can only be rendered where a return of the property cannot be had, under Code Civil Proc. Cal. § 627, providing that, if the property has been delivered to plaintiff and defendant claims a return thereof, judgment may be for a return of the property, or for the value thereof, in case a return cannot be had.

3. In an action for the possession of certain milch cows taken on attachment against plaintiff's vendor, it appeared that the vendor retained possession after the sale and continued to milk them and peddle the milk, and that he bought feed and managed and controlled the business as before. Held proper to refuse to charge that a de-

livery depends on the character of the property and the circumstances of each case; that it is not necessary for the purpose of delivery that the property sold should pass into the actual possession of the buyer; and that, when property is so situated that the buyer is entitled to and can rightfully take possession of it at his pleasure, he is considered as having actually received it as the statute requires.

4. Plaintiff requested an instruction that the fact that plaintiff employed the vendor after the sale was not conclusive, independent of other evidence, in determining the question whether there was an actual and continued change of possession of the property at the time of the alleged sale. Held, that it was properly modified by the court by adding that a party can employ the vendor, but if he leaves him in entire charge of the property, or in such apparently entire charge that it appears that there has been no open and apparent change of possession, no open and apparent means by which people about can take notice that there has been any change, then there is not such an actual change of possession as is required by law.

5. Cross examination of the vendor, as to what he did and said in regard to the cattle after the sale to plaintiff, was properly allowed, since such evidence was relevant to the issue of whether the sale was accompanied by immediate delivery, and followed by actual and continued change of possession.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

Action in replevin by M. Etchepare against Aguirre, sheriff. Verdict and judgment for defendant, and plaintiff appeals from the judgment, and from the order denying a new trial. Order affirmed, and judgment reversed.

M. V. Biscailus and W. I. Foley, for appellant. W. J. Williams, for respondent.

VANCLIEF, C. Action to recover the possession of personal property, or the value thereof, commonly called "claim and delivery of personal property." The defendant, as sheriff of Los Angeles county, seized the property in question by virtue of a writ of attachment, as the property of the defendant in the attachment suit, from whom the plaintiff claims to have purchased it before the levy of the attachment. It is alleged in the answer of the defendant that the sale of the property to plaintiff was fraudulent and void as to the creditors of the defendant in attachment, and this was the principal issue tried. The property was delivered to the plaintiff pursuant to section 514 of the Code of Civil Procedure, as a return thereof to the defendant was not required. The trial was by jury, whose verdict was as follows: "We, the jury in the above-entitled action, find for the defendant, and fix the value of the property at \$1,500." Whereupon it was adjudged by the court "that said defendant have and recover from said M. Etchepare, the plaintiff herein, the sum of \$1,500, or the return of the property described in the complaint herein, and his costs." The plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

1. It is claimed by appellant that the verdict is defective, in that it does not find "for the return of the property," and is not "in the alternative," since the answer of the defendant demands a return of

¹Judgment modified, 27 Pac. Rep. 929.

the property. The verdict for the defendant was special as to the value of the property, as required by the Code.¹ As to all other issues it was general. This was sufficient to justify a judgment for the return of the property, or for the value thereof in case a delivery could not be had. Such a judgment would have consisted entirely of pure conclusions of law from the verdict. The Code does not require the verdict to be special, except as to the value of the property, and the sole object of this exception is to enable the court to render an alternative judgment as required by section 667 of the Code of Civil Procedure. *Waldman v. Broder*, 10 Cal. 379; *Hunt v. Robinson*, 11 Cal. 262; *Pico v. Pico*, 56 Cal. 453.

2. But the judgment was not, in form or substance, in accordance with section 667 of the Code of Civil Procedure.² The defendant was not entitled to judgment for the value of the property, except upon the condition that a return of the possession thereof could not be had. The judgment should be "for a return of the property, or the value thereof, in case a return cannot be had." *Washburn v. Huntington*, 78 Cal. 577, 21 Pac. Rep. 305.

3. At the request of the plaintiff, the court gave to the jury the following three instructions: (1) "If you believe from the evidence that the plaintiff purchased the property in question in good faith and for a valuable consideration, and without any design to hinder, delay, or defraud any creditor of Jaureguy, and that the sale was complete and accompanied by an immediate delivery, followed by an actual and continued change of possession, then you must find a verdict for the plaintiff in this action." (2) "A *bona fide* sale of property by a judgment debtor to a person other than the judgment creditor in payment or satisfaction of a prior debt to such vendee is not fraudulent because such vendee may be aware, at the time of such *bona fide* sale, that it will have the effect of defeating the collection of other debts against his vendor." (3) "In determining whether there was an actual and continued change of possession of the property in question at the time of the alleged sale by Jaureguy to the plaintiff, while you are to consider the fact that the plaintiff employed Jaureguy after the alleged sale to plaintiff, still you are not bound, independent of other evidence, to regard this fact alone as conclusive of the question." But the court refused to give the fourth instruction asked by plaintiff,

which is as follows: "What constitutes a delivery depends upon the character of the property sold and the circumstances of each particular case. For the purpose of a delivery, it is not necessary that the property sold should pass into the actual possession of the buyer. When property is so situated that the buyer is entitled to and can rightfully take possession of it at his pleasure, he is considered as having actually received it as the statute requires." After the court had concluded its instructions, a juror asked the following questions: "Can a party who purchases stock or any kind of goods keep in their employ the same parties that were there, and still be complying with the law, or is it necessary to move those goods or move?" In answer to these questions the court said: "I will read the instruction asked by plaintiff, but I will do it so that the jury can fully understand with regard to it." Then, after reading the third instruction given at request of the plaintiff, added to it the following: "A party can employ the person,—the person from whom they purchase,—but if they leave the person in the entire charge of the property, or leave them in such apparently entire charge of the property, that it appears to the world around about that there has been no change of possession, that there is no open and apparent change of possession, no open and apparent means by which people about can take notice that there has been any change, then there is not such an actual change of possession as is required by law."

It is contended for appellant that the court erred in refusing the fourth instruction asked by plaintiff, and in giving the addition to the third instruction given at request of plaintiff. It is true that the language of the fourth instruction requested by plaintiff was extracted from the opinion of Mr. Justice McKee in *Williams v. Lerch*, 56 Cal. 334; but the language extracted is only a part of what was said by Mr. Justice McKee in connection with the facts of that case, which were materially different from the facts in this case. In that case the property (horses) were in the care and custody of a third person (Drew) for the sole purpose of being pastured on a mountain range at a considerable distance from the residence of the owner, (Sotcher.) After executing a bill of sale of the horses to Williams, (plaintiff in that action,) Sotcher ordered Drew to collect them together, and deliver them to Williams. Accordingly Drew collected the horses, and informed Williams that they were ready for him. Thereupon Williams employed Drew to continue to pasture the horses for him. (Williams.) Some five months thereafter, while the horses were still being pastured by Drew, they were taken by a constable by virtue of an execution against Sotcher. Upon these facts, Mr. Justice McKee, immediately preceding the language of the requested fourth instruction, said: "Everything was done which was necessary to a sale. It was complete and perfect if Drew subsequently delivered the horses to plaintiff, or took charge of them for the plaintiff." And,

¹ Code Civil Proc. Cal. § 627, provides that, "in an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of defendant, they also find that he is entitled to a return thereof, must find the value of the property."

² Code Civil Proc. Cal. § 667: "In an action to recover the possession of personal property, * * * if the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had."

after the language of the requested instruction, further said: "By delivering the bill of sale to the plaintiff, and giving direction to his agent to get the horses together, and keep them for the plaintiff, to whom they had been sold, Sotcher transferred them to the plaintiff; and when the agent, in obedience to the direction which he had received, collected them together in his pasture for the plaintiff, and wrote to him that they were ready for him, and to come and take them, and the plaintiff employed the agent to take charge of them and winter them for him, this was an actual delivery of the property, so far as the nature and condition of the property admitted it; and when the agent under his employment turned the horses out to pasture on their accustomed range, and kept them exclusively for the plaintiff until they were taken by the defendant, the requisitions of section 3440 of the Civil Code were fully satisfied." In the case at bar the cattle alleged to have been sold consisted largely of milch cows, and were in the actual possession of the seller, (Jaureguy,) who was milking the cows and peddling the milk, with the assistance of two servants. After the alleged sale he continued to milk the cows and to peddle the milk precisely as before, and the evidence strongly tends to show that he bought the feed for the cattle, and managed and controlled the business and the servants up to the time of the attachment, just as he had done before the alleged sale. Under this state of facts, the fourth instruction requested by plaintiff was not properly applicable, even conceding that it is good abstract law, which seems, at least, doubtful. The language of the instruction asked could not have been intended by Mr. Justice McKee to be read by itself as abstract law, but concretely with its context and the facts of the case of *Williams v. Lerch*. The instructions given at the request of the plaintiff, with the explanation added by the court, were quite as favorable to the plaintiff as he was entitled to ask. The oral explanation given by the court, in answer to the question of a juror, is not so precise and explicit as doubtless it would have been had it been deliberately written; but, as given, I think it is substantially supported by the following cases: *Stevens v. Irwin*, 15 Cal. 503; *Malone v. Plato*, 22 Cal. 103; *Cahoon v. Marshall*, 25 Cal. 201; *Bell v. McClellan*, 67 Cal. 283, 7 Pac. Rep. 699.

4. It is contended that the court erred in permitting Jaureguy to be cross-examined by defendant as to what he did and said in regard to the cattle after he executed the bill of sale of them to the plaintiff. But the testimony objected to was pertinent to the issue as to whether or not the sale had been accompanied by an immediate delivery and followed by an actual and continued change of possession, and therefore the court did not err in admitting it. I think the order denying a new trial should be affirmed, but that the judgment should be reversed, and that the court below should be directed to enter a judgment on the verdict in favor of defendant, in substantial accordance with this opinion.

We concur: **BELCHER, C.; FITZGERALD, C.**

PER CURIAM. For the reasons given in the foregoing opinion the order denying a new trial is affirmed; but the judgment is reversed, and the court below is directed to enter a judgment on the verdict in favor of the defendant, in substantial accordance with this opinion.

(91 Cal. 355)

ROCHAT V. GEE. (No. 13,810.)

SOMERS V. SOMERS.

(*Supreme Court of California. Sept. 24, 1891.*)

DISMISSAL OF ACTION—APPEALABLE ORDERS.

1. Under Code Civil Proc. Cal. § 581, which provides that the dismissal of an action by plaintiff "is made by entry in the clerk's register," and that "judgment may thereupon be entered accordingly," the filing by plaintiff of a written statement of abandonment of the action, and an entry thereof by the clerk in the register, does not operate as a dismissal, where no judgment of dismissal is entered, nor any order of the court made in relation to the matter of abandonment.

2. An order made pending an action to dissolve a partnership directing a receiver appointed therein to file an account is not appealable, since it is not one of the appealable orders enumerated in Code Civil Proc. Cal. § 968.

In bank. Appeal from superior court, San Bernardino county; **C. W. C. ROWELL**, Judge.

Action by Rochat against Gee for dissolution of partnership and appointment of a receiver. Receiver appointed, and court directed receiver to file an account. Defendant objected to the allowance of some of the items therein. Account approved. Defendant appeals. Appeal dismissed.

Charles R. Gray, for appellant. *C. J. Perkins* and *H. C. Rolfe*, for respondent. *E. E. Rowell* and *C. J. Perkins*, for receiver.

PATERSON, J. This action was commenced by the plaintiff, June 27, 1888, for a dissolution of the copartnership existing between himself and defendant, for the appointment of a receiver, and for an accounting and settlement of the affairs of the partnership; and on that day the respondent, Somers, was appointed receiver "to take charge of, manage and control and dispose of, under the direction of this court, all that certain real property belonging to the copartnership of Rochat & Gee, and to have charge of, manage, control, and dispose of all personal property of the said firm of Rochat & Gee, upon his executing the bond as such receiver in the sum of twelve thousand dollars and qualifying according to law." He qualified, took possession of the property of the firm, and for about one month operated a lumber-mill belonging to the firm. The defendant filed an answer September 15, 1888, admitting the fact of copartnership, but denying the allegation on which plaintiff relied for the relief asked. On June 29, 1889, plaintiff filed a written abandonment of the cause in the following words: "Now comes the plaintiff, and, before the final submission of the above-entitled cause, the plaintiff hereby abandons said cause." The register of actions showed the following entry: "June 29, 1889. Filing abandonment of cause by

plaintiff;" but no judgment of dismissal was ever made or entered, nor was any order of the court made in relation to the matter of abandonment. On September 2, 1889, the court directed the receiver to file an account. The account was filed November 12, 1889, and on November 29, 1889, the defendant filed written objections to the allowance of several of the items thereof. After hearing the testimony of the parties, the court approved the account as filed, and from this order the defendant has appealed.

The filing of the written statement of abandonment and the clerk's entry in the register of actions did not operate as a dismissal of the action. Code Civil Proc. § 581.¹ Page v. Page, 77 Cal. 83, 19 Pac. Rep. 153. Respondent has moved the court to dismiss the appeal, on the ground that the order is not appealable. We think the motion should be granted. The orders made before judgment which may be appealed from are named in subdivision 3, §§ 939, 963, Code Civil Proc. The order before us is not one of those specified in subdivision 3 of section 939, which is the same as subdivision 3 of section 336 of the practice act. *Adams v. Woods*, 8 Cal. 315. It is not a "special order made after final judgment," because there has been no final judgment in the action. It cannot be one of the orders named in subdivision 3 of section 963, because that class embraces only probate orders. *Estate of Calahan*, 60 Cal. 232. Appellant claims that the order is a final adjudication upon all matters involved in the report of the receiver, and being conclusive upon the parties, and for an amount exceeding \$300, the constitution secures to him the right of appeal, whether the legislature has provided the method of taking the appeal or not. It is not a question whether one aggrieved by such an order has the right of appeal,—that right must be conceded,—but when it may be exercised. We have not found any case in which such an order has been reviewed before final judgment. No good purpose could be subserved by a rule authorizing an appeal from every order of this kind made during the pendency of the suit. It is the policy of the law to discourage litigation piecemeal. The order of the court concludes with the following direction: "It is further ordered that said receiver be and continue in charge of the property of said parties herein, and that he continue to act as receiver herein until the further orders of this court in the premises. Said receiver is hereby disallowed any compensation or attorney's fees until the coming in of his final report herein on final determination of this cause, such compensation and attorney's fees to be then fixed by the court, as it

may be then advised." There are authorities holding that a receiver may appeal directly from an order made before judgment disallowing his final account; and it may be conceded that a party aggrieved by an order of the court made before judgment allowing a final account of a receiver may appeal without waiting for a final judgment in the case. That is not this case. The provision of the order quoted above shows that the receiver is still in possession of the assets of the firm, and acting on its behalf under orders of the court. There will be other reports to make. The final account will refer to previous reports filed, and when that is settled any one aggrieved will be fully protected by an appeal either from the final order or from the judgment. It may happen that those who object to the acts of the receiver during the first part of his administration will be entirely satisfied with the general result, and have no objection to the approval of his final account of the whole matter. *Vinson v. Freeze*, (Ky.) 1 S. W. Rep. 478; *McCord v. Weil*, (Neb.) 46 N. W. Rep. 152; *Perkins v. Four-niquet*, 6 How. 206; 2 Hayne, New Trial & App. § 188. The appeal is dismissed.

We concur: SHARPSTEIN, J.; HARRISON, J.; MCFARLAND, J.; DE HAVEN, J.

91 Cal. 371

DE TORO *et al.* v. ROBINSON *et al.* (No. 14,180.)

(Supreme Court of California. Sept. 25, 1891.)

SPANISH AND MEXICAN GRANTS—SETTLEMENT OF BOUNDARIES—PLEADING.

1. In an action to obtain a decree declaring plaintiffs the equitable owners of a portion of a tract of land called "P.," alleged to have been included in a patent for a certain tract called "C." by the fraudulent extension of the latter tract, the complaint alleged that in 1838 the governor of California decreed one N., plaintiffs' predecessor in interest, to be the owner of three contiguous tracts of land, called the "C.," "A.," and "P." tracts, containing more than 17 leagues; that the governor, in 1834, made a grant of the C. tract, to N., as containing 10 leagues, and that others, under whom defendants claim, acquired title to the A. tract as containing 6 leagues; that defendants' predecessors afterwards fraudulently obtained confirmation of the grant and a patent of the C. tract as containing 11 leagues, instead of 10, and of the A. tract as containing 6 leagues. *Held*, that the complaint did not state a cause of action because it did not allege directly or by implication that the fraudulent extension of the C. tract made it include any of the P. tract, since the additional league may have been taken from some other contiguous land.

2. Act Cong. March 3, 1861, § 13, appointing a commission to settle private land claims in California, and providing that all lands the claims to which shall not have been presented to the commissioners within two years after the date of the act shall be held and considered as part of the public domain of the United States, applies to claims under grants from the Spanish or Mexican government, and, where such claim was not presented as required by said act, the successors of the Spanish or Mexican grantee have no interest in the land covered thereby which will entitle them to sue on the ground that defendant has acquired the legal title thereto by fraud.

Department 2. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

¹ Code Civil Proc. Cal. § 581, provides as follows: "An action may be dismissed or a judgment of nonsuit entered in the following cases: (1) By the plaintiff himself at any time before trial upon payment of costs, provided a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer of defendant. * * * The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register. Judgment may thereupon be entered accordingly."

Action to obtain a decree declaring plaintiffs the equitable owners of land. Judgment for defendants. Plaintiffs appeal. Affirmed.

Frederick Hall, for appellants. *E. W. McGraw, W. A. Ryan, and Chapman & Hendrick*, for respondents.

DE HAVEN, J. This action is brought to obtain a decree that the plaintiffs are the owners in equity of a certain named undivided interest in 50,444 acres of land within the tract called "Los Coyotes," and that the defendants hold the legal title to such undivided interest in trust for them. The defendants answered, and thereafter moved for a judgment upon the pleadings, which motion was granted, and judgment thereupon entered in favor of the defendants. The plaintiffs appeal.

A motion for judgment on the pleadings, such as was made in this case, is proper when the complaint does not state a cause of action. *King v. Montgomery*, 50 Cal. 115; *Kelley v. Kriess*, 68 Cal. 210, 9 Pac. Rep. 129. This motion, like a demurrer for the same cause, admits for its purposes all the facts alleged in the complaint, and the question, therefore, to be considered on this appeal is whether the complaint states a cause of action in favor of plaintiffs. The allegations of the complaint, so far as necessary to be stated, are, in substance, that the plaintiffs are the successors in interest of one Juan Jose Nieto; that upon July 27, 1833, Jose Figueroa, then governor of California, made a decree declaring said Nieto to be the owner of the places called "Los Coyotes," "Los Alamitos," and "Palo Alto," in the county of Los Angeles, and directing juridical possession and title thereto to be given him; that these places were contiguous, and contained within their exterior boundaries more than 17 leagues. It is also alleged that the governor thereafter, on May 22, 1834, made a grant of Los Coyotes to said Nieto, containing 10 leagues. The complaint further alleges that one Abel Stearns acquired the right and title of said Nieto to the Los Alamitos, and obtained from the land commission a confirmation of an alleged grant of the same to said Nieto for 6 leagues. It is also alleged that said Nieto conveyed Los Coyotes to one Leandry, as containing 10 leagues, August 31, 1839; and in 1852 Andreas Pico and Mrs. Ocampo, successors of said Leandry, presented their petition before the land commission for the confirmation of Los Coyotes, containing 10 leagues, and the same was confirmed. It is also alleged that the patent was issued to them for this rancho as containing 11 leagues, and one to Abel Stearns for Los Alamitos as containing 6 leagues, but in fact containing an excess of 1,398 acres. It is nowhere averred in the complaint that any formal grant of or title to Palo Alto was ever made to Nieto, unless the decree of July 27, 1833, can be construed as such; and it is alleged that no grant of the same to said Nieto, or to any other person, by "said Jose Figueroa," * * * or any other person authorized to make the same, or by the Spanish or Mexican government, has ever been produced before any commission or tribunal or public

officer authorized by the government of the United States or of the state of California to ascertain or settle land claims in said state under grant from the Spanish or Mexican government." The complaint further alleges that in proceedings for the location and survey of Los Coyotes the said Abel Stearns, for the purpose of obtaining a patent therefor from the United States, and of defrauding the heirs and devisees under the will of Juan Jose Nieto of one square league of land, made false representations in a map produced by him as to the boundaries of Los Coyotes, and thereby induced the district court to approve a survey thereof as containing 11 leagues.

1. The motion for judgment on the pleadings was properly granted. It is clear from the allegations of the complaint that Juan Jose Nieto, the ancestor of plaintiffs, conveyed in his life-time his entire interest in the places Los Coyotes and Los Alamitos, and if said Nieto died possessed of Palo Alto there is no direct averment in the complaint that the boundaries of Los Coyotes and Los Alamitos, as the same are given in the patents of the United States therefor, include the place called Palo Alto. We understand this to be conceded by the attorney for appellants; but he contends that, though such fact is not directly averred, still it conclusively follows that such is the case, from other facts which are averred. If it should be assumed that a pleading which does not directly allege a material fact, but from which only the existence of such a fact may be argued, is sufficient as against a general demurrer, still this complaint would not be good, as everything therein alleged may be true, and yet no part of Palo Alto have been included within the patented boundaries of Los Coyotes and Los Alamitos. The facts upon which appellants rely to support the complaint on this point are that the 3 places only embraced 17 leagues, and that 2 of them had been sold as containing 16 leagues, and so confirmed; and that, as the survey of those 2 was fraudulently made to embrace 17 leagues and over, it must have been extended over the contiguous place called "Palo Alto," but this excess could just as well have been taken from other contiguous territory, and there is certainly no presumption arising from anything stated in the complaint that it was not.

2. But if the complaint could be construed as contended for by appellants, still it fails to state a cause of action, as it does not show that they are the equitable owners of any portion of the lands in controversy. Whatever equities or rights the plaintiffs have arise out of the decree of Gov. Figueroa, dated July 27, 1833, declaring Juan Jose Nieto the owner of the places called "Los Coyotes," "Los Alamitos," and "Palo Alto," and ordering juridical possession and title to be given him for the same; and as the complaint alleges that Nieto in his life-time parted with his ownership of all the lands except Palo Alto, it follows that plaintiffs could only succeed to his ownership of that place. But it is expressly averred, as we construe the above-quoted allegation of the com-

plaint, that the grant to Nieto of Palo Alto, if the above-referred to decree of Figueroa be so considered, was never presented for confirmation to the land commission appointed under the act of March 8, 1851, to ascertain and settle private land claims in this state; and it is declared by section 13 of that act that "all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act shall be deemed, held, and considered as part of the public domain of the United States." It has been held that this act requiring claims to be presented to the commission therein provided for applies to every claim "by virtue of any right or title derived from the Spanish or Mexican government," whether founded upon a perfect grant, or on an "imperfect and inchoate claim, where the initiation of the proceedings necessary to secure a legal right and title to the property had been commenced but not completed." *Botiller v. Dominguez*, 130 U. S. 238, 9 Sup. Ct. Rep. 525. And the court in that case say: "There can be no doubt of the proposition that no title to land in California dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to and confirmed by the board provided for that purpose in the act of 1851, or, if rejected by that board, confirmed by the district or supreme court of the United States." As no grant for or other claim to the place called "Palo Alto" was ever presented to the land commission appointed under the act of 1851, above referred to, it follows that at the end of two years from the date of said act the land embraced therein became a part of the public domain of the United States, and thereupon all rights of the appellants therein, as successors of Juan Jose Nieto, ceased. This being so, they cannot be heard to complain of the fraud alleged to have been perpetrated years afterwards, in the location and survey of the place called Los Coyotes, because such acts deprived them of no rights. The fraud, if perpetrated as charged, was against the United States alone, and consisted in fraudulently extending the boundaries of Los Coyotes over a portion of the public domain. This is a matter, however, with which appellants have no concern, and which cannot aid them in this action, as it cannot be said that their right to acquire the title now held by defendants was interfered with, or that but for such alleged fraud they would or could have obtained the legal title to any portion of the land so fraudulently included within said Los Coyotes as patented, and for this reason it must be held that they have not in their complaint stated a cause of action. This is a familiar principle, and the following are a few of many cases which might be cited to support it: *Burrell v. Haw*, 40 Cal. 373; *Durfee v. Plaisted*, 38 Cal. 80; *Houck v. Kelsey*, 17 Kan. 333; *Bohail v. Dilla*, 114 U. S. 47, 5 Sup. Ct. Rep. 782; *Dunn v. Schneider*, 20 Wis. 509. We find no error in the record. Judgment affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.

v.27p.no.12-43

§1 Cal. 338

PEOPLE v. LOS ANGELES ELECTRIC RY. CO.
(No. 13,879.)

(*Supreme Court of California.* Sept. 21, 1891.)

CORPORATIONS—REMITTING FORFEITURE OF CHARTER—CONSTITUTIONAL LAW—ACTION TO FORFEIT.

1. Const. Cal. art. 12, § 7, provides that no act shall be passed extending the charter of any corporation or remitting the forfeiture of a franchise. During the pendency of an action to forfeit the charter of a street-car company operating under a city ordinance, Acts Cal. 1891, cc. 18, 19, were passed, one amending Civil Code § 497, so as to invest municipal corporations with power to authorize street railways to use electricity as a motive power; the other ratifying existing ordinances granting such power. *Held*, that the acts did not extend the company's franchise or charter, and, as there had been no decree of forfeiture, there was none to remit, and therefore the acts were not repugnant to the constitution.

2. Civil Code Cal. § 502, provides that work on the construction of a street railway must be commenced within a year from the date of the ordinance granting the right of way and the filing of the articles of incorporation, and be completed within three years thereafter. *Held* that, where the complaint in an action to forfeit a charter did not state when the company commenced the construction, and thereby show that the three years had elapsed within which the work must be done, it failed to state a cause of action.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by the people against Los Angeles Electric Railway Company to forfeit its franchise. Defendant demurred to the complaint. Demurrer was overruled, and defendant neglecting to answer, judgment was entered as by default. Defendant appeals. Reversed.

Brunson, Wilson & Lamme, for appellant.
W. H. Hart, Atty. Gen., for the People.

SHARPSTEIN, J. This action is brought to have it determined that the defendant has forfeited, and that it be excluded from, all rights, privileges, right of way, and franchises acquired by it under a municipal ordinance passed by the city of Los Angeles on the 28th day of January, 1886. A copy of said ordinance is annexed to and made a part of the complaint. In the complaint two causes of action are separately stated. "The first," in the language of respondent's brief, "is based upon the theory that the law does not permit any incorporated city or town in this state to grant authority to any individual or corporation to lay railroad tracks through the streets or public highways of such city or town, whereupon cars can be propelled by the force of electric power. The second rests upon the ground that if defendant had the right to construct railroad tracks through the streets of Los Angeles, whereon it could propel cars by such electric power, it had forfeited that right by its failure to complete the road within three years from the date of the ordinance granting the right of way to construct said road as prescribed by the Civil Code." The complaint was demurred to by the defendant on the ground that it did not state facts sufficient to constitute a cause of action, and each alleged cause of action was separately demurred to on the same ground. The de-

murrer was overruled, defendant failed to answer, and judgment by default was entered against it, by which it is adjudged guilty of usurping and unlawfully holding said franchise described in said complaint, and adjudging that the defendant be excluded from all rights, privileges, right of way, and franchise acquired under and by virtue of said municipal ordinance numbered 210, described in said complaint, and that the same has become wholly forfeited. From that judgment this appeal is taken.

Since this appeal was taken the legislature of this state has passed two acts which, in our opinion, have an important bearing upon this case. By one of said acts section 497 of the Civil Code is so amended as to invest municipal corporations with the power to grant a right to propel cars by electricity upon railroad tracks, through streets and public highways. By the other of said acts ordinances passed prior to the passage of said act, by any municipality, giving authority and permission to propel cars upon railroad tracks laid through the streets and public highways of said city, city and county or town, by electricity, are confirmed, ratified, and made valid. If constitutional, the efficacy of this act of the legislature cannot, in our opinion, be doubted. Respondent claims that it is repugnant to section 7, art. 12, of the constitution, which section reads as follows: "The legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise of any corporation now existing, or which shall hereafter exist, under the laws of this state." We are unable to so construe the act of the legislature as to make it repugnant to that provision of the constitution. There is no attempt to extend any franchise or charter; and there was no forfeiture of any franchise to remit. Acts sufficient to cause a forfeiture do not *per se* produce a forfeiture. The corporation continues to exist until the sovereignty which created it shall by proper proceedings in a proper court procure an adjudication of forfeiture, and enforce it. *Ormsby v. Manufacturing Co.*, 65 Barb. 360; *People v. Manhattan Co.*, 9 Wend. 351; *River Co. v. Woodman*, 2 Me. 404; *Mickles v. Bank*, 11 Paige, 118; *Com. v. Bank*, 28 Pa. St. 383; *Murphy v. Bank*, 20 Pa. St. 415; *Field, Corp.* § 154. In this case there has not been any final adjudication of forfeiture. Therefore the act ratifying and confirming the ordinance granting the franchise to defendant is not an act remitting a forfeiture. But it is, in our opinion, an act waiving a forfeiture. It certainly is an act showing an intention on the part of the state that the franchise shall continue in existence, and such an act will be considered an absolute waiver of any existing right to enforce a forfeiture of the defendant's franchise. In *re New York El. R. Co.*, 70 N. Y. 327; *Mor. Priv. Corp.* 655, and cases cited. We think the constitution does not prohibit such a waiver, and that the state has waived its right to enforce a forfeiture of the defendant's franchise on the ground stated in the plaintiff's first alleged cause of action.

The second alleged cause of action presents another and different question. It is alleged that some portions of the road have not been constructed, although the time allowed the defendant to construct the entire road has elapsed. Conceding that the board of supervisors could not grant a franchise and right of way to the defendant on any other or different conditions than those prescribed by section 502 of the Civil Code, viz., "Work to construct the railroad must be commenced within one year from the date of the ordinance granting the right of way and the filing of articles of incorporation, and the same must be completed within three years thereafter;" and that "a failure to comply with these provisions, works a forfeiture of the right of way, as well as of the franchise, unless the uncompleted portion is abandoned by the corporation, with the consent of the authorities granting the right of way,—such abandonment and consent being in writing,"—it does not appear that at the date of the commencement of this action the time fixed for the completion of the railroad had expired. The complaint does not state when the work to construct said railroad was commenced, and, as we construe the language of the Code, the grantee of the franchise and right of way had three years after the commencement of the work within which to complete it. And at any time before the expiration of that time such grantee might, with the consent of the authorities granting the right of way, abandon the uncompleted portion. It follows that the judgment must be reversed. Judgment reversed, with directions to the court below to sustain the demurrer to the complaint.

We concur: BEATTY, C. J.; MCFARLAND, J.; HARRISON, J.; PATERSON, J.; GAROUTTE, J.; DE HAVEN, J.

(95 Cal. 581)

BAINES v. BABCOCK *et al.* (No. 14,224.)¹

(Supreme Court of California. Sept. 23, 1891.)

CORPORATIONS—ACTION AGAINST STOCKHOLDERS—RETURN OF EXECUTION—RES JUDICATA.

1. A judgment creditor who has had an execution returned unsatisfied against a street-railway corporation may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to be made parties, the amount due upon unpaid subscriptions for stock.

2. The liability of the stockholders is several, and it is not necessary to make them all defendants. *Hatch v. Dana*, 101 U. S. 205, followed.

3. Proof that a creditor has exhausted his legal remedy against the corporation is shown by the judgment and an execution thereon returned unsatisfied.

4. Evidence that the company owns a large amount of personal property besides its road and franchise is inadmissible.

5. The judgment is conclusive against the company and its stockholders, and they cannot show that the indebtedness for which the judgment was recovered arose upon a contract which was *ultra vires*.

6. One to whom stock is issued, and in whose name it appears on the books of the corporation, is liable to the creditors of the corporation for the unpaid subscriptions, although he is not the owner of such stock.

¹ Rehearing granted.

Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by Baines against Babcock and others for unpaid subscriptions for stock in a street-car company. Judgment for plaintiff, and from this and an order denying a motion for a new trial the defendants appeal. Affirmed.

Hunsaker, Britt & Goodrich, Brunson, Wilson & Lamme, Works, Gibson & Titus, and Sprigg & Barber, for appellants. *F. W. Burnett and M. S. Babcock, (McNealty, Trippet & Neale, of counsel,)* for respondents.

DE HAVEN, J. This is an action to subject the amount due from defendants for unpaid subscriptions for stock in the San Diego Street-Car Company to the payment of a judgment in favor of plaintiff, and against said corporation. The findings of the court, following the allegations of the complaint, show that execution was issued upon this judgment, and by the sheriff returned unsatisfied, because he could find no property of the corporation to apply to the satisfaction thereof. It is also alleged and found that the officers of the corporation have neglected and refused to make any assessment upon its stock, or to collect the balance remaining unpaid upon subscriptions for its stock. The plaintiff recovered judgment, and from this and an order denying their motion for a new trial the defendants appeal.

1. It is well settled that a judgment creditor who has exhausted his legal remedies against a corporation may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to come in and be made parties, the amount due upon unpaid subscriptions for stock, when the corporation neglects or refuses to collect the same. The action is sustained upon the principle that such unpaid subscriptions are a part of the capital stock of the corporation, and, like other debts due to it, constitute a fund to which creditors may look for the payment of their claims, and when the corporation neglects to call them in a court of equity will enforce their payment. *Sanger v. Upton*, 91 U. S. 56. The contention of appellants that this equitable remedy is superseded in this state by section 322 of the Civil Code, and that the only personal liability of the stockholder is that fixed by that section, is not tenable, and was so held by this court in *Harmon v. Page*, 62 Cal. 448. The remedy given by that section of the Code is purely statutory, and furnishes to creditors of corporations additional security by making the stockholder directly liable for his proportion of the corporate debts, and was not intended to diminish the assets of the corporation by releasing the stockholder from his indebtedness to the corporation on account of his unpaid subscription for stock, or to take away from the creditor the right to resort to a court of equity to compel its payment.

2. All the stockholders were not made parties defendant, and the objection to their non-joinder was taken both by demurrer and answer. The objection is not

well taken, although the rule contended for by appellants finds support in some of the decided cases. The precise question arose in the case of *Hatch v. Dana*, 101 U. S. 205, and it was there held, in an opinion, the reasoning of which seems to us to be conclusive, that it is not necessary that all the stockholders should be made defendants in this kind of an action. The court there say: "The liability of a stockholder for the capital stock of a company is several, and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. * * * It may be that, if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property, that is, out of its unpaid stock, there is not the same reason for requiring all the stockholders to be made defendants. In such a case no stockholder can be compelled to pay more than he owes." And this rule is followed by other courts. *Thompson v. Bank*, 19 Nev. 103, 7 Pac. Rep. 68; *Bartlett v. Drew*, 57 N. Y. 587; *Brundage v. Mining Co.*, 12 Or. 322, 7 Pac. Rep. 314.

3. It was not necessary for plaintiff to show that he had pursued his statutory remedy against the stockholders. The rule is that a creditor has a right to resort to the equitable remedy invoked by the plaintiff in this action after he had exhausted his legal remedies against the corporation, and this was shown in this case by plaintiff's judgment, and the return of the execution issued thereon unsatisfied.

4. The court did not err in refusing to allow defendants to show that the corporation was the owner and in possession of a large number of street-cars and other personal property, and a line of street railway and of valuable franchises within the city of San Diego. The purpose of this offered evidence was to show that plaintiff had not exhausted his legal remedy upon his judgment, but was not competent for that purpose. The rule upon this point is thus stated by Mr. Justice FIELD in *Jones v. Green*, 1 Wall. 332: "The court, when its aid is invoked, looks only to the execution, and the return of the officer to whom the execution was directed. The execution shows the remedy afforded at law has been pursued, and, of course, is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and from the embarrassments which would attend any other rule the return is held conclusive. The court will not entertain inquiries as

to the diligence of the officer in endeavoring to find property upon which to levy."

5. The appellants offered to show that the indebtedness for which plaintiff's judgment against the corporation was recovered arose upon a contract which was *ultra vires*. The evidence was excluded, and this ruling is assigned as error. The question is thus presented whether such judgment is conclusive upon the stockholders of the corporation in this action, and that it is without doubt. The object of this suit is to compel the corporation against whom the judgment was recovered to satisfy the same out of its assets, and it is not competent for the defendants, who are simply called upon to pay what they owe to the corporation in order that its obligations may be discharged, to reopen the question whether, upon the facts, the plaintiff ought to have had judgment against the corporation. The judgment was a conclusive determination of that fact as against the corporation and all persons in privity with it, and carries with it, without relitigating the facts upon which it is based, the undoubted right of enforcement against the property of the corporation, and that is all that is sought in this case. A corporation represents and binds its stockholders in all matters within the limits of its corporate power, so long as it acts in good faith and without fraud upon their rights; and, in the bringing and defending of suits affecting the rights and obligations of the corporation, it binds the stockholders as fully as in the making of contracts. The right to sue and be sued, to maintain and defend actions concerning corporate rights and corporate liabilities, is a power incident to every corporation. In this state it is not only conferred by statute, but is preserved by constitutional provision. Const. Cal. art. 12, § 4. And with this right of the corporation to maintain and defend actions concerning its corporate rights or liabilities the stockholder cannot interfere, except when the directors refuse to act, or are guilty of fraud in the maintenance or defense of the action. *Newby v. Railroad Co.*, 1 Sawy. 63; *Memphis City v. Dean*, 8 Wall. 73; *Ware v. Bazemore*, 58 Ga. 316; *Greaves v. Gouge*, 69 N. Y. 154; *Brewer v. Boston Theatre*, 104 Mass. 378. It must necessarily follow, from the nature of this corporate power, that a judgment against a corporation for an alleged corporate indebtedness is conclusive upon it, and of the right of the creditor to subject its property to the satisfaction thereof; and, in the absence of fraud, equally conclusive upon the stockholder when it is sought to satisfy the judgment out of the assets of the corporation in his hands. This was so held in *Marsh v. Burroughs*, 1 Woods, 471, Mr. Justice BRADLEY, in delivering the opinion of the court, saying: "The stockholders of the bank cannot ask to go behind the judgments rendered against the bank, and question the original cause of action, unless they can show collusion between the plaintiff and the bank, entered into for the purpose of defrauding the stockholders." And this view is also sustained by the following cases: *Glenn v.*

Williams, 60 Md. 93; *Henry v. Elder*, 63 Ga. 347; *Lehman v. Glenn*, (Ala.) 6 South. Rep. 44; *Stephens v. Fox*, 83 N. Y. 317; *Bank v. Chandler*, 19 Wis. 435. See, also, *Mor. Priv. Corp.* § 865.

6. The appellant Babcock offered to show upon the trial that he was the real owner of only 425 of the shares issued to him by the corporation, and that the others standing in his name on its books were owned by other parties, and that they were issued to him as a matter of convenience to enable him to negotiate a loan for such owners. The evidence was excluded, and, in our opinion, the ruling was correct. It seems to be well settled that one to whom stock is issued by the corporation, and who has the same placed in his name on the corporation books as the owner, is liable to the creditors of the corporation, as though he were the absolute owner; and this whether he was in fact a pledgee, agent, or trustee for the real owner. *Bank v. Case*, 99 U. S. 631; *Cook, Stocks*, §§ 249-253; *Thomp. Stocks*, § 223; *Thompson v. Bank*, 19 Nev. 103, 7 Pac. Rep. 68. The foregoing views dispose of all the questions presented by this appeal requiring special discussion. Judgment and order affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.

BAINES v. STORY *et al.* (No. 14,223.)¹

(*Supreme Court of California.* Sept. 23, 1891.)

Department 2. Appeal from superior court, San Diego county; W. L. FRENCK, Judge.

Hunsaker, Britt & Goodrich, Brunson, Wilson & Lamm, Works, Gibson & Titus, and Sprigg & Butler, for appellants. *F. W. Burnett and M. S. Babcock*, (*McNealty, Trippet & Neale*, of counsel,) for respondent.

PER CURIAM. The questions presented by this appeal are substantially the same as those involved in *Baines v. Babcock*, 27 Pac. Rep. 674, the opinion in which was filed this day. On the authority of that case the judgment and order herein are affirmed.

POTTER v. DEAR. (No. 14,272.)¹

(*Supreme Court of California.* Sept. 24, 1891.)

Department 2. Appeal from superior court, San Diego county; GEORGE PUTENBAUGH, Judge. *J. E. Denkin*, for appellant. *A. E. Cochran*, for respondent.

PER CURIAM. The points made by appellant have been determined adversely to his contention in the case of *Baines v. Babcock*, 27 Pac. Rep. 674, (this day decided;) and upon the authority of that case, and the cases cited in the opinion therein rendered, the judgment herein must be sustained. The judgment is affirmed.

(31 Cal. 304)

JUDSON *et al.* v. GAGE. (No. 14,037.)

(*Supreme Court of California.* Sept. 21, 1891.)

FINDINGS—SUFFICIENT TO SUPPORT JUDGMENT.

In an action on notes given by defendant in payment of his subscription to a fund to purchase a right of way for a railroad the court found on conflicting evidence that there was a substantial compliance with the terms of defendant's subscription that the railroad should be built on a certain line through defendant's land. Held, that such finding sustained a judgment for plaintiffs.

¹ Rehearing granted.

Department 2. Appeal from superior court, San Bernardino county; J. C. CAMPBELL, Judge.

Action by T. G. Judson against Matthew Gage on two promissory notes. Judgment for plaintiff. Defendant appeals. Affirmed.

Curtis & Otis and Geo. E. Otis, for appellant. *E. E. Rowell and Waters & Gird*, for respondents.

PER CURIAM. This is an action upon two promissory notes, alleged to have been made by defendant in payment of his subscription to a fund raised by citizens for the purpose of procuring a right of way and depot grounds for a certain railroad. Plaintiffs had judgment as prayed for, and defendant appeals from the judgment upon the judgment roll, which contains a bill of exceptions. We think that the complaint is good as against a general demurrer, and that the demurrer was properly overruled, although neither the complaint nor the answer is as certain and full as it should have been. Appellant further contends that the evidence was not sufficient to support the finding that the notes were given in payment of the subscription; and also contends that the subscription and the notes, which were given several months afterwards, should be considered as one transaction, and that the evidence is not sufficient to support the finding that the conditions of the subscription were complied with. But the evidence is overwhelming to the point that the notes were given in payment of the subscription. As to the other contention, the point made is that the railroad, by the terms of the appellant's subscription, was to be constructed through his land "on a line running parallel to Dr. Piersen's north line, and distant about 800 feet therefrom," and that the evidence fails to show that it was constructed on that line. There was some conflict of evidence on this point, but it warranted the court in finding that there was a substantial compliance with this condition. There was testimony to the point that the road was built substantially as described in the subscription, and that, if there was any slight variance from the rigid parallel line therein mentioned, such variance was with the knowledge and consent of the appellant, and that the road "did conform to Mr. Gage's ideas." We think that the findings support the judgment, and there are no other points necessary to be mentioned. The judgment is affirmed.

MEINERT v. SNOW.

(*Supreme Court of Idaho*. Sept. 17, 1891.)

BILL OF EXCEPTIONS — ACTION AGAINST ADMINISTRATOR — ADMISSIONS.

1. To entitle a bill of exceptions to be considered in this court it must be settled and signed by the district judge.

2. The admissions of an administrator, made in the allowance of a claim against an estate, although the claim is only allowed in part, bind the estate.

3. A telegram from P. to M., whom P. had employed to perform certain services, containing these words: "I will leave in about a week, di-

rect for the mine,"—held admissible in an action by M. against the administrator of P. for value of services, as tending to prove that the relations of employer and employee existed at the date of telegram.

(*Syllabus by the Court*.)

Appeal from district court, Custer county; C. O. STOCKSLAGER, Judge.

Action by Irad Meinert against George M. Snow, as administrator of the estate of Hiram Pearsons, deceased, for services rendered deceased in his life-time. Judgment for plaintiff, and defendant moved for a new trial, which was denied. Defendant appeals. Affirmed.

T. M. Stewart, for appellant. *Texas Angel*, for respondent.

HUSTON, J. This is an action brought by plaintiff against defendant, as administrator of the estate of Hiram A. Pearsons, deceased, for the value of services, alleged to have been rendered and performed by the plaintiff for the decedent during his life-time, and at his special instance and request. The appeal is from the order of the district court, overruling defendant's motion for new trial. The record purports to contain a bill of exceptions and statement on motion for a new trial. The bill of exceptions was never (as appears by the record) submitted to, settled, or signed by, the district judge, and cannot, therefore, be considered by this court as such.

One of the grounds of error upon which defendant predicates his motion for a new trial, and his appeal from the order of the district court denying the same, is the insufficiency of the evidence to support the verdict. The claim or demand sued upon in this action is for services alleged to have been performed by the plaintiff for the defendant during his life-time, and at his special instance and request. The facts, as they appear from the record, are substantially as follows: The decedent, Hiram A. Pearsons, and one J. G. Morrison were the owners of, and were engaged in working and operating, certain mines and a mill, located at Bonanza, Custer county, Idaho, in the year 1888. Morrison was present and attending in person to said operations and working. Pearsons was not present or personally attending to said operations or working, but on or about August 9, 1888, he employed the plaintiff, as the evidence shows, to go to said mines and mill, and look after his interests,—in fact to represent him there,—and gave the plaintiff the following letter, addressed to his (decedent's) partner, which letter was received in evidence without objection, and is as follows: "Challis, Idaho, Aug. 9, 1888. J. G. Morrison, Esq., Bonanza, Idaho.—Dear Sir: The bearer, Irad Meinert, I have retained to look after our mill and milling business, and for the better discharge of his duties, which are to commence at once, I wish that any man he may suggest therefor removal or employment of will be entertained by you. I shall expect him to have the freedom of our mines, books, and business, and, so long as he draws his entire salary from me, to be subject only to removal by me. Instructions as to his

duties I have given him. Trusting that he will meet with a courteous reception from you, I am, yours, etc., H. A. PEARSONS." James Hooper testifies that Pearsons told him that "he was going up that afternoon to hire Meinert to look after his interests until the next summer." Hooper further testifies: "I knew Meinert was sent in there afterwards. He was there directly afterwards." Meinert was permitted to testify, without objection, as follows: "Pursuant to the employment indicated in that letter, I went to the mines and mills of Morrison and Pearsons, and went to work in the mill. Mr. Morrison was there, and I continued until Mr. Morrison interfered with my employment of the men. After that I told him he could take charge of the men; that I would have nothing more to do with them. I remained there, looking after Mr. Pearsons' interests in the business, until the time of his death, July 20, 1889." Plaintiff's counsel here offered in evidence the following telegram, received by plaintiff from Pearsons: "Chicago, Ill., June 7th. 1889. Irad Meinert, Bonanza, Idaho, via Ketchum: I will leave in about a week, direct for the mine. H. A. PEARSONS." To the introduction of which defendant objected, upon the ground that it was irrelevant and immaterial, which objection was overruled by the court, and which ruling is assigned as error by appellant. From the character of the employment of plaintiff, as indicated by the letter from Pearsons to Morrison and the testimony of Meinert, we think the admission of the telegram was proper, as tending to show that such relation had continued up to that date. The plaintiff further testified, without objection, that "from the 8th day of August, 1888, to the 20th day of July, 1889, (the date of Mr. Pearsons' death,) he did not leave his employment; and that he had not been discharged by Mr. Pearsons; and that he was not under any employment of, or under any contract of, Mr. Morrison. He had no understanding with Morrison whereby Morrison was to keep his time or pay him. He had no control whatever over my wages or time." The only evidence which the record shows on the part of the defendant was the testimony of J. G. Morrison, the partner of Mr. Pearsons, who testified that plaintiff brought to him the letter from Pearsons, given above; that plaintiff worked 98 days, and no more. Although, as we have before stated, the record does not purport to contain all of the evidence, we think from that shown there is a clear preponderance in favor of the verdict. The appellant contends that "there was and is no legal evidence of a price for plaintiff's services." The plaintiff, as required by statute, presented to the administrator his claim against the estate of Pearsons, setting forth the time of service and the price, as he alleges, agreed to be paid him by Pearsons for such service. The administrator assented to the price, but refused to allow plaintiff for more than 98 days' service, which action of the administrator was subsequently approved by the probate judge. This was an admission by the administrator of the amount per month

agreed by Pearsons to be paid plaintiff; and, having been made by the administrator while engaged in the discharge of his duties as such, it binds the estate to that extent. *Church v. Howard*, 79 N. Y. 415; *Faunce v. Gray*, 21 Pick. 243; *Whiton v. Snyder*, 88 N. Y. 306; *Hill v. Buckminster*, 5 Pick. 391; 7 Amer. & Eng. Enc. Law, 374. We find no error in the instructions given by the court, or in its refusal to give those proposed. As all the questions raised by defendant's exceptions to the refusal of the district court to give the instructions asked have been passed upon by us in the consideration of the case as given, it is unnecessary to again repeat them. The order of the district court overruling the appellant's motion for a new trial is affirmed. Costs awarded to respondent.

SULLIVAN, C. J., concurs. MORGAN, J., did not sit in this case.

HILLARD, District Court Clerk, v. SHOSHONE COUNTY. (No. 41.)

(Supreme Court of Idaho. Sept. 12, 1891.)

CLERK OF COURT—COMPENSATION—SELF-OPERATIVE STATUTES.

1. Section 16 of article 5 of the constitution provides for the election of a clerk of the district court for each county. Section 6 of article 18 provides that the clerk of the district court shall be *ex officio* auditor and recorder. Section 7 of the same article provides that the compensation of this officer, for all the duties he shall perform as such officer, shall not exceed \$3,000, nor fall below \$500, for any one year. *Held*, that these sections are self-operative; that the clerk of the district court, as such clerk, and as auditor and recorder, for the performance of all his duties therein, cannot receive, for his own use, a greater sum than \$3,000 for any one year; and such compensation must be derived from fees and commissions.

2. If such fees and commissions fall below the minimum, then the county must make up such deficiency.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; JUNIUS HOLLEMAN, Judge.

Action by Barry N. Hillard, clerk of the district court, against Shoshone county for compensation as such clerk. Judgment was rendered for defendant. Plaintiff appeals. Affirmed.

Woods & Heyburn and J. Brumback, for appellant. *Chas. O'Neill, A. Hagan, and The Attorney General*, for respondent.

MORGAN, J. On the 14th day of April, 1891, the plaintiff presented to the board of county commissioners of Shoshone county his bill for services rendered as clerk of the district court for Shoshone county, as follows:

March 31st, 1891. To salary as clerk of district court, for the quarter ending	
March 31, 1891.....	\$125 00
To certified copies of sundry indictments, commitments, journal entries, and judgments, 524 folios, at 20 cents per folio....	104 80

Amounting in all to the sum of..... \$229 80

—Verified in due form by the plaintiff.

The said board, after duly considering the said bill, entered the following order: "At a regular meeting of the board held

the 14th day of April, 1891, the within bill of Barry N. Hillard, made out under the provisions of the Revised Statutes of Idaho, is by the board of county commissioners of said county considered correct; but the same is hereby disallowed, for the reason that the board of county commissioners think that all officers work under the constitution of the state of Idaho, and laws enacted thereunder. C. KRAUS, Chairman." The plaintiff thereupon appealed from the action of said board, and from said order, to the district court of the first judicial district of the state of Idaho, in and for Shoshone county. On the 4th day of June, 1891, the said court affirmed the order of the board of county commissioners aforesaid, disallowing said bill. From the judgment of the said court the plaintiff brings the cause to this court.

In the argument of appellant's counsel, it is stated that the only question involved in this appeal is, does section 7, art. 18, of the constitution, make any provision for a salary to be paid to the auditor and recorder? and then proceeds in the argument to show that the offices of clerk of the district court and auditor and recorder, though held by one person, are separate and distinct offices, and cites a list of authorities from the California Reports tending to sustain that position. We do not think this is the real point in this case. The real question is, was it the intention of the framers of the constitution that the person who held the offices of clerk of the district court and auditor and recorder, both offices being united in one person, should not receive more than the sum of \$3,000, nor less than \$500, for his services in both positions, and have they so expressed themselves in the constitution? Section 16 of article 5 of the constitution is as follows: "A clerk of the district court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the legislature, and shall hold his office for the term of four years." It will be noticed that this officer does not hold the same office that was occupied by the clerk of the district court before the admission of Idaho as a state. He was then the clerk of the district court for the first, second, or third district, as the case might be, consisting of several counties, and was appointed by the judge. Now he is clerk of the district court for a county only, and is elected by the people. It will be noticed, also, that the section of the constitution quoted above is operative the moment the constitution was approved and the state admitted by congress. This section provides for the first election of clerk. Section 6 of article 18 of the constitution provides that "the clerk of the district court shall be *ex officio* auditor and recorder." This clause in the constitution is also self-operative, and applies to the clerk elected at the first election as well as those thereafter elected. The clerks of the district courts in the several counties did not hesitate in considering both these clauses self-operative, and assumed all the duties of both offices, if we call them separate offices, as soon after their qualification as they could lawfully

get possession thereof, and very properly did so. Thus far the constitution has provided for a clerk of the district court for each county, and has made this officer *ex officio* auditor and recorder. He is still one person and one officer, although he holds two or three distinct and separate offices, if we please to call them so, and performs the duties of all. We must not confound the office with the officer or person who holds the office. The compensation is not paid to the office of district clerk, nor to the office or offices of auditor and recorder, but to the one person or officer who holds all these offices, and performs the duties thereof. The constitution having created this officer, and directed what positions he shall hold and the duties he shall perform, then proceeds to provide for his compensation in section 7, substantially as follows: "The clerk of the district court, who is auditor and recorder, shall receive annually, as compensation for his services, not more than three thousand dollars and not less than five hundred (500) dollars." This section, in effect, says that the officer, meaning the person who is clerk of the district court, and who is auditor and recorder, and performs the duties of such offices, shall receive as his compensation, etc. It would seem that this reading, which is strictly in accord with the sense and grammatical construction of the section, would make the meaning of these sections of the constitution unmistakable. This section is also self-operative. It does not provide a salary for this officer, and no salary is anywhere in the constitution provided for either position, but fixes a limitation providing that he shall not receive more than \$3,000 for any one year, and not less than \$500, and provides no means of payment, but, like the other sections referred to, goes into operation as soon as the officer qualifies and enters upon the duties of his office. This section would be operative at once, although the legislature did not provide a schedule of fees for five years after the section went into effect. Its operation does not depend at all upon the amount of fees the officer may charge and receive, nor the source from which he receives them. Section 8 of the same article then proceeds to direct how this officer shall be paid, not a salary, but the compensation provided in section 7, and further provides that all fees and commissions that he receives, under whatsoever law he may receive them, in excess of the maximum, shall be paid into the county treasury, and, in case his fees in any one year shall not amount to the minimum, the deficiency shall be paid him by the county. It will be seen that, in the opinion of the court, the clerk of the district court being *ex officio* auditor and recorder, and performing the duties of both or all three of these offices, cannot receive, as compensation for his own use, for the performance of all of said duties, any sum in excess of \$3,000 for any one year; and this compensation he is to receive in fees and commissions, with the single exception that, if such fees and commissions fall below the minimum, the county shall make up the compensation to that amount. The judg-

ment of the district court is affirmed. Costs are awarded to the respondent.

SULLIVAN, C. J., and HUSTON, J., concur.

HILLARD v. AUDITOR OF SHOSHONE COUNTY.

(*Supreme Court of Idaho*. Sept. 12, 1891.)

Appeal from district court, Shoshone county; JUNIUS HOLLEMAN, Judge.

Action by Barry N. Hillard against the auditor of Shoshone county for services as clerk of the district court. Judgment for defendant. Plaintiff appeals. Affirmed.

Woods & Heyburn and J. Brumback, for appellant. *Chas. O'Neill, A. Hagan, and The Attorney General*, for respondent.

MORGAN, J. The question involved in this cause being fully discussed and determined in cause No. 41, between the same parties, (27 Pac. Rep. 673,) the judgment of the court below, herein rendered, is affirmed for the reasons there given. Costs awarded to respondent.

SULLIVAN, C. J., and HUSTON, J., concur.

PEOPLE ex rel. LINCOLN COUNTY v. GEORGE.

(*Supreme Court of Idaho*. Sept. 16, 1891.)

NEW TRIAL — ORIGINAL PROCEEDING IN SUPREME COURT.

Motion for new trial is not a proper proceeding in the supreme court to obtain a rehearing on an issue of law, when said court is proceeding under its original jurisdiction.

(*Syllabus by the Court*.)

Petition for writ of mandate by the people of the state of Idaho on the relation of Lincoln county to Wesley B. George, defendant. Motion for new trial was granted plaintiff. Defendant moves to strike the motion from the files and the cause from the calendar. Granted.

William Ware Peck and Texas Angel, for relator. *R. Z. Johnson and S. B. Kingsbury*, for defendant.

MORGAN, J. A petition for writ of mandate was heretofore filed in this court by the relator against the defendant. Very able and lengthy arguments were heard at the April term, at Lewiston. The court having, by agreement of counsel, taken the cause under advisement, decided the same at Boise City, on May 6, 1891. Opinions, not then being fully prepared, were afterwards filed on the 3d day of June, 1891, (26 Pac. Rep. 983;) and this motion for new trial was placed on file June 12th. Counsel for defendant now move to strike said motion from the files, and said cause from the calendar. In the argument for the plaintiff we have been referred to section 38C2, subd. 8, Rev. St., which is as follows: "Every court has power to amend and control its process and orders, so as to make them conformable to law and justice." No one appears to dispute it, not even this court, but the line of argument, which would make this a pertinent authority in support of this motion for new trial, does not commend itself to the court. The terms "process" and "orders" have a well-defined meaning in law, and differ very materially from final judgments. The same may be said with reference to section 4368, also cited by plain-

tiff, which is: "An issue of law must be tried by the court, unless referred by consent." The method of trying an issue of law is by hearing the argument and examining authorities cited. That the word "tried" was used, in our opinion has no special significance, and simply means, heard and determined. In the decision upon petition for rehearing, which was rendered by the court in the case of *People v. Coon*, 25 Cal. 635, Mr. Justice CURREY seems to have been quite careful as to the language he used. He says: "Our judgment in the case was that of a court of original jurisdiction, and, for the correction of any error which we may commit in such cases, the party aggrieved must pursue the course prescribed by the practice act in like cases, arising in the district courts, so far as may be." It is unnecessary to refer to the particular provisions of the act, specifying the course to be pursued in order to obtain a re-examination of a case by the same court of original jurisdiction, after one decision made therein; the course prescribed by the statute has not been followed, etc. If the learned judge does not mean that the party deeming himself aggrieved by the decision of the supreme court, in a case where said court is exercising its original jurisdiction, may move for a new trial in that court, then it is difficult to understand what he does mean. The language used is almost identical with that used in our statute and in that of California in the definition of a "new trial." The statute is: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision." In the decision the court says: "It is unnecessary to refer to the provisions of the act, specifying the course to be pursued in order to obtain a re-examination of a case by the same court." This suggestion seems never to have been followed in any instance by the supreme court of California. In the case of *People v. Holloway*, 41 Cal. 409, the issues of fact were sent to the district court for trial, motion for new trial was made in the district court, and the supreme court say that the motion should be made in the supreme court. A lasting peace was given to that decision, and to the whole matter, by the legislature of California in section 1092, Code Cal., and in our statute by section 4984, which is as follows: "The motion for a new trial must be made in the court where the issue of fact is tried." Our statute does not contemplate or prescribe any method for obtaining a new trial, except for the re-examination of an issue of fact in the same court. The statute says: "A new trial is a re-examination of an issue of fact, in the same court, after a trial and decision by a jury or court or by referees." Rev. St. Idaho, § 4438. Section 658, Code Civil Proc. Cal., is the same. See, also, *Knight v. Roche*, 56 Cal. 17; *Benjamin v. Stewart*, 61 Cal. 607. A motion for a new trial is an application for a re-examination of the issues of fact. *Wittenbrock v. Bellmer*, 62 Cal. 560. No new trial can be had, unless there is to be a re-examination of an issue of fact. *Knight v. Roche*, 56 Cal. 17; *Benjamin v. Stewart*, supra; *Wittenbrock v. Bellmer*, supra.

The matter of new trial is wholly statutory. *Benjamin v. Stewart*, 61 Cal. 608. When there are findings of fact in a trial before the court, which are not set aside,—not complained of,—there is no new trial as to them. *Wittenbrock v. Bellmer*, supra. A petition for a *mandamus* was filed in this court. To that a demurrer was filed. This admitted all the facts properly pleaded. Therefore there was no issue of fact. If no issue of fact, there can be no new trial. There is no method of obtaining a rehearing on an issue of law, once determined by the district court, pointed out in our statute, except by appeal. This does not apply to the supreme court. The supreme court does point out, by its rules, a method for obtaining a rehearing therein. Whether that rule applies to cases of original jurisdiction we are not now called upon to decide. The motion of defendant is allowed. Costs awarded to defendant.

HUSTON, J., concurs.

(11 Mont. 164)

SPENCER v. MONTANA CENT. RY. CO.

(Supreme Court of Montana. Sept. 10, 1891.)

FIRES SET BY LOCOMOTIVES — COMBUSTIBLES ON RIGHT OF WAY.

1. A complaint against a railroad company for destroying the property by fire alleged that "on account of defendant not keeping free from dry and dead grass and other such combustible material its right of way, * * * and on account of not providing suitable spark-arresters," the defendant's locomotive emitted sparks which set fire to the dry grass on the right of way, "which fire was then and there communicated to the said standing grass in plaintiff's inclosure, and to the said hay and wood," and burned up all of said property. Held that, where no demurrer was raised, but defendant answered, and evidence was introduced as to how the fire was communicated to plaintiff's property, the above averment will be held sufficient on appeal, under Code Civil Proc. Mont. § 100, which requires pleadings to be "liberally construed."

2. Comp. St. Mont. 1888, div. 5, § 719, provides that any railroad company failing to keep its right of way free from dead grass and other combustible material "shall be liable for any damages which may occur from fire emanating from operating the railroad, and a neglect to comply with the provisions of this act in keeping clear any railroad track." Held, that an instruction that on the railroad company's failure to keep its track clear of dry grass, etc., as required, the statute makes it "liable for any damage that may occur from any fire emanating from operating the railroad," was error, since it failed to charge that the damage which will warrant recovery must have resulted from two causes,—the operating of the railroad, and the failure to keep the right of way clear of combustible matter.

3. In order to warrant recovery under this statute it must be shown that there was sufficient combustible material upon the right of way to indicate to common prudence a danger from fire, and a refusal so to charge is error.

Appeal from district court, Cascade county: CHARLES H. BENTON, Judge.

Action by John Spencer against the Montana Central Railway Company for loss by fire. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

McCutcheon & McIntire, for appellant. Henri J. Haskell and Taylor & Lewis, for respondent.

HARWOOD, J. This action was brought to recover the sum of \$1,220 damages alleged to have been sustained by plaintiff by reason of the wrongful destruction of 120 tons of hay, 15 cords of wood, and a quantity of grass standing in a field, the property of plaintiff, by fire emitted from defendant's locomotive engine, and communicated to said property by means of dry grass and other combustible matter which was carelessly and negligently allowed by defendant to accumulate and remain on its right of way opposite the place where said property was situated near said right of way, at the time the fire occurred. Appellant contends that the complaint fails to state facts sufficient to constitute a cause of action, and points out as the defect that plaintiff "alleges that the fire was set in grass upon defendant's right of way, but nowhere alleges that by reason thereof or that thereby the fire was communicated to the property of the plaintiff." After alleging the ownership, description, and situation of the property alleged to have been destroyed, the following averments are set forth in the complaint: "That at said time and place the defendant's right of way of said railroad (not exceeding one hundred feet on either side of said railroad bed) was covered with large quantities of dead and dry grass and other combustible material. That on account of defendant not keeping free from dry and dead grass and other such combustible material its right of way aforesaid, not exceeding one hundred feet on either side of its road-bed, and on account of not providing suitable spark-arresters and other machinery in operating said road, and by the negligence and carelessness of its officers, agents, servants, and employees in managing the same, the defendant's locomotive did at said time and place, and while passing plaintiff's property as above described, emit sparks of fire which set fire to the dead and dry grass on defendant's right of way, which fire was then and there communicated to the said standing grass in plaintiff's inclosure, and to the said hay and wood, and did then and there burn up and totally destroy all of said" property. The language employed in the complaint to allege the communication of fire from defendant's engine to plaintiff's property cannot be approved. It is subject to the criticism of appellant's counsel, as being ambiguous or uncertain in the averment that the defendant's locomotive emitted sparks which set fire to said dry grass on defendant's right of way, "which fire was then and there communicated to said standing grass in plaintiff's inclosure, and to said hay and wood." The ambiguity lies in the fact that the averment does not show with certainty how the fire was communicated to plaintiff's property. The objectionable averment would undoubtedly have sustained a demurrer on the ground of ambiguity or uncertainty, but no such demurrer was offered by appellant at the proper time. If there is only an ambiguity or uncertainty in the averment this cannot be taken advantage of for the first time in this court. The attempted statement of some essential facts

might be found so uncertain or ambiguous as to justify the discarding of the averment altogether. Then it could be said, as appellant contends here, that the pleading fails to state a cause of action. We can conceive of such a case, but the ambiguity would be an extraordinary one. The averment in the complaint which appellant points out as objectionable is aided somewhat by that which goes before, namely, that "on account of defendant not keeping free from dry and dead grass and other such combustible material its right of way aforesaid, * * * and on account of not providing suitable spark-arresters," etc., fire was emitted from defendant's engine, and "set fire to said dead and dry grass on defendant's right of way, which fire was then and there communicated to said standing grass in plaintiff's inclosure, and to said hay and wood." So we think the fair intentment of the averment as it stands, considered altogether, is that, on account of "the dry grass and other combustible matter" on defendant's right of way, and the want of proper spark-arresters on the locomotive engine; or thereby, or by reason thereof, the fire was communicated from said engine to said dry grass, and thereby to the standing grass and wood and hay of plaintiff. Although somewhat ambiguous and uncertain, we think that is the fair and reasonable intentment of the averment in question. If such intentment can be reasonably found in the terms used in the averment, we should so construe it. Code Civil Proc. § 100;¹ Bliss, Code Pl. (2d Ed.) § 314. An ambiguous averment is also one which may be cured by answer or proof. Bliss, Code Pl. (2d Ed.) §§ 435-442. In this case appellant answered and defended at the trial, and the testimony as to how the fire which destroyed the property described was communicated thereto is given in detail by the witnesses.

We now pass to the consideration of the assignment of errors alleged to have been committed by the court in giving instructions to the jury, and in refusing to give instructions requested by appellant. Appellant complains that the court erred in instructing the jury as to the effect of section 719, fifth division, of the Compiled Statutes. In this regard the court called the attention of the jury to said statute requiring railroad companies to keep the right of way of their roads in this state free from dead grass, weeds, or any dangerous or combustible material; and instructed the jury as to the effect of said statute in the following language: "It makes it the duty of the railroad company to keep their track and their right of way free and clear from any such dead grass, weeds, or other dangerous or combustible material, and upon failure on their part so to do it makes them liable for any damage that may occur from any fire emanating from operating the railroad. It also makes the fact, if it is shown to be a fact, that such dead grass or other dangerous or combustible material is

upon the track or upon the right of way, *prima facie* evidence of negligence on the part of any railroad company." This instruction appellant contends is erroneous, because it leaves out of the consideration of the jury the fact as to whether the negligence of the railroad company in failing to keep its right of way free and clear of dry grass, weeds, or other combustible material was the cause of, or contributed to, the damage complained of; in other words, that such instruction left out of consideration the fact as to whether the dry grass or weeds, etc., negligently allowed to remain on the right of way, was the means of communicating fire to the property alleged to have been destroyed through the negligence of defendant. This assignment of error must be sustained. The court instructed the jury, in the instruction recited above, in effect, that upon a failure of the defendant to keep its track free and clear of dry grass, weeds, etc., as required, the statute "makes them liable for any damage that may occur from any fire emanating from operating the railroad." This was plainly error. The full provision of the statute is not stated in said instruction. It provides that "any railroad company or corporation so failing to keep their railroad track free and clear as above specified, and on each side thereof, shall be liable for any damages which may occur from fire emanating from operating the railroad and a neglect to comply with the provisions of this chapter in keeping clear any railroad track and either side," etc. It is observed that the court in part used the language of the statute, but stopped short of stating the two elements which the statute declares shall combine to fasten the liability on the defendant; that is, a liability for "damage which may occur from fire emanating from operating the railroad, and a neglect to keep the right of way clear of combustible material. If these conditions set forth by statute are relied upon to sustain an action for damages it must be shown that the damage resulted from the two causes stated,—operation of the railroad, and the failure to keep the right of way clear of combustible matter. This clearly implies that the combustible matter must have operated as an agency in communicating to plaintiff's property the fire emanating from operating the railroad. Counsel for respondent admits that, if the negligence relied on by him to fasten the liability on appellant for the damage alleged was the failure to keep its right of way free and clear of combustible matter as required by statute, then it must be alleged and proved that through such negligence the damage was wrought. Therefore they contend, and we have held, that the fair import and intentment of the allegations of the complaint was that through or by reason of said dry grass and weeds which plaintiff alleged was on the right of way of defendant at the time and place the fire emitted from defendant's engine was communicated to the property of plaintiff, and the same was thereby destroyed. Now, if it was necessary, in order to show the negligence of defendant, and that through such neg-

¹ Code Civil Proc. Mont. § 100, provides that pleadings shall be "liberally construed."

ligence the alleged damage was done, to allege and prove the existence of the dry grass on the right of way, and that thereby fire was communicated from defendant's engine to plaintiff's property, then it was necessary for the jury, in finding their verdict against the defendant, to find upon that ground, to consider whether this alleged negligence was the cause of the damage; that is, whether the fire was communicated from defendant's engine, through said dry grass or combustible material, to the property destroyed. But the instruction above recited leaves out of consideration the question as to whether the dry grass or other combustible matter on the right of way was instrumental in destroying the property, as alleged in the complaint. If it was not instrumental in such destruction, then the negligence of allowing it there had no part in consummating the damage complained of; nor was it thereby that the property was destroyed, but by other cause. The statute provides that the liability follows where the destruction occurs from fire emanating from operating the railroad, "and a neglect to comply with the provisions of this chapter in keeping clear the right of way." The destruction must occur by means of these two agencies,—the operation of the road, and the presence of combustible material on the right of way,—in order to make out a liability on these points of negligence. The instruction under consideration assumed that the mere existence of dead grass, weeds, or combustible material on the right of way fastened the liability on the defendant for the damage alleged, without considering whether such combustible material was instrumental in effecting the destruction of the property as alleged in the complaint and as provided in the statute. Nowhere in the instructions did the court recur to the subject, and supply the omission apparent in the instruction above quoted.

These observations are fully in accord with the case of *Diamond v. Railroad Co.*, 6 Mont. 580, 13 Pac. Rep. 367, although the particular point before us was not involved in that case. In that case it is said: "The jury found as fact that the fire in question came from one of the defendant's trains, and was caused by the neglect of the defendant in failing to keep its right of way free from dead grass, and that there was sufficient thereof on said right of way in the vicinity of defendant's ranch to make it apparent to a person of ordinary prudence that there was danger of fire therefrom. * * * If there was neglect in this regard, whereby the fire occurred, and the damage was done, it was not very material how perfect and complete the road was equipped in other respects, or how faithful and efficient were its officers." In the case at bar the court refused to give, upon appellant's request, the following instruction: "If the plaintiff relies upon the fact that the fire started upon defendant's right of way, then he must prove that there was such a sufficiency of combustible material, dead weeds and dry grass, upon such right of way at the place where the fire is alleged to have started as to indicate dan-

ger from fire to common prudence, and, failing to prove this, no liability can arise therefrom." The refusal of the court to give said instruction is assigned as error. We are of the opinion that this instruction, or one embodying the ideas therein set forth, should have been given. But no instruction to that effect was given by the court. In addition to the extracts hereinbefore quoted from the *Diamond Case*, it was observed by the court in that case that "the statute requiring railroad companies to keep their track and right of way free from dry grass, weeds, or other combustible material should receive a reasonable construction. It is a matter of common observation that generally, in Montana, the right of way of railroads has upon them more or less dry grass and weeds; but, if the quantity is not sufficient to indicate danger from fire to common prudence and ordinary care, then no liability could arise therefrom. The instructions as given cover this proposition." No doubt counsel for appellant predicated the instruction asked for upon the views expressed in the *Diamond Case* as to the proper construction of said statute. These views are in no way questioned by respondent's counsel as not conforming to reason and authority. We fully approve them, and therefore conclude that the court erred in refusing to give the instruction asked as above recited, or one of like effect. That instruction is qualified by its own terms. It states that, "if the plaintiff relies upon the fact that the fire started on defendant's right of way," etc. This is proper. It does not assume that those points of negligence are the only ones which may be relied on; but says that, if such negligence is relied on, the fair construction of the statute, as explained in the *Diamond Case*, should be the rule in this case. But in the case at bar the court refused to give an instruction covering the very proposition in this regard which had been approved in the *Diamond Case*. Judgment, therefore, must be reversed, and the case remanded, with direction to sustain appellant's motion for a new trial, and it is so ordered.

BLAKE, C. J., and DE WITT, J., concur.

(3 Wyo. 470)

BOARD OF COUNTY COM'RS CROOK COUNTY
v. ROLLINS INVESTMENT CO.

(*Supreme Court of Wyoming*, June 11, 1891.)

COUNTIES—FUNDING OF INDEBTEDNESS—LIMITATION—STATUTES—REPEAL BY ADOPTION OF CONSTITUTION—REFERENCE TO SUPREME COURT—DIFFICULT QUESTION.

1. Act 1st Sess. 49th Cong. c. 818, p. 171, § 4, provides that no county in any of the territories shall ever become indebted to any amount exceeding 4 per cent. of the taxable property of the county, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness. Sess. Laws Wyo. 1890, c. 28, provides for the funding of county indebtedness, but limits the total amount of bonds to 4 per cent. of the taxable property of the county as determined by the last assessment for county and territorial purposes preceding the issuance of such bonds. Const. Wyo. art. 16, § 2, provides that no county of the state shall create any indebtedness exceeding 2 per cent of its taxable property as shown by the last preceding

general assessment: "provided, however, that any county * * * may bond its public debt existing at the time of the adoption of this constitution in any sum not exceeding four per centum of the assessed value of the taxable property in such county * * * as shown by the last general assessment for taxation." *Held*, that where indebtedness had been lawfully contracted from time to time under the territorial régime, and on July 10, 1890, the date of the adoption of the state constitution, was within the 4 per cent. limit, the county was authorized to issue funding bonds to an extent not exceeding 4 per cent. of its taxable property as shown by the general assessment for 1889.

2. Sess. Laws Wyo. 1888, c. 66, § 1, providing that, when an important or difficult question arises in the district court, the judge of that court may, on motion of either party, or upon his own motion, cause the same to be reserved to the supreme court, is still in force under the provision of the state constitution that all territorial laws not repugnant thereto shall continue in force until they expire by their own limitation, or shall be altered or repealed by the state legislature; and a question as to the validity of \$55,000 worth of Crook county bonds, bearing date May 1, 1891, is sufficiently important and difficult to authorize its reference to the supreme court.

Case reserved from district court, Laramie county; RICHARD H. SCOTT, Judge.

Action by the board of the county commissioners of the county of Crook, state of Wyoming, against the Rollins Investment Company to compel the defendant company to accept and pay for certain bonds according to contract. Reserved case.

Danl. E. Parks, M. Nichols, Co. Atty., W. S. Metz, and P. G. Ryan, for plaintiff. Potter & Burke, for defendant.

CONAWAY, J. This cause was submitted without action to the district court of the first judicial district upon an agreed statement of facts, under section 2570 of the Revised Statutes of Wyoming. Two questions arising in this proceeding have been reserved by said court, and sent to this court for its decision, under chapter 66 of the Session Laws of 1888.

On the 10th day of July, A. D. 1890, the county of Crook had an outstanding, unpaid, legal indebtedness, consisting of county warrants, of \$55,000. On the 25th day of August, A. D. 1890, the board of county commissioners of said county of Crook, at a regular meeting at the county-seat of the county, in due time, form, and manner, ordered that said debt of \$55,000 be funded, and that the funding bonds of said county, bearing 6 per cent. annual interest, be issued in exchange for the same, in accordance with the provisions of chapter 27 of the Session Laws of Wyoming of A. D. 1888, as amended by chapter 28 of the Session Laws of 1890. These bonds were actually issued, bearing date May 1, 1891. After due advertisement of the sale of said bonds, the defendant, the Rollins Investment Company, became the purchaser of the bonds at par, agreeing to take and pay for them if valid. This defendant company now refuses to perform its said contract, and refuses to accept and pay for said bonds as agreed, alleging as a reason for such refusal that the bonds are not valid. The first section of chapter 66 (Sess. Laws 1888) reads as follows: "Section 1. When an important

or difficult question arises in an action or proceeding pending before the district court in any county of this territory the judge of said court may, on motion of either party, or upon his own motion, cause the same to be reserved and sent to the supreme court for its decision." It should be remembered that the laws of the territory of Wyoming in force at the time of her admission as a state, and not repugnant to the constitution, are continued in force by constitutional provision until they expire by their own limitation, or shall be altered or repealed by the legislature. This section is not so repugnant, and has not so expired, and has not been altered or repealed.

The single question involved here upon which the answer to both questions sent to this court for its decision depends, is the question of the validity of these bonds. It must be presumed that the judge of the district court found the question either important or difficult or both. It is very questionable whether this finding is not conclusive. If it is not, we certainly agree with the judge of the district court that the question is an important one. It is important not only to the parties to this proceeding, but to other counties of the state, affecting seriously their power and ability to administer local government effectively and with economy; and, through counties so situated as to be affected by the determination of this question, the question becomes important to the state, and to all of its people, and, inasmuch as attorneys of known standing and ability differ upon the question, it would seem to be also a difficult question. Its evident public importance is such that we have considered it at once in advance of all other matters before us.

It is contended that the amount of the bonds is in excess of the amount that the county of Crook could lawfully issue. The legal enactments under which this contention is made are found partly in an act of the first session of the forty-ninth congress of the United States, (chapter 818, p. 171, § 4,) and which went into effect July 30, 1886, partly in the laws enacted by the legislature of the territory of Wyoming, and partly in the constitution of the state. The section in the act of congress referred to reads thus: "That no political or municipal corporation, county, or other subdivision in any of the territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county, or subdivision, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness, and all bonds or obligations given in excess of such amount shall be void. That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law; nor to prevent

any territorial legislature from legalizing the acts of any county, municipal corporation, or subdivision of any territory as to any bonds heretofore issued or contracted to be issued." Within this limit it was competent for the legislature of the territory of Wyoming to regulate the indebtedness of the counties, which it afterwards did. Chapter 27 of the Session Laws of 1888 provides for the funding of county indebtedness by the issue of negotiable coupon bonds of the county, but limits the total bonded indebtedness to 3 per cent. of the total assessed valuation of the property in such county as determined by the last annual assessment for county and territorial purposes, previous to the issue of such bonds. This was amended by the Session Laws of 1890, c. 28, to the effect that "the total amount of bonds issued at any time under the provisions of this act, together with the existing indebtedness of such county, shall not exceed four per centum of the total assessed valuation of the property in such county as determined by the last assessment for county and territorial purposes preceding the issuance of such bonds." Approved March 5, 1890. It will be observed that the limit of indebtedness which a county might incur after July 30, 1886, including debts of all classes, bonded or otherwise, was not to exceed four per cent. of the value of the taxable property in the county, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness; and so the law stood when the constitution went into effect by the admission of the territory as a state, on the 10th day of July, A. D. 1890. In article 16 of the constitution we find the following provision: "Sec. 3. No county of the state of Wyoming shall in any manner create any indebtedness exceeding two per centum on the assessed value of taxable property in such county as shown by the last general assessment preceding: provided, however, that any county, city, town, village, or other subdivision thereof in the state of Wyoming may bond its public debt existing at the time of the adoption of this constitution in any sum not exceeding four per centum on the assessed value of the taxable property in such county, city, town, village, or other subdivision as shown by the last general assessment for taxation."

It was held in the case of the Board of the County Commissioners of Carbon County against the Rollins Investment Company¹ that the time of the adoption of the constitution, within the meaning of this section, is the date of the admission of Wyoming territory as a state of the Union, on July 10, A. D. 1890. The words "adoption of the constitution" are sometimes used as meaning the final passage of the constitution by the constitutional convention, and the signing of the instrument by the members. The expression is also sometimes used as meaning the subsequent ratification of the constitution by the vote of the people. But the real

final act of adoption by which all preceding acts of adoption took effect was the admission of the territory as a state, July 10, 1890. Not till then did we have a real, subsisting constitution of a state. Not till then was the proposed constitution made an actual, effective one. Not till then did it have the force of law. Not till then could it be said to have been adopted as a constitution by anybody. Prior to that it was a mere proposition.

Such was the state of the law. The further material facts of the agreed case are that all of the indebtedness of Crook county existing at the time of the adoption of the constitution had been from time to time lawfully contracted by said county under the territorial *régime* and within the above-mentioned 4 per cent. limit, and was a legal, valid, outstanding indebtedness; that the assessed value of the taxable property of the county of Crook for the year 1889 was \$2,278,476.50, and that the indebtedness of the county on July 10, 1890, was less than 4 per cent. of this amount; that the assessed value of the taxable property of said county for the year 1890 was about \$1,500,000, and that the said indebtedness of said county was more than 4 per cent. of that amount; but that said last-mentioned assessment was not in fact returned by the assessor of said county, or equalized by the board of county commissioners, until after July 10, 1890; that the county of Weston was duly organized May 15, 1890, out of and over a part of the territory of the said county of Crook. There is also stated a tender of the above-mentioned bonds by said county of Crook to said defendant company on payment therefor as agreed and understood, by the exchanging and delivery therefor the said warrant indebtedness, amounting to \$55,000, to said county.

Some arguments *ab inconvenientio* have been urged to the effect that an exorbitant burden of taxation might be imposed upon the taxable property actually in a county on July 10, 1890, largely in excess of 4 per cent. of the value of such property, but not in excess of the value of the property of the county as shown by the last general assessment for taxation, by the organization of new counties from the territory of such county between the date of such last assessment and said date of the adoption of the constitution. In the absence of statutory provision for an apportionment of the indebtedness such a result might occur. A county carrying a debt to the 4 per cent. limit might be divided into four counties of about equal wealth. The county retaining the old name would be liable for the entire debt, making a burden of nearly 16 per cent. on its taxable property. *Commissioners of Laramie Co. v. Commissioners of Albany Co.*, 92 U. S. 307. But we have a statute providing for an equitable apportionment of the indebtedness in such cases between the counties in proportion to the taxable property of each, charging in such apportionment the county or counties containing the public property of the original county with the value of the same. In this way the county containing the public property, or an undue proportion of it, may become bur-

¹ Not yet obtainable.

dened with a debt in excess, to a limited extent, of 4 per cent. of the value of its taxable property. But this additional debt is always offset by the value of the public property falling to such county. Besides, the debt, if valid when contracted, continues to be valid after the change in the county boundaries by the formation of new counties, and the consequent reduction of the value of the taxable property of the original county, and the increase in the per centum of her indebtedness to such value. Changing the form of the indebtedness from warrants to bonds does not increase it. It does not enlarge the burden. In this case it diminishes it. Crook county's debt of \$55,000 in warrants bears interest at the rate of 8 per cent. per annum. She now has the opportunity to replace those warrants with her bonds of the same amount, bearing interest at 6 per cent. per annum, if she may legally issue such bonds. This amounts to a saving to the county of \$1,100 per annum in interest. The other benefits of funding are confessedly great. The law should be plain against the authority to fund to justify us in denying to Crook county these great advantages. On the contrary, both the letter and spirit of the law seem to be plainly in favor of the authority to fund. The portion of section 3 of the constitution applicable reads: "Provided, however, that any county * * * may bond its public debt existing at the time of the adoption of this constitution in any sum not exceeding four per centum of the assessed value of the taxable property in such county, * * * as shown by the last general assessment for taxation." This language would seem naturally to refer to the last general assessment previous to the adoption of the constitution. It is argued, however, that the evident purpose and spirit of the constitution is to enable the counties to fund their valid and legal debts existing at the time of its adoption, and that the language should be understood as referring to the last general assessment for taxation previous to the contracting of the debts, respectively; otherwise, a debt legal and valid, and within the 4 per cent. limit, when contracted, might be in excess of 4 per cent. of the last general assessment for taxation preceding the adoption of the constitution, and thus not fundable. This argument, in view of all the legislation upon the subject, and the known benefits of funding, has much weight. It is not, however, necessary to decide this question in this case, and we do not decide it. The agreed case is that the indebtedness of Crook county was legal and valid, as it was from time to time contracted. The figures submitted show also that the debt of the county existing at the time of the adoption of the constitution was not more than 4 per cent. of the value of the taxable property of the county at the last general assessment previous to such adoption,—that is, the assessment of 1889. Under either construction the issuance of the bonds of Crook county is authorized by law. The bonds, according to the agreed case, are legal and valid.

The two questions reserved and sent to

this court for its decision are: *First.* To what extent, and under what general assessment for taxation, could the county of Crook, Wyo., on the 1st day of May, A. D. 1891, issue its funding bonds for valid indebtedness existing, outstanding, and unpaid at the time of the adoption of the constitution of the said state? To this question we answer that the county of Crook, Wyo., on the 1st day of May, A. D. 1891, could issue its funding bonds for valid indebtedness existing, outstanding, and unpaid at the time of the adoption of the constitution of the said state, at least to the extent that such issue, together with all other indebtedness of said county existing, outstanding, and unpaid at the time, should not exceed 4 per cent. of the assessed value of the taxable property in such county as shown by the general assessment for taxation of the year A. D. 1889, and such issue could be made under the general assessment for taxation of that year. *Second.* Are all of the said funding bonds of Crook county, herein mentioned and described as having been tendered to the defendant company, the lawful and valid obligation of the said county of Crook, under the constitution and laws of Wyoming, and is the said company compellable to receive and pay for the same, as such, as agreed? To both branches of this question we answer, "Yes." And it is ordered that this cause be remanded to the district court to render judgment according to the stipulation this day filed, and for further proceedings in accordance with this opinion.

GROESBECK, C. J., and MERRELL, J., concur.

(7 Utah, 477)

STALLING v. FERRIN et al.

(Supreme Court of Utah. Sept. 12, 1891.)

WATER-RIGHTS—ABANDONMENT OF DITCH—FAILURE TO REPAIR—CONFLICTING EVIDENCE.

1. Under 2 Comp. Laws Utah, § 2783, which provides that a neglect for seven years to keep in repair any means of diverting or conveying water shall be held a forfeiture of the right, one claiming an easement in a water-ditch crossing the land of another, and failing to make repairs thereon for the statutory period, forfeits his right to the ditch.

2. Defendant claimed an easement in a ditch crossing the land of another, but declared his intention of not using the ditch, whereupon the owner of the land filled the ditch, and sowed it over with grass, with the knowledge of defendant, who made no objection. *Held* that, as against plaintiff, who purchased the land several years after the ditch was closed, and without notice of any claim thereto, defendant must be held to have abandoned his right to the ditch.

3. Where there is a substantial conflict in the evidence before a referee, his findings of fact will not be set aside.

Appeal from district court, Weber county; JAMES A. MINER, Justice.

Action by Charles A. Stalling against Josiah L. Ferrin and Josiah M. Ferrin for damages for trespass, and to restrain defendants from maintaining a ditch. Judgment for plaintiff against Josiah L. Ferrin on the finding of a referee. Defendant moved for a new trial, which being denied, he appeals from the judgment, and the order denying the motion. *Affirmed.*

Miller & Maginnis, for appellant. *Kimball & Allison*, for respondent.

ANDERSON, J. This is an action brought by plaintiff to recover damages for an alleged trespass by defendants in cutting a water-ditch across plaintiff's land, and to restrain the defendants from maintaining the ditch, and continuing the alleged trespass. The cause was referred to a referee to try all the issues in the action, both of law and of fact, and report his conclusions of law and judgment thereon. The referee heard the case, and made his report, in which he found the issues in favor of the plaintiff and against the defendant Josiah L. Ferrin, and that plaintiff was entitled to a judgment of six cents damages, and to a perpetual injunction against said defendant, restraining him from maintaining the ditch across the lands of plaintiff, and from conducting water across said land. The referee further reported that there was no cause of action against the defendant Josiah M. Ferrin. The district court confirmed the report of the referee, and entered judgment accordingly for damages in favor of plaintiff, and forever enjoining the defendant Josiah L. Ferrin from maintaining a water-ditch across the lands of plaintiff. There was a motion for a new trial by the defendant Josiah L. Ferrin, which was overruled, and he brings this appeal from the order overruling the motion for a new trial and from the judgment.

It is contended by counsel for appellant that the findings of facts are unsupported by the evidence. We have carefully read the evidence, which was mostly the oral testimony of witnesses given at the hearing, and is as conflicting as is usual in this class of cases. There being a substantial conflict in the testimony, it is a well-settled rule of this court that it will not set aside the findings as unsupported by the evidence. But counsel for appellant contend that the findings of fact do not support the conclusions of law and judgment. The referee found that the defendant Josiah M. Ferrin, about April 1, 1880, and prior to the commencement of this action, sold his land adjoining the plaintiff's land on the south, together with the ditch situated on plaintiff's land, and the water-right connected therewith, to the defendant Josiah L. Ferrin for a valuable consideration, and that Josiah L. Ferrin went into possession of the same, but that the deed of conveyance was not made until the day of trial, after plaintiff had closed his case. The thirteenth and fourteenth findings of fact are as follows: "*Thirteenth*. That the defendants, nor either of them, nor those of whom they purchased, have had possession or use of said water-ditch hereinbefore referred to for a period of twenty years, or for any other period of time, except that the defendant Josiah M. Ferrin used said ditch some time between 1864 and 1867, and again some time between 1871 and 1875, and again during the irrigating seasons of 1882 and 1883, but no repairs have taken place on such ditch since 1882. *Fourteenth*. That neither of the defendants, nor those through whom they claim, have for more than

twenty years last past, or at any time, owned or been in the peaceable or actual or continuous possession of the ditch hereinbefore described, or of the right of way across plaintiff's land hereinbefore described for said or any ditch on said land for twenty years, or for any other period, except as above stated." The evidence showed that prior to 1883 plaintiff's land was government land, and that between May and October, 1883, one Warden, plaintiff's grantor, entered the land as a homestead, under the land laws of the United States, and received a patent therefor in August, 1889. That Warden and those under whom he claimed had had possession of the land for some years before he entered it as a homestead. Warden testified that he was living on the land in 1882 and 1883, and for several years prior thereto, and that the ditch was used by Josiah M. Ferrin during the irrigating seasons of 1882 and 1883. That in the fall of 1883 he complained to Josiah M. Ferrin that the ditch made his land wet and swampy, and asked him to bridge the ditch, which Ferrin refused to do; and that Ferrin then said that if the ditch made Warden's land wet and swampy he did not want the ditch any more; that he was going to use his land for grazing, and did not need the ditch; and that he, Warden, then plowed and filled up the ditch, and sowed it in grass, and that there was no ditch there from that time until the spring of 1890, shortly before this suit was begun, when the defendant Josiah L. Ferrin went upon plaintiff's land and again opened up the ditch. This testimony was disputed by Josiah M. Ferrin, who was a witness for the defendant. The referee must necessarily have found that the defendant Josiah M. Ferrin voluntarily surrendered and abandoned whatever right he may have had to any ditch across the land in question in the fall of 1883, and that, as Warden entered the land between May and October, 1883, there could be no appropriation of the water or right of way for the ditch across plaintiff's land without his consent, or that of his grantors. The entry of the land by plaintiff was an appropriation of not only the land, but of the water; and any person entering upon the land thereafter became a trespasser. *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. Rep. 350. A party holding or claiming an easement in or to real estate may divest himself of the same by a declaration of an intention to no longer use or claim the same, where parties act on such declaration as well as by non-user for the statutory period of seven years. The referee found that no repairs had been made on the ditch since 1882, a period of more than seven years before this suit was begun, and more than seven years prior to the cutting the ditch in the spring of 1890. Section 2783, 2 Comp. Laws, 1888, provides that "a continuous neglect to keep in repair any means of diverting or conveying water, or a continuous failure to use any right to water for a period of seven years at any time after the passage of this act, shall be held to be abandonment and forfeiture of such right."

The plaintiff purchased the land in 1897,

several years after. Ferrin had declared his intention of not using the ditch any more, and four years after plaintiff's grantor, to whom the declaration was made, had filled up the ditch, and sowed it in grass with the knowledge of Ferrin, and without objection from him, and without any effort on his part to open or use the ditch until the spring of 1890. We think that, even if the defendant had a right of way across plaintiff's land in 1883, yet his declaration of intention to no longer use the ditch, and his implied consent for Warden to fill it up and keep it filled, and plaintiff having bought when there was no ditch there, and without notice of any claim of a right of way across the land for a ditch, we think defendant cannot now assert such right against him. We find no error in the record, and the judgment of the district court is affirmed.

ZANE, C. J., and BLACKBURN, J., concur.

(7 Utah, 482)

WELLS v. DENVER & R. G. W. RY. CO.

(Supreme Court of Utah. Sept. 12, 1891.)

INJURIES TO RAILROAD EMPLOYEE—COUPLING CARS
—EVIDENCE.

1. A freight brakeman was killed while coupling defective cars. A brakeman testified that immediately before the accident the couplings of the car were apparently in a safe condition. Another witness testified that at a distance of four or five feet away he noticed the defective condition of one of the cars to be coupled. *Held*, that a motion for nonsuit was properly overruled, as the question of deceased's contributory negligence was for the jury.

2. While it was improper to allow evidence of the good reputation of deceased as a railroad man for the purpose of showing want of contributory negligence, the evidence was competent on the question of damages.

3. While it was improper to allow evidence that the company's narrow-gauge rolling stock generally was considered dangerous, its admission was without prejudice to the company where it was undisputed that the particular car which caused the accident was out of repair, and that its unsafe condition was the cause of the death.

4. A charge that the jury in estimating damages should include damage for loss of companionship to the widow and daughter is not open to the objection that the jury might under it allow for mental suffering, when the court immediately afterwards charged that the jury should not allow for the mental suffering of the widow and daughter.

Appeal from district court, Salt Lake county, C. S. ZANE, Justice.

Action by Emma C. Wells, administratrix of the estate of Harvey A. Wells, deceased, against the Denver & Rio Grande Western Railway Company to recover damages for the death of her husband. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Bennett, Marshall & Bradley, for appellant. J. L. Rawlins and Reilly & Kane, for respondent.

ANDERSON, J. Plaintiff brings this action as administratrix of the estate of her deceased husband, Harvey A. Wells, to recover damages for the death of her husband, alleged to have been caused by the negligence of the defendant. Plaintiff's decedent was a brakeman in the employ of the defendant, and at the time of the

accident was attempting to couple two freight-cars together, when, owing to the defective condition of the coupling attachments and timbers connected therewith, the draw-head of one car passed over the draw-head of the other, allowing the cars to come together, whereby he was fatally injured. The defendant, by its answer, denied any negligence on its part, and alleged contributory negligence on the part of the decedent. There was a trial by jury, verdict and judgment for plaintiff, and defendant appeals.

The defendant offered no evidence in its behalf. Burnett, another brakeman on the same train, testified that he was standing about 20 feet away, and that immediately before the accident the condition of the draw-head, draw-bolts, and timbers connected therewith were apparently in a safe condition. Cahoon, another witness for plaintiff, and who had charge of the defendant's yard at Germania, testified that at a distance of four or five feet away he noticed the defective condition of one of the cars to be coupled, before the accident; that the appearance of the bumper or draw-head of the standing car indicated that it might give way in making an ordinary coupling, and that he would not have attempted to make the coupling. On this evidence the defendant requested the court to grant a nonsuit because of Wells' negligence in attempting to make the coupling, which the court refused to do, and such refusal is assigned for error, and the same point is specified as a reason why the evidence fails to justify the verdict. We think there was no error, under the evidence, in the court overruling the defendant's motion for a nonsuit, and submitting the question of the negligence of the defendant and of the contributory negligence of the plaintiff's decedent to the determination of the jury, and, after a careful examination of all the evidence in the case, we think the jury were justified in finding, as they must necessarily have done in order to find the verdict which they returned, that the defendant was guilty of negligence, and that the plaintiff's decedent was not guilty of contributory negligence.

Several witnesses were permitted to testify against the objections of defendant to the good reputation of plaintiff's decedent as a railroad man; and this, it is contended, was error. It is argued by counsel that, if decedent's reputation was ever so good, it would not excuse or palliate his negligence in the particular case. We think this would be true if considered alone with reference to the question of negligence; but, if considered with reference to the amount of damages the plaintiff had suffered by his death, it was not improper. If the deceased was an experienced railroad man, sober, industrious, diligent, and of exemplary habits, the loss to his wife and child was greater than if he had had but little experience in his business, and had been indolent, unreliable, of irregular habits, or addicted to habits of intoxication in any degree. The witnesses testified his reputation as a railroad man was good. One witness testified he had known him 10 years, during

which time he was engaged in railroad-ing; that he "never knew him to take a drink, nor smoke, nor chew, nor anything of that kind; his habits were good in all respects." We think such evidence not improper to go to the jury on the question of damages.

The yard-master, Cahoon, was permitted to testify, against defendant's objection, that the old narrow-gauge rolling stock was considered to be dangerous by defendant's employes, and that he had seen the same description of cars as the one which caused the death of Wells "smashed in the yard, because of their being in bad shape." The admission of this testimony is one of the errors assigned. The admission of this testimony was of doubtful propriety, to say the least, as its evident purpose was to establish the fair inference that all the cars of that class were in an unsafe and dangerous condition. *Goodson v. City of Des Moines*, 66 Iowa, 255, 23 N. W. Rep. 655; *Ruggles v. Town of Nevada*, 63 Iowa, 185, 18 N. W. Rep. 866; *Patt. Ry. Acc. Law*, § 364. But, if it be conceded that the ruling of the court was erroneous, still it could not have prejudiced the defendant, because, aside from this testimony, the evidence was undisputed that the particular car which caused the accident was out of repair, and in so bad a condition that another car could not be coupled to it in the ordinary way with safety, and that its unsafe condition caused the very accident complained of. Error without prejudice will not justify this court in reversing a cause and sending it back for a new trial.

The court instructed the jury that in estimating plaintiff's damages they should include any loss "which the widow of said deceased and his daughter have sustained or may hereafter sustain by being deprived of the support, care, nurture, companionship, assistance, and protection" which they might find from the evidence they would have received from the deceased if he had not been killed. Counsel for defendant contend this instruction was erroneous, because of the use of the word "companionship," and that it was in effect to instruct the jury that they might give compensation for any mental suffering flowing from loss of companionship, and hence was contrary to the rule established by this court in *Webb v. Railway Co.*, 24 Pac. Rep. 616. But we think the instruction is not fairly open to the criticism made by counsel, especially in view of the fact that in the next instruction the court expressly told the jury that they "should allow nothing for the mental pain of the widow and child of the deceased, or as a mere solace to their feelings." We find no error in the record sufficient to justify a reversal of the case, and the judgment of the district court is affirmed.

BLACKBURN and MINER, JJ., concur.

(7 Utah.)

ROBINSON v. OREGON S. L. & U. N. RY. CO.

(*Supreme Court of Utah*. Sept. 12, 1891.)

NEGLIGENCE—LEAVING HAND-CAR UNGUARDED.

In an action against a railroad company for occasioning the death of a boy 11 or 12 years old,
v. 27 p. no. 12—44

the evidence was that the sectionmen, when they quit work, left their hand-car unlocked and unguarded at the foot of an embankment 4 or 5 feet below the level of the track, and at a point a quarter of a mile from any house; that deceased was attracted by some boys, who had lifted the car upon the track, and were running it to and fro, and that he came to his death by jumping or falling from it when it was descending a grade at high speed. One of them testified that he and others had used the car 8 or 10 times before, with the permission of the "boss," when the men were there at work, but that he had never given them permission when the men were not there. The car weighed 600 or 700 pounds. *Held*, that it was not a thing dangerous in itself, and the company was not negligent in leaving it unlocked beside the track.

Appeal from district court, Salt Lake county; CHARLES S. ZANE, Justice.

Action by John Robinson against the Oregon Short Line & Utah Northern Railway Company to recover for personal injuries. There was judgment for plaintiff, and defendant appeals. Reversed.

Williams & Van Cott, for appellant.
Sutherland & Judd, for respondent.

ANDERSON, J. This action is brought by the plaintiff to recover damages for the death of his son, aged between 11 and 12 years, alleged to have been caused by the negligence of the defendant. There was a verdict and judgment in favor of the plaintiff for \$4,000, and the defendant brings this appeal from the judgment, and from the order of the court overruling a motion for a new trial.

The complaint alleged that on October 11, 1890, the defendant left a hand-car upon one of the tracks of its road within the limits of Salt Lake City, and permitted it to remain there until the evening of October 12th, without being in any way guarded or locked, and that on the last-named date plaintiff's son was attracted to the hand-car, and got on the same with other boys, and while riding down a grade lost his balance, and fell from the car and was killed. The answer of the defendant denied each and every allegation of the complaint. The evidence showed that the defendant was constructing yards and side tracks near the north limits of Salt Lake City. That on Saturday, October 11, 1890, there was a set of hands at work there, and that about noon of that day they quit work, and started back to the city on a hand-car, that on account of snow having fallen on the rails, and an ascending grade, they were unable to propel the car; that they set the car off the track, left it unlocked, and came back to the city on foot; that the car weighed between six and seven hundred pounds and required four men to lift it from the track; that at the point where they put the hand-car off the track the track is four or five feet above the level of the ground, and they placed it so that the edge of the car would be about six feet from the rail; that the place where they left the car is about a mile from the thickly settled portions of the city, and that there are no houses nearer than a quarter of a mile, and that the ground is swampy and wet, and is not used nor suitable for a play ground for children; that either that afternoon or on Sunday morning some boys

placed the car back on the track. On Sunday forenoon a number of boys were playing with the hand-car by running around on the side tracks or switches, and about 3 o'clock in the afternoon they were joined by plaintiff's son and other boys, when they pushed the car up an ascending grade, and all got on, and started down the grade, and when a high rate of speed had been attained the son of plaintiff either jumped or fell off in front of the car, and was run over and killed. Some of the plaintiff's witnesses who were on the car at the time of the accident testified that the deceased jumped off, while others say they thought he lost his balance, and fell off. The ages of the boys, as far as it appears in the evidence, ranged from 11 to 15 years. In the opinion of the witnesses the car was running at the time of the accident at the rate of 25 miles an hour, and the distance within which they stopped it, according to the testimony, was from 10 to 75 feet from where the accident happened. James Morris, a witness for plaintiff, testified that he was 15 years old; that he was one of the boys on the car when Robinson was killed; that after the accident they took the car off the track, and left it where the other boys told him they got it. He further testified that he, with other boys, had used the car before, with the permission of the "boss," 8 or 10 times, when the men were there working; but the boss never gave them permission to take the cars and ride on them when the men were not there.

The defendant contends that no negligence on its part was shown, and that the evidence is not sufficient to support the verdict. A hand-car, weighing six or seven hundred pounds, standing on the ground a quarter of a mile outside the settled limits of the city, is not of itself dangerous; and boys of sufficient age and strength to lift it up an embankment four or five feet high and place it upon the track are old enough to fully understand and appreciate whatever danger there is in running upon the track. The deceased and the other boys had no right to be upon the defendant's track meddling with its property. They were technically trespassers, and the defendant owed them no duty as in the case of passengers or employees. If the boys who took this car and placed it on the track had found a common wagon standing beside the road and had hauled it to the top of a hill, removed or raised the tongue, and all gotten in and let it run down the hill at such a reckless rate of speed as to cause one of their number to become so alarmed as to jump or fall out and get killed; or if they had gone on a neighbor's premises without permission, and while there had taken a sled belonging to him, and engaged in the amusement called "coasting," and while so engaged one of them had fallen off and been run over and killed,—it would scarcely be contended that the owner of the wagon or sled would be liable in damages for the injury; and yet in principle those cases would differ but little, if any, from the one under consideration. The case of *Railway Co. v. Stout*, 17 Wall. 657, cited by plaintiff, was a case where a turn-

table was left unfastened, and a small child was injured while it was being turned around. The court charged the jury in that case that, "if the turn-table in question, in its construction and the manner in which it was left, was not dangerous in its nature, the defendants were not liable for negligence;" and this instruction was approved by the supreme court of the United States. A machine, to be dangerous in and of itself, must be of such a character that it can only be handled with safety by persons of mature years and experience. But we think a common hand-car, standing on the ground beside a railroad track, is not a thing dangerous in and of itself, which the railroad company is required to guard or lock. *Railroad Co. v. McLaughlin*, 47 Ill. 265; *Railroad Co. v. Stumps*, 69 Ill. 414. We think that to leave the hand-car where it was left in this case, under the circumstances, was not negligence, and that the verdict is unsupported by the evidence. The cause is reversed and remanded, and a new trial ordered.

BLACKBURN and MINER, JJ., concur.

(7 Utah, 487)

LITER v. OZOKERITE MIN. CO.

(Supreme Court of Utah. Sept. 12, 1891.)

CORPORATIONS—CORPORATE EXISTENCE—EVIDENCE—ESTOPPEL TO DENY.

1. Comp. Laws 1888, § 2293, provides that foreign corporations shall within 60 days after commencing business in the territory file with the secretary of the territory a certified copy of their articles of incorporation, and shall designate some person residing in the county where their principal place of business is situated, upon whom process may be served, and shall file the same with the secretary, and a copy of such designation, duly certified by him, shall be evidence of the appointment. *Held*, that individuals who hold themselves out as a corporation by complying with the requirements of said section will not be permitted to deny their corporate existence when sued by persons who have acted in good faith upon such representations, and that the certificate of the secretary of the territory is sufficient proof of the appointment of the agent on whom to serve process.

2. Where a witness testifies in an action against a corporation that he is the agent of the corporation, letters addressed by him to the plaintiff are competent to prove the employment of the plaintiff.

3. Sup. Ct. Rule 6, providing that the abstract on appeal shall contain an impartial statement of so much of the transcript as may be necessary to present fairly the points made by the exceptions, must be complied with, or the appeal will be dismissed in pursuance of rule 8.

Appeal from district court, Utah county; JOHN N. BLACKBURN, Justice.

Action by William Liter against the Ozokerite Mining Company to recover for work done. There was judgment for plaintiff, and defendant appeals. Affirmed. *King & Houtz and Geo. Sutherland*, for appellant. *M. M. Kellog*, for respondent.

ZANE, C. J. This action was brought, as alleged, to recover \$950 compensation for labor performed by the plaintiff at the instance of the defendant. The plaintiff alleged in his complaint that the defendant was a corporation under the laws of the state of New York. This allegation

the defendant denied. To prove it the court admitted in evidence a paper purporting to be a copy of the certificate of incorporation of the defendant, signed and duly acknowledged by Jacob Wallace, Hibbert B. Masters, and Charles H. Barkley, three of the five trustees mentioned therein. To these articles was attached the following certificate: "State of New York, Office of the Secretary of State—ss.: I have compared the preceding with the original certificate of incorporation of Ozokerite Mining Company, with acknowledgment thereto annexed, filed and recorded in this office on the 5th day of March, 1886; and do hereby certify the same to be a correct transcript therefrom, and of the whole of the said original. Witness my hand and seal of office of the secretary of state at the city of Albany, this 30th day of November, one thousand eight hundred and eighty-six. FREDERICK COOK, Secretary of State. [Seal.]" Also a certificate in writing, purporting to have been made by Jacob Wallace, president, and Charles H. Barkley, secretary, of the defendant, under its seal, designating the plaintiff, William H. Liter, as a person on whom to serve process against the defendant. The following certificate was also attached to the copy of the certificate of incorporation: "Territory of Utah, Secretary's Office—ss.: I, Elijah Sells, secretary of the territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the charter and certificate of incorporation of the Ozokerite Mining Company, a corporation organized under the laws of the state of New York, and the appointment of William H. Liter agent for said company to accept service in civil actions; said papers filed in this office December 5th, 1886; as appears of record in my office. In testimony whereof I have hereunto set my hand and affixed the great seal of the territory of Utah, this 13th day of November, A. D. 1890. ELIJAH SELLS, Secretary of Utah Territory. [Seal.]" Other acts, purporting to be by Jacob Wallace as president and Charles H. Barkley as secretary of the defendant, were proven.

Section 2293, 2 Comp. Laws 1888, provides that all corporations not organized under the laws of this territory shall within 60 days after commencing business therein file with the secretary of the territory certified copies of their articles and certificate of incorporation, and that they shall also, within 60 days after commencing business, designate some person residing in the county in which its principal place of business in the territory is situated, upon whom process may be served, and shall file the same with such secretary: that a copy of such designation duly certified by such secretary shall be evidence of such appointment, and that service on such agent shall be deemed to be valid. The certificates of the secretary of the state of New York and of the territory of Utah are evidence that the certificate of incorporation of the defendant appears on the records of that state and this territory. The certificate of the secretary of the territory is sufficient proof also of the appointment of the plaintiff as defendant's

agent on whom to serve process. The officers of the defendant, by filing such certificates in the office of the secretary of the state of New York and in the office of the secretary of this territory, and by designating the plaintiff as its agent, represented the defendant to be a corporation, and held it out to the public as such. It further appears from the transcript in this case that the plaintiff was employed by the defendant at \$50 per month to look after its mine and other property, and that defendant paid plaintiff in part therefor, and that there is a balance due the latter for services so rendered to the amount found by the jury. The defendant represented to the public and to the plaintiff that it was a corporation, and as such employed him. It will not be permitted to escape liability upon the plea that it was not. "A person who has contracted with a corporation *de facto* claiming to have been incorporated under the laws of a foreign state cannot, after the contract has been performed on the part of the corporation, impeach the validity of the contract upon the grounds that the company was incorporated without legislative authority, and that the making of the contract involved an unauthorized exercise of corporate power." 2 Mor. Priv. Corp. § 736. And when individuals perform the acts and observe the forms required to create private corporations, and cause the evidence thereof to be placed on public records in pursuance of law, they will not be permitted to deny corporate existence when sued upon contracts entered into by such association as a corporation with persons acting in good faith upon such representations and appearances. The court permitted the plaintiff to introduce in evidence two letters addressed to him, and signed by the witness R. J. Kruger. This ruling of the court the defendant assigns as error. Kruger had testified that he was the agent of the defendant. Such letters were competent and relevant evidence to prove the employment of the plaintiff as alleged in his complaint. The defendant also assigned as error the ruling of the court in admitting in evidence certain letters of one J. Wallace. From the certificate of incorporation Wallace appears to have been one of the incorporators of the defendant, and as president he designated the plaintiff as the defendant's agent on whom to serve process in Utah. The defendant held him out to the public as its president and agent, and will not be heard to deny his authority to act for it, as the evidence shows he did. Other errors alleged by the defendant have been carefully considered by the court, and held not to be well assigned. In conclusion we feel it to be our duty to say that the counsel for the appellant in making the abstract filed in this case did not comply with the rules of this court. The abstract in all cases should contain an impartial statement of so much of the transcript of the record as may be necessary to present fairly the points made by the exceptions relied upon, so that the court, without looking at the transcript, may decide the case. When the court is obliged to read the

transcript, the examination of the abstract is a waste of time, and the court ought not to be bothered with it. An abstract of any pleading or order and of such evidence as may be pertinent to the points relied upon should be fairly made, and the substance intelligently stated. Rule 6 of this court must be complied with hereafter, or the appeal in such event will be dismissed in pursuance of rule 8. The judgment of the court below is affirmed.

ANDERSON and MINER, JJ., concur.

(7 Utah, 497)

TERNES *et al.* v. DUNN *et al.*

(Supreme Court of Utah. Sept. 12, 1891.)

NONSUIT—BREACH OF CONTRACT—EVIDENCE.

1. A complaint alleged that defendant agreed to sell certain lands to plaintiff, to be laid out into lots at plaintiff's expense, and sold by him; that defendant was to receive all the proceeds, and make deeds to the purchasers, and that, when a certain amount was realized from such sales, defendant was to convey the unsold remainder to plaintiff; that plaintiff offered to plat and sell said lands as agreed, but defendant would not permit him to do so. There was no allegation that plaintiff had incurred any loss or expense on account of such refusal, nor was there any evidence of damage. *Held*, that a nonsuit was properly granted under 2 Comp. Laws Utah, § 3843, subd. 5, providing that a nonsuit may be entered on defendant's motion when plaintiff fails to prove a sufficient case for the jury.

2. It is a good defense to an action for damages for breach of contract that it was without consideration, was obtained by fraudulent representations, and had been rescinded by mutual consent before the breach occurred.

3. In an action on a contract it is proper to require plaintiff to introduce the contract in evidence.

Appeal from district court, Weber county; H. P. HENDERSON, Justice.

Action by B. Ternes and others against J. F. Dunn and others for damages for breach of contract. A nonsuit was granted, and plaintiffs appeal. Affirmed.

Evans & Rogers and *A. G. Horn*, for appellants. *P. L. Williams*, for respondents.

ANDERSON, J. The plaintiffs and the defendant Chamberlain were partners as real-estate agents at Ogden City, Utah, under the firm name of Ternes, Chamberlain & Bowen. The partnership having been dissolved and settled, and Chamberlain, having refused to become one of the plaintiffs, was made a defendant in this action. The complaint, which was verified, alleges that the firm made a contract with the defendant Dunn, whereby Dunn agreed to sell to the firm certain real estate adjacent to the city of Ogden for the sum of \$7,500. That the firm was to plat and lay out the ground into lots, and pay the expense thereof, and sell the same as soon as it could be done, and turn over to Dunn the cash and mortgages received in payment therefor, and Dunn was to execute deeds to the purchasers of lots as fast as the same might be sold; and as soon as the sum of \$7,500 should be paid Dunn out of the proceeds of the sale of lots, he was to convey any parts of said land remaining unsold to the firm. That thereafter plaintiffs offered to have the land platted and laid out into lots, and to sell and dispose of them in accordance with

said agreement, but that the defendant Dunn refused to let them do so, and refused to carry out his part of the agreement in any respect, to the plaintiffs' damage in the sum of \$7,000, for which amount they demand judgment. The defendants filed their verified answer, denying each and every allegation of the complaint except the making of the agreement sued on; and also alleged that the same was without consideration, and was obtained by fraud; and that after its execution, and before any breach of its terms, it was, by mutual agreement of the defendant Dunn and the said firm, abandoned and rescinded. At the close of the evidence for plaintiffs the court discharged the jury and entered a judgment of nonsuit against plaintiffs, and plaintiffs appeal.

Appellants assign as error that the court erred in refusing plaintiffs' motion for judgment on the pleadings. It is sufficient to say that no such motion appears by the record to have been made, but if we assume, as counsel seem to concede, that such a motion was made and overruled, we think there was no error in so doing, for, while the answer may be defective in some particulars, the allegations that the agreement was without consideration, and was obtained by fraudulent representations, and that it had been rescinded by the mutual consent of all the parties to it, constitutes a good defense.

It is insisted that the court erred in granting defendants' motion for a nonsuit against the plaintiffs. By subdivision 5, § 3343, 2 Comp. Laws 1888, it is provided that a judgment of nonsuit may be entered by the court upon motion of the defendant, when upon trial the plaintiff fails to prove a sufficient case for the jury. The only evidence in the record is the contract sued on, and proof of its execution by the defendants. No evidence of any damage was introduced or offered by the plaintiffs. By the contract, the plaintiffs did not become purchasers of the land described in the contract, but merely the agents of the defendant Dunn for the sale of the land. It is true, the contract provides that "the party of the first part hereby agrees to sell to the party of the second part," etc., but it does not provide that the plaintiffs are to pay defendant Dunn anything, except to turn over to him the proceeds of all sales made by them to third parties, until the sum of \$7,500 should be paid. They do not agree to pay anything themselves absolutely for the property, nor was it to become theirs, but the title was to remain in Dunn, and he was to convey to persons who purchased from or through the plaintiffs, and receive the proceeds until he had received \$7,500, and then he was to convey any of the land or lots remaining unsold, if there should be any, to plaintiffs. No time is fixed within which the land should be sold, nor the length of time payments might be deferred, nor any price at which the lots should be sold. The complaint does not allege that the plaintiffs have paid out any money or performed any labor on account of the contract, nor that they had had any opportunities to sell any of the lots; nor does it allege that they could

have realized \$7,500 by the sale of less than the whole of the land, and if they could not they were not damaged; nor is it alleged the land could have been sold for, or was worth, more than was to be paid for it; nor is it even alleged that they could have sold the premises, or any part thereof, at any price; so that, although the complaint avers plaintiffs have been damaged \$7,000, it does not state in what manner they are damaged, nor any fact showing more than nominal damages. What, then, was there for the jury to determine? The most that plaintiffs could have recovered, if anything, under the allegations of the complaint, would have been merely nominal damages; but where no greater error, if, indeed, it was error at all, is committed by the trial court the ends of justice do not require that the litigation should be continued, and that the cause be retried, for in fact substantial justice has been done.

It is also insisted that the court erred in compelling the plaintiffs to introduce the contract in evidence. We are unable to understand how plaintiffs, when suing on a contract, should deem it error to compel them to introduce the contract in evidence. How they could expect to recover damages for the breach of the terms of a contract without introducing the contract in evidence we do not understand. We find no error in the record which would justify a reversal of the case, and the judgment of the district court is affirmed.

ZANE, C. J., and BLACKBURN, J., concur.

(7 Utah, 505)

OREGON S. L. & U. N. RY. CO. v. MITCHELL
et al.

(Supreme Court of Utah. Sept. 12, 1891.)

RIGHT OF WAY—ACTION TO CONDEMN.—MEASURE
OF DAMAGES.

2 Comp. Laws Utah, § 3852, provides that in condemnation proceedings the damages "shall be deemed to have accrued at the date of the summons." *Held*, in an action to condemn a right of way commenced by summons against a trustee in a trust-deed, to which the owner afterwards became a party defendant by amendment and voluntary appearance, that the damages should be estimated as of the date of his appearance.

Appeal from district court, Weber county: JAMES A. MINER, Justice.

Action by Oregon Short Line & Utah Northern Railway Company against F. A. Mitchell and others to condemn a right of way. Judgment for defendants, and plaintiff appeals. Affirmed.

Williams & Van Cott, for appellant. *Bennett, Marshall & Bradley*, for respondents.

BLACKBURN, J. This is a suit to condemn right of way for a railroad. It was commenced originally against Bacon alone as trustee, and summons issued December 24, 1889. Afterwards, August 25, 1890, the Mitchells were made parties by stipulation, and they appeared without summons. Trial was had February 25, 1891, and judgment in favor of defendants Mitchell for \$1,975 and costs and the value of the fence, \$325. The evidence showed Mitchells owned the land, and Bacon had no inter-

est in it only as trustee in a trust-deed to secure the payment of a loan of \$5,600. This was evidenced by a trust-deed in the usual form. There is no complaint that damages assessed are too high; but the plaintiff and appellant complains of the instruction of the court to the effect that the value of the land and estimation of damages should be made as of the date of August 25, 1890, and contends that the value of the land and estimation of damages should have been made as of the date of the summons,—December 24, 1889. We think the instruction was right. The Mitchells were the only persons entitled to damages. Bacon had no interest in the damages whatever, and was properly a party for the purpose of seeing that the security for the loan he represented was not impaired. If damages had been allowed him, the Mitchells would have been entitled to receive the full amount thereof credited on their indebtedness. For practical purposes, under the eminent domain statutes of this territory, they were the owners; and the condemnation of the land by a proceeding in which they were not parties would have been of no avail, and would have given the plaintiff company no right to enter upon the land and use it for the construction of their railway. Hence they were necessary parties to the proceedings of condemnation. 2 Comp. Laws Utah, § 3852, provides that the damages "shall be deemed to have accrued at the date of the summons." Summons was issued against Bacon alone on December 24, 1889, on a complaint against him alone, and afterwards the complaint was amended so as to make the Mitchells parties, and on August 25, 1890, they appeared and answered by stipulation without summons. If they had not appeared, it would have been necessary to have issued summons to them to make them parties, and their damages under the statutes would have accrued as of the date of the summons against them. It was for the benefit of the plaintiff that they appeared without summons, and, because they did that, is it reasonable that they waived their right to have their damages assessed according to law? These views need no authority in their support; they are rudimentary. The judgment is affirmed.

ZANE, C. J., and ANDERSON, J., concur.

(7 Utah, 510)

NICHOLS *et al.* v. UNION PAC. RY. CO.

(Supreme Court of Utah. Sept. 12, 1891.)

CARRIERS—EJECTION OF PASSENGER—STOPPING
PLACE—INTEREST ON DAMAGES.

1. Under Comp. Laws Utah, § 2354, which provides that "any passenger who refuses to prepay his fare or toll on demand may be put off the cars at any stopping place the conductor or employee of the company may elect," the company has no right to eject a passenger for non-payment of fare except at a stopping place.

2. In an action against a railroad company for ejecting plaintiff from its cars for non-payment of fare, the recovery is for unliquidated damages, and it is error to charge that interest should be added.

Appeal from district court, Weber county: JAMES A. MINER, Justice.

Action by Thursa Nichols and Gordon Nichols, her husband, against the Union Pacific Railway Company, for ejecting said Thursa Nichols from defendant's train. Judgment for plaintiffs. Defendant appeals. Modified.

Williams & Van Cott, for appellant.
Maloney & Perkins, for respondents.

BLACKBURN, J. This suit is brought to recover damages for ejecting the plaintiff Thursa Nichols from defendant's cars while riding as a passenger. She was riding from Hot Springs, Utah, to Willard station. The facts developed at the trial are substantially as follows: She had ridden in defendant's cars from Salt Lake City to Hot Springs on a ticket to Hot Springs. She continued on the train beyond, and wanted to go to Willard station. The conductor asked for her fare when the train had passed Hot Springs about one and a half miles. She offered him 25 cents, the regular fare from Hot Springs to Willard. He refused to accept it, and said it was 50 cents when paid on the train, and told her she must pay 50 cents or get off. That she did not do, and he stopped the train, and caused her to get off, and treated her very abruptly. The verdict of the jury was for \$175, and \$42 interest from October 10, 1890. The defendant made a motion for a new trial, which was overruled, and it appeals.

Many errors are assigned for reversal, but only two are insisted upon in the argument, and we do not deem it necessary to consider the others. They are: (1) The court erred in charging the jury that the appellant could only eject passengers at a station or stopping place for non-payment of fare. (2) The court erred in charging the jury that interest should be added to the damages at the rate of 8 per cent. per annum.

The first of these contentions is untenable. The statute of the territory is: "Any passenger who refuses to prepay his fare or toll on demand may be put off the cars at any stopping place the conductor or employe of the company may elect." Comp. Laws, § 2354. If before that statute was passed the company had not the right to eject a passenger who refused to pay his fare on demand, it gave it the right, but limited its exercise to a stopping place. If it had the right, in that case the statute would be entirely meaningless, unless it is a limitation of the right to a stopping place. Before the passage of this statute, any common carrier had the right to refuse to carry passengers unless they paid their fare on demand, and to exclude from their vehicles of transportation any person who refused to pay. *Railroad Co. v. Rogers*, 28 Ind. 1. What, then, could this statute have been enacted for, unless it was to prevent railroad employes from ejecting passengers who refused to pay their fare from the cars except at stopping places? Therefore we think the instruction complained of correctly states the law. There is a statute of the state of Illinois as follows: "If any passenger shall refuse to pay his fare

or toll, it shall be lawful for the conductor of the train and the servants of the corporation to put him out of the cars at any usual stopping place the conductor shall select." It will be seen by a comparison of these two statutes that they mean precisely the same thing. The supreme court of Illinois in *Railroad Co. v. Parks*, 18 Ill. 460, held that the meaning of the Illinois statute is that the employes of the railway company had no right to eject passengers from the cars for refusal to pay fare only at usual stopping places, and that court has adhered to that decision in many subsequent cases. We have no doubt that the true interpretation of the Utah statute is that the company has no right to eject a passenger from the cars for non-payment of fare, except at a stopping place.

The second contention is that the court erred in instructing the jury to add interest to damages from October 10th until the day of the trial. We know of no authority for adding interest to unliquidated damages in a case like this. We have been cited to none, and we are persuaded there is none. The jury found \$42 interest in this case, which should be remitted from the judgment. The judgment is affirmed, less \$42 interest. We think the respondent should pay the costs of this court.

ZANE, C. J., and ANDERSON, J., concur.

(7 Utah, 513)

ROTCH v. HAMILTON *et al.*

(Supreme Court of Utah. Sept. 12, 1891.)

RECORD ON APPEAL—DISMISSAL.

An appeal will be dismissed under 2 Comp. Laws, § 3650, requiring dismissal if appellant fails to furnish the requisite papers, where the only paper filed is one purporting to be a statement on motion for a new trial and on appeal, which is full of erasures and interlineations, and which does not contain the pleadings and orders of the court, but is merely indorsed by the referee as the evidence in the case pertinent to the specifications of error.

Appeal from district court, Salt Lake county; T. J. ANDERSON, Justice.

J. G. Sutherland, for appellant. *Arthur Brown*, for respondent.

PER CURIAM. In this case no transcript of the record has been filed. There is a paper filed purporting to be a statement on motion for a new trial and on appeal. It is full of erasures, and there are many interlineations. The pleadings and orders of the court are not in it. It is indorsed by the referee as the evidence in the case pertinent to the specifications of error. The transcript should be a copy certified by the clerk of the court where the trial is had to be a copy of the entire record in the case. This paper seems to be the original paper filed in the district clerk's office. It does not give a full history of the case, nor does the abstract. This appeal is therefore dismissed, on the motion of this court. 2 Comp. Laws, § 3650.¹

¹2 Comp. Laws Utah, § 3650, requires dismissal of an appeal if appellant fails to furnish the requisite papers.

(7 Utah, 515)

VICTORIA COPPER MIN. CO. v. HAWS *et al.*

(Supreme Court of Utah. Sept. 12, 1891.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE—TRIAL BY THE COURT.

1. The reception of improper evidence is not reversible error where the trial was by the court, and there was a clear preponderance of competent testimony, since it will be presumed that the judge disregarded such evidence and tried the case on proper testimony only.

2. Where the evidence is conflicting, and the abstract of the trial in the lower court without a jury is imperfect, the judgment will not be disturbed on appeal.

Appeal from district court, Salt Lake county; T. J. ANDERSON, Justice.

Action by Victoria Copper Mining Company against William Haws *et al.* to recover possession of certain mining claims. Judgment was rendered for plaintiff. Defendants appeal. Affirmed.

Bennett, Marshall & Bradley, for appellants. *Chas. C. Dey*, for respondent.

BLACKBURN, J. The abstract in this case is very imperfect. The names of the parties defendant are not set out. It does not purport to be an abstract of all the evidence given at the trial. It assigns errors in the findings of fact by the trial court by numbers, without setting out the findings. It only gives the findings as a whole, without designating them by numbers. The purpose of an abstract of the record is to enable the court of appeals to decide the case without the labor of the examination of a voluminous record. This abstract only increases, instead of lessening, the labor of the court. This suit was brought to recover the possession of two mining claims, the Copper the Ace, and the Antietam, and for damages, and was tried by the court without a jury, a jury being waived. The court found for the plaintiff company, and rendered judgment accordingly. The defendants made a motion for a new trial, which was overruled, and defendants appealed both from the order overruling the motion for a new trial and the judgment, and assigned many reasons for reversing the judgment, to-wit, errors of law, in this: that improper, irrelevant, immaterial, and incompetent evidence was heard by the court, some of which was admitted subject to the objections, and to some the objections were overruled. When the judge tries a case without a jury, it is not a reversible error to admit incompetent, irrelevant, or immaterial evidence; for he decides the case on the proper testimony only, and disregards entirely that which is incompetent, irrelevant, and immaterial. When a clear preponderance of competent, relevant, and material evidence supports the findings, this court will not reverse because of errors of the court below in admitting incompetent, irrelevant, or immaterial evidence, for the presumption in such cases is that it was wholly disregarded. *Insurance Co. v. Friedenthal*, (Colo.) 27 Pac. Rep. 88. This disposes of all the exceptions taken to the reception of evidence claimed to be improper.

We have carefully looked through the record, and considered all the evidence, and although we are not entirely satisfied

with the findings of the trial court, yet we cannot say as a matter of law that they are wrong. There is enough evidence in the record, if true, to support the findings and judgment. It is very contradictory, and we think the trial judge, who saw the witnesses on the stand, and noticed their manner and bearing, and doubtless attended closely to all the surroundings, is better qualified to judge of what testimony is truthful than this court, who has only an imperfect abstract of it in the record. One witness testifies in detail to all the circumstances of locating the claims, and, if what he says he did was really done, the location of the claim was complete. The defendant Haws looked for stakes afterwards, but did not find any, and so said several witnesses. But Haws quit work for the plaintiff company on the claims a very few days before he attempted to relocate them, and it is not at all improbable that a man who will not see stakes when he is looking for them, will deliberately undertake, while in his pay, to appropriate his employer's property to his own use. Again, it is not disputed that the defendant Haws took possession of the property, and ousted the plaintiff, while its agents were actually working on the claims. We do not think we ought to reverse the judgment because, it is alleged, it is not supported by the evidence; because we think that a clear preponderance of the evidence does support it. A further view of the evidence would be profitless.

Another contention of the defendants is that the court, in this case, during the progress of the trial, received certain evidence subject to the objections of the defendants, and did not afterwards specifically rule upon these objections, and left the contestants in doubt as to whether he considered such evidence in making his judgment. Many authorities are cited in support of this contention. It is fully supported by Californian authorities, but no other is cited in its support. This question need not be passed upon in this case, for the neglect to decide each of the objections made to the testimony would and could not have changed the result. And if it was error in this case it was harmless, for which an appellate court will not reverse; for, if the trial court believes the competent evidence, unobjected to, introduced by the plaintiff, he must have decided as he did, and it could make no difference which way he decided the question of the admissibility of the evidence objected to. We see no error in the record that justifies a reversal. Therefore the judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

(7 Utah, 519)

KELSEY *et al.* v. CROWTHER *et al.*

(Supreme Court of Utah. Sept. 12, 1891.)

SPECIFIC PERFORMANCE—RELINQUISHMENT OF DOWER.

1. Where a vendor contracts to sell land, agreeing to furnish an abstract of title, and the vendee is to have 30 days to examine the title and pay the balance of the purchase money, the tender of the purchase money on the thirty first

day is too late, and specific performance of the contract will not be enforced against the vendor, though he did not furnish the abstract of title within the 30 days.

2. A court of equity has no power to compel a wife to relinquish her dower under a contract of her husband to sell the land.

Appeal from district court, Salt Lake county; ELLIOT SANFORD and T. J. ANDERSON, Justices.

Suit in equity by Lewis P. Kelsey and J. K. Gillespie against W. J. Crowther, J. T. Lynch, and William Glassman, to enforce a specific performance of a contract to sell land. Complaint was dismissed, and plaintiffs appeal. Affirmed.

P. L. Williams, Waldemar Van Cott, and O. W. Powers, for appellants. Arthur Brown, for respondents.

BLACKBURN, J. This is a suit in equity to enforce the specific performance of the following contract: "Salt Lake, Utah, September 13, 1887. Received of Lewis P. Kelsey and J. K. Gillespie the sum of fifty dollars, being part consideration of the purchase price, to-wit, \$2,750.00, at which the undersigned agrees and contracts to sell, and by good and sufficient warranty deed convey, free of all liens, to said Kelsey & Gillespie, the following described lot of ground, to-wit: The east thirty (30) acres of the south half of the south-west quarter of section three, (3) township one (1) south, of range one (1) west, of Salt Lake meridian. Said purchaser to have after this date thirty (30) days for the examination of the title of said premises, and, in case said title is adversely reported on by the attorneys of the said purchasers, then the said part consideration hereby receipted shall be at once returned to said purchasers; but if said title is approved I hereby contract and agree to and with said Kelsey & Gillespie that I will at once, on the payment of said balance of agreed purchase money, to-wit, \$2,700.00, duly execute, sign, and acknowledge a full and perfect warranty deed conveying to said purchasers the entire title to said premises, and I agree to at once furnish an abstract of title to said premises and other needful papers." The complaint alleges a tender of the money, although an abstract was not furnished, a demand for a deed, and the failure to make same. The answer is a specific denial of the allegations of the complaint. A trial was had by the court, findings of fact, and a judgment that the complaint be dismissed, from which judgment the plaintiffs appeal. The testimony is all in the record, and we do not deem it important to review the findings of fact made by the trial court. The claim of the appellants is that the evidence does not justify the judgment. It shows that the contract was signed and delivered on the 13th day of September, 1887; that the defendants failed altogether to furnish an abstract; that at no time within the 30 days did the plaintiffs offer to pay the purchase money and demand a deed, but on the 31st day, October 14, 1887, defendant Crowther went to the office of plaintiffs, and told Kelsey, one of the plaintiffs, that he did not come round yesterday, and that his time was up, and Kelsey said that he

had forgotten it, and Crowther further told him that he had forfeited his \$50; but he further said—but this Kelsey denies—he offered him back the \$50. This occurred on the street in front of the office of plaintiffs, Crowther being in his buggy with his wife; and Kelsey went immediately into his office, and brought a bag with money in it, and said, "Here is your money," but Crowther drove off, and refused to wait. Kelsey says the amount of money required was in the bag. Kelsey further says that the offer of the money was on the condition that Crowther's wife would also sign the deed. We think this judgment must be affirmed.

1. The contract is an option. The plaintiffs had 30 days in which to tender the money and demand a deed. By the terms of the contract they did not have 31 days, and, having failed in that time to tender the money, they lost their right to enforce the contract. Nor do we think the failure of the defendant to furnish an abstract extended the time. It might make him liable for damages, but not enlarge or change the terms of the contract.

2. It does not appear from the evidence in this case that the plaintiffs have not a full and complete remedy at law for all the damages they may have suffered by reason of any and all breaches of this contract, if any were committed by the defendant Crowther; and as a rule specific performance of contracts is not enforced in equity, where the parties injured by breach of contract can be completely compensated in a suit at law.

3. The plaintiff Kelsey says that he offered the money on the condition that the wife of the defendant Crowther would sign the deed. A husband cannot contract away his wife's right of dower. A court of equity has no power on the husband's contract to compel a wife to relinquish her dower rights. Therefore the offer of the money was upon a condition that could not be complied with, and that was not obligatory upon the defendant, and that a court of equity could not enforce, and was no offer at all. 3 Pom. Eq. Jur. § 1400 et seq. We see no reason for the reversal of this judgment. It is therefore affirmed.

ZANE, C. J., and MINER, J., concur.

(16 Colo. 257)

LOTHROP V. UNION BANK.¹

(Supreme Court of Colorado. June 18, 1891.)

ACTION ON NOTE—ESTOPPEL TO DENY EXECUTION—SILENCE AS EVIDENCE.

1. "He who is silent appears to consent," is a rule having many exceptions and qualifications, and is to be considered with more or less caution, according to the circumstances of the case.

2. In a suit upon a promissory note by the payee against one whose name was signed thereby as maker, the only defense pleaded was the non-execution of the note. The testimony tended to show that the payee took the note believing the signature of defendant to be genuine; that defendant was notified by the payee holding the note that the same was about to become due, and that defendant paid no attention to the notice; that the payee presented the note shortly after its maturity to defendant in person for payment, and that defendant looked at the note, but said nothing special, did not deny its execution; that

¹ Rehearing denied.

defendant did not testify at the trial, nor offer any excuse for not testifying. Held (1) that the silence of defendant, under the circumstances, was legitimate evidence in behalf of plaintiff, tending to prove the execution of the note by defendant or by his authority; (2) that declarations of defendant, made to third parties shortly after the note matured, that he was allowing a certain person to use defendant's name for small amounts, were competent evidence in behalf of plaintiff for the same purpose; (3) that the sworn answer of defendant, denying the execution of the note, was not in any sense evidence in the case; (4) that, in the absence of evidence in behalf of defendant, the finding of the issue in favor of plaintiff upon the evidence aforesaid could not be disturbed by the appellate court.

(Syllabus by the Court.)

Appeal from superior court of Denver; MERRICK A. ROGERS, Judge.

Action by the Union Bank of Denver against Charles H. Scott and Wilbur C. Lothrop, upon a promissory note, dated June 9, 1885, payable 60 days after date, alleged to have been executed by them in favor of the bank for the sum of \$300, with interest. Judgment for plaintiff. Defendant Lothrop appeals. Affirmed.

The defendant Scott made no defense. The defendant Lothrop answered, denying the execution of the note, and alleging that if any such note was executed the signature of his name thereto was not genuine, but a forgery. This was the only defense interposed. Plaintiff filed two replications. The first is, in form, technically speaking, a replication of estoppel *in pais*. It avers in substance that defendant, by reason of certain conduct on his part in relation to the note, ought to be precluded from denying its execution. Certain other matters, to the effect that plaintiff had been specially injured by defendant's said conduct, are also specially set forth in the replication. The second replication avers in effect that Lothrop authorized and empowered Scott, his co-defendant, to sign his (Lothrop's) name to the note, and that the same was so signed with his knowledge and consent. The trial was to the court without a jury, resulting in a finding and judgment for plaintiff. The defendant Lothrop appeals.

W. B. Mills, for appellant. Sam P. Rose and Milton G. Cuge, for appellee.

ELLIOTT, J., (after stating the facts.) The assignments of error are numerous; but the principal one necessary to be considered is the alleged insufficiency of the evidence to warrant the finding and judgment of the court. The evidence was quite meager. Neither Mr. Scott nor Mr. Lothrop testified at the trial. Mr. Todd, cashier of the plaintiff bank, testified that he took the note believing Lothrop's signature thereto to be genuine; but he would not swear to its genuineness on the trial. He further testified that shortly after the note became due he called Mr. Lothrop's attention to the note at the bank, showing him two notes, each for \$300, one due in 80 days after date and the other, the note in suit, both purporting to have been executed by Lothrop and Scott; that Mr. Lothrop did not deny his signature to either of the notes; that he looked at them, but said nothing special;

did not say that the notes, or either of them, were forgeries. Mr. Roeschlaub, a clerk in plaintiff's bank, testified in substance that notice was sent to Mr. Lothrop through the mail, properly addressed, with postage prepaid, shortly before the note in suit became due, calling his attention to the note and the time of its maturity, as is the custom with banks; that on the envelope in which the notice was inclosed was a printed request to return to the bank if not called for in 10 days, and that it was not returned. Mr. Roeschlaub also corroborated in substance Mr. Todd's testimony about the presentation of the two notes to Mr. Lothrop, and further testified that shortly after such presentation the 30-day note was paid, and that a small amount was paid on the note in suit, the payments being made by Scott. Mr. Schooly testified in behalf of plaintiff that he had a talk with Mr. Lothrop some time in October, 1885, in which he called Mr. Lothrop's attention to the fact that certain notes were being offered in the market with his and Scott's names signed to them, and asked if the notes were all right; that Lothrop said they were,—he had been helping Scott some; that Scott needed money, and that he was allowing him to use his name for small amounts, and that the notes would be taken care of, and that Scott was all right. Schooly further testified that he told Lothrop his notes were around almost every day; that Lothrop said he would see Scott about it; said he was not flooding the market with notes; said he was going to see Scott and put a stop to it. The testimony of Mr. Legge was not particularly important, though to a certain extent it corroborated the testimony of the other witnesses in relation to Mr. Lothrop's conduct when spoken to concerning notes in circulation purporting to have been signed by himself and Mr. Scott. It is contended that the testimony of Schooly and Legge was not competent under the issues; but we are of opinion that plaintiff had a right to introduce the evidence as tending to show that Mr. Lothrop had authorized Scott to sign his (Lothrop's) name to promissory notes like the one in suit, and put the same in circulation. The weight of such evidence may have been slight, but the weight is not for our consideration on this review. Under the issues the burden was upon plaintiff to establish by a preponderance of the evidence either (1) that Lothrop executed the note; or (2) that he was estopped by his conduct from denying that he had executed it. If plaintiff succeeded in establishing affirmatively either of these propositions, he was entitled to recover. The testimony of Todd, Roeschlaub, Schooly, and Legge tended to prove that Lothrop either executed the note himself, or, what is the same in law, authorized Scott to execute it for him. By the testimony of these witnesses plaintiff made out a *prima facie* case. No evidence whatever was produced in behalf of defendant. We need not, therefore, consider the sufficiency of the replication of estoppel as a matter of law, or the evidence in support thereof as a matter of fact. The de-

defendant Lothrop did not testify in the case, nor was his failure to testify in any way explained. His silence at the trial, considered in connection with his previous conduct in relation to the note in controversy, fully warrants the application of the legal maxim, *qui tacet consentire videtur*. Starkie, Ev. (7th Amer. Ed.) 575, 937; Id. (10th Amer. Ed.) 861; Stimson v. Vroman, 99 N. Y. 82, 1 N. E. Rep. 147; McClenkan v. McMillan, 6 Pa. St. 366; 1 Greenl. Ev. §§ 197-199, and notes; 2 Whart. Ev. § 1136 et seq.; 1 Phil. Ev. §§ 436-445. The general rule, "He who is silent appears to consent," undoubtedly has many exceptions and qualifications, and is always to be considered with more or less caution, according to the circumstances of the case. In the trial of this cause, however, there can be no doubt that it was peculiarly applicable. The subject was one of common business experience. The notice sent to Mr. Lothrop, in accordance with the usual banking custom, calling his attention to the fact that the bank held the note against him, which was about to mature, naturally called for some expression of dissent or objection on his part, if he did not previously know of the note or consider himself liable upon it. Hence his failure to make such objection within reasonable time thereafter furnished some foundation for the inference that he was thus liable. Again, when shortly after the maturity of the note Mr. Lothrop was called to the counter of the plaintiff bank, and two notes, (the one in suit and another,) purporting to have been signed by Scott and himself, were presented to him by the cashier, who called his attention to the fact that the notes were past due, his failure to denounce the notes as forgeries, or to deny that he executed them, or either of them, or to say anything indicating that he was not bound to pay them, was conduct from which an inference of the genuineness of the notes and his liability thereon would naturally be drawn. The payment of one of these notes, and the making of a small payment upon the other the next day after such presentation, even though the payments were made by Scott, were circumstances not inconsistent with the inference that Lothrop recognized the notes as valid obligations incurred by himself. And finally, when upon the trial the conduct of Mr. Lothrop concerning the note, as above shown, was given in evidence, and he thereupon failed to go upon the witness stand to deny the execution of the note, or to explain his conduct when the note was presented to him, the inference that he executed the note, or authorized it to be executed, became, for the purposes of that trial, very forcible and convincing. The conclusion reached by the trial court was consistent with the ordinary course of human experience in such matters. No reason other than the defendant's liability upon the note was disclosed at the trial to show or explain why he should have so long kept silent in reference to a matter affecting his interest, under the facts and circumstances as proved. See authorities above cited. If Mr. Lothrop had gone upon the witness

stand and testified that he did not execute the note, nor authorize it to be executed, and had given some reasonable explanation of his previous conduct in regard to the note, the question of his liability might have appeared in a very different light. It is true, plaintiff's evidence shows that after December 1, 1885, and when he became aware of the extent to which Mr. Scott had used his name, he declared to Mr. Todd that the note was a forgery. But it could not be expected that this declaration in his own interest, made without the sanction of an oath, and without giving his opponent an opportunity for cross-examination, would weigh much against his own previous conduct. The sworn answer of the defendant, denying the execution of the note, was not in any sense evidence in the case. Its only effect was to throw the burden of proof of the execution of the note upon plaintiff. It did not in any manner excuse defendant from going upon the witness stand and submitting to cross-examination. The defendant having failed to testify or to offer any testimony in his own behalf, the action of the court in finding the issue against him upon the uncontradicted evidence introduced in behalf of plaintiff cannot be disturbed. The judgment is accordingly affirmed.

HELM, C. J. I concur in the foregoing conclusion.

LOTHROP V. ROBERTS.

(Supreme Court of Colorado. June 18, 1891.)

WITNESS — CROSS-EXAMINATION — CRIMINATORY EVIDENCE — OBJECTIONS TO EVIDENCE — ACTION ON NOTE.

1. In order that a party may have the benefit of the testimony of a witness given in his direct examination it is essential that the party against whom the testimony is introduced should be allowed to cross-examine for the purpose of testing the accuracy and credibility of the witness; and prejudice will generally be presumed where such right is denied.

2. It is the policy of the law to admit evidence unless a valid objection to it is clearly shown. Where no specific objection is interposed, the rule is that the evidence should be admitted, if it is competent upon any possible circumstances of the case.

3. The objection that the answer, if made, may tend to criminate the witness can only be made by the witness himself. It is not such an objection as counsel may take advantage of to exclude testimony.

4. After an acquittal upon the criminal charge it is too late for the witness to refuse to answer questions on the ground that his answer may tend to criminate himself.

5. Where the execution of a promissory note is denied in the answer under oath, it is error to admit the note until some proof of its execution is given, but if the evidence be afterwards supplied the error may be cured.

HELM, C. J., dissenting.
(Syllabus by the Court.)

Appeal from superior court of Denver; MERRICK A. ROGERS, Judge.

Action by Mamie E. Roberts against Wilbur C. Lothrop and others on two promissory notes. Judgment for plaintiff against defendant Lothrop. Defendant Lothrop appeals. Reversed. Petition for rehearing denied.

Appellee, as plaintiff, instituted this action against Charles F. Cook, Charles H. Scott, and Wilbur C. Lothrop as defendants. The suit was originally brought upon two promissory notes, but prosecuted upon one only, to which the names of the defendants appear as joint makers. Neither Cook nor Scott made defense. Lothrop appeared and filed a sworn answer, in which he denied the execution of the note, and charged that the signature of his name thereto was not genuine, but a forgery. A replication was thereafter filed, but it is not necessary to state this pleading further than to say that in effect it is no more than a reiteration of the allegations of the complaint. The cause was tried to the court without a jury, and a judgment rendered against Lothrop, from which this appeal was taken.

W. B. Mills, for appellant. *Sam P. Rose* and *Milton G. Cuge*, for appellee.

HAYT, J., (after stating the facts as above.) The facts in this case upon which a right of recovery is based are peculiar. It is not claimed that Lothrop himself signed the note in question, or that he received any benefit therefrom, but it is claimed that Scott signed Lothrop's name, and that he was authorized so to do. Both Scott and Lothrop appeared and testified, Scott swearing that he had authority to sign, and Lothrop emphatically denying such authority. In support of Scott's evidence it was shown that he and Lothrop were, at the date of the making of the note, and for some time subsequent and prior thereto had been, warm personal and political friends; that Scott had been elected to a lucrative position, succeeding appellant as county clerk and recorder of Arapahoe county, and that Lothrop apparently had the utmost confidence in the integrity, ability, and honesty of Scott. In reference to his authority to sign Lothrop's name Scott testified: "I had a sort of an understanding with Mr. Lothrop that if I got into very close quarters I could sign his name until the emergency was over,"—and that in pursuance of such authority he had signed the notes in suit, and others, aggregating a large amount. Three other witnesses testified to matters strongly tending to corroborate this claim. Others, however, testified to statements made by Scott out of court in corroboration of Lothrop's position. In this state of the record we should certainly not feel at liberty to substitute the judgment of this court, on the weight of the evidence, for that of the trial court with its superior advantages for arriving at the truth, growing out of the fact that the living witnesses appeared and testified before it. There are no findings of law distinct from the findings of fact upon which error could have been predicated, and, had no substantial error been committed to Lothrop's prejudice in its ruling upon the rejection and admission of evidence, the judgment of the superior court would not be disturbed. There is, however, such manifest error in its ruling in this regard that the judgment cannot be allowed to

stand. These errors were in refusing to permit pertinent and proper questions to be put to Scott upon cross-examination by counsel for appellant. In view of the nature of the issues, and the character of Scott's evidence, the fullest latitude consistent with good practice should have been allowed counsel upon his cross-examination. In order that a party may have the benefit of the testimony given by a witness in his direct examination, it is essential that the party against whom the testimony is introduced should be allowed to cross-examine for the purpose of testing the accuracy or affecting the credibility of the witness, and prejudice will generally be presumed where such right is denied. Scott, in his testimony in chief, claimed that he was authorized to sign Lothrop's name to the note in suit, and it was certainly competent, upon cross-examination, to show that he had made statements out of court inconsistent with his sworn evidence. Scott testified to having had several conversations with appellant in reference to the matter. One of these conversations occurred in Mr. Lothrop's office upon the evening preceding the arrest of Scott upon the charge of forgery preferred against him by Mr. Lothrop. The place of another of these conversations was located at Scott's office in the court-house; time, about one week preceding the meeting of the republican convention for Arapahoe county in 1885. In reference to these conversations the following questions were propounded to the witness upon cross-examination: "Question. Did you at that time, and during your conversation on the evening preceding your arrest, ask Mr. Lothrop to take charge of the office and the office receipts, and manage so that these notes should be paid, and not to make any exposure; that that would ruin you, or words to that effect?" To which question counsel for plaintiff objected, as not being a cross-examination. And the court sustained the objection, and excluded the evidence, and counsel for defendant Lothrop in due time and manner excepted. General objections were also made and sustained to each of the following questions, the evidence excluded, and similar exceptions reserved: "Question. Did you not, on account of the exposure and the consequences of it, threaten to take your own life?" Q. Were you not considering at that time the advisability of pleading guilty to one of the charges of forgery, and submitting to a sentence on that, with a view to having the others *nolled* and subsequently obtaining pardon? Q. Did you not in that conversation admit that you had signed his name to very many notes? Answer. I had signed his name to several notes. Q. Did you say to Mr. Benedict, after the matter as to whether you should plead guilty or not had been discussed, that you didn't know whether that were best or not, but you would take time to consider? Q. Wasn't this question asked you substantially at that time, on that occasion, at that place: 'You are charged with having signed Mr. Lothrop's name to these papers; what is there about it?' And did you not answer,

'I cannot swear to a lie about it; it is substantially true?'" A number of questions of the same nature were propounded to the witness, to which similar objections were sustained, and the evidence excluded. It is the policy of the law to admit evidence, unless a valid objection to it is clearly shown. Here no specific objections were interposed, and the rule in such cases is that the evidence should be admitted if it is competent under any possible circumstances of the case. The questions were competent as tending to test the credibility of the witness, and induce him to admit, if possible, that he had made statements as to the matters in issue very different from those made by him while upon the witness stand. *Thomp. Trials*, §§ 406, 677. We are not advised as to the reason for excluding this evidence. If it was because it might tend to criminate the witness and expose him to punishment, two answers are obvious: (1) The privilege can only be claimed by the witness himself. (2) Scott had at the time of the trial already been acquitted of the criminal charge. Appellant was entitled to have these questions answered and the answers considered by the court in forming its conclusions. The evidence having been improperly excluded, it must be presumed that Lothrop was prejudiced thereby. The court also erred in admitting in evidence against objection the note sued upon, without some preliminary proof tending to show its due execution. The answer denying the execution of the note being under oath, proof of execution was necessary before the note was properly admissible. As evidence upon this point was afterwards supplied, the error in this regard was cured. For the reasons stated the judgment must be reversed, and the cause remanded.

HELM, C. J., (*dissenting*.) That counsel for the parties attach little importance to the rulings of the court excluding testimony of Scott, on cross-examination, is shown by the fact that the subject receives only a passing reference in one of the briefs, while assignments of error relating to other matters were thoroughly and ably discussed both in printed and oral arguments. The cross-examination of this witness was exhaustive, and the matters to which the rejected questions relate were in the main elsewhere during such cross-examination fairly and fully covered by his testimony. In my judgment, upon consideration of the entire record, the alleged errors in this regard are not of sufficient importance to justify a reversal. I am of the opinion, therefore, that appellant is not entitled to a new trial upon the grounds stated by my associates.

ON REHEARING.

ELLIOTT, J. The burden of the petition for a rehearing is to the effect "that most of the questions which were disallowed by the court below were answered in other portions of Scott's testimony." True, the witness did testify concerning some, perhaps most, of the matters embraced in the disallowed questions. But that is not the exclusive test by which to

determine whether or not the privilege of cross-examination has been fully enjoyed. Undoubtedly the cross-examination of witnesses is subject to the reasonable control of the trial court; but the privilege is so important that it should not be interfered with except when it is being carried to an unreasonable length, or otherwise abused. The record does not disclose that the questions were disallowed in this case on the ground that the cross-examination was being unreasonably extended; nor does it appear that the privilege was being in any manner abused. Hence we must conclude that the trial court was of the opinion that the testimony sought to be elicited by the disallowed questions was wholly inadmissible for any purpose in the case. Upon no other theory could general objections to the questions have been properly sustained. See *Ward v. Wilms*, 16 Colo. —, 27 Pac. Rep. 247, and authorities therecited. Considering the nature of the issue, the conceded facts of the case, and the state of the trial at which the disallowed questions were propounded, it is apparent that the testimony sought to be introduced was both relevant and material. The note in suit had been given for Scott's sole benefit. He had received the whole of the money upon it. He had executed the note not only for himself, but had also signed Lothrop's name to it. Lothrop had not received, nor was he to receive, any consideration whatever for the use of his name. The authority claimed by Scott was most extraordinary. In a business or pecuniary sense a man cannot give to another greater authority than the right to sign his name without limit to commercial paper for the sole benefit of another; and yet this was what Mr. Scott, by his testimony in chief, had claimed Mr. Lothrop had done. The manner in which Scott had testified to this was peculiar and significant. It is unnecessary to say that the proof of such authority should be clearly established in order to warrant a court in basing a judgment upon it. We might expect that a party testifying to such a matter would be clear, positive, and explicit as to the time, place, terms, and circumstances under which such authority had been conferred. Instead of this, Mr. Scott had testified: "I had a sort of an understanding with Mr. Lothrop that if I got into very close quarters I could sign his name until the emergency was over." So the authority, at best, was but "a sort of an understanding." It was upon such testimony that plaintiff was relying to charge Mr. Lothrop with liability upon the note in suit when the questions were disallowed, as shown in the original opinion of the court. For the purpose of ruling upon the admissibility of the disallowed questions the trial court should have assumed that they would be answered in the affirmative, or that, by laying the proper foundation, evidence would be introduced tending to show that the witness had made the statements attributed to him by the questions, thus affecting his credibility and weakening the force of his testimony in chief. Such was the privilege of the party con-

ducting the cross-examination without disclosing in the presence of the witness the testimony he expected to elicit. A brief reference to the testimony thus sought to be introduced will suffice to show its relevancy and materiality. If Scott had signed Lothrop's name with authority, why should he have feared exposure? Why should he have threatened suicide in consequence of such exposure? Why should he have considered for a moment the advisability of pleading guilty to the crime of forgery on account of such signing? Why should he have resorted to such extraordinary language in admitting the signing of Mr. Lothrop's name if he had in fact signed with authority? These were some of the questions which the defendant was entitled to have seriously considered by the trial court in weighing the evidence. The disallowance of the questions would indicate that the court considered such matters of no importance in determining the issue. On the trial of this case, unlike the case of *Lothrop v. Bank*, (Sup. Ct. Colo.) 27 Pac. Rep. 696, Mr. Lothrop was sworn as a witness, and denied explicitly that he had executed the note in suit or that he had authorized Mr. Scott or any one else to execute it for him. Under such conflicting testimony it is difficult to estimate the value of cross-examination; and the most searching inquiry should have been indulged. The questions propounded, as shown by our former opinion, were proper, and their disallowance was error. I am of the opinion that the judgment should be reversed, and that the petition for a rehearing should be denied.

(16 Colo. 219)

COLORADO MIDLAND RY. CO. v. O'BRIEN.
(*Supreme Court of Colorado. June 18, 1891.*)

WRIGHT OF EVIDENCE—PROVINCE OF JURY—INJURY TO EMPLOYEE—ASSUMPTION OF RISK—VICE-PRINCIPAL.

1. In a civil action triable by jury as a matter of right, if there be evidence tending to establish the plaintiff's cause of action in substance as alleged, the verdict will not be disturbed merely on the ground that there is evidence of an opposite tendency.

2. Questions of negligence, as well as of contributory negligence, are generally within the province of the jury, which should not be invaded by the courts except in the clearest of cases.

3. A person engaging to work in and about the construction of a railroad assumes the ordinary risks of such employment, including the risk of being transported to and from his work on a construction train over a newly-constructed road, and cannot expect the road and road-bed to be in as perfect and safe condition before it is finished as if the same had been completed and opened for public travel.

4. A laborer unskilled in railroad building, even if he has aided in repairing defects in a newly-constructed road, is not necessarily chargeable with notice of the defective condition of the road-bed.

5. A servant cannot voluntarily and knowingly incur unusual and extraordinary danger at the risk of his master. But if the unusual danger is not apparent to a mind like his, and he does not know nor have the means of knowing it, he may incur such danger, under the order of his master or his representative, without being guilty of contributory negligence.

6. Where, in the absence of the superintendent of construction, the workmen employed in

constructing a railroad are performing their labor under the supervision and direction of a general foreman, who has full power and authority to employ and discharge them, such foreman is, in relation to such workmen, the representative of the railroad company, and not their fellow-servant.

7. It is the duty of a company constructing a railroad to employ a competent skilled person to see to it that its road is reasonably safe for the transportation of its workmen,—not necessarily as safe as a road fully completed and equipped for the carriage of passengers, but as safe as the circumstances of the case will reasonably allow.

8. The safety of human life requires that a very high degree of skill and diligence shall be exercised in the construction of railroads to be operated by the dangerous agency of steam. The question whether a railroad has or has not been properly constructed at a certain place for the purposes for which it is being used may be proper for the opinion of an expert witness.

9. In actions for personal injuries by loss of limb, the assessment of damages must, within reasonable bounds, be confided to the judgment of the jury.

(*Syllabus by the Court.*)

Error to district court, Arapahoe county; WESTBROOK S. DECKER, Judge.

This was an action by Michael O'Brien, plaintiff below, against the Colorado Midland Railway Company, defendant below, to recover damages for personal injuries to the plaintiff, alleged to have been caused by the negligence of the defendant company in operating its railroad. Verdict and judgment were rendered in favor of plaintiff for \$13,000. The defendant company brings the case to this court by writ of error. Affirmed.

H. T. Rogers, Rogers & Cuthbert, and A. E. Pattison, for plaintiff in error. Sullivan & May and Chas. G. Clements, for defendant in error.

ELLIOTT, J., (after stating the facts.)

The assignments of error challenge the sufficiency of the evidence to sustain the verdict. They also question the competency of certain evidence admitted, complain of the giving and refusing of certain instructions, and allege that the damages awarded by the jury were excessive, and apparently given under the influence of passion and prejudice. The principal contention by counsel for plaintiff in error is that the evidence is not sufficient to sustain the verdict. This necessitates a review of the evidence for the purpose of ascertaining its tendency. In actions of this kind, if there be evidence tending to establish the plaintiff's cause of action in substance as alleged, the verdict of the jury will not be disturbed merely on the ground that there is evidence of an opposite tendency. *Hallack v. Stockdale*, 14 Colo. 200, 23 Pac. Rep. 340; *Rollins v. Commissioners*, 15 Colo. 103, 25 Pac. Rep. 319. At the time of the accident by which plaintiff's injuries were occasioned the defendant company was engaged in constructing its railroad between Leadville and Aspen, in this state. It was in the fall of the year. The line of the road was through a mountainous region, and just before the accident, in September, 1887, it had been storming, and the road-bed in places was water-soaked, soft, and muddy. The plaintiff was employed by defendant in and about the construction of its railroad.

¹Rehearing denied.

A day or two before the accident plaintiff, in company with other workmen, had returned from the end of the track, where they had been at work, to the boarding camp for shelter. The evidence shows that one Henry Banker was the head track-layer for the defendant company, and general foreman under Nelson, the superintendent of construction. Banker had charge and control of the construction train and of the men who, like plaintiff, were employed by the company in handling and bedding ties, laying track, and other work of that kind "at the front," as it was called, and exercised the authority of employing and discharging such workmen. Early in the morning of the day of the accident plaintiff and some of his fellow-workmen were disinclined to go to the front. But Banker ordered them in a peremptory manner to go, saying, in substance, that they could go to work, or get their time and be discharged from employment; that he didn't want any "dudes" on this job at all; that he was "going to be in hell or Aspen by Christmas." The evidence further shows that the boarding camp was four or five miles from the end of the track at the time when Banker ordered plaintiff and the other men to go upon the construction train to be taken to their work. This was the customary way of transporting the men between the boarding camp and the front. The train consisted of an engine and tender, a flat-car carrying two large water-tanks holding several hogsheads each, and a flat-car loaded with broad-gauge curved steel rails and other material. The evidence tended to show that there were 70 or 80 rails, weighing from 600 to 650 pounds each, on the steel-car; that 40 or 50 men occupied the engine, tender, and tank-car; and that over 200 men were crowded as close together as they could stand upon the car containing the steel rails. As plaintiff expressed it in his testimony, the men were "packed on just as thick as they could possibly be packed; * * * from 200 to 220." Plaintiff also testified that there had been plenty of room for all on the previous trip when he went to the front. Allowing that the workmen were of average weight, the evidence tends to show that the steel-car on the day of the accident was laden with a cargo of human beings, steel rails, and other material, aggregating at least 75,000 pounds. The carrying capacity of the car was shown to be 50,000 pounds. The train thus freighted had proceeded but a short distance towards its destination when it reached a soft, marshy place in the road-bed, where the accident occurred. A fellow-workman of plaintiff, who testified that he was on the steel-car near plaintiff and near the center of the car, described the accident in his testimony, in substance, as follows: "The train had reached a little gulch where there was an embankment,—a gradual fill. The train was running about eight miles an hour down grade. Don't know how much of a grade. To the best of my remembrance, either the car ahead of us or the tank-car or the tender gave a lurch to one side, and the track slipped when

the iron-car came on it. I felt the body of the track, and the car gave a lurch right over into the ditch. The men on the edges of the car had a chance to jump and save themselves, but those that were in the center of the car could not, because of those on the outside. It was impossible for them to save themselves by any means on that iron-car. The engine and tender went off the track, and the tender tipped over. The front trucks of the car-load of iron went down in the ditch. The hind trucks remained on the track. The car went slantways in the ditch. These curved rails were not piled the same as straight steel is. Straight steel, as a custom, is packed; as they call it, "locked,"—that is, ball up on one rail and ball down on the other, so, if it goes, it goes in a mass. Curved steel is piled one way, together at a time,—half a dozen; just as it would happen. Almost all of the steel went off the car. I could not say whether there was any rails on it or not when I got up; the left of it came off. I was caught under the steel and injured; was powerless to help myself, either hand or foot. I was conscious all the time. I was taken out, and could see that the cause or occasion of the accident was the track sliding. About two rails-length of this track slipped, more or less,—varied from two or three inches up. I don't know exactly the distance. The furthest part the track had slipped 14 to 18 inches anyhow. The track was knocked down off the dump. It slid from these ties, so the ends of these ties sunk into mud, and tipped the train off this way, [indicating;] the track tipped up. I saw O'Brien after the accident,—after the steel had come off. His legs were caught fast. His body was free. He could use his hands and arms. I saw O'Brien when he was taken out. His limbs at the time he was taken out resembled a dish-rag. I could see blood all over his pants, and masses of raw flesh under his overalls, and blood where his overalls were torn by this iron, and I could see, where his garments were gone, his legs were all crushed up. After he got out it looked to me as if they were literally ground to pieces,—bone, flesh, and muscle all mingled together." The plaintiff's testimony corroborated that of his fellow-workman in most particulars. There was a curve in the road at the place where the accident occurred, though the testimony in behalf of plaintiff was not altogether clear or consistent as to the degree of the curvature. There was a conflict of evidence as to the condition of the road, the loading of the train, and other matters relating to the supposed cause of the accident. The defendant gave evidence to the effect that plaintiff, under the direction of one Boyle, assistant foreman to Banker, had been employed with others in repairing the road at the place where the accident occurred. Upon this evidence it is contended that plaintiff is precluded from a recovery in this action, on the ground that he had knowledge of the dangerous condition of the road, and that going upon the train with such knowledge was contributory negligence on his part.

According to the testimony of the superintendent of construction, the ground about the place of the accident was "a swamp," and the nature of the material used in the grade was "what is called 'peat,'—soft, boggy material." Even if plaintiff did aid in repairing the road at this place, we are not prepared to hold that a common laborer, unskilled in such matters, as plaintiff was shown to be, was necessarily chargeable with notice of its defective construction so as to make him guilty of contributory negligence in going upon the train in obedience to the order of his superior. It was the duty of the defendant company to employ a competent engineer or other skilled person to see to it that the road was reasonably safe for the transportation of its workmen,—not necessarily as safe as a road fully completed and equipped for the carriage of passengers, but as safe as the circumstances of the case would reasonably allow. If the road was really dangerous, the defendant company should have exercised reasonable care to ascertain its condition, and have the same repaired before undertaking to transport its employees over it to and from their work. Plaintiff must be held to have voluntarily assumed all the usual and ordinary dangers incident to his employment; he is not entitled to recover damages resulting from such dangers; nor could he voluntarily and knowingly incur unusual and extraordinary dangers at the risk of his master. But if the unusual danger was not apparent to a mind like his, and he did not know nor have the means of knowing that he was incurring unusual and extraordinary danger in going upon the train, he might obey the orders of his master's representative without being guilty of contributory negligence. A servant is generally excusable for obeying orders in and about his master's business, when such orders are given by one in authority over him as a representative of the master, unless the danger to be incurred by such obedience is so plain and manifest that no prudent person would obey, even under the penalty of being discharged from employment. *Miller v. Railroad Co.*, 3 Colo. Law Rep. 492; *Railroad Co. v. Fort*, 17 Wall. 553. But, in any event, the alleged contributory negligence of plaintiff was not, under the circumstances, a question of law for the court. Plaintiff in his testimony denied having worked upon the road at the point of the accident, and denied any knowledge of its dangerous condition at that place. This conflicting evidence was submitted to the jury under appropriate instructions, and the jury was properly charged as to what would constitute contributory negligence under the circumstances. *Wells v. Coe*, 9 Colo. 159, 11 Pac. Rep. 50; *Milling Co. v. Schaad*, 15 Colo. 197, 25 Pac. Rep. 89.

It is unnecessary to set forth the evidence in greater detail. There is nothing in the evidence, as certified to this court, which would justify the removal of the case from the operation of the general rule that "questions of negligence, as well as of contributory negligence, are generally within the province of the jury, which

should not be invaded by the courts except in the clearest of cases." Unless there was a clear absence of evidence tending to show that the negligence of the defendant was the proximate cause of the injury, or unless it was clearly established by the evidence that the negligence of the plaintiff contributed to cause the injury, the verdict of the jury, having been given in plaintiff's favor, cannot properly be disturbed on either of those grounds. See *Lord v. Refining Co.*, 12 Colo. 392-394, 21 Pac. Rep. 148, and the authorities there cited.

It is insisted that the evidence shows that the engine and tender were the first to leave the track, and hence that it was not the overloading of the steel-car which caused the accident. Even if this be conceded, the fact still remains that the evidence also tends to show that the crowded condition of the men upon the steel-car prevented those like plaintiff, in the center, from saving themselves when the accident occurred. In confirmation of this, it appears that 60 men in all were injured. The surgeon of the company testifies that 40 men were so badly injured that they had to be taken to the hospitals at Leadville and Colorado Springs for treatment. Three men, including Banker, who was riding on the engine, were killed. It is contended that plaintiff was a fellow-servant of Banker; and hence that if Banker was negligent in causing the train to be greatly overloaded with human beings to be transported over a weak and dangerous road-bed, it was but the negligence of a fellow-servant, and gave plaintiff no cause of action. But the evidence does not show that plaintiff was a fellow-servant of Banker. As to plaintiff and his co-employees engaged in handling ties and rails and laying track, Banker, having full power and control over them, was the representative of the defendant company; and hence, if he was guilty of negligence in and about the transporting of the workmen, it was the negligence of the company itself. See opinion of Mr. Justice HART in *Railroad Co. v. Driscoll*, 12 Colo. 520, 21 Pac. Rep. 708, and authorities there cited. See, also, opinion of Mr. Justice ELBERT in *Railroad Co. v. Ogden*, 3 Colo. 503. Donald W. Campbell, a civil engineer of many years' experience in the construction of railroads, was called as a witness in behalf of plaintiff. A statement of the supposed condition of the road at the place of the accident, as testified to by plaintiff's witnesses, accompanied by a statement of the use which was being made of the road at the time, was made to the witness Campbell; and he was thereupon asked his opinion as to whether the road was safe or faulty at that place for the purposes for which it was then being used. This question was objected to—*First*, on the ground that the facts supposed by the question were not supported by the testimony in the case; and, *second*, on the ground that the subject of the inquiry was not a proper one for the opinion of an expert witness. The facts supposed by the terms of the question were fairly within the limits of the evidence already given. The objection

was not well taken on the first ground. It was for the jury, and not for the court, to determine whether the matters assumed as facts by the hypothetical question were or would be ultimately sustained by the evidence as the real facts in the case.

The second ground of objection requires further consideration. The dangerous agency of steam having been utilized as a motive power for the carriage of passengers, the safety of human life necessarily depends in a large measure upon the proper construction and operation of railroads. The law takes cognizance of this necessity, and requires that a very high degree of skill and diligence shall be exercised in such matters. Hence the determination of the question whether defendant's railroad had or had not been properly constructed, for the purposes for which it was being used, required the aid of persons possessing superior scientific knowledge and experience in such matters. The subject-matter of such inquiry was therefore proper for the opinion of an expert witness after he had been properly informed as to the facts and circumstances of the case. No prudent company would engage in the construction of a railroad for the carriage of human beings for any purpose without employing some person or persons having special learning, skill, and experience to supervise the work. The defendant company had its civil engineer and superintendent of construction. They were present and testified at the trial, giving their opinions as well as stating facts regarding the character and condition of the road at the place where the accident occurred. Was plaintiff bound to hazard the result of the trial on the testimony of these employees of the defendant company, or was he entitled to call other witnesses of skill and experience in railroad building, and secure the benefit of their opinions as to the character and condition of the road? There can be but one answer. The question was one of science, skill, and experience, and therefore proper for the opinion of an expert, based, if necessary, upon a hypothetical question properly framed. *Rog. Epx. Test.* §§ 1-6; *Carpenter v. Railroad Co.*, 11 Abb. Pr. (N. S.) 416-419; *Muldowney v. Railway Co.*, 36 Iowa, 473. Upon the whole evidence there can be no doubt that it was the duty of the court below to submit the controversy to the jury under appropriate instructions. It was clearly a case where the jury must decide as to the questions of negligence and contributory negligence upon proper consideration of the weight of the evidence and the credibility of the witnesses. Unquestionably plaintiff, in engaging to work for defendant in and about the construction of its railroad at the front, assumed the ordinary risks of such employment, including the risk of being transported to and from his work on a construction train over a newly-constructed road. Plaintiff could not reasonably expect the road and road-bed of the defendant company to be in as perfect and safe condition before it was finished as if the same had been completed and opened for public travel.

Defendant was required to exercise only reasonable care, considering the circumstances and condition of its road, to provide for the safety of plaintiff while riding thereon. Full and explicit instructions to the foregoing effect were given to the jury at the request of defendant's counsel. The case of *Brick v. Railroad Co.*, 98 N. Y. 211, states the law very clearly as to the degree of care to be exercised by railroad companies in respect to roads in process of construction. But in so far as the doctrine of the New York case may be considered at variance with the case of *Railroad Co. v. Driscoll*, supra, as to circumstances under which a person in charge of the company's business is to be regarded as a vice-principal, we cannot follow it. See, also, *Batterson v. Railway Co.*, 53 Mich. 125, 18 N. W. Rep. 584. Some of the instructions,—for example, those declaring it to be the duty of the defendant company to exercise reasonable care and prudence in selecting competent servants to discharge the duties assigned them,—though stating the law correctly, may have been unnecessary under the issues and evidence. But they could not have been misleading, in view of the fact that the evidence tended to show that the proximate cause of the injury was the negligence of Banker in taking a train so heavily and improperly loaded over a defective road. The answer admits that plaintiff and his co-employees were engaged in the work of constructing defendant's railway, and "were performing their labor under the supervision and direction of one Henry Banker." The evidence also, as well as the pleadings, showed that Banker was the representative of the company in relation to plaintiff at the time of the accident, and not a fellow-servant of a common master. Hence the instructions relating to servants in different departments of the defendant's service, whether stating correct legal propositions or otherwise, could not have been prejudicial to defendant. It is unnecessary to consider the instructions further in detail. The charge of the court was full and explicit, stating the law correctly, in substance, as to the material matters in controversy at the trial. No proper requests to charge in behalf of the defendant were refused, except so far as they have been otherwise given in substance. The cause was fairly submitted to the jury upon the law applicable to the evidence.

As to the question of damages, little need be said. In cases of this kind, the assessment of damages must, within reasonable bounds, be confided to the judgment of the jury. This court has never been disposed to encourage extravagant verdicts, and juries in this state have, as a rule, been conservative in such matters. The plaintiff testified that he "was thirty-nine years old at the time of the accident; was always a healthy man; was six feet one and one-half inches tall; strong physically." The testimony further shows that working upon the railroad was only a temporary employment of plaintiff; that his usual occupation had been merchandising or iron mining at the east, at which business he had been able to earn \$100 or

more per month. The testimony further shows that both of plaintiff's legs were so crushed as to render amputation necessary,—one being cut off about four inches and the other about five inches below the knee; that he is not able to straighten out the stumps; and that he has no means of support except his labor. The treatment necessary to his recovery was long and painful. Not being able to straighten his legs at the knee joints, artificial limbs cannot be adjusted, so his only mode of personal locomotion is by dragging himself along upon his knees. The record before us does not disclose nor lead to the conclusion that the jury were influenced either by passion, prejudice, or other unworthy motive in arriving at their verdict. Under the circumstances, we do not feel warranted in declaring the damages excessive. The judgment is accordingly affirmed.

(16 Colo. 244)

GERMAN NAT. BANK v. ELWOOD.¹

(Supreme Court of Colorado. June 30, 1891.)

BILL OF EXCEPTIONS — NECESSITY — FORECLOSURE OF LIENS — WRIT OF ERROR — REVIEW.

1. A recital in the minutes made by the clerk, to the effect that the ruling or judgment of the court is excepted to, is not sufficient to preserve such exception. Exceptions to the rulings and decisions of the court can be preserved only by bill of exceptions, duly signed and sealed by the presiding judge.

2. The records and judgments of a court of general jurisdiction are presumed to be regular and free from all jurisdictional defects, as well as other errors, unless the contrary clearly appears.

3. The general rule is that the owner of the property upon which miners' or mechanics' liens are sought to be foreclosed shall be made a party to foreclosure proceedings; but *quære*, whether, if the property and the title thereto have been regularly transferred to a third person for the purpose of being disposed of to pay incumbrances against the same or to pay debts against the owner, it may not be sufficient to make such third person a party to the foreclosure proceedings instead of the original owner.

4. It is not the office of the writ of error to relieve a party from his own mistakes or omissions in the lower court.

5. A review by the supreme court upon writ of error must be prosecuted upon matters appearing in the record, and not upon *ex parte* matters introduced afterwards.

(Syllabus by the Court.)

Error to district court, Summit county; L. M. GODDARD, Judge.

Action by C. W. Elwood against A. G. Hoopes, receiver of the Warrior's Mark Mining Company, and the German National Bank, impleaded, to enforce certain miners' liens. Judgment for plaintiff. Defendant bank brings error. Affirmed.

C. W. Elwood was plaintiff below. A. G. Hoopes, receiver of the Warrior's Mark Mining Company, and the German National Bank of Denver were defendants. The action was brought by plaintiff in his own right and as assignee of certain other miners to enforce certain miners' liens against the property of the Warrior's Mark Company. The liens arose out of work done by plaintiff and his assignors under contract with said company upon its mines. The complaint shows that the

work by said plaintiff and his assignors continued up to the time when said mines and all the property of said company, both real and personal, passed into the hands and under the control of the defendant Hoopes, as a receiver appointed by the district court of Summit county, the same court in which this action was brought and tried. The complaint further shows that the defendant the German National Bank of Denver claimed a lien upon the property of said mining company by virtue of an attachment levy. The prayer of the complaint was to the effect that the amount found due plaintiff on account of the liens in favor of himself and said other miners be decreed to be prior liens upon the mining property as against all persons; that the said defendant bank be required to answer concerning its lien; that plaintiff's liens be foreclosed; and that the receiver proceed upon notice to be fixed by the court to sell the property in his hands for the purpose of paying said liens; and that, if any balance remain after the payment of the liens in favor of plaintiff, the same be applied to other claims against said mining company. The receiver and the bank each filed a separate answer, contesting the plaintiff's claims upon the merits. Upon the trial the court found and rendered judgment in favor of plaintiff for the sum of \$8,114.10 on account of the claims represented by him, and declared the same to be liens upon the property of said company in the hands of said receiver, and that such liens were prior to the lien claimed by the bank. The decree ordered the sale of the property covered by such liens, the proceeds to be applied to the payment of the plaintiff's judgment. The defendant bank brings the cause to this court by writ of error.

Patterson & Thomas, for plaintiff in error. *D. E. Parks*, for defendant in error.

ELLIOTT, J., (after stating the facts.) The assignments of error are, in effect, as follows: (1) That the district court had no jurisdiction whatever over the Warrior's Mark Mining Company or over its property, and had no jurisdiction to render any judgment or decree in the action against said company, for the reason that said company was not a party to the action. (2) That the district court had no right or authority to adjudge or decree the liens of plaintiff to be prior or superior to the lien of the defendant bank. The cause was referred for trial to a referee, who reported findings and judgment to the court. The final decree, as rendered by the court, and signed by the judge, shows that no objections or exceptions were taken by either party to the report of the referee, or to the filing or approval thereof by the court. It does not appear that any attempt was made to preserve any objection or exception in the court below at any stage of the proceedings until the next day after final judgment was rendered. Then for the first time a recital appears in the minutes made by the clerk to the effect that the attorney for defendant comes and "excepts to the entering and filing of the judgment and decree heretofore entered herein." It is scarcely

¹ Rehearing denied.
v.27P.no.12—45

necessary to say that such recital in the clerk's minutes is not sufficient to preserve an exception to the final judgment. It is well settled that exceptions to the rulings and decisions of the court cannot be thus preserved for review upon error or appeal. Exceptions can be preserved for such purpose only by a bill of exceptions, duly signed and sealed by the presiding judge. See *Ruterv v. Shumway*, 16 Colo. —, 26 Pac. Rep. 321, and cases there cited. The court gave defendant 90 days in which to prepare and tender a bill of exceptions; but no such bill has been certified to this court. If objection had been taken in the court below on the ground that the Warrior's Mark Mining Company was not made a party, or on the ground that the complaint did not allege with sufficient certainty the transfer of said company's property to the receiver, these alleged defects might have been remedied. It is true the allegations in respect to such transfer are not very specific; they are perhaps inaccurate and defective in form; but they are in no way controverted by the answer of either defendant; and it cannot properly be said that the defects alleged are jurisdictional, or of such a nature as to require a reversal of the judgment upon an objection made for the first time in this court. Bliss, Code Pl. §§ 435-438. The court from which this record comes is one of general and unlimited original jurisdiction as to all causes at law and in equity. Its records and judgments are presumed to be regular, and free from all jurisdictional defects as well as other errors, unless the contrary clearly appears. The general rule undoubtedly is that the owner of the property upon which miners' or mechanics' liens are sought to be foreclosed shall be made a party to the foreclosure proceedings. If, however, the property and the title thereto have been regularly transferred to a third person for the purpose of being disposed of to pay incumbrances against the same or to pay debts against the owner, we are not prepared to say that it may not be sufficient to make such third person a party to the foreclosure proceedings instead of the original owner. In this case, however, we do not decide that the rights of the Warrior's Mark Company, or the rights of the bank or of Elwood as against said company, are necessarily concluded by this proceeding. The Warrior's Mark Company is not here complaining. The plaintiff in error was summoned and appeared as a party to the action. It made no objection on the ground of a defect of parties. It made no objection to the form or substance of the pleadings, nor to the amount or character of the proof. It took no exception to the finding or judgment reported by the referee, nor to the final decree of the court. It will be presumed, therefore, for the purposes of this review, that sufficient was made to appear before the trial court to justify its findings and decree, so far as the parties to this record are concerned. Bliss, Code Pl., *supra*. Our conclusion upon this point in no way conflicts with the previous decisions of this court as cited by counsel. The *Decker-Myles* Case, 4 Colo. 566, in which it was said that the defend-

ants proper in proceedings to foreclose miners' and mechanics' liens are the owners of the property sought to be charged, was an original action growing out of a previous foreclosure suit. The question involved was in no way analogous to the one at bar. The *San Juan-Finch* Case, 6 Colo. 214, was also an original action brought to restrain the execution of a judgment rendered against the *San Juan Company* without service of process upon said company. The *Snodgrass-Holland* Case, 6 Colo. 596, was a suit to enforce a miner's lien against a mine owned in fee by *Snodgrass* and one *Warwick* as tenants in common. That the contract under which the lien was claimed was made by the authority and sanction of *Warwick* does not appear to have been disputed. *Snodgrass* moved in the court below that his co-tenant *Warwick* be made a co-defendant, and for the refusal of the court to grant this motion the judgment was reversed. It is not intimated by this opinion that the *Warrior's Mark Company* might not, by an original suit, obtain relief against the judgment now under review; nor is it decided that, if plaintiff in error had moved in the court below to make the *Warrior's Mark Company* a co-defendant, it would not have been error to have refused the motion. Plaintiff in error knew when this cause was pending below, or had the means of knowing then as well as now, the necessity of making the *Warrior's Mark Company* a co-defendant, if such necessity there was. A party cannot ordinarily resort to an appellate court to obtain relief from his own mistakes or omissions in the lower court. Such is not the usual office of the writ of error. The transcript in the case of *Denison et al. v. Warrior's Mark Min. Co.*, filed in this proceeding, cannot be regarded in any sense as a supplemental transcript in this case. It does not appear ever to have been made a part of this proceeding in the court below. Perhaps, if it had been introduced in evidence on the trial below, it might have had some bearing on the case. But this review must be prosecuted on the record, and not upon *ex parte* matters introduced afterwards. *Luthe v. Luthe*, 12 Colo. 420, 21 Pac. Rep. 467.

As to the right and authority of the court to determine the priority of the liens claimed by the plaintiff for himself and his assignors and the defendant bank, respectively, there can be no doubt. The bank by its answer joined issue with plaintiff, and asked to have its lien by attachment adjudged to be prior to any lien claimed by plaintiff. It had full opportunity to be heard by evidence and by its counsel. If it had succeeded in establishing the priority of its lien by a decree of the court, it might have proceeded to sell the property by virtue of its levy discharged of plaintiff's liens, and thus would have gained all it desired in the litigation. In case of success, there was no necessity on its part to make the mining company a party to the litigation, inasmuch as the only issue material to its interests and the only parties necessary to an adjudication of its claims were before the court. Surely, it cannot

now be successfully urged as a ground of error in behalf of the bank that it did not anticipate defeat, and so did not take the steps necessary for the protection of its interests in such a contingency. The issue, as joined between the parties, was found and adjudged in favor of plaintiff, and nothing whatever, either of law or of fact, is shown in the record against the correctness of such finding and adjudication. Certainly no reason appears why the adjudication of the controversy in respect to the priority of the respective liens should not be regarded as final between the parties to the record. Phil. Mech. Liens, § 395. The judgment of the district court is affirmed, without prejudice to the defendant bank as a lien claimant junior to plaintiff in respect to the liens adjudged against the property known and described in the record as the property of the Warrior's Mark Mining Company.

In re THOMAS.

(*Supreme Court of Colorado.* Sept. 14, 1891.)

ADMISSION TO THE BAR—RIGHT OF WOMEN.

Attorneys at law are not civil officers, within Const. Colo. art. 7, § 6, providing that "no person except a qualified elector shall be elected or appointed to any civil office in the state;" and, in the absence of any statutory or constitutional inhibition, women will be admitted to the bar on equal terms with men.

Petition for admission to the bar.

J. Warner Mills, for petitioner. *Atty. Gen. Maupin*, *amicus curiæ*.

HELM, C. J. Petitioner, Mrs. Mary S. Thomas, asks to have her name placed upon the roll of attorneys practicing before this and other courts of the state. She tenders credentials attesting the prescribed professional qualifications, and a compliance with all express requirements of the statute and rules of court regulating access to the legal profession. The question is therefore squarely presented, are women entitled to admission to the bar of this state on equal terms with men? By ancient and universal usage, women have been denied the right to practice before the English courts. The two or three exceptions cited in petitioner's brief, such as that of Anne, countess of Pembroke, are not well authenticated. During the early history of this country a like exclusion from the profession generally prevailed, though a few instances are recorded, as in the case of Margaret Brent, also mentioned in petitioner's brief, where they were permitted to appear specially in particular proceedings. In the District of Columbia, and in Massachusetts, Illinois, and Wisconsin, within a period comparatively recent, such applications have been rejected, the courts promulgating learned opinions in connection therewith. Fifteen years ago the supreme court of the United States also denied the right. The case was not reported, but the chief justice, in orally epitomizing the reasons for adverse action, declared that the court had concluded to adhere to the uniform custom since its organization, of licensing men only, till "a change is required by statute or a more extended practice in the

highest courts of the states." *In re Lockwood*, 9 Nott. & Hop. 346; *Ex parte Robinson*, 131 Mass. 376, citing the above ruling of the United States supreme court; *In re Bradwell*, 55 Ill. 535; *Ex parte Goodell*, 39 Wis. 232. The written opinions mentioned marshal all objections to conferring this privilege upon women, dwelling with especial force and clearness upon those existing outside of constitutional and statutory provisions. They ably discuss questions of impropriety and inexpediency based upon the laws of nature, the bearing of historical customs and usages, and the impediments growing out of woman's legal status at the common law. With all deference to those learned courts, we decline to imitate their example in the latter regard. We shall not indulge in speculation concerning the natural aptitude and physical ability of women to perform the duties of the profession, nor shall we dwell upon considerations of propriety or expediency in the premises. These are matters as to which wide differences of opinion exist; and we conceive that they have little, if any, bearing upon similar applications now presented in this state, however pertinent they may have been in the commonwealths referred to when the above rulings were made. We shall likewise decline to give controlling weight to historic custom or usage in England, in the American colonies, and in the republic during its infancy. Reasoning, predicated upon the latter ground, possesses the inherent weakness of ignoring, to a greater or less extent, the marvelous changes throughout the country during the last 50 years in the legal status of woman. It is a significant circumstance, indicating the trend of popular sentiment on the subject, that each of the cases above referred to was speedily followed by a statute providing for the admission of women to the profession. The supreme court of the United States, and the courts of the District of Columbia, Massachusetts, Illinois, and Wisconsin, no longer adhere to the rule of discrimination on the ground of sex. Women are now licensed without question to practice in these courts as well as in those of several other states upon the same conditions as men, save only that the act of congress requires three years' membership of the bar of the highest court in some state or territory as a condition precedent to their appearance before the supreme court of the United States. In this commonwealth, women of sufficient age, married or single, may make contracts, form partnerships, inherit, acquire, and dispose of property, in all respects substantially the same as men. The policy of our legislative and judicial action has tended constantly towards conferring upon them the same property rights and business status as are enjoyed by men. They may undoubtedly pursue all vocations and enterprises of a business character. They may also become ministers, physicians, or educators, and, if any limitation in regard to the learned professions exists, such limitation applies solely to the bar. The privilege of practicing this profession and sharing in its emolu-

ments is alone questioned. Hence we contend with none of the difficulties encountered by the courts above mentioned arising from the disabilities of women, especially married women, at the common law. Applications like the one before us may therefore be regarded with the judicial favor usually extended when equality of rights is involved, unless some restrictive provision be found in our statutes or constitution.

Turning to the act regulating the licensing of attorneys, and defining their duties, liabilities, etc., we find nothing that, in our judgment, fairly shows a legislative intent to bestow this privilege upon men exclusively. The substantive phrases used throughout the act, when speaking of applicants, cover both sexes. They are "no person" and "any person;" as, "no person shall be permitted to practice; * * * "no person whose name is not subscribed; * * * "any person producing a license from any court of record; * * * "if any person not licensed as aforesaid shall receive any money. * * * The pronouns employed with reference both to applicants and licensed attorneys are, it is true, masculine; but this fact, standing alone, is a matter of very little significance. The masculine pronoun is constantly used in legal and secular literature to designate both sexes; besides, it is expressly provided by law here, as in other states, that, unless the language contains something inconsistent therewith, this rule may be followed in construing statutes: "Every word importing the masculine gender only, may extend to and be applied to females as well as males." Mills, Ann. St. § 4185. There is no language in the act under consideration inconsistent with the application to its construction of this statutory guide. We are not unmindful of the rule that a statute is to be interpreted in the light of other statutes constituting a part of the same legislative system. But, as already suggested, the uniform and unmistakable policy of our legislation, as shown in numerous provisions, has been to extend the legal rights of women, and enlarge their sphere of occupation and usefulness. The proposition, however, is advanced, with plausibility and force, that section 6, art. 7, of the constitution, indirectly, but clearly, forbids licensing women to practice law. This section reads: "No person except a qualified elector shall be elected or appointed to any civil or military office in the state." It is argued that attorneys are civil officers, and that since women are not electors they cannot become attorneys. Women may participate in school elections, and hold certain offices connected with the public schools, but they are not such electors as this section of the constitution contemplates. The constitutional term "qualified elector" is here "used in its broadest sense, meaning a person qualified to vote generally." In re Notaries Public, 9 Colo. 628, 21 Pac. Rep. 473. The limitation declared by this provision is plain, and, if attorneys at law are civil officers within its meaning, the objection must be sustained.

The phrase "civil office," as thus em-

ployed, is frequently used interchangeably with the term "public trust." It undoubtedly relates to public offices; that is, to those offices which involve an election or appointment by or on behalf of the general public, and the performance of duties essentially public in their nature. See Cohen v. Wright, 22 Cal. 293; also Weeks, Attys. § 39, citing cases from Alabama, Virginia, New York, and South Carolina. Attorneys at law are constantly spoken of as "officers of the court." The designation is not inaccurate. Their special researches and general legal knowledge enable them to aid the courts, and thus to contribute somewhat towards the due administration of justice. The office is therefore an important one, and the attorney incidentally performs a *quasi* public duty. But admission to the profession is purely a private matter, and is secured solely for the advancement of private interests. By virtue of such admission, attorneys are not required to perform specific public acts, nor are specified duties devolved upon them in behalf of the general public. The duties they assume and the labor they perform are usually in pursuance of personal contracts with private litigants. Admission to the bar is an essential prerequisite to the filling of certain offices, such as prosecuting attorney and judges of supreme, district, and other courts. But these public trusts, and the functions connected therewith, devolve only upon members of the profession by virtue of an independent election or appointment. Until thus designated, they can no more enter into offices where the functions are of a public nature than can unlicensed persons wholly ignorant of the law. Our conclusion is that attorneys at law are not, *per se*, civil officers, within the meaning of the constitutional phrase under consideration. See authorities last above cited. The major premise of the argument in support of a constitutional inhibition thus proves upon examination to be untrue, and of course the conclusion falls. That instrument, so far as we are aware, contains nothing inconsistent with the admission of women to the bar. If there were anything in the rules or usages of the court involving this inconsistency, we would feel that a modification of such rules or usages should now be made. We have no disposition to postpone falling into line with the supreme court of the United States and other enlightened tribunals throughout the country, that have finally, voluntarily, or in obedience to statutory injunction, discarded the criterion of sex, and opened the door of the profession to women as well as men. The prayer of the petitioner will be granted. It is ordered that her name be placed upon the roll of attorneys.

(16 Colo. 231)

DRAKE *et al.* v. GILPIN COUNTY MIN. CO.
*et al.*¹

(Supreme Court of Colorado. June 18, 1891.)

ENFORCEMENT OF JUDGMENT — EQUITABLE AID.

Plaintiffs sold defendants a mining claim, payment to be made as soon as a good title could be furnished, plaintiffs agreeing to give title, with covenants of warranty, except as against

¹Rehearing denied

the United States. When this was tendered, defendants refused to accept deed, and to pay the money, and a judgment was rendered in plaintiffs' favor for the amount thereof; it being provided, as a part of the judgment, that plaintiffs deposit and keep on deposit with the clerk a deed of the claim, to be delivered to defendants. *Held*, that plaintiffs having failed to comply with the judgment as to depositing the deed, but instead thereof having entered upon the land as claim-jumpers, and asserted title by reason of a relocation, on the ground that defendants had forfeited it by non-compliance with the mining laws, equity would not assist in enforcing the judgment against other property of defendants. *BISSELL and REED, CC., dissenting.*

Commissioners' decision. Error to district court, Arapahoe county; *VICTOR A. ELLIOTT, Judge.*

Suit by Lester E. Drake and Harper M. Orahod, executors of Lester Drake, deceased, against the Gilpin County Mining Company and others, asking the aid of the court in enforcing a judgment. Judgment for defendants, and plaintiffs appeal. Affirmed.

L. C. Rockwell and Teller & Orahod, for plaintiffs in error. *L. B. France*, for defendants in error.

RICHMOND, C. In April, 1879, Lester Drake was interested as owner in the Williams lode, situated in Gilpin county. The extent of such interest is immaterial, as he held contracts with the other owners giving him the right, for the time being, to sell the entire property. The plaintiff had been unsuccessful in his efforts to make such sale until he met defendants Weltbrec and Cooper. He was then in embarrassed circumstances, and the time of these options was about to expire when the negotiations with these defendants were entered upon. Upon the last day he succeeded in making a contract with them, whereby they were to take 600 feet of the property, and pay therefor the sum of \$36,500. About this time the defendants Weltbrec and Cooper, with one Parker, organized a corporation known as the "Gilpin County Mining Company," in whose name the negotiations were finally consummated, although it is claimed that it was a personal enterprise on the part of Weltbrec and Cooper, with which the company had nothing whatever to do. The title to 50 feet of the 600 being in dispute, it was arranged that the sale should be completed without regard to that portion of the claim. A separate agreement in writing was executed as to this, wherein the price to be paid therefor was fixed at \$2,500. This amount was made payable on the 15th of September, 1880, or as soon as a good and sufficient title thereto could be furnished, Drake agreeing to furnish such title with covenants of warranty, except as against the United States. The price agreed upon for the 550 feet was \$34,000. This sum was paid as follows: Company stock for the corporation, for which Drake received in cash from Weltbrec and Cooper \$7,500; the notes of the company for \$20,500, which were paid by Weltbrec and Cooper; and the assumption by the company of the payment of a note of plaintiff for \$6,000. Some of these notes were secured

by a trust-deed upon the property. This part of the transaction appears to have been fully closed at the time, and a deed executed and delivered to the company for the 550 feet by Drake. In the year 1881, Drake, claiming to have secured the title to the remaining 50 feet, tendered a deed to the company for the same, and demanded the \$2,500 agreed to be paid thereupon. The company, claiming some misrepresentation in reference to the property, declined to accept the deed, and refused to pay the money. Thereupon Mr. Drake brought suit for this amount, with interest. In that suit he obtained judgment against the company, and caused an execution to be issued and levied upon the mining property theretofore transferred by him to the company, but made no further attempt to satisfy the writ until the institution of the present action. Some of the notes given in part payment of the original purchase price falling due in the mean time, Weltbrec and Cooper caused the property to be advertised for sale by the trustee. Drake thereupon instituted this suit to restrain the sale and subordinate the lien of the trust-deed to the lien of his judgment.

The pleadings in this case are somewhat voluminous, and I deem it unnecessary to make extended extracts therefrom. Drake, having obtained the judgment for \$2,500, which judgment remained unsatisfied, and having entered upon the possession, as he claims, of the 50 feet of ground, under the mining laws of the United States, as public land, and while claiming title thereto, seeks to subordinate the lien of the trust-deed to the lien of his judgment, and subject the property of the defendant mining company to sale in satisfaction of said judgment. He alleges that the defendants Weltbrec and Cooper are the sole owners of all the stock of the Gilpin County Mining Company; that they have declared dividends resulting from the products of the mine when said company was indebted to him; that the various notes secured by the said deed of trust were not legal obligations against the company, and that it was in no way indebted to Cooper and Weltbrec by reason of the execution of these said notes. Drake having deceased before the cause was reached for trial, the action was continued in the name of his executors, the present plaintiffs in error. A trial to the court without a jury resulted in findings and judgment for the defendants. Much appears in the complaint which is without bearing upon the actual controversy between the parties. It does not appear, however, by averment or otherwise, that any of the defendants are insolvent; and it is not shown, either by testimony or by the pleadings, that the plaintiff was induced by fraud or misrepresentation to enter into the contract of sale. The consideration to be paid for the 50 feet was the sum of \$2,500; the judgment against the company was rendered accordingly. It is admitted by the pleadings (the defendants having alleged it, and the plaintiff not having denied it) that, as a part of such judgment, it was ordered and adjudged by the court that the said plaintiff

deposit, and keep on deposit, with the clerk of the district court, a deed of conveyance of said 50 feet of said Williams lode, said deed to be delivered to the defendant the Gilpin County Mining Company. Thereafter, and before the institution of this suit, Drake, having, as he alleges, deposited the deed to the property with the clerk of said court, assumed and avers in his replication to the answer that the company had neglected to comply with the mining laws of the United States; had forfeited their right to said 50 feet; and that he had the right, as a citizen of the United States, to enter upon and repossess himself of the title and possession of said property. And this, too, in the face of his contract with the defendant company to make a good title to said 50 feet of ground free and clear from all disputes, adverse claims, and incumbrances, with covenants of warranty, except as against the government of the United States. Whether such a deed was tendered or deposited in the hands of the clerk is put in issue by the pleadings. The burden of such issue was clearly upon the plaintiff, but no proof was offered thereon by either party. Plaintiff thus failed to show that he had complied on his part with the judgment which he is now seeking to enforce. Instead of doing so, he claims the property while seeking to recover the purchase price. There is no better rule known to equity jurisprudence than that "he who seeks equity should do equity." Drake was obliged to make a deed to the property before he could in equity and good conscience demand the payment of the \$2,500. As a "jumper," he entered upon the possession of that property, and asserts an absolute claim to it by reason of a relocation, and thereafter comes into a court of equity and says: "I want the \$2,500 which these defendants obligated themselves to pay me for 50 feet of this ground which I originally contracted to sell to them, and which I am now the owner of." In other words, it is an effort by plaintiff to obtain from a court of equity a decree for the enforcement of that part of the judgment which was against defendants, while he leaves unperformed that part which was against himself. He seeks to recover the consideration for premises sold while he withholds the title-deed and the possession claiming under an adverse title. Under his contract, as recited in his own pleadings, he was obligated to furnish a satisfactory title with covenants of warranty to that 50 feet. Under the decree of the court allowing him a judgment for \$2,500, and execution thereon, he was bound to execute and make a deed to it. Being so bound, he says: "I want the court to say that the defendants Weltbree and Cooper had no right to go into the market and purchase promissory notes of the defendant company secured by a deed of trust. They had no right to declare dividends arising from the proceeds of their mining operations upon this claim. They had no right to appropriate to themselves individually any sums of money resulting from the products of the said company's operations while I remained a creditor of

the company; and by reason of their conduct in this particular, by reason of the fact that they have done things they ought not to have done, I ask that the property of the company be relieved of those incumbrances, and that I shall receive full satisfaction of my claim against the company in the sale of the identical 550 feet which they purchased, notwithstanding the fact that I am now the possessor and owner of 50 feet to which I contracted to give a perfect and satisfactory title, though I have not given the same." If plaintiff had deposited and kept on deposit the deed required by the judgment, and some third party, not knowing all the circumstances, had entered upon this 50 feet of ground, then the prayer of this complaint would appear in a different light; but how the individual, who was familiar with the defective title he possessed when he contracted to make the sale, who was familiar with the fact that the \$2,500 was due to him only upon making a satisfactory title, assumes that he can ask the aid of a court of equity in the enforcement of that judgment, and the payment of that claim, under the circumstances here presented, is beyond my fathoming. It is claimed that the sale was, in fact, made by Drake to Weltbree and Cooper, and not to the company. And yet, at the time when Drake was in possession of all the facts, he instituted suit against the corporation, and obtained judgment against it as the sole vendee. It will be conceded that the conduct of Weltbree and Cooper concerning the affairs of the corporation is open to be questioned by a creditor; a *bona fide* creditor; an equitable creditor; one who could step into a court of equity with clean hands, and who, coupled with his equity, could show the insolvency of the defendant company; but when such a claim to equity emanates from one who seeks to get something for nothing, who occupies the position of being now the owner and possessor of the identical property which moved the defendant company to execute the agreement as evidence of their obligation to him, and seeks to obtain a decree for the sale of that portion of the property for which he has been paid in full, his claim does not address itself favorably to a court of equity. Drake evidently sought by his complaint, and by his testimony, and the counsel on behalf of appellants herein seek, to convey the impression that he never understood the language of the papers that he was signing. This cannot be true; especially it cannot be true in the face of his own testimony: "Question. Under what circumstances did you sign that paper? Answer. When I sold the property up there. It must have been on the table in Mr. Orahood's office, and Mr. Orahood must have told me to sign it, and I signed it without any hesitation. He told me to sign that paper, and to sign other papers, and I signed it. I did it without any question." Drake was present at the time with his counsel, and the court below was warranted in concluding from the testimony that Drake understood fully at the time the nature of the transaction upon which he entered. It is claimed the capital stock

was issued to Drake in order that it might appear to be fully paid up. If this be true, and it seems quite probable from the evidence, plaintiff's position is not benefited thereby. After having taken and retained the benefits of the transaction for these many years, he cannot now be heard to complain. I am clearly of the opinion that the proof is not sufficient to warrant a decree for the plaintiff in this action, and that the judgment of the district court should be affirmed.

BISSELL and REED, CC., dissenting.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the court below is affirmed.

(16 Colo. 238)

FISK v. CATHCART.¹

(Supreme Court of Colorado. June 19, 1891.)

JUDGMENT—RES JUDICATA—AMENDMENT WITHOUT NOTICE.

An agreement accompanying the sale to C. of a stock of goods provided that C. was to take possession of the business, and out of the sales pay the debts named, including his own, and that if any property remained he was to return it to the debtor. The debtor afterwards made a general assignment, and F., who had notice thereof, bought the property from C. under an agreement to settle with the debtor or his assignee "for all claims or interest he may have in the business." A suit by the assignee to cancel the contract between the debtor and C. on the ground of fraud, and to recover the full value of the stock, was amended after trial and before judgment so as to transform the proceeding into an action on the contract for the surplus after payment of these secured debts. F. was not a party to the action, though he had notice of its pendency in the original form, and testified at the trial. Held that, inasmuch as he had no notice of the amendment, and the fraud referred to in the original complaint was not a matter for which he was responsible under his agreement, his liability in an action by C. to recover the money C. was obliged to pay on a judgment in that action was not *res judicata*.

Appeal from superior court of Denver; **MERRICK A. ROGERS, Judge.**

Action by Thomas L. Cathcart against Archie C. Fisk to recover money under a contract. There was judgment for plaintiff, and defendant appeals. Reversed.

On the 24th of May, 1883, Edgar D. Parker, being insolvent, transferred by bill of sale to appellee Cathcart a certain stock of goods in the city of Pueblo. This transfer was absolute on its face, and the alleged consideration was \$15,000. Cathcart immediately took possession, and proceeded to dispose of the goods in the ordinary course of trade. The real transaction, however, instead of being an absolute sale, appears by virtue of a contemporaneous written agreement to have been in effect an assignment to secure certain preferred creditors, among whom was Cathcart himself. On the 20th of October, 1883, about five months subsequent to the foregoing transaction, Cathcart sold the goods in question to appellant Fisk and one Hughes. Fisk and Hughes bought the interest of Cathcart outright, and paid about \$12,000 therefor. They took subject to the rights of Parker, and covenanted to settle with him or his as-

signee for his reserved interest in the property. Prior to the execution of the last-named instrument Parker made an assignment to one Alexander for the benefit of all his creditors, conveying in general terms all property of every kind belonging to him. Of this assignment, as well as of the fact of Parker's insolvency at the date of both of these transactions, Cathcart, Fisk, and Hughes had notice. On the 24th of October, 1884, Alexander began a suit against Cathcart, on behalf of Parker's creditors, to recover the full value of the stock of goods in question, on the ground of fraud in the original transfer to Cathcart. At the same time he instituted a separate suit against Fisk and Hughes in connection with the same matter, averring notice by them of the alleged fraud at the date of their purchase. The latter suit, being resisted by Fisk, was ultimately dismissed. The former suit was defended by Cathcart, but plaintiff secured judgment against him for \$5,500. On the 25th of July, 1886, the present suit was instituted by Cathcart against Fisk and Hughes to recover the said \$5,500, which he had previously paid Alexander in pursuance of the judgment mentioned. Hughes not being served with process, Fisk alone answered. It is unnecessary to here state the averments of the pleadings, as they sufficiently appear in the opinion. Cathcart recovered a judgment against Fisk for \$7,491.57, being the amount paid Alexander, with interest. To review that judgment this appeal was taken.

Rogers & Shafroth, for appellant. **V. J. Markham** and **J. L. Jerome**, for appellee.

HELM, C. J., (after stating the facts.) The rights of the parties in the present case depend upon the construction we shall give the following extract from the contract made by Cathcart with Fisk and Hughes upon the sale to them of the stock of goods in question: "The said second parties agree, in the event of the said purchase being made by them, that they will settle with the said E. D. Parker, or his assignee, for all claims or interest he may have in said business." But this provision must be construed in connection with the agreement to which it undoubtedly refers, viz., the writing between Parker and Cathcart made at the time Cathcart obtained control of the goods sold by him to Fisk and Hughes. This writing shows that the transaction between Parker and Cathcart, though accompanied by a bill of sale, was in fact a sort of pledge, conditioned substantially as follows: Cathcart assumed and agreed to pay, when due, certain debts owed by Parker, including one to himself, aggregating about \$12,000. He was to take possession of the property and carry on the business as if it were his own, and out of the sales settle the debts in question, or reimburse himself if they were otherwise paid by him. But Parker retained the privilege of paying these debts himself, in which event Cathcart was to restore the property and account for the proceeds from the sales, less salary and expenses. Or if Cathcart paid the debts from sales,

¹ Rehearing denied.

he was to return to Parker the business, together with any goods remaining, or if all were sold, the surplus proceeds, less expenses and the cost of new purchases: provided that, if at the expiration of a year from the date of the transaction the secured debts were not paid, either by Parker or by moneys received for goods, the bill of sale became absolute. In the negotiations between Fisk and Cathcart the above agreement between Parker and Cathcart was undoubtedly regarded as *bona fide*. The contract by which Fisk and Hughes became owners of the goods was made upon that basis. Fisk's guaranty amounted simply to a promise that he would take Cathcart's place, and settle with Parker or his assignee in accordance with the agreement with Parker. It is difficult to conceive that the thought ever entered the mind of either contracting party that Fisk was giving an undertaking to indemnify Cathcart for a fraud on his part in the original transfer from Parker to him. To say that Fisk agreed to pay Cathcart upwards of \$12,000 in land and money for a stock of goods held by Cathcart under a certain contract with Parker, and at the same time agreed to pay Cathcart, in addition thereto, the full value of the goods in case Parker's creditors recovered such value from Cathcart on the ground of a mutual fraud between Cathcart and Parker in making this contract, would be a strained and unnatural construction of the language employed by the contracting parties, besides imputing to Fisk a most extraordinary indifference to his own financial interests.

It follows from the foregoing that the original complaint in the suit by Alexander against Cathcart for the benefit of Parker's creditors did not refer to a matter in connection with which Fisk was responsible to Cathcart. This complaint contained two counts or alleged causes of action. Both of these counts were predicated upon a transfer by Parker, who was insolvent, of his property in fraud of the rights of all his creditors save those mentioned in the transfer, the difference between the two counts being that one pleaded a constructive fraud through the supposed invasion of the statute then in force relating to assignments for the benefit of creditors; the other, an actual fraud through the assignment upon a fictitious consideration of the property, and the subsequent retention of possession by the assignor. Neither Fisk nor Hughes was made a party to that suit; but Fisk had notice of its pendency as brought. A copy of the summons was given him by Cathcart. He conferred with Cathcart during its progress, and testified at the trial. These facts do not, however, in our judgment establish Fisk's liability in the present case. Had that suit been prosecuted to final determination upon the original complaint, and had Alexander recovered a judgment against Cathcart for the full value of the goods on the ground of a fraudulent transfer, Fisk would clearly not have been indebted to Cathcart for the entire amount of such recovery. It is asserted, however, that Fisk is liable over to Cathcart under his guaranty, because

the judgment in that suit, when finally rendered, was for the balance in money due Parker (all the property having been sold by Cathcart) by virtue of his agreement with Cathcart. Fisk's undertaking may have covered such an indemnity; for, as above stated, he agreed in effect to carry out Cathcart's contract with Parker. But by reference thereto it will be seen that the complaint upon which the action against Cathcart was tried, under which the evidence of Fisk was given, and of which he had notice, attempted to state causes of action predicated upon the ground of fraud, to set aside and cancel the agreement between Parker and Cathcart, and to recover from Cathcart the entire value of the property in question. By stipulation, however, of Cathcart's counsel with Alexander's counsel, after the cause was fully tried and ripe for judgment, and without notice to Fisk, that complaint was amended so as to transform the proceeding from a suit to cancel the contract into an action predicated upon the contract; from a suit to recover the entire value of the property, on the ground of fraud, into an action to recover a surplus of proceeds therefrom after payment of the secured debts; from a suit which Parker himself could not prosecute, and which was only available to his creditors or their representative into an action that lay in favor of Parker as well as his creditors; from a suit that neither Fisk nor Cathcart can fairly be regarded as contemplating when they executed their agreement into an action which may be treated as within the scope of that agreement. Were we to concede that as between Cathcart and the creditors of Parker the change made in the complaint after trial, and before judgment, was a legitimate amendment of the cause of action originally pleaded, the fact would still remain that this change substituted a liability, within the purview of Fisk's contract with Cathcart, for one that, at least so far as Cathcart is concerned, was not covered thereby. As already suggested, the decisive question is, did Fisk agree to indemnify Cathcart against liability to Parker's creditors arising out of the invalidity of Cathcart's transaction with Parker, because of the mutual fraud of Cathcart and Parker in that transaction? If he did not, his liability to Cathcart in this action should not be treated as *res judicata* by virtue of the judgment rendered in the suit against Cathcart. It is unnecessary to speculate as to what would have been the result had Fisk received notice of the contemplated amendment of the complaint, and been favored with an opportunity to object, or to assert his defenses, if any he had, even at the eleventh hour. It is sufficient to say that no such notice and opportunity were given. Nor are we embarrassed by a consideration of any possible right or equity of Parker's creditors against Fisk because of his supposed privity with Cathcart. Those creditors have been fully satisfied, and we have now only to deal with the rights of Fisk and Cathcart as between themselves. We think Fisk was entitled to be heard in the present action upon the question of his *bona fide* compliance with

the obligation taken upon himself by the indemnity provision in his contract with Cathcart; and we further believe that he should not be estopped from pleading a subsequent contract, if any there were, with Cathcart, changing or modifying such obligation. It follows that the judgment now under consideration must be reversed.

CRAMER, Sheriff, v. OPPENSTEIN.

(*Supreme Court of Colorado. Sept. 14, 1891.*)

SHERIFF'S COSTS FOR DISBURSEMENTS — COMMISSIONS—ACTION FOR MONEY ILLEGALLY RETAINED—PLEADINGS.

1. The sheriff may be reimbursed in costs for money out of pocket expended by him in good faith in taking and preserving property seized under valid process; but such costs are allowable only to the extent of reasonable and actual, as well as necessary, expenditures.

2. The making of an inventory of attached property is not a matter necessarily involving the expenditure of money out of pocket, and the sheriff is not entitled to costs therefor, in addition to the statutory fees prescribed by statute for serving and otherwise executing attachment writs.

3. When the sheriff is compelled to remove a large stock of merchandise to a different place for safe-keeping, the actual and reasonable expense of drayage incurred in making such removal may be allowed in his bill of costs.

4. The sheriff has an insurable interest in property seized in execution, but he cannot subject the execution debtor to the cost of insurance without his express consent.

5. The sheriff is not entitled to charge commissions on the proceeds of an execution sale in excess of the amount necessary to satisfy the execution.

6. Commissions are allowed by statute to the sheriff to compensate him for making sale of property upon execution. He is not entitled to charge the plaintiff or defendant in the execution with the additional expense of an auctioneer without their consent.

7. Facts, not forms, are the essential requisites of good pleading, though approved forms may aid the pleader in setting forth the facts upon which the rights of parties depend.

8. Where the sheriff retains moneys above his proper fees and costs, the party entitled to the surplus may recover the same by action. The remedy in such cases is not limited to a proceeding to retax the sheriff's fees and costs, though that course may be pursued; and, though the suit may be for treble damages under the statute, still, under appropriate allegations, there may be a recovery as for money had and received.

(*Syllabus by the Court.*)

Appeal from superior court of Denver; MERRICK A. ROGERS, Judge.

Action by Abraham Oppenstein against Frederick Cramer, sheriff, to recover money alleged to have been illegally retained. Judgment for plaintiff. Defendant appeals. Affirmed.

This was an action by the appellee, Oppenstein, plaintiff below, against the appellant, Cramer, sheriff, for the recovery of certain moneys alleged to have been received and illegally retained by him as sheriff. Certain writs of execution and of attachment against Oppenstein, having come into the sheriff's hands, were levied upon a stock of merchandise consisting of gentlemen's furnishing goods, the property of Oppenstein. The goods were sold under the executions, and the sheriff received the sum of \$7,602.25 as the proceeds of such

sale. Before the money was paid over, Oppenstein compromised with his creditors, and the money in the hands of the sheriff was released from all executions and attachments, so that Oppenstein became entitled to receive the proceeds of the sale, less proper fees and costs. The sheriff paid Oppenstein the sum of \$6,419.94, and retained \$1,182.31 as "sheriff's fees, costs, and charges," which he itemized as follows:

Levying three executions.....	\$ 4 50
Invoicing goods.....	30 00
Drayage.....	26 00
Insurance.....	25 50
Storage of goods, 16 days.....	30 50
Serving papers in attachment.....	26 90
Advertising fees, 3 cases, 50c. each.....	1 50
Printers' bill.....	93 28
Auctioneer's commission.....	760 22
Sheriff's commission.....	151 96
Custodian, 3 days.....	30 00
Mileage and return.....	1 95
	<hr/> \$1,182 31

In his complaint Oppenstein claimed that certain of the foregoing charges, aggregating \$948.74, were illegal and excessive. The sheriff answered, and attempted to justify the charges. The cause was tried by the court without a jury, and resulted in a finding and judgment for plaintiff in the sum of \$995.08 and costs. The defendant brings this appeal.

L. B. France, for appellant. *Sullivan & May*, for appellee.

ELLIOTT, J., (*after stating the facts.*) It is assigned for error, *inter alia*, that the finding and judgment of the court are contrary to the law and the evidence. The plaintiff claimed that the sheriff's charges for "invoicing goods," for "drayage," for "insurance," for "custodian, three days," for "sheriff's commissions," and for "auctioneer's commissions," were either altogether illegal or excessive. The trial court evidently regarded the plaintiff's claims for the most part as well founded; but, as the finding does not specify the items upon which the court based its conclusion, the law and the evidence applicable to the contested matters must be considered.

1. The decisions are somewhat conflicting as to the costs which may properly be allowed to the sheriff in cases of this kind in addition to his statutory fees; but common justice, we think, requires that he should be reimbursed for necessary expenditures of money out of pocket incurred by him in good faith in taking and preserving property seized under valid process. The ordinary fees allowed by statute evidently were not intended to cover all extraordinary disbursements which the sheriff may be compelled to make in the faithful discharge of such duties. On the other hand, justice to litigants requires that this rule should not be unduly extended. Costs should be allowed only to the extent that expenditures are reasonable and actual, as well as necessary. The sheriff cannot justify charges for disbursements by showing their reasonableness, unless he has in fact actually made the expenditures; neither can he justify expenditures on the ground that they have been actually made, and that they are reasonable, unless he

can also show that there was a legal necessity for making them. *Bank v. Tucker*, 7 Colo. 220, 3 Pac. Rep. 217; *Murfree, Sher.* § 960, also §§ 1065, 1077; *Crock. Sher.* § 1162; *Mechem, Pub. Off.* § 889; *Hanness v. Smith*, 21 N. J. Law, 496; *Croft v. Brandt*, 58 N. Y. 106; *McKeon v. Horsfall*, 88 N. Y. 429; *Dew v. Parsons*, 2 Barn. & Ald. 562. The doctrine announced in the case of *Baldwin v. Hatch*, 54 Me. 169, is not materially different from the rule laid down in *Bank v. Tucker*, supra, except that it authorizes the sheriff to deduct the necessary expenses, without procuring the amount to be "first taxed and allowed in the plaintiff's bill of costs;" and this seems to have been authorized by the Revised Statutes of that state.

2. The charge "for invoicing" cannot be sustained as a necessary expenditure. The statute requires the making of an "inventory," not an "invoice," of the attached property. An invoice is an account or catalogue of goods, with the value, marks, or particular description thereof annexed; an inventory is a list or catalogue of property merely. It is true that attachment writs were also levied by the sheriff upon the property seized in execution. The charge "for invoicing" is attempted to be justified under that provision of the Code (section 104) which requires the sheriff to make "a full inventory of the property attached." But the making of an inventory is not a matter necessarily involving the expenditure of money out of pocket. It is a specific act enjoined upon the sheriff in connection with the levy and service, and as "a part of his return upon the writ." He can perform this act himself. Fees for the levy of executions and for the service and recording of writs of attachment are prescribed by statute. These fees were duly charged as part of the sheriff's fees and costs in the cases under consideration. No complaint is made of such charges. If they were insufficient, the sheriff must look to his poundage or commissions for any additional compensation for making the inventory. If the sheriff is poorly paid for some official acts, he should remember that for other services he is exceedingly well compensated. Like other public officials, he takes his office *cum onere*. If there is any fault in respect to the fees or costs allowed him by law, the remedy is with the legislature. *Murfree, Sher.* §§ 1070, 1078, 1081, 1082; *Slater v. Hames*, 7 Mees. & W. 413; *Irvin v. County of Alexander*, 63 Ill. 530. The employment of a custodian to take charge of the goods for three days while they remained in the store where the levy was made was a necessary expenditure; but the charge of \$10 a day cannot be sustained, since the evidence shows without contradiction that the sheriff actually paid only \$5 a day for such service. This was a clear overcharge of \$15.

3. It appears that after three days the sheriff was obliged to remove the goods to another place for safe-keeping. The expense of drayage was therefore necessary; and the evidence does not show but what the charge therefor was reasonable. Though there are many authorities against such charges, we are inclined to

hold that when it becomes necessary for the sheriff to remove a large stock of merchandise to a different place for safe-keeping, the actual and reasonable expense of drayage incurred by the sheriff in making the removal should be allowed in his bill of costs.

4. The charge for insurance in this case cannot be allowed. It was made, as the under-sheriff himself testified, solely at his own instance. Undoubtedly the sheriff has an insurable interest in goods seized by him under execution or attachment, and he may insure them at his own expense or at the expense of the plaintiff, upon his request, for their better protection; but the authorities are agreed that the sheriff is not bound to insure them. Insurance is a precaution which may be taken or omitted, at the option of the party having an insurable interest in the property. The sheriff generally takes the property against the will of the debtor; and no reason is perceived why the debtor should be subjected to the cost of insurance after the levy any more than before, without his express consent. *Murfree, Sher.* § 1078; *Crock. Sher.* § 371; *White v. Madison*, 26 N. Y. 117; *Browning v. Hanford*, 5 Hill, 588.

5. The charge for "sheriff's commissions" was excessive. From the evidence the court was warranted in finding that there was no agreement for the sale of all the goods levied upon. The sheriff, therefore, should not have sold more than was necessary. It is well settled that where money received as the proceeds of an execution sale exceeds the amount necessary to satisfy the execution, the sheriff is not entitled to charge commissions on such excess. Statutes allowing such commissions are carefully construed for the protection of the debtor, and so as to offer no temptation to the sheriff to make excessive sales. *Murfree, Sher.* § 1073; *Sinnickson v. Gale*, 16 N. J. Law, 21. The three executions upon which the goods were sold in this case required the sheriff to make in the aggregate for the plaintiff only a little more than \$5,000. The additional costs of levy and sale need not have increased this sum more than \$300 or \$350. A sale amounting to over \$7,600 was therefore excessive. The sheriff charged commissions upon the full proceeds of the sale, and thus made an excessive charge of at least \$45.

6. The charge for "auctioneer's commissions" was altogether illegal. According to the testimony of the under-sheriff, he employed the auctioneer before speaking to Oppenstein about the matter. He says that on the morning of the sale he told Oppenstein that he was going to have an auctioneer sell the goods, and that Oppenstein said the auctioneer selected was just as good as any of them. There is no testimony that Oppenstein expressly agreed or consented or even acquiesced in the employment of an auctioneer at his expense. Oppenstein testified that he did not remember having any conversation with the under-sheriff about the auctioneer. As between the sheriff and Oppenstein, the court below was fully warranted in finding as a matter of fact that the sheriff employed the auctioneer

upon his own responsibility, and that he was not entitled to reimbursement for auctioneer's commissions. The law casts upon the sheriff the burden of making sales of property upon execution. Commissions are allowed by statute to compensate him for making such sales, and not to compensate him for employing some one else to make them. He is not entitled to charge either the plaintiff or defendant in the execution with the additional expense of an auctioneer without their consent. It is no argument against this view of the law that in the opinion of the sheriff or any number of witnesses goods may be sold to better advantage by a professional auctioneer. The sheriff cannot be permitted to devise expedients for selling property upon execution whereby the proceeds may be consumed, and then justify the expenditure on the ground that the means devised were wiser and better than those provided by law. His fees are controlled by the statute. His costs cannot be allowed to exceed those actual and necessary disbursements without which the property could not be taken, kept, and subjected to sale. *Binn. Sher.* § 180; *Crock. Sher.* § 1162; *Griffin v. Helmbold*, 72 N. Y. 437.

7. The learned counsel for appellant insists that the plaintiff has mistaken his remedy; that there are some grave defects in the form of the action; that the plaintiff's pleadings are not sufficient to sustain the judgment as rendered; that the allegations and the evidence do not correspond, etc. These objections require but brief notice. It is generally understood, at this day, in this jurisdiction, that facts, not forms, are the essential requisites of good pleading, though approved forms may aid the pleader in setting forth the facts upon which the rights of parties depend. *Mining Co. v. Johnson*, 13 Colo. 258, 22 Pac. Rep. 459; *Campbell v. Shiland*, 14 Colo. 491, 23 Pac. Rep. 324.

8. The sheriff having retained moneys out of the proceeds of the sale over and above his proper fees and costs, appellee, as execution debtor, was, under the circumstances, entitled to maintain an action against him to recover the moneys thus wrongfully retained. *Mechem, Pub. Off.* § 884. The remedy of the execution debtor in such cases is not limited to a summary proceeding to retax the sheriff's fees and costs, though doubtless that course might have been pursued. When necessary expenditures are incurred by the sheriff in connection with the seizure or sale of property on execution, he may have such disbursements allowed by order of the court, and taxed as costs; but if he assumes to charge such disbursements as costs, and retains the money in payment thereof, without procuring such order of allowance, he does so at his peril; and, if he retains too much, he certainly cannot be heard to complain that he is sued for the excess, instead of being subjected to a motion to retax the costs. These views are not in conflict with the opinion in *Bank v. Tucker*, *supra*. In

this action the sheriff's charges for costs have been considered as though they had been presented before the proper court for allowance as costs as indicated in the *Bank-Tucker* opinion. It has not been insisted that such previous allowance by order of court was an absolute prerequisite to the validity of such charges. All questions of law and fact relating to the controversy have been thus considered. This has certainly been fair to appellant. It has given him his day in court to maintain his charges for costs, if he could do so, upon the law and the evidence, even though he had improperly assumed to tax and retain such costs without giving appellee an opportunity to contest their validity.

In his complaint plaintiff alleges that the sheriff committed the "illegal acts" complained of "wrongfully, willfully, and knowingly, and in his official capacity;" wherefore he prays "that his damages may be trebled, as provided by statute," etc. See *Gen. St.* 1883, pp. 273, 324, §§ 610, 817. From this it is argued that the action was penal in its nature, and not the proper one for the recovery of money illegally retained as fees. But the complaint very specifically alleges that the moneys derived from the sale of the goods became and were the moneys of the plaintiff, freed and released from all claims of the attaching and execution creditors; that the sheriff received and retained said moneys belonging to the plaintiff, and "refuses to pay the same or any part thereof to the plaintiff, although requested so to do." These allegations are good in form, as well as in substance, for an action of *assumpsit* as for money had and received, in which the plaintiff is entitled to recover *ex æquo et bono*. *Hall v. Marston*, 17 Mass. 579; *Pease v. Barber*, 3 Caines, 266; *Rollins v. Board*, 15 Colo. 104, 25 Pac. Rep. 319. Moreover, plaintiff's allegations were amply sustained by the evidence. The trial court was warranted in finding that the sheriff retained nearly \$300 more than he was entitled to. That the court did not find that this was done willfully and knowingly, and thereupon give judgment for treble the amount, is not a matter of which appellant can justly complain. The amount thus overcharged, with interest from the date of the execution sale to the date of trial, would fully equal the amount of the court's finding. The allowance of interest on such overcharge is not specially complained of. The contention that Oppenstein acquiesced and approved of the expenditures and charges made by the sheriff, and accepted without protest the sum of \$6,419.94 in full of all demands on account of the proceeds of the sale, even if good in law as a defense to an action for moneys thus received and retained, must be regarded as having been resolved against the sheriff as a question of fact by the finding of the trial court upon such evidence as precludes our interference. *Mechem, Pub. Off.* § 884. No substantial error in the record having been shown, the judgment of the superior court is affirmed.

CRAMER, Sheriff, v. OPPENSTEIN.

(Supreme Court of Colorado. Sept. 14, 1891.)

SALES ON EXECUTION—DUTIES OF SHERIFF—PLEADING.

1. In seizing and selling property upon execution, the sheriff is bound to pursue with diligence the course prescribed by law, with the view to promote the interests of all parties. He may exercise considerable discretion, for which he will not be held liable so long as he acts in perfect good faith, and keeps within legitimate limits; but he cannot safely disregard reasonable business-like requirements.

2. It is negligence for the sheriff to sell a large amount of miscellaneous merchandise upon an advertised list which he knows to be defective, without ascertaining and making known to the bidders the extent of the discrepancy. Agreeing to make a rebate in proportion to the shortage does not excuse such negligence, and paying a rebate upon the uncorroborated claim of the purchaser, without any evidence as to the character and amount of the alleged shortage, is still greater negligence.

3. It is the duty of the sheriff to sell for cash. He is not at liberty to make a conditional sale upon his own responsibility; and where he accepts negotiable paper in payment, and makes a delivery of the goods, the execution debtor is entitled to treat the reception of such paper as a cash payment.

4. Duplicate statements for the same cause of action are not absolutely prohibited by the Code; they are sometimes permissible,—as, where the party cannot reasonably anticipate the evidence, so as to safely go to trial upon a single statement.

5. When the complaint contains three statements of the same cause of action it is not error to deny a motion to strike out the first and second, though a motion to require the plaintiff to elect which cause or causes of action he would rely on, and that the residue be struck out, might be granted in whole or in part.

(Syllabus by the Court.)

Appeal from superior court of Denver; MERRICK A. ROGERS, Judge.

Action by Abraham Oppenstein against Frederick Cramer, sheriff, to recover money alleged to have been unlawfully retained. Judgment for plaintiff. Defendant appeals. Affirmed.

This suit arises out of the same transaction as the preceding case between the same parties, decided at this sitting of the court. 27 Pac. Rep. 713. At the execution sale the merchandise belonging to the Oppenstein stock was sold in bulk for the gross sum of \$8,000. The fixtures were sold to other parties for about \$139.25. After the merchandise was thus sold, paid for, and possession taken, the purchaser claimed \$537 as a rebate, on the ground that there was a shortage in the goods delivered as compared with the inventory under which he purchased. The officer who made the sale paid the rebate as claimed, and thereupon made return that he had received only \$7,602.25 as the gross proceeds of the sale of the merchandise and fixtures. As appears by the preceding case, Oppenstein, by settling with his creditors, became entitled to receive the proceeds of the execution sale. He brings this action against the sheriff to recover the difference between the amount originally bid and paid for the property and the amount returned as the gross proceeds of the sale; in other words, for the amount repaid as a rebate. The cause was tried

by the court without a jury, and resulted in a finding and judgment in favor of plaintiff for the full amount of his claim, with interest. The defendant appeals to this court.

L. B. France, for appellant. *Sullivan & May*, for appellee.

ELLIOTT, J., (after stating the facts.) There is very little controversy as to the facts of this case. Under the assignment of errors the principal question to be determined is whether or not the finding of the trial court was warranted by the law under the evidence submitted. In seizing and selling property upon execution the sheriff does not act as an agent selected by the execution debtor. As to the debtor the proceeding is adverse; it is *in invitum*. The sheriff derives his authority directly from the law by virtue of the process in his hands, and not from the owner of the property. In executing his writ he is bound to pursue the course prescribed by law, and to act at all times with reasonable diligence with the view to promote, as far as he can justly do so, the interests of all parties to the proceeding. In the discharge of such duties he may, and often must, exercise considerable discretion as to details, for which he will not be held liable so long as he acts in perfect good faith and keeps substantially within legitimate limits; but if he would make sure of escaping liability he cannot disregard common prudence and reasonable business-like requirements. Murfree, Sher. §§ 990, 996, 1078; Blinnore, Sher. § 177.

Upon a careful examination of the evidence we are forced to the conclusion that the proceedings complained of in this case were of the most negligent character. The under-sheriff who conducted the execution sale testifies that he knew the advertised list or inventory was erroneous before the sale commenced. He does not show to what extent the inventory was erroneous. His testimony upon that point is: "At that sale all the goods levied upon under that execution were sold. The goods fell short of the advertised inventory. I did not have all the goods advertised. The discrepancy occurred in this way: In making out the list for the printer in several cases they made '6-12 of a dozen,' '7-12 of a dozen,' '5-12 of a dozen,' and the printer got it in at '6 dozen,' '5 dozen,' '4 dozen;' and until the morning of the sale the discrepancy was not discovered." The goods consisted of a large stock of merchandise, such as boots, shoes, clothing, gentlemen's furnishing goods, etc. It nowhere appears in the testimony whether the "dozens" which the officer claims were erroneously advertised were common muslin neckties, worth twenty-five cents a dozen, or expensive boots and shoes, worth fifty or a hundred dollars per dozen pairs, or other articles more or less expensive. Notwithstanding the officer knew of this alleged discrepancy, he proceeded to sell the goods in bulk, making, as he testified, public announcement in a loud tone, so that all could hear, at the commencement of the vendue, as follows: "We sell these goods to check out according to the advertised list. If there

is a shortage, there will be a rebate made in the ratio of the sale of the goods, the whole, as to the amount." The testimony of the officer concerning this announcement is not altogether corroborated. Other witnesses testified that the announcement was to the effect, "We offer the following goods for sale," and that the advertised list was then read. It makes but little difference which form of announcement was used. The legal effect was practically the same, considering how the goods were sold, and especially considering how they were delivered, and how the rebate was claimed and paid. With the exception of the fixtures, the goods were all sold in bulk for the gross sum of \$8,000. Several responsible parties made bids,—one bidding \$7,850, another \$7,900. It was unquestionably very negligent for the officer to sell a large amount of miscellaneous merchandise upon an advertised list which he knew was defective, without ascertaining and making known to the bidders the extent of the discrepancy. Agreeing to make a rebate in proportion to the shortage did not excuse the negligence. Such agreement could not be carried out with any reasonable degree of accuracy. Nor was it reasonable to expect that such an arrangement could be consummated without trouble and conflict between the purchaser and the officer if the officers should attempt to be faithful to his trust. If the merchandise had been sold at retail, or in lots consisting of a number of articles of the same class and value, the difficulty of adjusting the rebate would not have been so great; but, the sale being in bulk, of a large quantity of miscellaneous goods, who could say with any degree of certainty what was the value of the supposed missing goods as compared with the value of the whole quantity advertised? It would be a mere matter of opinion at best. Different persons might have very different opinions upon the subject. Some of the other bidders may have had opinions very different from those of the purchaser concerning the rebate to be allowed. Hence it cannot be said that no injury resulted from the mode of proceeding adopted.

But the manner of making the sale in bulk upon a defective list, with an agreement to make a proportionate rebate for any shortage that might be found, was by no means the most negligent part of the transaction. As soon as the goods were struck off, the under-sheriff, pleading other pressing official engagements, asked and received from the purchaser a certificate of deposit for \$2,500 and a check for \$5,500 in payment of the goods, and thereupon delivered possession of them, and went away, leaving no officer to attend to the delivery and checking of the goods to the purchaser. A few hours later, the purchaser, claiming that there was a shortage in the goods, and that the shortage was of the value of \$537, stopped payment on the \$5,500 check, and demanded that the \$537 be immediately repaid to him. The purchaser, as he himself testified, took no inventory of the goods as delivered; nor did he make any list of the goods claimed by him to be missing. In making his claim for a rebate he exhibit-

ed no list of the supposed missing articles; nor did he ever make any statement to the under-sheriff, or to any other officer or person, concerning the kind, class, or quantity of the alleged missing goods. He simply asserted that the shortage amounted to \$537; and upon this bald, naked, uncorroborated claim the under-sheriff, without protest, and without attempting to ascertain the truth in respect to the alleged shortage, repaid the full amount claimed by the purchaser. He did this for the reason, as shown by the evidence, that he could not otherwise get a settlement. The proprietor of the auction-house testified without contradiction that the under-sheriff told him that he "couldn't make a settlement; that we had got to make a rebate." It certainly was the officer's own fault that he was in the power of the purchaser in respect to the settlement for the alleged shortage. In this connection it is significant that not even upon the trial was any evidence produced showing the quantity, kind, class, or description of the goods claimed by the purchaser to constitute the shortage. Not a single article of the supposed missing goods was proved or testified to by any person. The under-sheriff himself testified that he had no personal knowledge as to the amount of the shortage. As before stated, he left no officer in charge to look after the delivery of the goods, or to take an account of any shortage that might be found to exist. It is true, he says that the proprietor of the auction-house represented the sheriff's office in the delivery of the goods, and that, according to the figures that the proprietor and the purchaser had made, the shortage claimed was correct; but neither the proprietor nor any of his employees testified to taking any account of the supposed shortage; nor does it appear that they did look after or take any such account, or that they gave any attention to the matter. None of them testified that there was any shortage; nor was the absence of such testimony in any manner excused or explained. The proprietor testified that the purchaser and men that he brought there—expressmen—took the goods out of the store; and the purchaser testified that he simply notified the proprietor of the mistake after the goods were checked out. No one but the purchaser gave any testimony in regard to the checking out of the goods according to the advertised list; and he did not undertake to give the court any basis or foundation whatever by which to test the value of the goods claimed by him to be missing. In fact, he did not designate a single article in the advertised list that was not delivered to or received by him. The under-sheriff seems to have yielded every matter connected with the adjustment of the supposed shortage to the absolute dictation of the purchaser,—the adverse party in interest. No precaution whatever was taken for the protection of the sheriff or any other party interested in the property. Almost as well might the officer have delivered the goods to the purchaser in the first instance, saying, "Pay me what you think they are worth,"

as to have made and carried out the arrangement for the sale of the property as he did. In every aspect of the case there seems to have been an utter want of common business-like prudence in the manner of conducting the sale, and particularly in the manner of delivering the goods and paying the rebate as demanded. Under the circumstances, it is not surprising that the trial court held the sheriff responsible for the full amount at which the goods were struck off to the purchaser.

Appellant cannot be heard to plead that he did not actually receive the full price at which the goods were struck off. In sales upon execution it is the duty of the sheriff to sell to the highest bidder for cash only. He is not at liberty to make a conditional sale, or a sale on credit, upon his own responsibility. As between the sheriff and Oppenstein, the latter is entitled to treat the acceptance of the certificate of deposit and the check as a cash payment to the sheriff of the full amount for which the goods were sold. In view of the fact that he voluntarily made a complete delivery of the goods upon receipt of such payment. As was said by the supreme court of New Jersey in a recent case, (*Disston v. Strauck*, 42 N. J. Law, 546:) "If he [the sheriff] give an unauthorized credit to purchasers, and deliver possession to them of goods sold at judicial sales, he will not be permitted to elect what remedies shall be pursued against him." *Murfree*, Sher. § 993; *Draper v. State*, 1 Head, 262; *Blinmore*, Sher. § 188; *Swope v. Ardery*, 7 Ind. 213. Under the circumstances, the repayment of the \$537 by the sheriff cannot, in any proper view of the law, be justified as a reasonable expenditure connected with the seizure and sale of the property. Since the sheriff at the trial failed to produce evidence of any proper criterion by which to determine how much, if anything, should be allowed in respect to the alleged missing goods, nothing can be justly allowed. In making claim for such allowance, the sheriff starts with the confession of his own negligence in knowingly making the sale upon an erroneous advertisement of his own publishing. Hence it certainly was incumbent upon him to produce satisfactory evidence to excuse the consequences. He produced none. It is of course to be regretted that appellant should suffer because of the want of ordinary care on the part of his subordinate. But the law in such cases necessarily holds the superior officer responsible for the acts of his deputy.

One further assignment of error requires consideration. The amended complaint upon which this cause was tried contained three separate statements of the same cause of action. The Code, § 49, provides that there shall be no "unnecessary repetition" of the "facts constituting the cause of action." Duplicate statements for the same cause of action are not absolutely prohibited. They may sometimes be necessary, and, therefore, permissible, as where there is reasonable cause to believe that the plaintiff cannot safely go to trial upon a single statement. There may be circumstances under which the plaintiff cannot reasonably be expected to an-

ticipate the evidence in advance of the trial. But we need not test the ruling of the trial court by these principles. The defendant's motion was to strike out the first and second causes of action. If the motion had been to require plaintiff to elect which cause or causes of action he would rely on, and that the residue be struck out, the motion might have prevailed in whole or in part. As the motion was framed it was not error to deny it. *Bliss*, Code Pl. § 119; *Jones v. Palmer*, 1 Abb. Pr. 442; *Whitney v. Railway Co.*, 27 Wis. 337. The judgment of the superior court is affirmed.

(16 Colo. 358)

MORTON V. MORTON.¹

(Supreme Court of Colorado. June 30, 1891.)

SERVICE BY PUBLICATION—DIVORCE—FRAUD—SETTING ASIDE DECREE.

1. Under Code Civil Proc. Colo. §§ 32, 42, providing that service of summons by publication shall be deemed complete 10 days after the time prescribed for publication, and that if the defendant be served out of the district he shall have 40 days in which to answer, 50 days must elapse after the last publication before he can be considered in default.

2. In an action by a wife to set aside a divorce obtained by the husband, the evidence showed that the decree was granted before the husband had acquired the residence necessary to maintain such an action, that the evidence upon which it was granted was false, and that there was a good defense upon the merits. It appeared also that the service was by publication; that the affidavit upon which the order of publication was granted was made by the attorney, without any sufficient reason being given why the husband himself had failed to make it; and that the wife, who lived in a distant state, had received no copy of the summons, and no notice of the action until long after final judgment. It was shown by affidavit that a copy of the summons had been mailed to her, but there was no proof that the postage thereon had been prepaid. The default and decree were both entered before the time for answering allowed by Code Civil Proc. Colo. §§ 32, 42, had expired. *Held*, that the decree would be set aside.

Error to Bent county court.

In the year 1886 Henry T. Morton, defendant in error, obtained in the county court of Bent county a decree of divorce from Bridget E. Morton, his wife. No personal service was had upon the defendant in that suit; the service was by publication. The present action is a direct proceeding on the part of Bridget E. Morton, the plaintiff in error, who was plaintiff below, to set aside said decree of divorce for the following reasons: The want of jurisdiction in the court to enter any decree against her; *second*, fraud of the plaintiff in procuring the decree. The trial below resulted in a judgment for the defendant.

Teller & Oranhood and *J. C. Elwell*, for plaintiff in error. *Clarence Way*, *J. F. Bostwick*, *C. S. Thomas*, and *Bryant & Lee*, for defendant in error.

PER CURIAM. The decree of divorce was obtained without service of process upon the defendant, either actual or constructive. At the time of the action, and for many years prior thereto, she had resided in the same house in Scranton, Pa.; and, although she received her mail with uniform regularity, no copy of the summons

¹Rehearing denied.

in this case ever reached her. Although her residence was well known to plaintiff, no notice of the action was received by her until long after the entry of final judgment in the cause. It is true it appears by an affidavit that a copy of the summons was mailed to her properly addressed, but, in the absence of proof that postage thereon had been duly prepaid, it is fairly to be implied, under the circumstances, that this important item was overlooked. The affidavit upon which an order of publication was obtained was made by plaintiff's attorney instead of plaintiff himself, although no sufficient reason for the plaintiff's neglect to make it is given. It is made upon information and belief only, while it is apparent from the record that the only information upon which the attorney could have acted was such as plaintiff saw fit to communicate to him; plaintiff, perhaps, hoping to escape the risk of a prosecution for perjury incident to making the affidavit himself. The evidence further shows that he never had acquired the residence in this state necessary to maintain an action of this character; that the evidence upon which the court granted the decree was false; and that there is a good defense to the action upon the merits. The undue haste exhibited in the divorce proceeding is of itself a suspicious circumstance, which naturally suggests that the whole record should be closely scrutinized. The default and decree were both entered before the time for answering had expired. The complaint was filed on the 11th day of March, A. D. 1886. Summons was issued, and application for the publication of the same made and filed, and an order for publication obtained the same day. The default of the defendant for failure to answer was entered May 4th, and judgment the following day. The affidavit of the publisher made and filed in that case shows that the summons was published for four successive weeks in the *Las Animas Leader*, a public newspaper printed and published weekly at West Las Animas, in the county of Bent and state of Colorado, the first publication of the summons having been on the 12th day of March. This would bring the last publication on the 2d day of the following month of April. Under the Code¹ service was not complete until 10 days thereafter, to-wit, upon April 12th. After this the defendant had 40 days in which to answer, so that default and judgment could not properly have been had until the 23d day of May. It is therefore apparent that there was no authority for the entry of either default or judgment at the time the same were entered. The Code provision in reference thereto is plain and unambiguous. Whenever the question has been presented it has been uniformly held that,

where the service is by publication, 50 days must elapse after the last publication required by law before the defendant can properly be considered in default. *Conley v. Morris*, 6 Colo. 212; *Skiles v. Baker*, Id. 295; *O'Rear v. Lazarus*, 8 Colo. 608, 9 Pac. Rep. 621. As to whether the decree should be set aside in this proceeding for this reason, it is quite unnecessary to determine. In view of the failure on the part of appellee to show, when called upon, that the postage was prepaid upon the copy of the summons mailed, and of the fraud shown to have been practiced upon both the defendant and the court in procuring the decree of divorce, it cannot be allowed to stand. It is apparent from the record that but one result can be obtained upon a retrial of the case. The judgment is therefore reversed, and the cause remanded, with directions to the county court to enter a judgment annulling the decree of divorce.

WHEELER *et al.* v. WADE *et al.*

(Court of Appeals of Colorado. Sept. 14, 1891.)

PUBLIC LANDS—TOWN-SITES—TITLE OF COUNTY JUDGE.

Under Rev. St. U. S. § 2387, providing that when public land is occupied as a town-site, if the town is not incorporated, the county judge of the county wherein the land is situate may enter the land in trust for the benefit of the occupants thereof, to be disposed of under regulations prescribed by the legislature, where a county judge makes entry under that statute, and pays the price therefor, and four years afterwards receives his patent, he is vested with the legal title; and a deed from his successor in office gives a valid title as against one claiming through the authorities of the town which became incorporated prior to the issuing of the patent.

Appeal from district court, Pitkin county; THOMAS A. RUCKER, Judge.

Action by Jerome B. Wheeler and D. M. Van Hovenberg against John Wade and Helena Connors, to determine the right to certain real estate. Judgment dismissing the action. Plaintiffs appeal. Affirmed.

Porter Plumb and *W. W. Cooley*, for appellants. *Wilson & Stimson*, for appellees.

REED, C. On the 2d day of June, 1881, J. W. Deane was the county and probate judge of Pitkin county, and as such made application to enter at the district land-office the town-site of Aspen under the provisions of the act of congress of March 2, 1867. The application was accepted and the necessary money to perfect the entry was paid. From causes not necessary to be here stated the entry was suspended, and so remained until the 3d day of March, 1885, when the patent issued. The portion of the statute necessary to be considered is as follows, (section 2387, Rev. St. U. S.): "It is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such

¹ Code Civil Proc. Colo. § 42, provides that, in case of the service of summons by publication, the service shall be deemed complete 10 days after the expiration of the time prescribed for publication. Section 32 provides that, if the defendant be served in the county, he shall answer the complaint within 10 days; if out of the county, but in the district, within 20 days; and in all other cases within 40 days.

town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated." The granting clause in the patent issued is as follows: "Now, knowye, the United States of America, in consideration," etc., "have given and granted, and by these presents do give and grant, unto the said J. W. Deane, county and probate judge aforesaid, and to his successors and assigns, in trust as aforesaid, the said tract above described, [describing the Aspen town-site:] to have and to hold the same, together with all rights, * * * unto the said J. W. Deane, county and probate judge as aforesaid, and to his successors and assigns as aforesaid." It appears that prior to the grant to Judge Deane the town had become incorporated. The corporate authorities, assuming to succeed to the trust of Judge Deane, and assuming the right to dispose of the lots of the town, published a notice requiring claimants to file their respective claims within 90 days. One George E. Triplett, within the designated time, filed a claim to the lot in controversy in this case. Afterwards Byron E. Shear was appointed by the board of trustees of the town of Aspen a commissioner to take proofs and make conveyances to claimants. On the 8th day of December, 1884, Triplett, being the only claimant to the lot in controversy, paid for the same, and took a conveyance from Shear as commissioner or agent of the corporate authorities of the town. The lot afterwards, by mesne conveyances, became vested in the appellants. On the 8th day of October, 1885, Thomas A. Rucker became county and probate judge of Pitkin county, and the successor of Judge Deane, who had, as is alleged, assigned or transferred to him the property in trust for the purposes of the grant. While acting by virtue of his office as trustee, he conveyed the lot in controversy to one Bermudy, who afterwards conveyed it to appellees. Afterwards, in July, 1887, M. G. Miller became county and probate judge, and successor in trust under the grant to Judge Rucker, and proceeded to advertise and notify claimants of lots to make applications and proofs of claims and perfect the title to town lots claimed by them, respectively. Both claimants to the lot in controversy, feeling insecure in their respective titles, filed their claims to the property with Judge Miller, and this suit was brought by appellants (plaintiffs below) to determine which party had the better title, and which was entitled to a further conveyance from the then county and probate judge. Upon the coming in of the answer, a hearing having been had, the suit was dismissed, and from such judgment of dismissal this appeal was taken.

The case of *Mayor v. Land Co.*, 10 Colo. 191, 15 Pac. Rep. 794, and 16 Pac. Rep. 160, appears to be conclusive in this case, not only as a precedent, but upon sound legal principles. The conveyance to a claimant, to be effective, must have been made by the party holding the legal title. The patent from the United States government vested the title in Judge Deane, his succe-

sors and assigns, in trust "for the several use and benefit of the occupants thereof." He being county and probate judge, his successors could only be, according to all authorities, those succeeding in an official capacity in the same office. He holding the legal title as grantee under the patent, his assigns could only be those who held title by virtue of a conveyance from him or a successor. It is not necessary to inquire or determine whether a mistake was made by the department of the interior in issuing the patent to Judge Deane instead of to the corporate authorities of the town. It is clear that the patent was sufficient to pass the legal title to him in trust, and the corporate authorities of the town could not be a successor, and did not become an assignee for want of a conveyance from the grantee in the patent. It follows that all attempts of the corporate authorities, through Mr. Shear as commissioner or otherwise, to receive proofs and applications, and make titles to the respective claimants, were unwarranted and ineffectual; hence Triplett took no title. Judge Rucker, as successor of Judge Deane, succeeded to the title in trust, and what title he had passed by the conveyance to Bermudy. This must be regarded as an execution of the trust as to the lot in controversy on the part of the trustee. The power of the trustee was exhausted, and the conveyance effectual to pass the title unless the transaction was or can be impeached for error or fraud. As far as appellees are concerned, we do not deem that any further conveyance or assurances were needed from the successor of Judge Rucker. The judgment of the court in dismissing the suit should be affirmed.

RICE v. BUSH et al.

(*Supreme Court of Colorado.* Sept. 14, 1891.)

JUDGMENT UPON PLEADINGS — LIABILITY OF UN-NAMED PRINCIPAL—PLEADING.

1. In passing upon a motion by one party for judgment upon the pleadings, after issue joined, all the material allegations of the opposite party must be taken as true; and if the pleadings of the opposite party, though defective in form, are nevertheless sufficient in substance to sustain a judgment in his favor, the motion should not be granted.

2. In an action by the vendee of real estate the complaint showed that a contract under seal for the sale of the property was executed by one person as principal and owner, without indicating in writing that any other person was interested in the premises, though it appeared that the vendee knew when the instrument was executed that there was another owner who held the legal title to the property. *Held*, that the interest of the known but unnamed principal was not bound by the contract.

3. The allegations of the complaint being that two certain persons (naming them) were the equitable owners of certain real estate, but that the legal title stood in the name of one only, *held*, that such averment of ownership was sufficient in substance as against a motion for judgment upon the pleadings, though the same might have been obnoxious to a special demurrer, or to a motion to make more definite and certain.

(*Syllabus by the Court.*)

Error to district court, Arapahoe county; PLATT ROGERS, Judge.

This was an action to compel the specific performance of a contract to convey

real estate. John T. Rice was plaintiff below; the defendants were William H. Bush, Willard Teller, and Mary D'Arcy. Judgment for defendants. Plaintiff brings error. Reversed.

The complaint alleges that Bush and Teller were the equitable owners of the property; that the legal title stood in the name of Teller; that Bush had full power and authority to sell the same for such price and upon such terms as he pleased; and that, in pursuance of such authority, said Bush, claiming to act in his own behalf and for said Teller, and with his knowledge and consent, executed certain written agreements at the time of their respective dates, as follows:

First agreement: "Denver, Colo., April 9, 1887. Received of J. T. Rice fifty dollars as earnest money and in part payment for the purchase of the following described piece or parcel of land, lying and being in the county of Arapahoe and state of Colorado, to-wit, lots twenty-three and twenty-four, block fifty-one, East Denver, which I have this day sold to said J. T. Rice for the sum of six thousand seven hundred and sixty-two 50-100 dollars on terms as follows, viz.: On delivery of warranty deed the sum of two thousand seven hundred and sixty-two 50-100 dollars cash, and buyer to assume note for \$4,000, secured by trust-deed now on said property. And it is agreed that in case the title of said premises is not perfect, and cannot be made perfect within thirty days from date hereof, this agreement shall be void, and the above fifty dollars refunded; but if the title to said premises is perfect, and not taken within thirty days from date hereof, the said fifty dollars to be forfeited to me; but it is agreed and understood by all the parties to this agreement that said forfeiture shall in no way affect the right of either party to enforce the specific performance of this contract. WM. H. BUSH, Principal. [Seal.]"

Second agreement: "This agreement, made and entered into this fourteenth day of April, A. D. 1887, by and between J. T. Rice, party of the first part, and W. H. Bush, party of the second part, witnesseth, that whereas, said W. H. Bush is the owner of lots numbered twenty-three and twenty-four, (23 & 24,) block numbered fifty-one, (51,) East Denver, and has given said J. T. Rice an option on said lots for thirty days from April 9th, A. D. 1887: Now, therefore, the said Bush being desirous of selling said lots to one W. G. Russell, or some client of said Russell's, it is hereby agreed by and between said J. T. Rice and W. H. Bush that, whereas said Bush has paid to said Rice one hundred and fifty dollars on account of said option, and agrees to pay to said Rice three hundred dollars (\$300) more in full payment for said option on or before thirty days from date hereof, provided sale to said Russell or client is consummated within thirty days from date hereof; if sale is not consummated to said Russell or clients, and balance of three hundred dollars not paid by Bush to Rice within thirty days from date hereof, said Rice hereby agrees to pay to said Bush one hundred dollars, (\$100,)

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and said Bush, in consideration thereof, hereby agrees to and with the said Rice that the said option given by said Bush to said Rice, of date April 9th, A. D. 1887, for thirty days, shall continue in force from May 14th, A. D. 1887, to June 14th, A. D. 1887. Dated April 14, A. D. 1887. J. T. RICE. [Seal.] WM. H. BUSH. [Seal.]"

The complaint further alleges that Bush did not sell the property to Russell or any client of his within 30 days from April 14, 1887; and that on or about May 16th thereafter plaintiff tendered to Bush the \$100 provided for in said last-mentioned agreement, but that Bush refused to accept the same, and that on the same day he informed plaintiff that he, Bush, would not convey said premises to plaintiff pursuant to the terms of said agreements, or either of them. The tender of the \$100 is renewed in the complaint, and plaintiff offers to pay the same into court for the use of said Bush. Plaintiff also alleges that he has ever since May 14th aforesaid been ready and willing to comply with the contract on his part, and offers to comply with the terms of sale and purchase pursuant to the terms of the agreements. It is further alleged that on or about May 24, 1887, the defendant Teller by deed conveyed and delivered possession of the property in controversy to the defendant Mary D'Arcy, who had full knowledge of the agreements aforesaid, and of plaintiff's rights in the premises; that defendants had perfect title to the property, and power to convey the same, but refused to perform the contracts aforesaid, etc. Prayer for specific performance and other relief. The defendants filed separate answers, to which plaintiff in turn filed replications. The cause being thus at issue, the several defendants moved for judgment in their favor, respectively, on the ground that the pleadings on the part of plaintiff were insufficient to sustain the action against them. These motions were sustained by the court below, and judgment in the action was rendered accordingly. To reverse said judgment the plaintiff brings the cause to this court. The sections of the statute of frauds referred to in the opinion read as follows: "Sec. 8. Every contract for the leasing, for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made. Sec. 9. Every instrument required to be subscribed by any party, under the last preceding section, may be subscribed by the agent of such party, lawfully authorized." Gen. St. 1883, p. 508. Section 9 was amended in 1887, by adding thereto the words, "by writing," (Sess. Laws 1887, p. 274;) but the amendment did not go into effect until after the execution of the instruments as above stated.

Oscar Reuter, for plaintiff in error. Teller & Orabood and C. M. Kendall, for defendant in error.

ELLIOTT, J., (after stating the facts.) The action of the district court in sus-

taining the motions of the several defendants for judgment upon the pleadings is the only matter assigned for error. In passing upon a motion by one party for judgment upon the pleadings after issue joined, all the material allegations of the opposite party must be taken as true; and if the pleadings of the opposite party, though defective in form, are nevertheless sufficient in substance to sustain a judgment in his favor, the motion should not be granted. In general, a motion for judgment upon the pleadings cannot properly be granted, except in cases where the pleadings are not sufficient to sustain a different judgment notwithstanding any evidence which might be produced.

The principal questions to be considered upon this review may be stated thus: (1) To what extent, if at all, under the pleadings, may the several defendants be held liable upon the written instruments sued on? (2) To what extent, if at all, may their several interests in the property, as alleged, be affected by a judgment in this action? It will be observed that neither of the written instruments purports to have been executed by Mr. Teller. His name nowhere appears in or upon them. They do not purport to have been executed for him or in his behalf by any party assuming to be his agent; nor do they refer directly or indirectly to any other writing or memorandum by which he can be identified as the seller of the property or as a party to the contract. On the contrary, the instruments purport to have been executed by Mr. Bush, who expressly describes himself as "principal" in the first, and as "owner" of the property to be conveyed in the second. The two instruments, for the purposes of this action, are to be construed as one contract. Such contract is controlled by the statute of frauds in force at the time, which provided that every contract for the sale of any lands should be void, unless the contract, or some note of memorandum thereof, expressing the consideration, should be in writing, and subscribed by the party by whom the sale was to be made, or by the agent of such party, lawfully authorized. Gen. St. 1883, p. 508. But see amendment, Sess. Laws 1887, p. 274. Under the statute of frauds as it existed in this state prior to the amendment of 1887 an agent acting under parol authority might execute the written contract or memorandum required by the statute for the sale of real estate, and thus bind his principal. This construction of the statute has been too long established by judicial decisions to be easily overthrown. Thus far the authorities are generally agreed. But as to the proof by parol of other matters relating to such writings the decisions are contradictory. For example, on the one hand, the rule has been announced that a contract for the sale of land cannot be enforced unless the names of the purchaser and of the seller appear upon the face of the written contract or memorandum, or are so designated thereby that they can be identified without parol proof. On the other hand, it has been decided that an agent authorized by parol to sell the land of his principal may enter into such con-

tract in his own name, without in any manner disclosing his principal, and that the purchaser, upon discovering the real principal, may enforce the contract against him, and for that purpose may prove the name of such principal, as well as the authority of his agent, by parol evidence. While the more rigid rule, requiring that the names of the parties should be in some way disclosed by the contract or memorandum itself, would seem to be based upon the more reasonable as well as the more logical construction of the statute according to the natural import of its language, the more relaxed rule doubtless grew out of certain supposed equitable considerations developed by cases of peculiar hardship. The first step allowing the agent's authority to be shown by parol having been taken, the next was readily ventured upon. The argument relied upon for such departure may be stated thus: Since the authority of the agent to sell may be shown by parol, the name of the principal giving such authority will be disclosed as an almost inseparable concomitant of such proof; and, it being established that a certain person as principal has given to a certain other person as agent control over the former's estate, with power to sell the same, and the agent having exercised such authority, the purchaser must be held to have acquired an equitable title, since he acquired it from one clothed with lawful authority to sell. It is further urged that, if the agent to sell did not disclose his principal at the time of entering into the contract, it was no fault of the buyer, and the buyer should not be deprived of the benefit of his bargain by the fault of the agent of the other contracting party, especially when such fault consisted, not in want of authority to sell, but merely in the manner of executing such authority. Whatever weight there may be in arguments like the foregoing, in cases where the unnamed principal is also unknown to the other contracting party, the reasoning loses its force whenever it appears that the real principal, though known at the time of making the contract or memorandum, was not named, nor in any manner designated or referred to therein. In the record before us it affirmatively appears by the plaintiff's own pleadings that he knew at the time of entering into the contract with Mr. Bush—at the very time of making the first agreement—that Mr. Teller was an owner of the property contracted for, and the only one who could convey the legal title thereto. Under such circumstances, if plaintiff desired the contract to bind Mr. Teller, he should have required the same to be drawn in such terms as would express that intent and effectuate that purpose. The plaintiff had full knowledge as to the ownership and title of the property contracted for, as we must assume from the complaint. Therefore, by accepting the individual contract of Mr. Bush, instead of requiring the contract to be executed also by or on behalf of Mr. Teller, the plaintiff must be held to have relied on the individual covenants and personal responsibility of Mr. Bush in case of a breach of such contract,

and his remedy must be limited accordingly. This view is strengthened, though not, in our opinion, necessarily controlled, by the fact that the written instruments are under seal; there being no averment that Mr. Teller ever in any manner ratified or performed the agreements, or either of them, either in whole or in part. *Chandler v. Coe*, 54 N. H. 361-576; *Ford v. Williams*, 21 How. 289; *Grafton v. Cummings*, 99 U. S. 100; *Stackpole v. Arnold*, 11 Mass. 27; *Anderson v. Harold*, 10 Ohio, 399; *Briggs v. Partridge*, 64 N. Y. 357; *Yerby v. Grigsby*, 9 Leigh, 387; *Eppich v. Clifford*, 6 Colo. 493, and cases cited; *Williams v. Canal Co.*, 13 Colo. 469, 22 Pac. Rep. 806; *Pom. Spec. Perf.* §§ 89, 326; *Fry, Spec. Perf.* § 146 et seq., and notes.

From the foregoing it is apparent that under the pleadings the plaintiff cannot have a recovery for or on account of the Teller interest in the property, either against him or his grantee. But the complaint avers that both Teller and Bush were the equitable owners of the property. True, Mr. Teller, in his answer, not only denies that Bush was his agent, but denies that Bush had any interest whatever in the property. Mr. Bush also, in his answer, denies all the material averments of the complaint. Nevertheless, for the purposes of the motion under consideration, this court, as well as the trial court, is bound by the matters averred in the complaint, even though the same may be defectively pleaded. Hence, Teller and his grantee are proper parties to the action so long as the alleged equity of Bush in the premises is undetermined. See *Henry v. Insurance Co.*, 16 Colo. —, 26 Pac. Rep. 318, 321, and authorities there cited. According to the pleadings, the defendant Bush occupies a position in reference to the written agreements quite different from the other defendants. The complaint shows that Mr. Bush executed both agreements in his own name. He executed them alone as "principal" and "owner." He received from plaintiff \$50 advance payment upon the first agreement. Shortly thereafter he paid plaintiff \$150 to secure a suspension of the first agreement for a period of 30 days, and agreed upon the happening of a certain event to pay plaintiff \$300 more to be released from the first agreement altogether. He further agreed that, if the event did not happen by which he might be entitled to be released from the first agreement, and in case he should not pay to plaintiff the further sum of \$300, the first agreement should continue in force for another month upon plaintiff's paying to him the sum of \$100. The event did not happen entitling him to be released from the first agreement. He did not pay to plaintiff the further sum of \$300. But the plaintiff did, shortly after the expiration of the suspension of the first agreement, tender to Mr. Bush the sum of \$100 for the purpose of continuing the first agreement in force. The sum so tendered Mr. Bush refused to accept, and about the same time informed plaintiff that he would not comply with the contracts of sale as evidenced by the written agreements.

The argument that the tender was not

made in due time, because not made on May 14th, or May 15th, which was Sunday, is not sound. Plaintiff did not agree to pay the \$100 on or before May 14th in order to continue the first agreement in force. On the contrary, the second agreement did not permit plaintiff to renew the first agreement by making such payment until after the expiration of the 30-days suspension. Mr. Bush was entitled to the full period of suspension, including the whole of May 14th, in which to carry through, if he could do so, the proposed transaction by which he might secure a release from the first agreement altogether. No particular date was specified for the payment of the \$100 by plaintiff, though it is evident that prompt payment was contemplated by the contract. A payment or tender of payment on May 16th was in reasonable time under the circumstances.

It is claimed that the refusal by Mr. Bush to accept the sum of \$100 tendered by plaintiff was a breach of the contract on the part of Mr. Bush. Certainly, the implied undertaking on the part of Mr. Bush to accept the \$100 is not the principal contract of which plaintiff now seeks the specific performance. The tender of the \$100 was for the purpose of continuing the first agreement in force. In equity the refusal to accept the tender did not have the effect to prevent such continuance. The tender was as effectual to continue the first agreement as the acceptance of the tender would have been. The mere refusal to accept the tender was no injury to plaintiff; it was not of itself such a breach of the contract to convey as would constitute a cause of action in plaintiff's favor.

It is not intended by this opinion to encroach in the least upon the domain of the facts of this case, but merely to discuss the legal effect of the pleadings on the part of the plaintiff. As to the alleged interest of the defendant Bush in the property in controversy the complaint is sufficient in substance, though the averments might have been obnoxious to a special demurrer, or to a motion to make more definite and certain. Whether the alleged conduct and declarations of the defendant Bush, indicating that he repudiated the written agreements, and that he would not perform them, were sufficient to obviate the necessity of a tender or offer on the part of plaintiff to fully perform his part of the contract,—that is, to pay the sum of \$2,762.50, and assume the incumbrance of \$4,000,—would seem to be mixed questions of law and fact, to be determined upon final trial, rather than by a motion for judgment on the pleadings. The conditions and covenants of the written instruments are peculiar, and somewhat difficult of construction. The matters relied on to show the breach as well as the waiver of said conditions and covenants rest almost entirely in parol. Not only the defendant's conduct and declarations, but the conduct and declarations of both parties, and all the facts and circumstances of the case, so far as competent to be introduced in evidence, considered in connection with the lapse of time in bringing the suit, would doubtless

have afforded the trial court advantages for drawing proper inferences, and arriving at correct conclusions as to the rights and liabilities of the parties, which are not and cannot be presented upon the consideration of a motion for judgment upon the pleadings. *Insurance Co. v. Gracey*, 15 Colo. 70, 24 Pac. Rep. 577. It would be quite impracticable and unprofitable to attempt to anticipate further the questions which might arise upon such a trial. Upon the issues as made, or upon such issues as might have been framed by a liberal allowance of amendments to the pleadings, the case should have been tried below before seeking a review in an appellate court. By trial upon the merits most, and perhaps all, of the difficulties which now surround the case may disappear. The judgment is reversed, and the cause remanded.

CLARKE V. PEOPLE.

(Supreme Court of Colorado. Sept. 14, 1891.)

CRIMINAL LAW — PRESUMPTION OF INNOCENCE — ABORTION.

1. The defendant in a criminal case is entitled to every presumption of innocence consistent with the evidence in the case.

2. Evidence examined, and found insufficient to support a conviction.

(Syllabus by the Court.)

Error to criminal court of Arapahoe county; WILBUR F. STONE, Judge.

Indictment of Uri S. Clarke for producing an abortion. Verdict of guilty. Defendant brings error. Reversed.

C. W. McCord and Edgar Cayless, for plaintiff in error. Alvin Marsh, Atty. Gen., for the People.

HAYT, J. Plaintiff in error, Dr. Uri S. Clarke, was convicted in the criminal court of Arapahoe county of producing an abortion upon a young unmarried woman. There are nearly 300 folios of evidence certified to this court in the bill of exceptions. Much of this evidence is entirely irrelevant to the issue. Beyond showing that a miscarriage had taken place from the effects of which death ensued, and that plaintiff in error was the sole attending physician at the time of the abortion, and for some time prior and subsequent thereto, but little appears to cast suspicion upon his conduct; while his explanation of his connection with the case is entirely consistent with his innocence of any crime, and not inconsistent with the testimony offered by the prosecution. The deceased first sought the professional services of Dr. Clarke upon the 24th day of February, 1887, and according to the defendant's testimony, which is uncontradicted, she was at that time suffering from "bearing-down pains," although a miscarriage did not, in fact, take place until the last day of the month. After this she gradually sank until her death, which occurred upon the 7th day of the month of March following. During this entire period she was attended by her friend and confidant, Miss Dell Davidson, while a skilled nurse was also in attendance for several days immediately prior to her death. Upon the theory that the

abortion was the result of a conspiracy between the defendant, the deceased, and Miss Davidson, everything that transpired in the sick-room during this time was allowed to be detailed to the jury by the witness introduced by the state without eliciting anything against the defendant, except that he burned the *fetus*, instead of burying it; and that, in reply to a question propounded by the landlady of the house at which Miss Davy was stopping, he had stated that his patient was suffering from inflammation of the bowels, although he well knew at the time that the miscarriage was the real cause of her trouble. In explanation of the first of these acts, it is shown that decomposition had set in, rendering it necessary to dispose of the *fetus* at once; that the patient required the immediate attention of the defendant at the time; and that there was no other man about the premises to bury the same; and that burning was the most effective, as well as the most convenient, way to dispose of it. The fact of the decomposition corroborates the theory of the defense, which is that the vitality of the *fetus* had been destroyed by drugs taken into the system prior to the time at which the defendant was called into the case, and that the abortion was the result of the latent action by such drugs; and, as to the misleading statement relating to the nature of the ailment, it is quite as likely to have been made with a view of shielding his patient from any unnecessary publicity, and consequent spreading of her disgrace, as from any desire to shield himself. The testimony for the defense indicates that Dr. Clarke found the deceased suffering from labor pains upon his first visit; that upon his second visit, which occurred the next day, he cautioned her in reference to the danger she was incurring, and warned her against the effects of the course she had entered upon, advising that she should reconcile herself to her condition, let the full time elapse before birth, and that some one could be found who would raise the child did she then desire to part with it. At the end of this visit he was paid for his services, and considered himself discharged from the case. A few days thereafter he was again called, and then found the deceased threatened with a miscarriage, which took place a few days afterwards; that it was too late, even at the first visit, to prescribe any medicines to counteract the effects of the drugs which she had previously taken, but that he did prescribe quiet and rest; and that subsequently, finding that this would not prevent the abortion, he did what he could to relieve the patient, and save her life. It is also shown that the day before her death the defendant informed deceased that she was not progressing as favorably as he had hoped, and that he desired a physician in consultation, and advised that her parents in the east should be notified; to both of which propositions she objected, and the matter was finally compromised by his promising to await the developments of the night. Finding her worse instead of better, the next forenoon he caused her father to be notified by tele-

graph, and sent out for another physician; but, owing to some delay, the latter did not arrive until shortly before her death, which occurred at about 2 o'clock of that day. In addition to this evidence, it is also shown, both by the witnesses for the prosecution and for the defense, that the deceased, upon being interrogated in reference to the matter shortly before her death, fully exonerated the defendant. Miss Davidson, a witness for the prosecution, testified that the deceased said the doctor was not the cause of her trouble, while the defendant testifies that she said he had not caused her sickness. Counsel for the state, accepting the first statement only as correct, claim that deceased intended thereby simply to indicate that the doctor was not her seducer. There does not appear to be the slightest foundation for this contention, as at all times it was conceded that another party was the author of her ruin. There was not the remotest suspicion against the defendant in reference to this matter, and it is evident that the deceased intended fully to exonerate him from being the cause of her sickness. This statement, in view of the circumstances under which it was made, comes with all the force of a dying declaration, and should have been given weight accordingly by the jury. It is further shown that, immediately after her death, the defendant took her effects to the coroner, at which time he also notified that official of the cause and circumstances of her death. The defendant in a criminal case is entitled to every presumption of innocence consistent with the evidence in the case. The evidence in this case is entirely compatible with the innocence of the defendant of the crime of which he was convicted, and the verdict of the jury can only be accounted for upon the theory that they misconceived the testimony, or were influenced by passion or prejudice in weighing the evidence. The crime charged is one that strikes at the foundation of our social fabric, and is well calculated to arouse the indignation of all right thinking people; but to allow this conviction to stand would be to violate the fundamental rule of the criminal law fixing the quantum of proof necessary to sustain a conviction. We fully agree with the attorney general that prudence would have dictated the calling of counsel at an earlier period in the case, but the neglect in this particular cannot be taken as a justification of the verdict and judgment rendered in the court below. The judgment must be reversed, and the cause remanded.

DILLON v. BAYLISS.

(Supreme Court of Montana. Oct. 6, 1891.)

MINING CLAIMS—LOCATION NOTICES—EVIDENCE.

1. A location notice described the claim as so many feet long, running easterly and westerly along the vein from the center of the discovery shaft, and so many feet wide, being in a certain mining district, county, and territory. It stated that a post and notice were set at the discovery shaft, and that there was a substantial post and monument at each corner, and that the M. H. claim was on the south-east, the N. H. claim on the south west, and the St. L. on the north, and

that the claim began at the south-west boundary of M. H., ran 200 feet, more or less, to the N. H. lode, on the south-west side, being 200 feet, more or less, bounded on the north-west by the St. L. lode, to the place of beginning. Held, that it could not be said from an inspection of the notice that such description was an impossible or uncertain one, and that therefore the notice was admissible as *prima facie* evidence of the location.

2. The description in the location notice is not conclusive, but evidence is admissible that one could not take the description therein, and, by referring to the permanent monuments therein mentioned, find the premises claimed.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

Action by John L. Dillon against Rawlinson T. Bayliss to determine the right of possession of certain mineral lands. Judgment for plaintiff, and defendant appeals. Reversed.

This action is a contest between claimants of mineral lands upon the public domain of the United States. Defendant applied to the government for a patent to the Maskelyne quartz lode mining claim. Plaintiff filed his adverse claim in the appropriate land-office, alleging that he owned the premises by virtue of his location of the Kilby claim. Plaintiff then commenced this action in the proper court, for the purpose of determining the right of possession of the premises between the claimants. The contention is therefore between the two claims, the Kilby and the Maskelyne. The Kilby location was made on January 2, 1882; that of the Maskelyne was April 5, 1883. As the Kilby locator had all of the years 1882 and 1883 in which to perform his first annual representation work, forfeiture was not a question in the case. If the Kilby location was valid, and abandonment had not taken place, the Maskelyne location was a nullity. On these lines the case was tried. Defendant's attack was upon the Kilby location, and was made upon the following grounds: The description of the Kilby, as contained in the location notice, was as follows: "Extending along said vein or lode 100 feet in an easterly direction, and 100 feet westerly direction, from the center of the discovery shaft, and 300 feet on each side from the middle or center of said lode or vein at the surface, comprising in all 200 feet in length along said vein or lode, and 600 feet in width. * * * The mining claim hereby located is situated in Ottawa [unorganized] mining district, Lewis & Clarke county, Montana territory, and is a fraction of a claim formerly owned by A. D. Porter and Michael Gleason, but by them forfeited by failure to represent. The adjoining claims are the Marble Heart claims, on the south-east, the Nine Hour lode claim, on the south-west, and the St. Louis claim, on the north. This location is distinctly marked on the ground, so that its boundaries can be readily traced by a post and notice set at the discovery shaft, where this notice and statement is posted this 2d day of January, A. D. 1882, and by substantial posts or monuments of stone at each corner of the claim. And the exterior boundaries of the claim, as marked by said posts or monuments, are as follows,

to-wit: Beginning at the south-west boundary of Marble Heart, running 200 feet, more or less, to the Nine Hour lode, on the south-west side, being 200 feet, more or less, bounded on the north-west by the St. Louis lode, to the place of beginning." Defendant objected to the introduction of this notice of location, on the ground that it is indefinite and uncertain, and contained no sufficient description of the so-called "Kilby Lode," so that the same could be identified. The objection was overruled, and the notice admitted. This appellant assigns as error.

Another alleged error relied upon is the refusal of the court to allow certain civil engineers to testify whether a skilled engineer could take the description in the notice, and, with knowledge of the surrounding geography, find the claim on the ground. To make this point clear it is necessary to state some of the evidence introduced prior to this offer by defendant. It is observed that the location notice places the Marble Heart claim on the south-east, the Nine Hour claim on the south-west, and the St. Louis on the north. Michael Gleason, a witness for plaintiff, testified that the Marble Heart was on the north, the Nine Hour on the south, and the St. Louis on the west. A witness (Senate) for defendant testified to the same effect. A. E. Cummings, on the part of defendant, who qualified himself as a skilled engineer, and as well acquainted with the ground, said that the Nine Hour was southerly, and the St. Louis on the west, and the Marble Heart on the north-east; that he had taken the plat of the Kilby, as filed in the United States land-office, upon the adverse claim, and gone upon the ground. He was, while on the witness stand, shown the location notice of the Kilby, and asked whether a skilled civil engineer could take the description in the location notice, and from it find the Kilby claim. James S. Keerl also qualified himself as a civil engineer, and was asked practically the same question. George H. Robinson, also a civil engineer, went into details as to the premises, and his knowledge of them, and the surrounding ground and monuments. He was then asked the same question as that propounded to Cummings and Keerl. Pursuing this line, the defendant offered to prove by these witnesses that it would be impossible to take the description in the notice of location of the Kilby, and from it locate the Kilby claim on the ground. This evidence was objected to by plaintiff, on the ground that whether the description was sufficient was a question for the determination of the court, which was concluded by the admission in evidence of the notice of location of the Kilby. The objection was sustained by the court. This position taken by the court is also assigned as error.

Cullen, Sanders & Shelton, for appellant.
Toole & Wallace, for respondent.

DE WITT, J., (after stating the facts.) We will discuss the two points suggested in the above statement of the case. Was the location notice properly admitted in evidence? Did the court properly exclude

evidence tending to show that the description in the notice was not sufficient to identify the claim?

1. The Revised Statutes of the United States, (section 2324,) under which locations of mining claims may be made upon the public domain, provide: "All records of mining claims * * * shall contain * * * such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim." The description in the location notice of the Kilby claim is by reference to three alleged adjoining claims, the Marble Heart, the Nine Hour, and the St. Louis. A description by reference to an adjoining mining claim is a sufficient reference to a permanent monument to allow the notice of location to be introduced in evidence, and it then becomes a matter of proof as to whether the adjoining claim is a permanent monument. In *Prescott v. Metcalf*, 10 Mont. —, 25 Pac. Rep. 1037, is the last affirmation which this court has made of a line of decisions to that effect. Therefore, the reference to a permanent monument was sufficient in the Kilby location notice to allow it to be introduced in evidence.

Appellant's counsel, as appears by the records of this court, is not without a share in the labor of establishing this doctrine upon the firm foundation on which it now rests in this court, and in the argument at the bar in this case he cordially assents to its continued stability. But his objection to the location notice goes beyond the principle just cited. Admitting that the three mentioned adjoining claims are permanent monuments, yet he says that the reference to them does not identify the claim. We are prepared to concede that, no matter how permanent and prominent the monument may be, or how conspicuous and certain the natural object is, yet, if there was no intelligent reference to them that would identify the claim, the description would not satisfy the requirements of the United States law. The very object of selecting a natural object, or erecting or referring to a permanent monument, is, in the language of the statute, to identify the claim. As remarked by Judge HALLETT in *Faxon v. Barnard*, in the circuit court of the United States for the district of Colorado, 9 Morr. Min. R. 515: "The government gives its lands to those citizens who may discover precious metal ores therein, upon the condition that they will define the subject of the grant with such certainty as may be necessary to prevent mistakes on the part of the government, and on the part of other citizens who may be asking the same bounty. This is reasonable and necessary to justly administer the law, and therefore it must be said that without such description a certificate of location is void." Now, what are the facts as to the location notice in question? We examine it now upon its face alone, to ascertain whether it should, *prima facie*, be admitted in evidence, wholly disregarding, for the present, all uncertainties and ambiguities that may be developed by evidence *allunde* the notice. We find that the claim is 200 feet long, running easterly

and westerly, and 600 feet wide. It is in a certain mining district, county, and territory. A post and notice are set at discovery shaft. There is a substantial post and monument at each corner. The Marble Heart claim is on the south-east, the Nine Hour on the south-west, and the St. Louis on the north. The description begins at the south-west boundary of the Marble Heart, and runs 200 feet to the Nine Hour, on the south-west side. Appellant argues that, if the Marble Heart is on the south-east of the Kilby, a corner of the Kilby cannot be on the south-west boundary of the Marble Heart. From the location notice, the court did not know the directions of the surface lines of the Marble Heart, or the superficial shape of the same, or of the other adjoining claims. Mining claims are not always right-angled parallelograms. They are frequently, especially in a district well covered by locations, and in which are many fractions of full claims, very irregular figures, preserving a general parallelism of the end lines. It does not appear from the face of the Kilby location notice that the Marble Heart was of such a shape that there was not a boundary which could be intelligently called a south-west boundary, although the body of the Marble Heart might be properly described as lying south-east of the Kilby. A court could not say from an inspection of the notice that such description was an impossible or uncertain one. And so with the balance of the description by reference to the adjoining claims. The face of the notice does not set forth the corners or figures of the Nine Hour or St. Louis claims. It does not appear from the notice but the surface lines of these claims were such that the Kilby's reference to them would have been certain, when one went upon the ground, and observed their lines, and the Kilby's conformation to them. The supreme court of Colorado in *Drummond v. Long*, 9 Colo. 539, 13 Pac. Rep. 543, says: "That degree of certainty with which the final survey for a patent fixes the *locus* and boundaries of the subject-matter of the grant is not required in the original location to be made by the discoverer of the lode, nor would it be practicable, without the aid of a professional surveyor." We are of opinion that there was no error in admitting the location notice in evidence. Its fate, however, when it got into court, and met the attacks of its adversary, is another matter, and brings us to the consideration of the second error assigned by the appellant.

2. It was shown in the evidence and by one of plaintiff's witnesses, among others, that the three adjoining claims named were situated in directions from the Kilby other than those set forth in the location notice. Witnesses who were skilled engineers were offered to prove that an engineer could not take the description in the location notice, and, by referring to the permanent monuments therein mentioned, find the premises claimed as the Kilby lode. We do not attach importance to the fact that these witnesses were professional engineers. We mention them as such, for it was in that character that

they appeared upon the trial. If, instead of being engineers, they had been any other class of persons, "who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others," the principle involved in the exclusion of their evidence would have been the same. Their offered testimony was not excluded because it was an attempt to set up the technical and exact rules and methods of applied mathematics as against the common perceptions of laymen. We can understand why an engineer might say professionally that a description was insufficient for him to find the ground, if he spoke by the principles of the exact science in which he dealt, while, as an ordinary observer, he might be compelled to admit that the description would guide him to the ground, and that, disregarding scientific errors and inaccuracies, he might find the ground intended to be described. But, as remarked, the engineers' testimony was not excluded because it was offered as conclusive in establishing that the description was fatally defective. It was not objected that it was applying too strict scientific measurements to locations which of necessity are made by men unacquainted with professional surveying. The law recognizes that locations of mining claims are generally not made with mathematical exactness, and much liberality is properly extended to the locator who does the best that the circumstances allow. A surveyor could technically and truthfully say that a certain description would not identify the ground. With scientific exactness, it might not; but a practical miner, familiar with the methods of locating claims, and with knowledge of the neighborhood, might as truthfully testify that he could take the description, and find the ground. The question in the case at bar is not between exact science and common knowledge. The engineers' testimony was excluded on a different ground,—a ground that would have applied as well to the witness of common knowledge as to the civil engineer. If the engineers' testimony was to be excluded on the ground assigned, then all testimony of all witnesses to the same effect is incompetent. The ground was as follows: Respondent took the position that the sufficiency of the description in the location notice was a matter for the court, and this was concluded by the fact that the location notice had been admitted in evidence, and that it could not then be attacked by testimony. On this objection the court excluded the testimony offered. To be sure, it was for the court to determine whether the location notice was sufficient, on its face, to admit it in evidence; and this, as we have shown above, the court properly decided. But did the notice then become infallible? Could it not be shown by engineers, or any competent witnesses who knew the facts, that the description of the notice, when applied to the premises and the alleged monuments, failed to identify the claim? And this is the precise class of testimony that the court had been allowing throughout the trial. The responsibility of its exclusion at this point, we are constrained to remark, is upon the counsel, and not upon

the court. The objection, as appears, was, quoting the language of the record, "for the reasons above given." This was in the course of an examination, in which certain pertinent objections had been made, and the reasons given, and the objections sustained. Then comes the objection in question,—“for the reasons above given.” Among those “reasons above given” was the one that the description in the location notice was conclusive. This was not called to the special attention of the court, but, in the collection of “reasons above given,” the court must have had in mind other reasons and grounds which were deemed to be good. This is the only explanation of the sudden and single departure of the court from the course which it had theretofore followed. Take the respondent's position in its extreme results, and it would appear that, if the description upon the face of a notice is good, then it is still good, even if it be made to appear by the clearest evidence that it describes nothing. Take an apparently good description, go upon the ground with it, find the monuments mentioned, then start to run the lines of the claim by reference to the monuments, and find that the monuments so exist, and the lines are so located by reference to them, that the description is wholly unintelligible, and, with the description, one cannot find the premises intended to be described. Then we must accept that location description as final, and cannot show by any testimony that it is utterly worthless for the purposes of identifying the claim. We do not understand that to be the law.

The reference to natural objects or permanent monuments is for the purpose of identifying the claim. It is, among other purposes, to show the prospector that the ground that he may desire to appropriate has been taken by another. Now, if such prospector reads his predecessor's notice, finds his monuments, and, tracing the description, finds nothing described, is that notice to him? Or is it a description which enables the government to grant to such locator anything certain? We think not. We do not know what the testimony of these witnesses would have been. We do not speak of its weight. It might have been, in the minds of the jury, wholly overthrown. But the nature of it was competent. It is a matter of proof whether or not an object described in the location notice as a permanent monument is in fact such. Then it is certainly a matter of legitimate proof whether, in fact, there is any reference to the permanent monument which is intelligible, or whether the reference is delusive, meaning nothing, describing nothing, and misleading. Let it be well understood that we pass upon the objection as it was made and sustained. If the question was objectionable upon grounds other than those assigned, and called to the attention of the court, that was not before the district court nor this court. The court on the trial had received evidence of the errors of the description, that the adjoining claims were not situated as described in the notice, and evidence tending to show that the claim could not be found from the description.

Then the question is asked, could a civil engineer take the description, and find the ground? In view of the question, and the objection thereto, it would have been the same thing if it had been asked whether the ground could be found from the description? and, if not, why not? going into the same testimony as to errors in the description which the court had already entertained, and the case would have been upon the same ground upon which it had been proceeding. But counsel's objection threw the case off the track which it had been pursuing. He said the location notice description was conclusive, and it could not be attacked by evidence; and this view the court sustained, apparently inadvertently, because it contradicted the theory upon which the court had theretofore gone. As the objection was made, it was not valid, and we pass upon its validity as made. The logic of *Russell v. Chumaseero*, 4 Mont. 317, 1 Pac. Rep. 713, and kindred cases, points clearly to this view. The notice in those cases was admitted, not as conclusive. The notice, *prima facie* good, may go into evidence. Then it may be shown whether the natural object or permanent monument is such. The reference to the permanent monument is quite as material to the description as is the permanent monument itself. A permanent monument, with no intelligible reference to it, would not describe or identify the claim. Then why may it not be shown that there is no reference, as well as that there is no permanent monument? Of this we have no doubt whatever.

We are of opinion that the court erred in excluding the proffered testimony of Cummings, Keerl, and Robinson, and on that ground the judgment is reversed, and the case is remanded, with directions to grant a new trial.

HARWOOD, J., concurs.

BLAKE, C. J., having tried this case when chief justice of the territorial supreme court, did not participate in this decision

(7 Utah, 523)

HARRISON V. DENVER & R. G. W. RY. CO.

(Supreme Court of Utah. Oct. 3, 1891.)

INJURY TO EMPLOYEE—ASSUMPTION OF RISK—EVIDENCE OF DAMAGES.

1. When the work an employe is ordered to do is not obviously dangerous, or is of such a nature that there may be a difference of opinion in the minds of reasonable and prudent persons in regard to it, he is not obliged to set up his judgment against that of his master, or do the work at his own risk.

2. In an action by an employe against his master for personal injuries claimed to have been caused by the master's negligence, the admission of evidence that some time thereafter the master refused to employ him, introduced for the purpose of showing the condition of plaintiff's health at the time, but not followed by evidence to show that the refusal was on account of plaintiff's condition, was error.

Appeal from district court, Third district; C. S. ZANE, Justice.

Action by George Harrison against the Denver & Rio Grande Western Railway Company for personal injuries received by

plaintiff while an employe of defendant. Judgment for plaintiff, and defendant appeals. Reversed.

Bennett, Marshall & Bradley, for appellant. *J. L. Rawlins*, for respondent.

BLACKBURN, J. This suit was brought by respondent for personal injuries received while in the employ of the defendant company. The evidence shows that he was engaged as a helper in the machine-shop, and had been for several years. His foreman directed him to assist in taking down some shafting in the blacksmith shop and adjoining building. He did not work in that building. This work was to be done after regular working hours. He said he was tired and did not want to work extra hours, but he was urged by his foreman, and consented. It was dark when the work was to be done, and the negligence charged on the company which caused the injury was the want of sufficient light to handle the machinery and do the work with safety and success. It is also claimed that the tackle used in lowering the shafting was insufficient for the purpose. The plaintiff was standing on a platform about 14 feet from the floor, and was pushing the shafting so that it would miss the hangings, and the tackle slipped off the other end, and the end he was at was thrown up, and injured him severely, so that up to the commencement of the trial he was unable to do full work, and the testimony was conflicting as to whether his injuries were permanent. The jury found for the plaintiff, and assessed his damages at \$4,000. Motion was made for a new trial, and overruled, and this appeal was taken.

1. It is contended by defendant that the evidence was insufficient to sustain the judgment. It clearly shows that the lights were not sufficient to enable the work to be done with success and safety. A witness for the defendant says the accident would probably not have happened if there had been sufficient light to do the work. The lights furnished were individual lamps, and not enough of them. All these questions were fairly and fully submitted to the jury. The instructions given were justified by the testimony, and stated the law correctly, and those refused ought to have been refused. Therefore this contention is not well taken.

2. The defendant insists that the plaintiff knew the lights were insufficient before he undertook to do the work, and it was contributory negligence on his part to proceed with the work when it was extra-hazardous. The court instructed the jury on that subject as follows: "It is the primary duty of the servant to obey the orders of his master, within the scope of his employment; and when the work ordered to be done is not obviously dangerous, or of such a nature that the servant can see that it cannot be performed with safety, or about which there can be a difference of opinion in the minds of reasonable and prudent persons, then the servant is not, at the peril of being discharged, bound to set up his judgment against that of his master. The servant has a right to rely upon it that the master has taken

reasonable precaution for his safety, under such circumstances that the work may be done without extra hazard or peril to himself." We think this instruction states the law correctly. An employe is not usually in condition to abandon his employment for slight reason; for out of employment means often out of bread and meat for his family, and he will take unusual and hazardous risks to keep his place, and no employer ought to put him to the choice of peril or loss of employment.

3. The defendant contends the damages are excessive. The jury was properly instructed in the measure of damages, and the evidence as to the extent and permanency of the injury was somewhat conflicting. The estimation of damages is peculiarly within the province of the jury, and we cannot say that it was influenced by prejudice or passion in fixing the damages at the amount it did.

4. Another contention of appellant is that improper testimony was allowed to go to the jury, that may have and probably did influence its verdict. The testimony complained of is as follows: By plaintiff: "Question. You may state whether or not you attempted to renew your services to this company. Mr. Marshall: We object as immaterial, and ask to strike it out. The Court: Well, he sought employment again after the injury, and he had recovered,—I think he may state that. (Exception by defense.) Answer. Yes, sir; I was unable to perform the labor I had been performing prior to the injury, and I am not now able to do so, and have not been since the injury. I am not able to do the same kind of work, nor the amount of work, I was able to do before. As soon as I start to work, it seems to affect my head. I start to get giddy. I called upon Mr. Smith, defendant's master mechanic, after this time, six weeks or two months after the injury. My condition at that time, as to being able to work, was poor, but still was able to do some. Q. Did you call upon Mr. Bancroft, and inform him of your condition? Mr. Marshall: I object to that as immaterial. The Court: For what purpose do you offer that? Mr. Rawlins: I offer it for this purpose: I expect to follow it up by showing that Mr. Bancroft was general superintendent of the defendant company, and that plaintiff applied to him some four or six weeks after receiving the injury, explained to him his condition at that time, and asked for such employment as he was able to do, and Mr. Bancroft declined to give him any employment by reason of his condition. I ask that for the purpose of showing to the jury the real condition of plaintiff at that time. Mr. Marshall: We object to it as immaterial. The Court: That he failed to give him employment at the time? Mr. Rawlins: Yes, sir. The Court: When you follow it up by that, it may go in. Mr. Marshall: Note an exception. Witness: Yes, I asked him. Mr. Bancroft was then acting as general superintendent of the defendant company. I found him in his office, and carried a message to him from S. C. Smith, the master mechanic of the company. Q. What did you say to Mr. Bancroft, if anything, in relation to

your willingness to continue in the employment of the company? Mr. Marshall: We object as immaterial. The Court: He may answer that question (Exception by defense.) Witness, (continuing:) He never offered me any employment. Q. I will ask you whether or not you were able at that time to obtain employment from the defendant company. Mr. Marshall: We object as immaterial, and I will state on that point his injuries were neither aggravated nor lessened whether or not he procured employment from the defendant company. The question is whether he was able to work. The Court: You offer it merely for the purpose of showing he was unable to get employment? Mr. Rawlins: Yes, sir. The Court: Well, he may answer that question. Mr. Marshall: Note an exception. Witness, (continuing:) Since that time I have been able to get some employment, but not able to do it. * * * The balance of the answer is long, and no question as to its materiality is raised. I have given this testimony as it appears in the record. The plaintiff did not follow it up by showing that he was refused work by the defendant company because of his condition. We think the testimony objected to was improper, and we cannot say as a matter of law that it was harmless. The defendant company was under no legal obligations to furnish the plaintiff work. It is only bound to make full compensation to him for the injury he has received. This testimony might, and perhaps did, influence the jury in estimating the damages. It did not tend to prove any of the issues involved in the case. It did not tend to prove the negligence of the defendant company. It did not tend to prove care and precaution on the part of the plaintiff. It did not tend to prove how bad the plaintiff was hurt; nor was it any way proper to aid the jury in estimating the damages; and it may have prejudiced the jury against the defendant. Therefore it ought to have been excluded. For this reason the cause is reversed, and a new trial awarded. We find no other error in the record.

ANDERSON and MINER, JJ., concur.

(3 Idaho [Hasb.] 117)

CONNELL v. WARREN.

(Supreme Court of Idaho. Sept. 28, 1891.)

RIGHT TO APPEAL—SPECIAL ORDER AFTER FINAL JUDGMENT.

1. Under section 4807 of the Revised Statutes of Idaho, an appeal cannot be taken from an interlocutory order, made on the trial of an application for a special order after final judgment.

2. An interlocutory order, made in the trial of an application for a special order after final judgment, is not a "special order after final judgment," within the meaning of section 4807 of the Revised Statutes.

(Syllabus by Sullivan, C. J.)

Appeal from district court, Alturas county; C. O. STOCKSLAGER, Judge.

Action on a money demand by Joseph Connell against George Warren, originally brought in the probate court. Judgment for plaintiff. Defendant's application to quash a writ of execution denied. Defendant appealed to the district court.

Plaintiff's motion to dismiss the appeal denied. Plaintiff appeals. Dismissed.

Kingsbury & McGowan, for appellant. Bruner & Parsons, for respondent.

SULLIVAN, C. J. This is an appeal from the district court of Alturas county. The facts are substantially as follows: The appellant brought his suit in the probate court of Alturas county, on a money demand, against the respondent, and recovered judgment therein. Thereafter a writ of execution was issued by said court for the collection of said judgment. Thereupon the respondent made application to said probate court for an order to quash or vacate said writ. After hearing said motion or application, the probate court denied the same. Thereupon the respondent appealed to the district court, from the order denying said application. Thereafter, and before said appeal came on for trial in the district court, the appellant moved to dismiss the said appeal so taken from the probate court. The district court overruled said motion to dismiss. Thereupon the appellant appealed to this court from the order of the district court overruling said motion to dismiss. The respondent appears in this court, and moves to dismiss the appeal on the ground that the order appealed from is not an appealable order, and cites, among other authorities, in support of said motion, section 4807 of the Revised Statutes of Idaho, as follows: "An appeal may be taken to the supreme court from the district court * * * (3) from an order granting or refusing a new trial; from an order granting or refusing an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment,"—and urges that the order appealed from is not enumerated in said section as an appealable order, and that it is not an order from which an appeal can be taken. The appellant maintains that said order is a "special order, made after final judgment," and is mentioned in said section as one of the orders from which an appeal may be taken; that the final judgment in the main case was made and entered by the probate court, and that the order appealed from was made after final judgment therein. This court is called upon to determine whether said order refusing to dismiss said appeal is "a special order, made after final judgment," within the meaning of said section 4807. The order made by the district court, refusing to dismiss said appeal, is an interlocutory order, made in the proceeding to obtain an order to quash or vacate a writ of execution, and is not a "special order after final judgment," within the meaning of said section 4807. If a "special order after final judgment" means every order that a court may make in the trial or hearing to determine whether an order prayed for shall be granted, a separate appeal would lie from each and every interlocutory order made by the court during the trial. I am of the opin-

lon that the expression "special order made after final judgment," as used in said section, means the special or particular order applied for after final judgment, and not every order that may be made by the court in the hearing to determine whether the order applied for shall be granted. By saving the proper exception to all interlocutory orders made by the court on the hearing of an application for an order after final judgment, all of such interlocutory orders may be reviewed on an appeal from the order granting or refusing the order prayed for. For the reasons above stated this appeal should be dismissed, and it is so ordered, with costs against the appellant.

MORGAN and HUSTON, JJ., concur.

(3 Idaho [Hast.] 119)

STATE v. BRAITHWAITE.

(Supreme Court of Idaho. Sept. 23, 1891.)

INFORMATION — PRELIMINARY EXAMINATION FOR COMMITMENT.

Section 8, art. 1, Const. Idaho, authorizes proceedings either by indictment or by information. That section, in connection with the act of the legislature passed to carry into effect the provisions of said section, (see 1st Sess. Laws Idaho, p. 184,) authorizes a proceeding by information only where a defendant has had a preliminary examination as prescribed by chapter 7 of title 8 of the Penal Code of Idaho, or has waived such examination, or is a fugitive from justice.

(Syllabus by Sullivan, C. J.)

Appeal from district court, Bingham county; D. W. STANDROD, Judge.

Trial of John Braithwaite for grand larceny on information. Plea of guilty. Defendant appeals. Reversed.

Orr & Orr, for appellant. George H. Roberts, Atty. Gen., for the State.

SULLIVAN, C. J. This is an appeal from the district court of the fifth judicial district. The facts are substantially as follows: The appellant was arrested for the crime of grand larceny, and taken before a committing magistrate. The record shows that a warrant of arrest was issued, but fails to show that a complaint or information or any depositions were laid before the magistrate charging the commission of a public offense, as required by section 7576 of the Revised Statutes of Idaho, either before or after the issuance of the said warrant of arrest. The record further shows that a preliminary examination was held, and the depositions of two witnesses taken. The following commitment was indorsed on said depositions: "It appearing to me that the offense in the within depositions mentioned has been committed, and that there is sufficient cause to believe that the within-named John Braithwaite is guilty thereof, I order that he be held to answer the same, and that he is admitted to bail in the sum of five hundred dollars, and is committed to the sheriff of the county of Bingham until he give such bail." It is certified in the record that it contains a record of all the proceedings by and before the committing magistrate, and contains all of the papers transmitted to the district court by said magistrate. The depositions of John G.

Brown and C. Devinney are the only depositions contained in the record, neither of which contains a question put to the witnesses. At the June term of the district court the district attorney filed an information against the appellant, charging him with grand larceny, which information was filed under and by virtue of section 8 of an act entitled "An act to provide for prosecuting offenses on information, and to dispense with calling grand juries except by order of the district judge," approved March 13, 1891. See 1st Sess. Laws Idaho. Said information contained the following indorsement, to-wit: "Names of witnesses whose depositions were examined before filing the foregoing information: John G. Brown and C. Devinney." After said information had been filed in the said district court, the appellant, by his attorneys, filed a motion to quash the information, on the ground, among others, "that, previous to the filing of the information, the defendant had not been committed or held to answer by any magistrate having authority to commit," which motion was overruled by the court, to which ruling the defendant duly excepted, and assigns said ruling as error. Thereafter the defendant pleaded guilty to the crime charged. On the 25th day of June, 1891, the defendant, by his attorneys, filed a motion in arrest of judgment on the ground following, to-wit: "That the court had no jurisdiction to try the defendant, for the reason that the law had not been complied with in the arrest and preliminary examination of the defendant,"—which motion was overruled by the court, and duly excepted to by the defendant, and the said ruling is assigned as error. The proceeding by information against persons accused of crime is a creature of the constitution, (section 8, art. 1,) and provides that "no person shall be held to answer for any felony or criminal offense of any grade unless on the presentment or indictment of a grand jury, or on information of the public prosecutor after a commitment by a magistrate." To carry into effect said provision of the constitution, the legislature passed the act above cited.

As we view it, there is but one question for this court to decide in this case, and that is, can a defendant be prosecuted for a crime by information, under and by virtue of section 8 of the act above referred to, until such person shall have had a preliminary examination as provided by law, or waived his right to such examination, or is a fugitive from justice? There is no claim in this case that the defendant waived his right to such examination, or that he is a fugitive from justice. Section 8 of said act declares as follows: "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor as provided by law." Section 7576 of the Revised Statutes of Idaho directs how the depositions in a preliminary examination must be taken and authenticated. Subdivision 2 of said section provides that the depositions must contain the questions put to the witnesses, and their answers thereto. Subdivision 5 of said section pro-

vides that the deposition must be signed by the witness, and certified by the committing magistrate. Section 8 of the act above referred to, and section 7576 of the Revised Statutes of Idaho, are mandatory, and the district court has no jurisdiction to try any person for an offense by information until the statute in regard to preliminary examinations has been complied with. *Kalloch v. Superior Court*, 56 Cal. 229. In my opinion, the judgment of the district court should be reversed, and it is so ordered.

MORGAN and HUSTON, JJ., concur.

CURTIS, Adjutant General, v. MOODY, Auditor.

(Supreme Court of Idaho. Sept. 28, 1891.)

MANDAMUS — COMPENSATION OF ADJUTANT GENERAL—MILITARY FUND.

1. A writ of mandate will not issue to compel the state auditor to draw his warrant upon a fund that has not been established by law.

2. An act of the legislature entitled "An act for the organization of the militia of the state of Idaho," (1 Sess. Laws Idaho, p. 217,) provides that the compensation of the adjutant general shall be paid out of the military fund, but fails to provide such a fund.

(Syllabus by Sullivan, C. J.)

Application of Edward J. Curtis, adjutant general of the state of Idaho, against Silas W. Moody, state auditor, for a writ of mandate. Denied.

S. B. Kingsbury, for plaintiff. *Silas W. Moody*, pro se.

SULLIVAN, C. J. This is an application made by the adjutant general of the state of Idaho for a writ of mandate to compel the auditor of the state to issue his warrant upon the state treasurer for the payment of the plaintiff's salary as adjutant general from April 10, 1891, to July 11, 1891. The defendant appears, and by answer waives the issuance of the alternative writ, and, further answering, admits each and every allegation of the petition; and alleges, as the ground of his refusal to issue the warrant demanded, that there is no fund or appropriation provided by law for the payment of said claim, or upon which the defendant may lawfully draw a state warrant in payment thereof. The plaintiff, in support of the application for said writ, contends that section 32 of the act approved March 14, 1891, entitled "An act for the organization of the militia of the state of Idaho," (see 1 Sess. Laws Idaho, p. 217,) appropriates the sum of \$2,100 for the purpose of defraying the current expenses of the Idaho National Guard, and of arming and equipping the companies thereof for the year 1891, and that the sum so appropriated constitutes what is designated as the "Military Fund" in sections 3, 33, 34, and 36 of said act. The defendant contends that section 3 of said act provides that the salary or compensation of the adjutant general shall be paid quarterly out of the "Military Fund," and that the appropriation above referred to does not constitute said fund. The only question for our consideration, then, is as to whether the \$2,100 appropriated

to pay the current expenses of the Idaho National Guard constitute the "Military Fund," within the meaning of that term as used in said act. That part of section 3 which refers to the payment of the salary or compensation of the adjutant general is as follows: "He shall be entitled to receive a compensation of five hundred dollars per annum, to be paid quarterly out of the military fund, in the same manner as other state officers are paid." Section 32 of said act provides as follows: "For the purpose of defraying the current expenses of the Idaho National Guard, and of arming and equipping the companies thereof as they are organized, there is hereby appropriated out of the general fund for the year 1891 the sum of \$2,100, and for the year 1892 the sum of \$2,200, or so much thereof as may be necessary." As will be observed, the above appropriation was made "for the purpose of defraying the current expenses of the Idaho National Guard, and of arming and equipping the companies thereof," and is an appropriation made from the general fund of the state, and is not designated as the military fund mentioned in said act. It is simply an appropriation out of the general fund for the purpose of paying the "current expenses" of the Idaho National Guard. The compensation of the adjutant general is not a part of the "current expenses" of the Idaho National Guard, within the meaning of the term "current expenses," as used in said act. The said act mentions a military fund, but fails to establish such a fund. For the reasons stated, I am of the opinion that the application for the writ should be denied, and it is so ordered.

MORGAN and HUSTON, JJ., concur.

BOHNERT v. BOHNERT. (No. 14,406.)

(Supreme Court of California. Sept. 28, 1891.)

DIVORCE—ALIMONY AND COSTS.

1. Under Code Civil Proc. Cal. § 1049, an action is pending from its commencement until final determination on appeal, or until the time for appeal has passed; and under Civil Code Cal. § 137, providing that "when an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action,"—the court, in an action by the husband for divorce, may, after judgment for him, on the wife's showing that she wishes in good faith to appeal, and has no means, order the husband to pay for transcribing the testimony, and other costs, and to pay into court for the wife's attorney a certain sum for prosecuting the appeal, such order being an allowance for the wife, and not a direct judgment in favor of persons not parties to the suit.

2. The allowance of alimony to the wife, in such case, for her support, being discretionary with the trial court, will not be disturbed, if no abuse is shown.

Department 1. Appeal from superior court, Siskiyou county; EDWIN SHEARER, Judge.

Action by Charles Bohnert against Josephine Bohnert for divorce. After judgment for plaintiff the court ordered him to pay into court certain amounts, to enable defendant to prosecute an appeal, and

certain other money. From these orders plaintiff appeals. Affirmed.

John V. Brown and James F. Farragher, for appellants. H. B. Warren and Gillis & Tapscott, for respondent.

GAROUTTE, J. This is an appeal from two certain orders made after judgment for plaintiff in an action of divorce based upon the adultery of the defendant. Upon a showing by the affidavit of defendant that she desired in good faith to appeal to the supreme court from the judgment rendered against her in the aforesaid action; that she was advised by the attorneys who appeared for her at the trial in the lower court that she has good grounds for appeal; that she has no attorneys to prosecute such appeal, and no means to retain such attorneys; that she has no funds from which to pay the costs and expenses of such appeal, and has no means for her personal support during the pendency of such appeal, etc.,—the court made an order that the plaintiff pay into court the following sums, to-wit: "The sum of eighty-seven and 80-100 dollars, to be paid out forthwith as expenses for transcribing the testimony on the part of the defendant already incurred; the sum of seventy-five dollars as incidental expenses in perfecting said appeal, including clerk's fees and expense of printing transcript herein and filing the same with the clerk of the supreme court; and the sum of three hundred dollars, attorneys' fees for preparing said cause for appeal, and arguing the same in the supreme court, to be paid said attorneys when the transcript in the said cause is ready for filing with the clerk of the supreme court; and that plaintiff pay as alimony to the said defendant the sum of twenty dollars per month from the date of the judgment herein during the pendency of the appeal." The court also made an order that "the plaintiff pay to the clerk of said court the amount of \$269.90, to be by said clerk retained, and to await further action herein." The foregoing was the amount of defendant's costs incurred in the trial of the cause, as settled by the court. Plaintiff appeals from the foregoing orders.

Section 137 of the Civil Code provides that "when an action for divorce is pending the court may, in its discretion, require the husband to pay, as alimony, any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." Section 1049 of the Code of Civil Procedure provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal is passed, unless the judgment is sooner satisfied." As to the granting of alimony *pendente lite*, that is a matter resting in the sound discretion of the court, and this record discloses nothing to justify us in disturbing that discretion as exercised by the trial court in this cause. Under section 137 of the Civil Code, the power to make an allowance to the wife for her support as alimony, or an allowance to her for the purpose of defending or prosecuting the action, is not exhausted upon the rendition

of the judgment in the trial court. *Reilly v. Reilly*, 60 Cal. 624; *Ex parte Winter*, 70 Cal. 291, 11 Pac. Rep. 630; *Larkin v. Larkin*, 71 Cal. 330, 12 Pac. Rep. 227. The case of *Everett v. Everett*, 52 Cal. 384, is not in conflict with the foregoing authorities. In that case the order was made under another section of the Civil Code, and was made after final judgment, and was in no sense an order for alimony made *pendente lite*. The order to pay the amount of the attorneys' fees into court is not void, under the authority of *Sharon v. Sharon*, 75 Cal. 37, 16 Pac. Rep. 345; for it is not "a direct judgment for money in favor of persons not parties to the suit." See *Robinson v. Robinson*, 79 Cal. 511, 21 Pac. Rep. 1095. The fact that the court ordered the clerk to retain in his possession until further order the amount ordered to be paid by plaintiff for witness fees affords no grounds of complaint by plaintiff, for he is not injured by that portion of the order. Let the orders be affirmed.

We concur: HARRISON, J.; PATERSON, J.

91 Cal. 367

Ex parte WIDBER. (No. 20,829.)

(*Supreme Court of California.* Sept. 24, 1891.)

SUPERIOR COURTS—FURNISHING ROOMS FOR HOLDING COURT—PAYMENT OF EXPENSE.

1. Code Civil Proc. Cal. § 144, provides that if suitable rooms, etc., for holding the superior courts be not provided by the county supervisors, the courts, or the judge or judges thereof, may direct the sheriff to provide the same, "and the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof." *Held*, that the courts or judges, after certifying the expenses incurred, have not, either inherently or under the statute, the power to order the treasurer to pay the same, and the latter is not guilty of contempt in refusing to obey such an order.

2. Since the statute provides that the expenses incurred shall be audited by the judge, it is not necessary that they be audited by the county supervisors.

In bank. Petition for writ of *habeas corpus*. Writ granted, and petitioner discharged.

John D. Durst, for petitioner. *A. P. Black*, for respondent.

GAROUTTE, J. This is an application for a writ of *habeas corpus*. The petitioner alleges that he is unlawfully restrained of his liberty by the sheriff of the city and county of San Francisco. Section 144 of the Code of Civil Procedure is as follows: "If suitable rooms for holding the superior courts and the chambers of the judges of said courts be not provided in any city and county, or county, by the supervisors thereof, together with the attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business, the courts, or the judge or judges thereof, may direct the sheriff of the city and county, or county, to provide such rooms, attendants, furniture, fuel, lights, and stationery; and the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the

general fund thereof." The board of supervisors of the city and county of San Francisco having failed to provide suitable apartments, furniture, stationery, etc., sufficient for the transaction of the business of department 11 of the superior court of said city and county, said department 11. Hon. JAMES M. TROUTT presiding, made an order that the sheriff of the city and county of San Francisco provide such apartments, furniture, stationery, etc., sufficient for the transaction of the business of said department of the court. The sheriff complied with the aforesaid order, and incurred certain expenses in the sum of \$1,867.42 therefor, and said expenses were certified to be correct by said JAMES M. TROUTT, judge of department 11 of the superior court of said city and county. Thereafter an order of court was made declaring that said expenses were a charge against the treasury of the city and county of San Francisco, and it was further ordered and adjudged that the treasurer of said city and county forthwith pay out of the "general fund" the aforesaid bills and expenses. A copy of this order was served upon the petitioner, treasurer of the city and county of San Francisco, and he refused to comply with its terms; whereupon such proceedings were had that he was adjudged guilty of contempt, and ordered committed to the custody of the sheriff.

In the solution of the question as to the legality or illegality of petitioner's imprisonment, it is only necessary to determine whether or not the court had any authority in law to make the order requiring the treasurer to pay these expenses. If the order was made without authority in law, the treasurer was not bound to obey it, and his refusal constituted no contempt. That portion of the order of the court declaring the expenses to be a charge against the treasury of the city and county of San Francisco is purely surplusage, for the statute expressly provides that the act of the judge in certifying to the correctness of these expenses constitutes them a charge against the city and county treasury, to be paid out of the general fund. It will be conceded upon all sides that it is the duty of the board of supervisors to prepare suitable rooms, furniture, stationery, etc., for the use of the judges of the superior courts of this state, and public officers are presumed to know their official duties. It is also conceded that the board of supervisors of the city and county of San Francisco in the line of their official duties failed to provide suitable rooms, furniture, lights, etc., for department 11 of the superior court of said city and county. It is immaterial whether such failure was willful and intentional, or arose through negligence and neglect, the evil results to ensue from the failure would be the same. The articles enumerated are necessities required in order that courts may exist, and the law be administered; and the legislature undoubtedly recognized these facts when it provided that, if these articles were not furnished, the court should have the power to provide them forthwith, and thus the progress of its business would

not be retarded, and the administration of justice would flow on without interruption. This power vested in the judge or court is not an unlimited power, and therefore not a dangerous power. This section of the Code does not open wide the doors of the city treasury, and place the keys of the treasure vaults in the hands of the judiciary, with an invitation to enter and partake *ad libitum*, as petitioner would insist, but the power is measured by the section, and expenditures made in excess of the limitation of the statute would be made without authority of the law. It is not necessary that these demands should be audited by the board of supervisors, for the legislature in the section of the Code itself provided that the judge should be the auditing officer. The act of the board of supervisors in auditing such demands would be an idle thing, purely *pro forma*, for it would have no authority to reduce or increase the amount of the demand, as certified by the judge. Indeed, the legislature never intended that the board of supervisors should audit these demands, which are created in direct opposition in most cases to their wishes and desires, and to which the board may be hostilely inclined. *Ex parte Reis*, 64 Cal. 233, and especially the concurring opinion of Justice THORNTON, 242 et seq., would seem to conclusively establish the correctness of the foregoing views.

This demand being a charge against the city and county treasury, to be paid out of the general fund, can the payment thereof be enforced against the county treasurer by proceedings in contempt? In other words, had the court the power to order the petitioner to pay this money from the general fund of the treasury? If it had the power to make the order, it had the power to enforce that order by contempt proceedings, but we find nothing in the provisions of the section giving the court any such power, and it certainly had not the inherent power to make the order, for such power was not a necessary incident to the court in order that its previous acts might fully and truly accomplish the results intended and desired. The demand had ripened into a legal liability against the city and county, and remedies were not lacking to enforce its payment. Again, the treasurer was not an officer of the court, and in no way was he a party to the proceedings. Under the above circumstances, the court certainly had no inherent power to make an order placing the petitioner in the unpleasant and perilous position of either paying out the people's money or be punished for contempt of court. Under the provision of the Code, the court does not even audit the demand; that act is performed by the judge, and when performed the power given under the section is exhausted, and whatever duty devolves upon the treasurer thereafter, in relation to such demand, is a duty imposed by law, and a neglect or refusal to perform that duty renders him liable to proceedings by writ of *mandamus* or other appropriate remedy. The cases of *Ex parte Reis*, 64 Cal. 233, and *Aid Soc. v. Reis*, 71 Cal. 627, 12 Pac. Rep. 796, add no weight to respondent's

position. The latter case is a proceeding in *mandamus*, and in the matter of *Ex parte Reis* the language of the statute was, "and paid out of the treasury of the county on the order of the court." These words are italicized in the opinion of Justice McKINSTRY, and it is patent from a casual reading of the decision that, if the statute had not contained the words "on the order of the court," the petitioner would never have been remanded. We conclude, therefore, that the court neither had inherent power, nor power granted by statute, to make the order requiring petitioner to pay out the city and county's money upon these certified demands, and that a refusal to obey such order did not render the petitioner amenable to proceedings in contempt. Let the petitioner be discharged.

We concur: HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.; DE HAVEN, J.

91 Cal. 112

KREMER v. EARL *et al.* (No. 14,054.)

(Supreme Court of California. Sept. 10, 1891.)

CONTRACTS AGAINST PUBLIC POLICY—AGREEMENT TO CONVEY—PUBLIC LANDS—SPECIFIC PERFORMANCE.

1. Under Pol. Code Cal. § 3500, relative to acquiring title to school lands from the state, and requiring the applicant to swear that he is a citizen of the county and a resident of the state, and that he has not entered any of said land, which, together with that then sought to be purchased, exceeded 820 acres, a contract by which one of two persons, each of whom claims adversely to the other the right to acquire title to nearly 500 acres of public land, agrees to convey to the other all the title which he had or might have in about 400 acres of it, he having already taken steps to have other persons enter it in their names, under the school-land laws, but for his benefit, is void as in violation of the spirit of the law, and will not be enforced.

2. Though the defendant in an action to enforce such contract has never questioned its legality, a decree for its specific performance will on appeal be reversed.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action to compel the conveyance of land and the cancellation of a mortgage. Judgment for plaintiff, and defendants appeal. Reversed.

Del Valle & Munday, for appellants. *S. Haley and Lee & Scott*, for respondent.

PATERSON, J. This is an action to compel the defendant Earl to convey to plaintiff, who is special administrator of the estate of Henry Charles, deceased, the legal title to the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 22, township 8 S., range 8 W., S. B. M., and to cancel a mortgage thereon given by Earl to his co-defendant Egan. The facts found by the court show that in September, 1875, Henry Charles and F. P. Forster, brother of defendant M. A. Forster, claimed the right adversely to each other to acquire the title to several tracts of public land, including the land in controversy, and on that day entered into a written agreement, by the terms of which Forster agreed to convey to Charles all the right, title, and interest which he then

held or might thereafter acquire in the lands described in the agreement, upon the payment to him by Charles within 60 days of the amount paid by Forster to Mullen & Hyde, of San Francisco, for said lands, together with interest thereon at 1 per cent. per month. On November 8, 1875, Charles paid to Forster the sum of \$1,056, which was more than enough to pay for the lands described in the agreement, and thereupon Forster executed and delivered to Charles a deed of conveyance, including the lands in controversy. Forster had previously, for the purpose of acquiring the title to the lands described in the agreement, together with other public lands, employed Mullen & Hyde to discover portions of school sections which had been lost to the state, and to procure lands in lieu thereof, under the provisions of title 8, pt. 3, of the Political Code. In pursuance of their employment they procured one Sheldon to make an application in due form under the provisions of the Code referred to for certain lands, including the lands in controversy, on March 5, 1875. On April 16, 1875, the surveyor general applied to the register of the United States land-office, asking that all of the lands described in Sheldon's application be accepted in part satisfaction of the grant to the state in lieu of certain portions of school sections which had been lost to the state, and at the same time located and selected the lands described in the application for the use and benefit of the applicant. On November 15, 1875, the surveyor general's selection was duly approved by the commissioner of the general land-office and by the secretary of the interior, and thereupon the state became the owner of the lands. About the same time Mullen & Hyde procured other persons to make applications for other portions of the land which Forster had agreed to secure and convey to Charles. Believing the applications to be void because they had been made before the approval of the township plat, Mullen & Hyde procured other persons to file applications for the same lands in March, 1876. Sheldon's application was abandoned, and one Weber filed on the lands described therein. His application was approved by the surveyor general in December, 1880, and on February 19, 1881, the register of the land-office issued to him a certificate of purchase for the lands described in his application, including the lands in controversy. F. P. Forster died intestate March 15, 1881, and the defendant M. A. Forster was appointed administrator in the following month. In February, 1881, Mullen & Hyde procured Weber to execute a deed to the defendant Egan for all the lands in the Weber application. This conveyance, the court finds, was for the sole use and benefit of F. P. Forster, who paid the consideration and cost thereof. Egan, who was an employee of F. P. Forster, did not know of the execution of the deed until several days thereafter. On November 24, 1882, Egan conveyed the lands in controversy, with others, to M. A. Forster, it being understood that Forster would reconvey to him the 40 acres in controversy. November 25, 1882, Forster reconveyed the

lands in controversy to Egan. A patent was issued to M. A. Forster December 27, 1882. March 10, 1888, Egan conveyed the 40-acre tract to Earl in consideration of the sum of \$4,000, one-third of which was paid in cash, and the balance was secured by the note and mortgage which plaintiff seeks to have canceled. Egan was the trustee, friend, and confidential adviser of both F. P. and M. A. Forster. He acted as the agent of F. P. in procuring the payment of the \$1,056 by Charles, and never disclosed the fact that he claimed any interest in the land in controversy until within two years before the commencement of this action. All of the defendants knew of the agreement between Charles and Forster from the time it was executed, and had notice of all the facts concerning the dealings between Mullen & Hyde, the different applicants who filed on the lands, and Charles and Forster. Charles always erroneously believed, until within two years prior to the commencement of this action, that he had acquired title to the lands in controversy through the application of Clarke and Cavanaugh, the certificate of purchase issued to them and assigned to him, and the patent issued by the state to him for the lands described in their application. Hyde procured the deed from Weber to Egan to be made to Egan as the agent of Forster, and Egan received it in trust for and for the sole use and benefit of Forster, who paid the consideration, fees, and expenses on account thereof through Mullen & Hyde. The purchase price of the land was paid to the state by Egan from his own funds. Charles occupied the lands in controversy exclusively, and used the same for pasture, from the time of the agreement with Forster to April 1, 1883. From April 1, 1883, to March 30, 1888,—the date of the commencement of this action,—he used the land in the same manner in connection with other lands, except that in 1885 and 1886 Egan's tenants, who it appears were also tenants of the plaintiff, used the land for pasturage. Egan purposely concealed from Charles the fact that he had procured a deed from Weber for the 40-acre tract.

It is apparent from the facts stated above, and taken from the findings of the court, that the purpose of the agreement between Charles and Forster was to secure from the state large tracts of land in a manner unauthorized by law. The lands described in the agreement itself amounted to 398.46 acres, and the quantity claimed by each adversely to the other was 463.27 acres. The statute under which they propose to acquire title to the lands requires the applicant to make an affidavit that he is a citizen of the United States, or has filed his intention to become such, and a resident of the state of lawful age; that he desires to purchase the lands, and there is no valid claim to the same other than that of the applicant; that he has not entered any land in part satisfaction of the grant in lieu of sixteenth and thirty-sixth sections, which, together with that now sought to be purchased, exceeds 320 acres. There is no doubt that the contract contravenes the spirit and policy of the land

laws of this state. The application and purchase authorized by section 3500, Pol. Code, are intended for the benefit of the applicant himself. "This was distinctly the policy of the act,—a policy adopted to prevent the acquisition of large tracts of land by one person through the use of other persons. * * * If such evasion of the statute as is attempted in this case should be allowed, it would be a very easy matter for one who had acquired under the laws above mentioned 640 [here 320] acres, and therefore could not take the oath prescribed, by the employment of others, who could take the oath, to acquire for himself, in manifest disregard of the intent and policy of the act, many times 640 [here 320] acres." *McGregor v. Donnelly*, 67 Cal. 150, 7 Pac. Rep. 422. It is not necessary that the act itself or any other act should declare in express words such a contract to be void. If, upon a review of all the state legislation upon the subject, such a contract appears to contravene the design and policy of the laws, a court of equity will not enforce it. *Civil Code*, § 1667; *Dial v. Hair*, 18 Ala. 800; *Smith v. Johnson*, 37 Ala. 636. "No court will lend its aid to give effect to a contract which is illegal, whether it violate the common or statute law, either expressly or by implication." *Damrell v. Meyer*, 40 Cal. 170. The parties being *in pari delicto*, the court will leave them where it finds them. *Wat. Spec. Perf.* § 207. Our land laws are intended to benefit actual settlers; to encourage the immigration of industrious people, and enable them to build homes; to place the lands of the state beyond the reach of speculators. If we hold this contract not to be in violation of the spirit of the law, we shall sanction a contrivance by which one, though not an actual settler, or even a resident of the state, can acquire any quantity of land under the act. There is nothing in the record to show that Charles was a citizen of the United States, or possessed of any of the qualifications necessary to entitle him to purchase land from the state. If he is entitled to the relief he seeks in this action, it must be by virtue of the terms of the written contract, and not by virtue of any oral agreement, or of any trust relation existing between him and Egan, or between Egan and Forster. There is enough in the record to indicate that the land in controversy is agricultural land, and fit for cultivation. If it is, no one was entitled to purchase it who was not an actual settler thereon. There seems to be no pretense that the plaintiff was ever an actual settler on the land. Our constitution provides that "lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding 320 acres to each settler;" and this provision governs applications made prior to the time when the constitution took effect. *Manley v. Cunningham*, 72 Cal. 240, 13 Pac. Rep. 622; *Wat. Spec. Perf.* § 207, *supra*; *Brake v. Ballou*, 19 Kan. 402. But, whether the lands were fit for cultivation or not, the agreement upon which plaintiff relies for a specific performance contravenes the provisions of the statutes which were in

force at the time it was executed, and no recovery can be had upon it.

It may be suggested that the appellant has never questioned the legality of the contract, and that we ought not to make the point for him. As a general rule, cases should not be reversed upon points which the respondent has not had an opportunity to discuss; but in cases of this kind the court is bound to satisfy its own conscience, and cannot shut its eyes to the fact, although it is not put in issue. A court of equity will not allow itself to become a handmaid of iniquity of any kind. It intervenes, not for the sake of the party who is benefited by the intervention, but for the sake of the law itself. It matters not that no objection is made by either party; when the court discovers a fact which indicates that the contract is illegal, and ought not to be enforced, it will of its own motion instigate an inquiry in relation thereto. *Valentine v. Stewart*, 15 Cal. 405; *Pom. Cont. § 286*. Judgment and order reversed, with directions to the court below to dismiss the action.

We concur: HARRISON, J.; GAROUTTE, J.

(31 Cal. 309)

WARNER v. DARROW. (No. 14,179.)

(*Supreme Court of California*. Sept. 21, 1891.)

APPEAL—JUDGMENT OF NONSUIT—RIGHTS OF VENDOR—TRIAL ON CROSS-COMPLAINT.

1. The time within which an appeal can be taken from a judgment of nonsuit is not prescribed by Code Civil Proc. Cal. § 989, subd. 1, providing that an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within 60 days after the rendition of the judgment. *Miller v. Wade*, 25 Pac. Rep. 487, explained.

2. Under an agreement of the vendor of land to make the conveyance "on or before" a date named, provided the vendee shall, "on or before that day," have paid to the vendor the price stated therein, payment or tender of the price by the vendee within the time stated, entitles him to a conveyance.

3. Where plaintiff is nonsuited after filing a answer to a cross-complaint, he can have no relief on account of matters alleged in his complaint, but defendant is entitled to have the issues made by his cross-complaint, and the answer thereto, tried and disposed of.

Department 2. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by Warner against Darrow, in which the plaintiff is nonsuited, and the defendant files a cross complaint for affirmative relief that the plaintiff be required to convey certain land. Trial under the cross-complaint, and judgment of nonsuit against defendant. Defendant appeals. Reversed.

W. T. Kendrick, for appellant. M. Whaling, for respondent.

DE HAVEN, J. The defendant filed a cross-complaint in the action, in which he asked as affirmative relief that the plaintiff be required to convey to him certain described land. The plaintiff answered. Upon trial of the action the plaintiff was, upon motion of defendant, nonsuited. The court thereupon proceeded to a trial

of the issues made by the cross-complaint and answer thereto, and, when the defendant had concluded his evidence in support of his cross-complaint, the court, on motion of plaintiff, granted a nonsuit as to the matters alleged in said cross-complaint. From this judgment the defendant appeals.

1. The appeal in this case was taken more than 60 days after the rendition of the judgment of nonsuit, and the respondent insists that, as the determination of the question whether the nonsuit was proper actually depends upon the sufficiency of the evidence to sustain the allegations of the cross-complaint, the appeal was not taken in time.¹ This view finds support in the opinion of Mr. Justice WORKS, in *Miller v. Wade*, 87 Cal. 410, 25 Pac. Rep. 487, but was not concurred in by a majority of the court in that case, and it cannot be sustained without overruling previous decisions in which it was uniformly held that the ruling of a court upon a motion for a nonsuit presents a pure question of law, and is properly assigned as such on appeal from the judgment. *Cravens v. Dewey*, 18 Cal. 42; *Donahue v. Gallavan*, 43 Cal. 576; *Schroeder v. Schmidt*, 74 Cal. 460, 16 Pac. Rep. 243. In the latter case this court said: "An error in granting a nonsuit is an error in law, and should be excepted to and specified as such. *Donahue v. Gallavan*, 43 Cal. 576; *Cravens v. Dewey*, 18 Cal. 42. It cannot be reviewed on the ground that the evidence is insufficient to sustain the decision. This is a ground for the review of questions of fact, not of law." We have no doubt of the correctness of these views. A motion for a nonsuit admits the truth of plaintiff's evidence, and every inference of fact which can be properly drawn therefrom, and the question thus presented is as purely one of law as that which would arise if, to a complaint alleging the same facts, a demurrer should be interposed upon the ground that such facts were insufficient to constitute a cause of action.

2. The evidence was sufficient to show that appellant tendered to respondent the balance of the price, which, by the terms of the agreement alleged in the cross-complaint, he was to pay for the land. This, in the absence of any proof of the matters set up as a defense, entitled him to a conveyance. The agreement binds the respondent to make the conveyance "on or before" July 1, 1892, provided that the appellant shall, "on or before that day, have paid to the obligor" the price named therein. This provision does not render the present action by appellant for a specific performance premature, or justify the respondent in withholding the conveyance after she had been paid or tendered the agreed price for the land. The true meaning of the agreement is that appellant was to have until the dates fixed therein with-

¹ Code Civil Proc. Cal. § 989, subd. 1, provides that "an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment."

in which to make the different payments provided for, the last falling due on July 1, 1892, but might at his option make payment sooner, and if he did that respondent would at once convey. Upon payment or tender of the purchase price, the appellant became in equity the owner of the whole estate in the land purchased, and entitled to a conveyance of the legal title.

3. The nonsuit of plaintiff, upon motion of defendant, did not operate as a dismissal of the action, so as to prevent the trial of the issues arising upon the cross-complaint and the answer thereto. The effect of this order was that plaintiff was entitled to no relief against the defendant on account of matters alleged in the complaint, but the issues made by the cross-complaint and the answer thereto still remained, and the appellant was entitled to have them tried and disposed of. This was, in effect, so held in *Mott v. Mott*, 82 Cal. 419, 22 Pac. Rep. 1140. The case of *Wood v. Ramond*, 42 Cal. 644, upon which respondent relies, is not in conflict with this view. In that case there was no cross-complaint, and what was there said about an order of nonsuit being, in effect, a dismissal of the action does not apply here. The other grounds relied upon to sustain the judgment do not require special mention. The reversal of the judgment and order denying appellant's motion for a new trial necessarily compels a reversal of the order denying the motion for taxation of costs. Judgment and orders reversed.

We concur: BEATTY, C. J.; MCFARLAND, J.

91 Cal. 323

SMITH *et al.* v. PHENIX INS. CO. (No. 13,514.)

(*Supreme Court of California.* Sept. 21, 1891.)

INSURANCE—CONDITIONS OF POLICY—CHANGE OF POSSESSION AND TITLE.

Putting a lessee in possession of insured property under a contract that he shall buy the property on the expiration of his lease, or, at his option, at any time during its continuance, does not violate a condition of the policy that it shall become void if any change takes place in the title or possession, when, on application for the insurance, the building was in process of erection, untenanted, and the company had notice of the contemplated lease and change of possession, though not of the agreement to convey contained in the lease. 23 Pac. Rep. 383, reversed.

In bank. On rehearing. For former report, see 23 Pac. Rep. 383.

Action by Smith and others against the Phenix Insurance Company for loss under a fire policy. Judgment for plaintiffs. Defendant appeals. Affirmed on rehearing.

BEATTY, C. J. In March, 1890, we made a decision in this case reversing the judgment of the superior court, with directions to enter judgment on the findings in favor of the appellant. 23 Pac. Rep. 383. After a rehearing of the case, and upon fuller consideration of the questions involved, we are satisfied that our former decision was erroneous, and that the judgment of the superior court should be affirmed. The action is upon a fire insur-

ance policy. Plaintiffs had judgment in the lower court, and defendant appealed from the judgment alone, claiming that upon the facts found the judgment should have been in its favor. The policy in suit was issued in August, 1887, and the property insured consisted of a frame building designed for an hotel or boarding-house. The defendant was advised by the papers accompanying the application for insurance—which, by the terms of the policy, are made a part of the contract—that the building was occupied or to be occupied by a tenant (no particular tenant being named) for hotel purposes; and it is found by the court, as alleged in the complaint, "that before said insurance was effected defendant had full knowledge that said building was built by plaintiffs for the purpose of renting the same for a boarding and lodging house, and was to be occupied by the tenant of the plaintiffs, the said building not being at that time fully completed and furnished." After the insurance was effected and the building completed, the plaintiffs, on December 24, 1887, by a written lease, demised the insured premises to one J. D. Stewart for a term of five years, at a fixed rent, payable monthly. The lease also contained stipulations binding the plaintiffs to put in certain furniture, consisting of carpets, cooking range, gas-fixtures, etc., and binding Stewart to put in other necessary furniture. It was agreed that the building and furniture should be properly insured for the benefit of the parties as their interest might appear, and that Stewart, the lessee, should pay one-half of the expense of insuring the building and the entire expense of insuring the furniture. It was further agreed as follows: "Said party of the second part [Stewart] may at any time during said term of five years purchase said hotel, lots, and premises for the sum of twenty-five thousand dollars cash, and likewise purchase said carpets, gas-fixtures, and range at cost price. It is further agreed that said party of the second part will purchase said hotel, lots, and premises on or before five years from this date for the sum of \$25,000, together with said carpets, gas-fixtures, and range at their cost price." The defendant had no notice of these stipulations for purchase and sale of the property. Under this lease and agreement Stewart entered into possession of the insured premises, and so continued until the destruction of the hotel by fire in April, 1888. The plaintiffs thereafter, upon due notice and proofs of loss, demanded payment of the policy, which was refused by the defendant. Hence this action, which is defended on the ground of an alleged violation by plaintiffs of the following conditions of the policy: "If the property be sold or transferred, (in whole or in part,) or upon the commencement of foreclosure proceedings against, or a sale under a deed of trust, or the existence of a judgment lien, or the issue or levy of an execution against any kind of property herein described; or if the property be assigned under any bankrupt or insolvent law, or any change takes place in the title or possession, (except in case of succession

by reason of the death of the assured,) whether by legal process or judicial decree, or voluntary transfer, assignment, or conveyance; *or if the title or possession shall be changed from any cause whatsoever*; or if this policy shall be assigned before a loss, without the consent of the company indorsed hereon,—this policy shall, in each and every instance, be void." The passages which we have italicized are those to which attention is particularly directed; the claim of appellant being that the lease and agreement of sale, and Stewart's possession thereunder, wrought a change both in the title and possession of the property insured, involving a forfeiture by plaintiffs of all rights under the policy.

In their argument at the rehearing counsel for appellant took the position, for the first time, that possession by Stewart, under the lease and as a tenant merely, without regard to the contract of sale, was a violation of the provision of the policy against a change of possession. But clearly this position cannot be maintained, in view of the statement made in the application upon which the policy was issued, to the effect that the building was to be occupied by a tenant for hotel purposes; and the fact found by the court that defendant had full knowledge, before issuing the policy, of the purpose for which the building was being constructed, and that it was to be occupied by a tenant. Occupancy of the identical character contemplated by the policy was not a change of possession. The issuance of the policy was an express consent to possession by a tenant, and, since no particular tenant was named, it was a consent to occupancy by any tenant selected by the assured, subject, of course, to revocation by canceling the policy and returning the premium if an objectionable tenant was selected.

The real and only question in the case is whether the contract of sale embraced in the lease, or superadded to it, wrought a change in the title to the insured premises within the meaning of the policy, or imparted to the possession of Stewart a character materially different from the possession of a tenant. Upon this question we held in our former decision, in accordance with the contention of appellant, that Stewart, by taking possession of the insured premises under the lease and agreement of December 24, 1887, not only acquired the right but became absolutely bound to complete the purchase; that henceforth the buildings were at his risk; that if they were destroyed the loss would be his alone, because he was obliged at the expiration of his term as tenant, upon tender of a deed for the land without the buildings, to pay the full contract price of \$25,000. From this it necessarily followed that Stewart, from the time of taking possession, acquired an insurable interest equivalent to the value of the buildings, and that, if plaintiffs could collect the insurance and keep it, they would be paid twice over for the buildings, so that they would have a direct interest in their destruction. Of course, upon these premises, it was impossible to avoid the conclusion

that the effect of the transaction with Stewart was to work a change in the title not merely nominal and technical, but substantial and material to the risk, and necessarily violative of the conditions of the policy. But on a fuller consideration of the case we are satisfied that the authorities cited in our opinion and in the briefs of counsel did not warrant us in holding that under the circumstances of this case Stewart, by taking possession under the lease and contract of December 24, 1887, became absolutely bound to complete the purchase of the premises at the expiration of his term, notwithstanding the previous destruction of the buildings. There can be no question that under such a contract the equitable title to the land, as between the vendor and vendee, is in the latter. This is a familiar doctrine of equity, based upon the principle that, for the prevention of fraud and the enforcement of the just rights of the parties, equity will deem that to be done which ought to be done. The maxim is applied most frequently in actions by the vendee for specific performance of the contract, or in aid of his defense when the vendor is seeking to recover possession of the land upon his legal title. *Laffan v. Naglee*, 9 Cal. 663; *De Rutte v. Muldrow*, 16 Cal. 505; *Hall v. Center*, 40 Cal. 63; *Dowd v. Clarke*, 54 Cal. 48; *King v. Ruckman*, 21 N. J. Eq. 599.

Decisions almost innumerable to the same effect might be cited from the reports of this and other states, but they do not decide the question involved in this case. There is a wide distinction between the proposition that the vendee in possession under an executory contract of sale may maintain the possession against the vendor as long as he performs his part of the agreement, and upon full compliance may enforce specific performance of the vendor's contract to convey the legal title, and the proposition here contended for, viz., that the vendor in such a contract, notwithstanding the destruction of the subject of the contract, in whole or in part, before the date stipulated for payment and conveyance, and his consequent inability to make a conveyance of that for which the vendee has bargained, may nevertheless compel the vendee to pay the whole contract price in exchange for a fraction of the property sold. When we come to make a critical examination of the cases cited to this point, and especially the cases in which the precise questions we are considering are directly involved, we find that they lend a very slight support to the appellant's contention. In the case of *McKeehle v. Sterling*, 48 Barb. 330, the doctrine is, it is true, carried to an extreme degree; but the authorities cited in support of that decision are not in point, and the reasoning by which they are made to support the decision is very unsatisfactory. In *Richter v. Selin*, 8 Serg. & R. 439, the supreme court of Pennsylvania use this language: "Where a contract is made for the sale of land, equity considers the vendee as the owner of the estate sold, and the purchaser as a trustee for the vendor for the purchase money. So much is the vendee considered in contemplation of equity as actually seised of the estate that

he must bear any loss that may happen to the estate between the agreement and the conveyance, and he will be entitled to any benefit which may accrue to it in the interval, because by the contract he is the owner of the premises to every intent and purpose in equity." But this was said *arguendo* in deciding a case where the point was not directly involved, and the proposition, true enough in general, and in its application to the circumstances of that case, was stated in its most unqualified form, and without regard to the special circumstances which in many cases render it inapplicable. Similar statements of the same doctrine are to be found in some of the insurance cases hereinafter referred to, with reference to most of which it was correctly applied, as we shall see. But we shall also see that the doctrine has its reasonable limitations, and that this is one of the cases to which it cannot be applied without doing the wrong and injustice which it was designed to prevent. In the case of *Wells v. Calnan*, 107 Mass. 514, the facts were that the plaintiff agreed to sell the defendant a farm, and the defendant agreed to buy. On the day previous to that fixed for the payment and conveyance, the buildings on the farm were destroyed by fire. The plaintiff tendered a conveyance in pursuance of the contract, and demanded payment of the purchase price, which being refused, he sued for damages. It was held that he could not recover, because by reason of the destruction of the buildings he was unable to comply with the contract on his part. It is true the vendee had not taken possession, and the court found it necessary to distinguish the cases in which lessees in possession had been held liable on their covenant to pay rent or make repairs notwithstanding the destruction of tenements by fire during the term. In those cases it was said the liability of the defendant resulted from the fact that the lessors had fully complied with their contracts, while in the case under consideration the plaintiff was unable to do so. There can be no doubt of the soundness of this distinction, and no difficulty, we think, in showing that it applies to the present case. In the earlier Massachusetts case, (*Thompson v. Gould*, 20 Pick. 134,) it was applied where the defendant was in possession and had paid the purchase price for the purpose of sustaining his right to recover back the money paid. In that case the agreement of purchase and sale was by parol, but the plaintiff paid at different dates the whole purchase price, and got receipts in writing specifying the purpose of the payments, and he had entered into possession of the house. Clearly, under the circumstances, he had put himself in a position to enforce specific performance of the contract to convey, and was the owner of the equitable title. But, before any conveyance was tendered, the house was destroyed by fire, and the plaintiff sued in *assumpsit* for the money paid. In a well-considered opinion the court held that he was entitled to recover back the money on account of failure of consideration. It was conceded that the contract of the vendor, though by parol, could, under the circumstances,

have been specifically enforced, but it was denied that it could have been enforced against the vendee after destruction of the house. It may be said that in this decision the mere legal rights of the parties were regarded, and that the court could not act upon the equitable doctrine for want of jurisdiction; but it will be seen that the equitable doctrine was discussed in the opinion, and its reasonable limitations pointed out. What those limitations are it is not necessary that we should consider exhaustively. For the purpose of this decision, it is sufficient to say that no case has been cited, and we have discovered none, in which the vendee has been held bound to pay the purchase price where a valuable part of the property has been destroyed before the day fixed for payment and conveyance, unless he has taken possession under the contract of sale, or has the right to such possession under the contract before the occurrence of the loss. Now, in this case, it is to be remembered that the agreement between plaintiffs and Stewart consisted of a lease, for a term of five years, reserving a rent payable monthly in money, a stipulation giving Stewart the privilege of purchasing at \$25,000 at any time during the term, and the contract binding him to purchase at \$25,000 at the end of the term.

In considering the question before us we may lay out of view the stipulation giving Stewart the privilege of purchasing, for clearly he was not thereby bound to take the property and pay for it, even if it remained whole and intact. To determine the character of his possession with reference to the extent of his liability upon his agreement to purchase, the contract is to be viewed as if it consisted merely of the lease and the agreement to purchase. Would Stewart, entering under such a contract, at the beginning of the term demise, be deemed, for the purpose of enforcing a most inequitable liability, to have entered and to be holding under his contract of purchase? Clearly he would not, if his possession could be referred to either the lease or the contract as distinct from the other; for there can be no doubt that during the term of the lease he would hold under that. His right to remain in possession would depend on his payment of rent and performance of other covenants of the lease, and would be determined by failure so to pay and perform. And we think that, for the purpose of determining his liability under his agreement to purchase, in case of destruction of a material part of the property sold prior to the time for payment and conveyance, this distinction between the lease and agreement ought to be made. It is reasonable and equitable, and not opposed to any authority cited, unless the case in 48 Barb., above referred to, should be deemed an authority against it. If so, we can only say that we think that case goes to an unreasonable length, and that it ought not to be followed. On the contrary, we think the best-considered cases warrant us in holding that the liability of Stewart upon his agreement to purchase ended with the destruction of the hotel; that it was never at his risk,

but was always at the sole risk of the plaintiffs. But appellant contends that even on this view there was a change of title and possession within the meaning of the policy, and he cites a number of cases to sustain the proposition that the equitable ownership of a vendee under a contract of purchase constitutes a sole, absolute, and unconditional ownership, and consequently that the vendor cannot also be the sole, absolute, and unconditional owner. A review of these cases, however, will show that they differ essentially from the case in hand. In the case of *Hough v. Insurance Co.*, 29 Conn. 10, the legal title to the property insured was in a trustee, who held it as security for about \$1,600, subject to which incumbrance the plaintiff and two others owned the equitable title in equal shares. The plaintiff bought out his co-owners, agreeing to pay each the sum of \$1,000 for his interest, and he had paid on his purchase \$500 to one, and \$700 to the other. He had also taken possession of the land, and erected a dwelling thereon, at a cost of \$2,700, and was to receive a conveyance from the trustee upon the payment of the sum secured to him on the property. Under these circumstances, the court held that it was not a misrepresentation on the part of plaintiff in applying for insurance to state that the property was his. And it was also held that his interest in the property was, within the meaning of the policy, an absolute interest, because he could by no contingency be deprived of it except by his own consent. No doubt this case was correctly decided. The plaintiff, by reason of his original interest in the property, his payment to his co-owners upon the purchase of their interests, and the money he had expended in improvements on the property, independent of his agreement to purchase, had bound himself to do so, and he was the only person who could suffer loss by destruction of the property. It was his, therefore, absolutely, in every sense of the word material to the risk. And the decision was in line with hundreds of others in which the courts everywhere have refused to defeat recovery upon insurance policies by giving effect to the literal terms of clauses of forfeiture. Such clauses are always, and justly, construed with the utmost strictness against the insurer, and always with reference to their only legitimate object, *i. e.*, the protection of the insurer against risks that are materially different from those which he has undertaken. The cases of *Insurance Co. v. Wilgus*, 88 Pa. St. 107; *Chandler v. Insurance Co.*, Id. 223; *Insurance Co. v. Dyches*, 56 Tex. 565; *Swift v. Insurance Co.*, 18 Vt. 313; and *Gaylord v. Insurance Co.*, 40 Mo. 16,—are all substantially like the Connecticut case, and the decisions rest upon the same ground. In every instance the vendee had made large or complete payments upon his purchase, or valuable improvements, or both. In other words, he had given bonds to complete it, so that the loss must necessarily fall upon him in case of destruction of buildings.

The case of *Davidson v. Insurance Co.*, 71 Iowa, 532, 32 N. W. Rep. 514, upon the

authority of which, principally, our former decision herein was based, was another of the same sort. There the vendee had entered into possession of a small farm under a contract to purchase it for \$400, upon which \$50 was to be paid in cash. Prior to the sale the vendor had, as in this case, procured insurance on a building on the farm. After the sale the building was destroyed by fire, and the vendor sued on the policy. The defense was breach of a condition of the policy against any sale or conveyance of the property by the insured. The defense was sustained on the ground that there was a sale of the property. This ruling was clearly opposed to the decision of the supreme court of Maryland in *Insurance Co. v. Kelly*, 32 Md 421, and to other decisions cited in the dissenting opinion. It was rested also upon the false assumption that if the plaintiff could collect the insurance he could also collect the full purchase price of the building from his vendee, which would be holding, in effect, that the defendant remained bound by the policy after it became the interest of the assured to destroy the property. But upon the doctrine of equity that the vendee in possession is the equitable owner of the property, and the vendor merely his trustee of the legal title, the money collected by the plaintiff on the policy would have been held in trust for the vendee, and applied on the purchase price, (*Reed v. Lukens*, 44 Pa. St. 202;) so that in fact the plaintiff, even if he had been held entitled to recover on the policy, could have no interest in the destruction of the property. And so in this case, even if Stewart could be held bound by his contract of purchase after the fire, the plaintiff could gain nothing by collecting the amount of the policy. This, however, would be no answer to the objection of defendant that the title was changed in a sense material to the risk; for to hold that the plaintiff could collect the insurance for the benefit of his vendee would convert the transaction into a virtual assignment of the policy, which can never be done without the consent of the insurer. We do not, therefore, rest our decision in any degree upon the ground that the plaintiffs could not possibly have derived an advantage from the destruction of the hotel, and have only alluded to the matter for the purpose of calling attention to the false quantity in the reasoning of the Iowa supreme court in the case cited in support of our former decision. The cases of *Insurance Co. v. Dunham*, 117 Pa. St. 460, 12 Atl. Rep. 668, and *Elliott v. Insurance Co.*, 117 Pa. St. 548, 12 Atl. Rep. 676, cited on the rehearing, are essentially like the other cases cited to the same point, which we have already considered. We conclude that there was in this case no change of title or possession material to the risk, and that the judgment of the superior court on the facts found was correct. In reaching this conclusion we have not overlooked the argument based upon the fact that Stewart agreed to pay one-half of the premium on the insurance of the hotel. That agreement is evidently one of the terms of the lease, as contradistinguished from

the agreement to purchase. The judgment is affirmed.

We concur: PATERSON, J.; HARRISON, J.; DE HAVEN, J.; GAROUTTE, J.

McFARLAND, J. I concur in the order of affirmance.

SMITH *et al.* v. PENNSYLVANIA FIRE INS. CO.
(No. 13,515.)

SAME v. AMERICAN FIRE INS. CO. (No. 13,516.)
(*Supreme Court of California.* Sept. 21, 1891.)

In bank. On rehearing. For former report, see 23 Pac. Rep. 385.

Actions against the Pennsylvania Fire Insurance Company and the American Fire Insurance Company, respectively, for loss under fire policies. Judgment for plaintiff. Defendants appeal. Affirmed on rehearing.

PER CURIAM. These cases being in all material respects the same as Smith v. Insurance Co., 27 Pac. Rep. 738, (this day decided,) and for the reasons given in the opinion in that case the judgments are affirmed.

91 Cal. 358

FREDERICK *et al.* v. DICKEY. (No. 14,015.)
(*Supreme Court of California.* Sept. 23, 1891.)

ADVERSE POSSESSION—PAYMENT OF TAXES—LOCATION OF WATER-RIGHT—EVIDENCE.

1. Where a mill-owner claimed adverse possession of a water-ditch appurtenant to his mill, and of a right of way therefor over adjoining property, for a period exceeding five years, and his land was, during one year of that period, mortgaged for more than its value, his failure to show, in an action to enjoin his neighbor from interfering with the ditch, that he paid the taxes on the mill property or on the ditch for that year, is immaterial under Code Civil Proc. Cal. § 325, which provides that one claiming adverse possession of "land" must show that he has paid all the taxes thereon; since, strictly speaking, no tax was levied on the "land" for that year, even if "land" be held to include such easement, which is doubtful.

2. A notice of the location of the water-right, made by the mill-owner's grantor 15 years before the commencement of the action, was admissible as evidence of an adverse claim, though the location was not made in accordance with the provisions of the Code.

In bank. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Action for an injunction by A. Frederick and another against one Dickey. Judgment for plaintiffs. Defendant appeals. Affirmed.

Waters & Gird, for appellant. Goodcell & Leonard and Ezra Crossman, for respondents.

McFARLAND, J. This action was brought to enjoin defendant from destroying or interfering with a certain water-ditch, a portion of which runs through defendant's land. Judgment went for plaintiffs, and defendant appeals.

The court found that plaintiffs and their grantors, for 10 years next before the commencement of the action, were the owners of a certain mill; that said water-ditch and right of way for the same were appurtenant to said mill, and used solely for the purpose of operating the same; and that plaintiffs and their grantors for

10 years had been in the open and adverse possession of said ditch and right of way, except that such use and possession of the same where it crosses defendant's land was adverse only after October 19, 1881, which was about seven years before the commencement of the action.

We see nothing in the objections to the introduction of the deeds marked Exhibits "A" and "B." Neither was the objection to the introduction of a notice of location of the water-right made by plaintiffs' grantor, Matthews, made in 1873, a good one. Whether or not the location was made in accordance with the provisions of the Code, it was admissible as evidence tending to show an adverse claim, for which purpose alone it was offered. See *Coonrad v. Hill*, 79 Cal. 593, 21 Pac. Rep. 1099.

The real question in the case is whether or not plaintiffs and their grantors held the ditch, water-right, and right of way over defendant's land adversely to defendant and his grantors; and a discussion of this question here would simply be a review of the evidence. The evidence clearly shows that plaintiffs and their grantors were in the possession and use of the ditch for a much longer period than the one found by the court, some of the witnesses putting it at 16 years. Appellant contends that during this long period it was held and used merely under a parol license, revocable at any time by appellant or his grantors; while respondents contend that it was held under a grant, which, although at first invalid, because not in writing, ripened into title by adverse user, having always been held under claim of title. And while on this issue the evidence was, no doubt, somewhat conflicting, it was amply sufficient to justify the finding of the court.

Upon the question of adverse possession appellant invokes section 325, Code Civil Proc., which provides that one claiming adverse possession of land must show that he has paid all taxes assessed upon said land. It is doubtful if the word "land," as used in that section, was intended to have any other than its common meaning. In some legal connections it is, no doubt, used as co-extensive with "real property," but primarily it means "the soil or a portion of the earth's crust." The sections of the Code upon the subject of adverse possession which precede section 325—except sections 324 and 327, which are immediately connected with it—all use the more general words, "real property," "real estate," or "property;" but section 325 and the two preceding sections use the word "land," and speak of methods of adverse holding which apply only to land in its common meaning, as "cultivated," and "protected by a substantial inclosure," and used "for purposes of husbandry, or for pasturage." In the very section 325 it is first provided that, in order to constitute adverse possession, land is deemed to have been possessed—"First, when it has been protected by a substantial inclosure; second, when it has been usually cultivated or improved;" and then it provides that the possession shall not be considered adverse unless "the land" has been occupied," etc., "and the claimant

shall have paid the taxes levied upon such land." It is, therefore, not at all clear that the section was intended to apply to mere easements or appurtenant rights. But, waiving that question, the water ditch and right here involved were appurtenant to the mill property, and, in our opinion, as intimated in *Coonratt v. Hill*, supra, should be considered as included in the assessment of the latter. It was, however, during some years assessed separately; but, whether assessed separately or not, all the taxes assessed were paid by plaintiffs and their grantors each year from 1878 to 1888. (when this action was commenced.) inclusive, unless the year 1884 is to be deemed an exception. The facts as to 1884 are that in that year the property was mortgaged to an amount exceeding its value, and there was no tax to be paid by the owner. We do not think, as contended by appellant, that respondent has lost his right as an adverse claimant because he does not show affirmatively that the mortgagee had paid the tax that year on the mortgage. Strictly speaking, there was no tax levied on "the land" within the letter of said section 325, (whatever meaning we attach to "land" as there used;) and, if that section be broadly construed as requiring the payment of taxes by an asserted adverse claimant as evidence of the *bona fides* of his claim, then certainly respondent and his grantors were within the spirit and intent of the provision. The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.

91 Cal. 363

SCHALLERT-GANAHL LUMBER CO. *et al.* v. NEAL *et al.* (No. 13,939.)

(*Supreme Court of California.* Sept. 24, 1891.)

MECHANICS' LIENS—ENFORCEMENT—FORFEITURE OF LIEN.

1. In an action to enforce a lien for materials furnished to a contractor who was building a house for defendants, the court found that the contractor delivered a check to plaintiffs' agent, taking a receipt therefor, and requested the agent to apply the proceeds to materials furnished by plaintiffs on a building then being erected for a third person; that the agent refused to so apply the proceeds of the check, but stated that part would be so applied, and that the residue would be applied to certain other contracts, not including that with defendants; that afterwards the contractor went to plaintiffs' office, showed plaintiffs' book-keeper the receipt for the check given by the agent, and the book-keeper, in ignorance of the facts, and relying on the contractor's statements, gave him a receipt for the amount of the check on the materials furnished for defendants' house; that plaintiffs, on discovery of the facts, promptly repudiated the application of the check so made by the contractor, and the contractor afterwards approved plaintiffs' bill for the whole amount of materials furnished on defendants' house, without claiming any credit on account of the check; that the contractor, by producing the receipt, afterwards induced defendants to advance "further money" on his contract; and that plaintiffs did not know of the use to which the contractor put the receipt. *Held*, that such findings did not support a conclusion of law that defendants were entitled to have the amount of the check deducted from plaintiffs' claim for materials furnished.

2. Code Civil Proc. Cal. § 1202, provides that "any person who shall willfully give a false notice of his claim to the owner, under the provision of section 1184," or "shall willfully include in his claim, filed under section 1187, work or materials not performed upon or furnished for the property described in the claim, shall forfeit his lien." *Held*, that a lien for materials furnished to a contractor is not subject to forfeiture on the ground that the claimant "knowingly and willfully filed a notice of lien for more than he was entitled to, and sought in the action to recover an amount in excess of the amount actually due;" the notice to the owner, referred to in section 1202, not being the notice of lien required to be filed.

In bank. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by the Schallert-Ganahl Lumber Company and the Los Angeles Planing-Mill Company against Juana A. Neal and others to foreclose mechanics' liens. Judgment for defendants. Plaintiffs appeal. Reversed.

Harcley, Willson & Carpenter, for appellants. *J. W. Mitchell & Graff and Gibbon & Creighton*, for respondents.

GAROUTTE, J. This is an action to enforce two certain mechanics' liens; the Schallert-Ganahl Lumber Company claiming \$672.21 for materials furnished the contractor, defendant Goetzman, the building being owned by the defendant Neal. The said plaintiff recovered judgment against defendant Neal for the amount claimed, less \$625, and also recovered a judgment for an attorney's fee of \$50. The plaintiff the Los Angeles Planing-Mill Company brought its action for \$982, and at the trial, upon the conclusion of its evidence, defendants moved for judgment of nonsuit against it upon the ground that it appeared from the evidence that it had willfully and knowingly filed a notice of lien for more than it was entitled to, and sought in this action to recover, by foreclosure proceedings against said defendants, an amount in excess of the amount actually due. The motion was granted, and both plaintiffs appeal from the respective judgments and order denying them a new trial. The ninth finding of the court is "that on or about the 30th day of November, 1887, the said H. J. Goetzman delivered to John L. Hickman a check drawn by R. T. Royal in favor of H. J. Goetzman, who was then constructing a house for said Royal, and received from said Hickman a receipt for said check; that, at the time of receiving said check, said Goetzman requested from said Hickman, as the agent of plaintiff, that the same be applied on the Royal contract; that said Hickman at said time declined to apply the same to the Royal contract, except for the sum of \$385 and some odd cents, the amount then due plaintiff for the materials furnished on said Royal contract, and stated to said Goetzman that the balance would be applied to the account of plaintiff with said Goetzman on other accounts then due, not including the Neal contract; that afterwards, on the same day, and before said Hickman had returned to plaintiff's office, said Goetzman went to the book-keeper of plaintiff, and stated to him that he paid

said Hickman \$525, and requested a receipt therefor, on account of the Neal job, at the same time producing the receipt given by Hickman for said check; that said book-keeper, in ignorance of the facts, and relying upon the statements of said Goetzman, gave said Goetzman a receipt for \$525 on the Neal job; that upon discovery of the facts plaintiff promptly repudiated said application by Goetzman, and said Goetzman thereafter approved said bill for the amount then due, to-wit, \$627.51, without claiming a credit of said \$525 thereon. Said sum of \$525 was applied by plaintiff as follows, to-wit, \$385 on the Royal account, being the amounts then due, and the balance to the other accounts of plaintiff against Goetzman, not including the Neal job. That said Goetzman thereafter produced said receipt to Telfair Creighton, the agent of said defendant Juana A. Neal, representing to him that he had paid that amount on the Neal contract for the purpose of inducing said Creighton, as the agent of said Neal, to advance further money on said Neal contract; that plaintiff had no knowledge of the use to which Goetzman had applied said receipt." A portion of the tenth finding reads: "That, by reason of the production by said Goetzman of said receipt for five hundred and twenty-five (\$525) dollars, said Creighton, as the agent of Juana A. Neal, advanced further money to said Goetzman." As a conclusion of law the court found: "That the defendant Juana A. Neal is entitled to have the sum of \$525, being the amount of the receipt aforesaid, deducted from plaintiff's said claim of \$672.51." This conclusion of law is clearly erroneous. How the defendant can be entitled to a credit of \$525 upon this demand by reason of the facts found we entirely fail to comprehend, and respondents' counsel have given us no additional light upon this legal proposition in their printed argument. If, by reason of the presentation of this unauthorized and repudiated receipt to defendant, she had been misled, and thereby paid the contractor, or other creditors, more money than the amount of her indebtedness to the contractor, such fact might create a sufficient prop to support an argument favorable to her claims in this action; but the court found that, by reason of the production of said receipt by Goetzman, said defendant advanced "further money" to said Goetzman. The words "further money," as to amount, are vague and indefinite; *non constat* but she still had large amounts in her hands, applicable to the payment of plaintiff's claim, when this action was commenced.

This section of the Code of Civil Procedure under which the plaintiff the Los Angeles Planing-Mill Company, was nonsuited, provides: "Sec. 1202. Any person who shall willfully give a false notice of his claim to the owner under the provisions of section 1184 shall forfeit his lien;" and again. "Any person who shall willfully include in his claim, filed under section 1187, work or materials not performed upon or furnished for the property described in the claim, shall forfeit his lien." The foregoing section contains other mat-

ters not involved in this question. This section of the statute provides that the claimant shall forfeit his lien *in toto* for a violation of its provisions; it is penal in its character, and not only must be strictly construed, but the evidence under which it is invoked should be clear and convincing that the violation was willful and intentional. Upon a comparison of the provisions quoted above with the grounds upon which the motion for a nonsuit was made, we find no similarity. The grounds upon which the motion was made for a nonsuit, which was practically to ask that the lien be declared forfeited, are not grounds specified in section 1202 of the Code, and we have been referred to no provision authorizing the forfeiture of a claimant's lien upon the grounds relied upon, to-wit, that "he knowingly and willfully filed a notice of lien for more than he was entitled to, and sought in the action to recover an amount in excess of the amount actually due." The notice referred to in this section is not the notice of lien required to be filed, and the allegation and proof that the plaintiff is seeking in this action to recover an amount in excess of the amount actually due is not satisfied by the provision of the Code "that any person who shall willfully include in his claim materials not furnished for the property described in the claim shall forfeit his lien." For the foregoing reasons we find it unnecessary to enter into an examination of the evidence as to the good or bad faith of the plaintiff in making these charges upon which a lien is sought. The judgment and order denying a new trial as to both plaintiffs is reversed, and as to the plaintiff the Schallert-Ganahl Lumber Company it is ordered that the trial court enter judgment for the amount prayed for in its complaint, an attorney's fee of \$50 as heretofore allowed, and costs of suit; as to the plaintiff the Los Angeles Planing-Mill Company the cause is remanded for a new trial.

We concur: HARRISON, J.; PATERSON, J.; SHARPESTEIN, J.; DE HAVEN, J.; McFARLAND, J.

91 Cal. 442

MEUX v. HOGUE. (No. 14,383.)

(Supreme Court of California. Sept. 30, 1891.)

SALE OF REAL ESTATE—SUFFICIENCY OF CONTRACT
—SPECIFIC PERFORMANCE.

Under Civil Code Cal. § 1741, providing that no agreement for the sale of real estate is valid "unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, thereunto authorized in writing," a contract signed by an agent, who had only verbal authority to sell, reciting that the sale was "subject to the approval of the owner," and giving the terms as \$3,925, of which \$1,535 should be cash, is invalid, and cannot be enforced by the owner of the land, the only ratification on his part being an approval of the terms of the sale as set out in a letter from the agent to him, stating that the sale was for \$4,000, of which \$1,600 was to be cash.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by J. P. Meux against S. L. Hogue for specific performance of a sale of

real estate. Judgment for defendant, and plaintiff appeals. Affirmed.

Meux & Edwards and Thompson & King, for appellant. *Edward Lynch*, for respondent.

In bank. BEATTY, C. J. Justice GAROUTTE is, for the purpose of a decision herein, assigned to department 2.

BEICHER, C. The plaintiff brought this action to enforce the specific performance of a contract to purchase from him certain lots of land in the city of Fresno. The court below gave judgment for the defendant, from which the plaintiff has appealed, and has brought the case here on a bill of exceptions. The principal question in the case is whether an enforceable contract was made between the parties for the sale and purchase of the lots. The material facts of the case, as shown by the record, are as follows: The plaintiff was residing in San Francisco, and was the owner of the lots; and prior to April 10, 1888, he had verbally authorized Rader & Bear, who were real-estate agents at Fresno, to sell them. On the day of its date the defendant executed and delivered to Rader & Bear a paper, reading as follows:

"Fresno, Cal., April 10, 1888. Received from S. L. Hogue and J. D. Power the sum of one hundred dollars in gold coin, being a deposit and part payment on account of bargain and sale made to them this day of a certain lot, tract, or parcel of land, lying and being situate in the city of Fresno, county of Fresno, state of California, and bounded and described as follows, namely, lots 13, 14, 15, and 16 in Blk. 77, said lots having been sold to them this day for the sum of three thousand and nine hundred and twenty-five dollars in gold coin, subject to the approval of the owner: the balance to be paid, fourteen hundred and twenty-five dollars on delivery of deed and abstract; one thousand dollars, six months; and sixteen hundred dollars on one year from Feby. 1, '88, at 10 per cent. interest from date, or this deposit to be forfeited without recourse; title to prove good, or no sale; and this deposit to be returned, subject to approval of owner.

"We hereby agree to buy the property above described, upon the terms and conditions hereinbefore expressed.

"S. L. HOGUE.

"J. D. POWER.

"By S. L. H.

"RADER & BEAR, Agents."

On the same day the agents wrote to plaintiff, but did not send him a copy of the contract, nor does it appear that he ever saw the contract, or a copy of it. The letter is as follows: "Fresno, Cal., April 10, 1888. J. P. Meux, Esq., 240 Montgomery St., San Francisco, Cal.—Dear Sir: We have sold lots 13 to 16, inclusive, in block 77, of Parkhurst's addition, for \$4,000. Terms, sixteen hundred dollars cash, one thousand dollars in six months, and sixteen hundred dollars in one year, interest 10 per cent. This sale is made upon the terms left us by your brother, Dr. Meux. He preferred \$1,600 cash. Please send deed and abstract at once, as the purchaser is ready to take up the deed at

once. Yours, truly, RADER & BEAR." To this letter plaintiff replied, but the reply was not produced and put in evidence. Rader could only testify, as to its contents, that it "amounted to just a confirmation of the sale as it was made on the terms," etc. And the plaintiff only said: "I wrote to Mr. Rader that I confirmed the sale that had been made; that I was satisfied with the sale of the property, and would give a deed to the parties." Several other letters in reference to the matter subsequently passed between the plaintiff and his agents, but none of them were produced, nor were their contents shown. Shortly after the receipt of the letter above set out, plaintiff sent to the agents a deed of the property. When this deed was shown to Hogue he requested that it be sent back to plaintiff, and that he should make another deed to one Murray. The deed was sent back and plaintiff made and forwarded another deed, in which Murray was named as grantee. This second deed, Rader testified, was tendered to Mr. Hogue, and he also said: "I don't know what has become of that deed. I don't think Mr. Hogue ever took the deed up. I suppose it afterwards fell back into the hands of Mr. Meux." Neither of the deeds above mentioned was produced or offered in evidence. Subsequently a third deed was made, and on this the plaintiff testified: "I executed another deed, and again tendered him (Hogue) a deed. That was on the 9th of February, 1889. He declined to receive it, and he said that he would not take the property, and I waited some little while, and filed this complaint against him." The deed was produced, and in it S. L. Hogue and J. D. Power were named as grantees, and the consideration expressed was \$4,000. When the first deed was offered to Hogue the agent stated that they would deliver it upon the payment of a certain amount of money, and the execution of notes and a mortgage for the balance. The action was commenced against Hogue and Power; but upon Hogue's statements that he signed Power's name to the contract without any authority, the action was dismissed as to the latter. The Civil Code (section 1741) provides: "No agreement for the sale of real property, or of an interest therein, is valid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, thereunto authorized, in writing." The agreement produced here was not subscribed by the seller, or by any agent authorized in writing to subscribe it, nor can it be ascertained therefrom who the seller was. It was probably not necessary that the seller sign the paper, (*Vassault v. Edwards*, 43 Cal. 459; *Pom. Spec. Perf. § 75*;) but it was made "subject to the approval of the owner," and it was necessary that he should know its contents, and approve and ratify it, before it could become binding upon either party. It is claimed for appellant that he fully approved and ratified the sale, upon the terms named in the paper, by his letters to his agents and by the deeds which he executed and offered to the purchaser. But, as before stated, it is

not shown by the record that he ever saw the written agreement, or ever learned its terms, except from the letter above quoted. Now, what were the terms of sale which the appellant approved and ratified? The agreement states that the property was sold for \$3,925, and that the balance to be paid was \$1,425 on delivery of deed, \$1,000 in six months, and \$1,600 on February 1, 1889, thus making the deferred payments aggregate \$4,025. The letter states that the property was sold for \$4,000, to be paid as follows: \$1,600 cash, \$1,000 in six months, and \$1,600 in one year, thus making the payments aggregate \$4,200; and the complaint states that the property was sold for \$4,000, payable \$1,600 cash, \$1,000 in six months, and \$1,400 on the 1st day of February, 1889. (At the conclusion of the trial, by consent of counsel, and by leave of the court, the complaint was "considered amended on its face so as to conform to the contract of purchase and to the evidence.") These terms are not the same, but materially different, and the ratification, if any, must have been of the terms stated in the letter, and not of those stated in the contract. But, in order to constitute a valid contract, the minds of the contracting parties must meet and agree to the same thing. "A court of equity will not specifically enforce any contract, unless it be complete and certain. This rule applies as well to parties as to price, subject-matter," etc. "It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted *ad idem*." "Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or equity. Where a contract is a unit, and left uncertain in one particular, the whole will be regarded as only inchoate, because the parties have not been *ad idem*, and therefore neither is bound. A proposal to accept, or acceptance, upon terms varying from those offered, is a rejection of the offer." See *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. Rep. 179, and cases cited. We see nothing in the evidence to take the case out of the rule above stated, and we conclude, therefore, that the court below properly found that the plaintiff never authorized or ratified the contract of sale on which he relies. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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McGOVERN *et ux.* v. MOWRY. (No. 13,112.) (Supreme Court of California. Sept. 26, 1891.)

QUIETING TITLE—POSSESSION.

Under Civil Code Cal. § 1006, providing that "occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession," evidence that plaintiff was in the actual possession and occupation of premises, at and for a long time before the commencement of an action to quiet title, is suffi-

cient to enable him to maintain it as against one who claimed, but never had, title.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action to quiet title. Judgment for plaintiffs, and defendant appeals. Affirmed.

R. Percy Wright, for appellant. Page & Eells, for respondents.

BEATTY, C. J. Justice HARRISON is, for the purpose of a decision herein, assigned to department 2.

SHARPSTEIN, J. This is an action to quiet title to certain lands in the Laguna survey, in San Francisco. Several defendants were sued, but only one defendant, George B. Mowry, appears. His answer denied the plaintiffs' title, and set up title in himself. The findings of the court are in favor of plaintiffs on all the issues, and the appellant attacks them upon two very material grounds: *First*, that there was no evidence that plaintiffs were the owners of the land; and, *second*, that the evidence established the defendant Mowry to be the owner. The evidence for plaintiffs establishes that they are husband and wife; that they inclosed the land in question with a substantial fence about March 1, 1882, and used it as a pasture until 1886, when they built a dwelling-house upon it, and have ever since resided there; that they filed a declaration of homestead upon the property in 1886; that a deed from the city under the Van Ness ordinance was made to them in 1883, and that their possession has been exclusive and undisturbed under claim of title since March, 1882. The suit at bar was begun on August 17, 1887. The Alcalde grant covering the lot in question was executed on September 25, 1848, to one Stephen A. Harris, and no deraignment of title from Harris was shown by either party, except so far as it is to be presumed from plaintiffs' occupation of the land. Counsel for appellant claims that the proof of plaintiffs' title is insufficient, because the Van Ness ordinance deed is inoperative, owing to the previous Alcalde grant, and because plaintiffs have not established a title by prescription, owing to the fact that they had not paid taxes upon the property for the full term of five years before the commencement of the action. His contention is that it is incumbent upon the plaintiff, in a suit of this character, to establish a perfect title of record, or by prescription, whether the defendant has any title or not, and that, on the failure of such proof by the plaintiff, the action should be dismissed. Counsel for respondents claim, on the contrary, that actual possession under claim of ownership is sufficient evidence of title in the plaintiff as against a trespasser, or one who establishes no title in himself. Section 1006 of the Civil Code provides that "occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession." "The possession of real estate is *prima facie* evidence of the highest estate in the property, to-wit, a seisin in fee." *Hill v. Draper*, 10 Barb. 458. The plaintiff was in

the actual possession and occupation of the premises at and for a long time before the commencement of this action. This was sufficient to enable him to maintain an action to quiet title against any one who, like defendant, never had any title, but who claimed to have title to the premises. Judgment and order affirmed.

We concur: DE HAVEN, J.; HARRISON, J.

¶1 Cal. 342)

HOWELL v. BUDD, Judge. (No. 14,539.)

(Supreme Court of California. Sept. 23, 1891.)

RES JUDICATA — DISTRIBUTION OF ESTATES — DISQUALIFICATION OF JUDGE.

1. Code Civil Proc. Cal. 1886, § 1908, which provides that, "in case of a judgment or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a decedent, * * * the judgment or order is conclusive upon the title to the thing, the will, or administration," does not modify *Garwood v. Garwood*, 29 Cal. 514, which holds that, where the grant of administration turns on the question as to which of the parties is next of kin, the judgment is conclusive on that question in a suit between the same parties for distribution.

2. Section 170 provides that no justice or judge shall act as such in any action or proceeding "when he is related to either party by consanguinity or affinity within the third degree, computed according to law." *Held*, in an action by an alleged daughter of a decedent to revoke letters of administration granted to decedent's grand-nephew, that the sons of a judge, who have contracted to try the case for the nephew on condition of receiving one-fourth of the estate if they succeed, are "parties," within the spirit of the Code, and their father cannot act as judge.

3. Where the answer to a petition to enjoin the judge from trying the application to revoke the letters of administration alleges that he has no information sufficient to enable him to answer the allegation as to the agreement between his sons and the nephew of decedent, but his brief states that since the oral argument he has received information which will enable him to deny the allegation, he will be allowed time to amend his answer in that regard.

In bank. Application for writ of prohibition by Mary Eliza Johnson Howell against Joseph H. Budd, judge of the superior court of San Joaquin county. Demurrer overruled, and leave to amend granted.

Pillsbury, Blanding & Hayne, for petitioner. *Jos. H. Budd*, in pro. per.

GAROUTTE, J. This is an application for a writ of prohibition to restrain the respondent, who is one of the judges of the superior court of San Joaquin county, from acting as judge in the matter of the application of the petitioner herein for the revocation of letters of administration issued to one Eugene Kay upon the estate of William B. Johnson, deceased, and for her own appointment as administratrix in the place and stead of said Kay. For the relief desired, petitioner relies upon the following allegations of her petition: "(1) That the sons of the respondent (in conjunction with two other attorneys) have a contract with and from said Kay and other alleged heirs for the conveyance of one-fourth of the said estate to them, when petitioner is declared to have no title therein, and said title shall be adjudged to be vested in said heirs. (2)

That the administrator, Kay, is a grand-nephew of the deceased, and claims that as such he and the other collateral kindred are entitled to the estate. (3) That petitioner is the only child of the deceased, and as such is entitled to the whole estate, and also entitled to letters of administration (though a married woman) by virtue of an act of the legislature of 1891. (4) That, upon the hearing of petitioner's application for letters of administration, the question at issue will be whether she is the child of the deceased or not. The administrator and other alleged heirs say she is not, and, if it be decided that she is the child of the deceased, she is entitled to letters of administration, and to the whole of the estate; but if she is not such child she is entitled to nothing, and said Kay and other heirs are entitled to the estate."

As shown by the verified answer of respondent, which must be taken as true, as far as the consideration of questions of law are involved, the objection to respondent hearing the matter and the application for transfer of the cause was made as follows: "That thereafter, and on the 7th day of June, 1891, F. T. Baldwin, Esq., and E. S. Pillsbury, Esq., who had long been on terms of intimate friendship with respondent, made a friendly call on respondent, and during said call, and a conversation with respondent thereat, Mr. Pillsbury stated to respondent, in substance, that he deemed he ought to inform respondent that their client, Mrs. Howell, the petitioner herein, objected to said matter being heard before respondent as judge of the court, because of the relationship between respondent and James H. Budd and John E. Budd, two of the attorneys for Mr. Kay; and suggested that respondent request one of the judges of the superior court in and for the city and county of San Francisco to hear and determine the matter. In reply to this, respondent stated, in substance, that his associate on the bench, Judge Smith, and respondent, would not request any other judge to hear and determine any matter which they could hear and determine, and that the rules of the court respecting the apportioning of the business of the court among the judges thereof would not be departed from to suit the wishes of any litigant, and that, the matter being in department 1 of the court, it would be heard and determined by respondent as judge; and respondent denies that said petitioner and affiant ever, in any way or manner, called the attention of this respondent to the alleged fact that said sons of affiant had a contingent interest in said estate of Wm. B. Johnson, deceased, or in the result of said litigation, or to any disqualification of this respondent from acting as judge in said matter; and he denies that she ever in any manner, other than by said statement and suggestion of Mr. Pillsbury, at said friendly call on respondent, requested respondent not to act as judge in said matter, or to call in some qualified judge to act therein; and respondent denies that she ever, in any way or manner, either directly or indirectly, requested respondent to transfer

said matter to said department 2 of said court; on the contrary, he alleges that neither the petitioner, nor either or any of her attorneys, ever suggested to or requested of respondent that Judge Smith, one of the judges of said court, hear and determine said matter. Further answering, respondent admits that he refused, as above stated, said request of Mr. Pillsbury to have a judge of the superior court of San Francisco hear and determine said matter, and he admits that he stated to her attorneys, as above stated, in reply to the statement and suggestion of her attorney, Mr. Pillsbury, that, said matter being in department 1 of the court, it would be heard and determined by the respondent as judge; but he denies that he otherwise informed her or her attorneys, or either or any of them, that he intended to act or would act as judge in said matter." Under the authority of *Havemeyer v. Superior Court*, 84 Cal. 402, 24 Pac. Rep. 121, the application to respondent for a transfer of the cause was clearly insufficient; yet we understand respondent, being desirous of an adjudication of the cause upon its merits, to have waived his objection to the course adopted by the petitioner in making her application for an order of transfer, and therefore we proceed to examine the cause upon the main questions involved.

It is insisted by petitioner that the respondent is disqualified from hearing her application to have the letters of administration heretofore issued to one Kay revoked, and herself appointed as administratrix in the estate of said Johnson, deceased; and this matter is to be decided in the light of subdivision 2 of the following sections of the Code of Civil Procedure: "Sec. 170. No justice or judge or justice of the peace shall sit or act as such in any action or proceeding (1) to which he is a party, or in which he is interested; (2) when he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law."

At the very threshold of this examination, in order that we may intelligently consider the question as to who are parties to this proceeding in the lower court, we must ascertain what will be the force and effect of the judgment of that court denying or granting petitioner's application, as considered with reference to subsequent proceedings in the estate, and especially as considered with reference to the decree of distribution. In this estate, as alleged in the petition, the right of petitioner to administer depends solely upon the fact as to whether or not she is the child of deceased; that is the issue in the case. No exercise of discretion is allowed. The inquiry becomes a matter of legal right, and is, by the express provision of the statute, to be determined by the right of succession; and, if the determination of that issue upon this hearing is to be conclusive upon her at final distribution, then this application for letters assumes a far more serious aspect; for it practically determines, at the very inception of the probate proceedings, who is to receive the residue of the estate upon final

distribution, and places the respondent in the exact position as though he were proceeding to hear the petition for distribution rather than an application for letters of administration. In section 550 of Greenleaf on Evidence, we find the following: "And if the grant of administration turned upon the question as to which of the parties were next of kin, the sentence or decree upon that question is conclusive everywhere in a suit between the same parties for distribution." In the case of *Caujolle v. Ferrie*, 13 Wall. 474, a case in all respects involving the principles under discussion here, the supreme court of the United States, after an exhaustive review of the English authorities upon the question, said: "It may, therefore, as the result of these authorities, be safely assumed to be the established law in England that if the sentence of an ecclesiastical court in a suit for administration turns upon the question of which of the parties is next of kin to the intestate, it is conclusive upon that question in a subsequent suit in the court of chancery between the same parties for distribution." And again: "On principle and authority, therefore, the judgment in the suit for administration in New York was pleadable in bar to this suit, and on that ground alone the bill should have been dismissed." If the judgment upon the issuance of letters of administration upon the question of heirship can be pleaded as a bar to matters arising upon petition for distribution in a court of concurrent jurisdiction, can there be a doubt as to that judgment being a complete and perfect bar in a proceeding in the very court that created such judgment?

Passing to the law of this state, we find practically this identical question carefully considered by this court in the case of *Garwood v. Garwood*, 29 Cal. 514, where the doctrine heretofore announced is fully approved and declared to be the law of the land. Respondent insists that the effect of the law found in *Garwood v. Garwood* has been nullified by the following provision of section 1908 of the Code of Civil Procedure: "In case of a judgment or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a decedent, * * * the judgment or order is conclusive upon the title to the thing, the will, or administration." The fair and legitimate interpretation of this provision is that a judgment or order respecting the administration of the estate is conclusive upon the administration as to all matters directly involved in such judgment or order. There seems to be nothing in the provision detracting in any degree from the force and effect of the principles laid down in the case of *Garwood v. Garwood*, supra, but rather the provision seems to be in complete consonance and full accord with it. We conclude, therefore, that the judgment to be rendered by the court upon the hearing of petitioner's application for letters of administration (subject to appeal) will determine for all time and in all courts, as far as the parties to the proceeding are concerned, whether the petitioner is the child of said

Johnson, deceased, and therefore entitled to all of his estate to the exclusion of kindred of the collateral line, or whether Kay, the administrator, and other collateral kindred, are next in the direct line of succession, and entitled to the whole of the estate of said deceased.

What is the interest of the sons of respondent in this estate? The allegation of the petitioner is that "said Kay and the other said next of kin after this petitioner have made a valid agreement with James H. Budd, Esq., John E. Budd, Esq., and Messrs. Nutter and De Vries, all of whom are attorneys at law, that they shall have one-fourth of said estate in case and upon condition that the said question of the heirship of this petitioner and affiant be determined adversely to her and in favor of said Kay and said other next of kin." It seems these parties have a contract for a share of the estate, which consists of real and personal property, and which share is contingent upon the nature of the judgment to be rendered upon the hearing of the application for letters of administration; which matter respondent threatens to hear and determine, and whose threatened acts in that regard this very proceeding is inaugurated to restrain and forbid. These parties will be the owners of a perfect equitable title to one-fourth of the estate upon the happening of a condition, and that condition is dependent upon the act of respondent. To the extent of the investigation of the questions pending before us, the conditional equitable interest of the sons of respondent in this estate is clothed with all the dignity, importance, and value of a vested and absolute interest; for it is in the power of the respondent to create the condition, and thus create a perfect equitable estate. It is assumed in the argument of respondent, although not found in the petition, that the consideration for this agreement was legal services to be performed by these attorneys *in futuro*, and he insists that until these services are performed the sons of respondent have no interest in the estate. No principle of equity can be found to support such argument. In equity, from the time of the execution of the contract for the sale of land, the vendor as to the land becomes a trustee for the vendee, and the vendee as to the purchase money becomes a trustee for the vendor. Such contracts for most purposes are deemed executed, upon the principle that courts of equity will regard substance rather than form, and thus assist the parties by extending to the agreement the effect desired and intended. Pomeroy, in his *Equity Jurisprudence*, (volume 1, § 105,) speaking of such agreements, says: "The view which equity takes of the juridical relations resulting from the transaction is widely different. Applying one of its fruitful principles, that what ought to be done is regarded as done, equity says that from the contract, even while yet executory, the vendee acquires a real right, a right of property in the land, which, though lacking a legal title, and therefore equitable only, is none the less the real beneficial ownership, subject, however, to a lien of the vendor as

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security for the purchase price as long as that remains unpaid." This principle is fully recognized by the decisions of this court. See *Willis v. Wozencraft*, 22 Cal. 616; *Love v. Watkins*, 40 Cal. 565; *Hoffman v. Vallejo*, 45 Cal. 565; *Watson v. Sutro*, 86 Cal. 527, 24 Pac. Rep. 172, and 25 Pac. Rep. 64. In the case of *Hoffman v. Vallejo*, supra, the court said, referring to a contract similar to the one respondent alleges this to be: "The agreement of September, 1865, constituted Hoffman and the Wilsons together the equitable owners, as against the defendant, J. J. Vallejo, of the undivided half of whatever should thereafter result from the prosecution or compromise of the suit instituted against Clark."

Counsel for petitioner has argued with great learning that proceedings upon the application for letters of administration are in the nature of proceedings *in rem*, and therefore all persons interested are parties; but, owing to the views we entertain upon the other branch of the case, it will not be necessary to consider that question. To hold that the word "party," as used in section 170 of the Code of Civil Procedure, is confined to parties of record by name, would be a construction so narrow as to find support neither in principle nor authority. To say that a judge would be qualified under this provision to try and determine an action in ejectment, brought by the administrator of an estate, of which the children of the judge are the heirs, or that he could render judgment in a foreclosure suit, where an administrator is defendant, and the heir is a son of the judge, would be to sacrifice substance to form, and contrary to all principles of modern legal jurisprudence. In the case of *Fredericks v. Judah*, 73 Cal. 608, 15 Pac. Rep. 305, the court said: "Although in that action Mrs. Judah, as executrix, was plaintiff, it was an action between the same parties, within the meaning of this provision, for the executrix represented the heirs therein." In the case of *Briggs v. Briggs*, 80 Cal. 255, 22 Pac. Rep. 334, it was held that a successor's interest was a "party," within the meaning of the provision that a deposition properly taken could be read in evidence in a subsequent action "between the same parties." In the case of *Schultze v. McLeary*, 73 Tex. 92, 11 S. W. Rep. 924, the court said that, notwithstanding that the judge was not related to the party by name, yet that "if he was but the representative of his wife, who was so related, or if he was the representative of a right claimed by himself and wife in community, or if any judgment rendered in his favor or against him would affect the right of the wife through her community rights even to the extent of costs, then the wife of Orynski, within the spirit and purpose of the constitutional provision to which we have referred, was a party to the suit, and the district judge disqualified." See *Hodde v. Susan*, 58 Tex. 389; *Gains v. Barr*, 60 Tex. 676; *North Bloomfield, etc., Co. v. Keyser*, 58 Cal. 322. In *Stockwell v. Township Board, etc.*, 22 Mich. 350, Justice GRAVES said: "The court might not be astute to discover refined and subtle distinctions to

save a case from the operation of the maxim, when the principle it embodies speaks the propriety of its application." The Code provides that its provisions "are to be liberally construed, with a view to effect its objects and to promote justice." Section 4, Code Civil Proc. And again: "When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted." Section 1866, Code Civil Proc. These provisions of the Code, taken in connection with the authorities cited, indicate that section 170 is to have no technical or narrow construction, but is to be broadly applied to all litigation, where a judge is called upon to adjudicate property rights. We conclude, therefore, that the word "party," as used in section 170, is not confined to the parties to the record by name, but includes all persons represented by parties to the record. Are the sons of the respondent represented by a party to the record? It seems unnecessary to examine into the question as to the relations existing between the administrator and the heirs, for the administrator himself is one of the heirs, and is a grantor under the agreement to convey to the sons of respondent. While he is not the sole grantor, that fact is immaterial, for the disqualification results from the kind of interest held by the sons, and not from the amount of interest. Their ownership of a portion of the estate is as disqualifying as if they owned it in entirety. As petitioner's right to the estate will be conclusively determined upon the hearing of her application for letters, as far as the parties to that proceeding are concerned, and as Kay, the administrator, is a party to that proceeding, and has contracted to convey to the sons of respondent an interest in the estate, and as therefore he is the trustee of said sons for such interest, and as they are the equitable owners thereof, they are as fully and completely represented by the administrator, Kay, in that proceeding, as any beneficiary can be represented by his trustee.

Respondent alleges in his answer that he has no information or belief upon the subject sufficient to enable him to answer the allegation in said petition and affidavit "that said Kay and the other of said next of kin after this petitioner and affiant have made a valid agreement with Jas. H. Budd, Esq., and John E. Budd, Esq., and Messrs. Nutter and De Vries, that they shall have one-fourth of said estate, in case and upon condition," etc., "and therefore he denies said allegation." Petitioner objects to the sufficiency of the foregoing denial to create an issue, but inasmuch as respondent in his brief sets out that since the oral argument he has received information that will enable him to make a specific denial of the allegation, and asks to amend his answer in that regard, which application we are disposed to grant, it becomes unnecessary to pass upon the merits of petitioner's contention in this respect. The demurrer to the petition will be overruled, and the respondent will be allowed five days after service of a copy of the order thereof to file an

amended answer in accordance with his request.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.; PATERSON, J.

MILLER v. WADDINGHAM *et al.* 91 Cal. 377 (No. 13, 899.)

(Supreme Court of California. Sept. 25, 1891.)

SALE OF LAND—REMOVAL OF BUILDINGS—INJUNCTION.

Plaintiff sold certain land, receiving \$9,000 of the purchase price, and placing his vendee in possession, but retaining the legal title as security for the fulfillment of the contract of purchase. The vendee, without any agreement with plaintiff relative thereto, constructed houses on the land, and then sold them to defendant to be removed. Held that, in the absence of any showing on plaintiff's part that security would be impaired by such removal, it would not be enjoined.

In bank. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action to enjoin the removal of certain houses. Injunction denied, and plaintiff appeals. Affirmed.

Walters & Gird, for appellant. *Harris & Gregg*, for respondents.

HARRISON, J. In March, 1887, the plaintiff entered into an agreement in writing with one Clubine, for the sale and conveyance to him of two blocks of land in Ontario, in this state, receiving from him the sum of \$9,000 on account of the purchase price of the property, and placed his vendee in possession of the land. Clubine subdivided the land into lots suitable for residence and business purposes, and employed the defendant Newman to construct certain dwelling-houses upon the land, and to furnish the materials therefor, for the sum of \$4,100, payable in weekly installments as the work progressed. Shortly after Newman began the construction of the houses, Clubine, failing to make such payments, agreed with him that the houses should belong to said Newman until paid for, and thereupon Newman proceeded with his work, and finished the houses, having received from Clubine only the sum of \$725 upon account thereof. Prior to the commencement of this action, Newman sold the houses to the defendants Waddingham and Gargan, and they very soon thereafter commenced to remove them from the land, and had partly completed such removal when the plaintiff commenced this action. The houses were built on redwood mud-sills of two-inch by six-inch timber, resting upon the soil, and the soil was not disturbed in building or removing the houses. The plaintiff brought this action for the purpose of perpetually restraining the defendants from removing the houses from the land, and also to recover from them the sum of \$3,000 damages alleged to have been done to his property by the attempted removal. At the commencement of the action a restraining order was issued by the court, and upon the trial of the cause the court rendered judgment in favor of the defendants, and dissolved the restraining order. From this judgment the plaintiff has appealed upon the judgment roll alone.

Although the principal ground urged by the appellant for the reversal of the judgment is that upon the construction of the houses they became fixtures attached to the land, and that by their removal the defendants were committing waste, we think that the respective rights of the parties are to be determined upon principles other than those applicable to the subjects of waste and fixtures. The court below did not find that the buildings in question were fixtures, and, in the absence of a finding by it upon that subject, we cannot say upon the facts that were found that they did become fixtures. Whether, in any case, buildings that are placed upon land become fixtures, is a question of fact to be determined upon the evidence of that particular case. The mere erection of a building upon land does not necessarily make it a fixture, (*Pennybecker v. McDougal*, 48 Cal. 160;) and in order to determine whether it be a fixture depends upon various circumstances and relations connected with its being placed upon the land, (*Lavenson v. Soap Co.*, 80 Cal. 250, 22 Pac. Rep. 184.) The rules applicable to fixtures have been created by a series of judicial decisions, and these decisions are not always capable of being reconciled. The attempt in the Civil Code to give a definition of a "fixture" only in part removes the difficulty. Section 660 declares that "a thing is deemed to be affixed to land when it is * * * permanently resting upon it, as in the case of buildings;" but it still requires evidence to determine what is "permanently resting" upon the land. The finding in the present case that "said houses were built on redwood mud-sills of two-inch by six-inch timber, said mud-sills resting upon the soil," and that "the soil was not disturbed in building or removing said houses," is consistent with a determination of the court below that the buildings in question were not fixtures, and, for the purpose of upholding its decision, it may be assumed that such determination was made by it. But, without determining whether or not the buildings were fixtures, we are of the opinion that upon other principles applicable to the case the plaintiff is not entitled to the relief sought by him.

The plaintiff has invoked the aid of a court of equity to protect him against threatened injury, and, in order that he may have such protection, it is incumbent upon him to show that he has rights which need and can receive it, and also that the acts charged upon the defendants are an invasion of such rights, and demand such assistance. In his complaint he alleged that he was the owner of certain land upon which certain buildings exist, and that the defendants had committed certain acts of trespass upon the same, causing a damage thereto of \$3,000. Upon the trial the court, instead of finding that he was the "owner" of the land upon which the alleged trespass was committed, found that he had made a contract of sale thereof with the grantor of the defendants, and placed his vendee in possession of the land, and that the buildings had been thereafter placed upon the land at the instance of the vendee, and

were being removed under authority derived from him. Upon the execution of this contract of sale, the vendee of the plaintiff became vested with the equitable title to said land, and the plaintiff retained in himself the legal title as a security for the performance of the contract by the vendee. By placing his vendee in possession of the land, he thereby conferred upon him the right to its use and enjoyment, so long as he should continue to comply with the obligations of his contract. It may be conceded that, if the buildings had been upon the land at the date of the purchase, and had formed a part of the subject-matter of the sale, the plaintiff might have had the right to have them remain upon the land as a part of his security until the whole purchase price was paid. In this case, however, the buildings formed no part of the consideration for the purchase of the land, nor were they placed upon the land in pursuance of any terms of the contract of sale. The fact that the plaintiff was under no obligation to give to his vendee possession before a conveyance of the land is immaterial. He did give him possession, and, while such possession did not authorize the vendee to do any act which would diminish the value of the property of which he had received the possession, he had the right under his equitable ownership to any use and enjoyment thereof consistent with such obligation. For such use and enjoyment he could not be chargeable with waste. After the execution of a contract of sale the relation of the vendor and vendee to the land is likened to that of mortgagor and mortgagee. The vendor retains the legal title as security for the performance by the vendee of the contract on his part, and by placing the vendee in possession of the land gives to him the right to use and enjoy it as his own, so long as he does not impair its condition, or diminish its value as it existed when received by him. So long as the vendee complies with the terms of his contract, he is entitled to retain possession of the land, (*Willis v. Wozencraft*, 22 Cal. 607;) and the vendor can at no time enforce payment of more than the agreed price therefor, however much the land may have appreciated in value, or been improved by the vendee. The fact that the vendor holds the legal title as security for such payment does not give him any greater rights than he would possess if he had conveyed the land and taken back a mortgage for the unpaid portion of the purchase money, or than are held in land by a mortgagee, who takes for his security a conveyance absolute in form, instead of a formal mortgage. It is a well-recognized principle in equity that a mortgagee cannot maintain an action to restrain waste without showing that thereby his security will be impaired, (*Robinson v. Russell*, 24 Cal. 467; *Buckout v. Swift*, 27 Cal. 433. See, also, *Perrine v. Marsden*, 34 Cal. 14;) and, by parity of reasoning, the vendor who holds the legal title as security for the fulfillment of the contract of purchase by the vendee in possession should show that he will sustain some injury before he can maintain an action

like the present. So long as the sufficiency of the security is unimpaired, he has no right to disturb the vendee in any use or enjoyment which he may make of the land. Such use and enjoyment by the vendee is a use of his own property, and unless he thereby impairs the security, or diminishes the estate which he received from the vendor, or the value of the land as he received it, he should not be restrained. In view of these principles, the plaintiff has failed to show any right to the equitable interposition of the court, and the action of the court in dismissing his complaint was correct. It is not alleged in his complaint, nor is it found by the court, that the vendee has in any respect failed to comply with the terms of his contract, or that he is unwilling or unable to do so. The record does not disclose the terms of the contract of sale,—either the amount of the purchase price remaining unpaid, or the time when it will become payable. Nor is it alleged or found that the land is less valuable than it was at the date of the contract of sale, or how great is the obligation for which the plaintiff holds it as security. In the absence of any allegation or finding to the contrary, it must be assumed that the land is fully as valuable as at the date of the contract, and that the vendee is not only able to comply with his obligations, but that he will fully and promptly meet them as they mature. Inasmuch, then, as the plaintiff has received \$9,000 towards the payment of the purchase price of the land, he does not show any impairment of his security or injury to himself by the fact that the defendants are threatening to remove from the land buildings placed thereon by themselves, and which are shown to be of the value of only \$4,100. The judgment of the court below is affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; GAROUTTE, J.; SHARPSTEIN, J.

91 Cal. 313

THOMPSON V. LAUGHLIN. (No. 13,972.)

(Supreme Court of California. Sept. 21, 1891.)

JUDGMENT—EQUITABLE RELIEF—INJUNCTION.

1. A court of equity will enjoin the enforcement of the alternative part of a judgment for the return of property or its value where the property was voluntarily returned before the judgment was rendered.

2. After judgment, and within the time allowed by law to move for a new trial, the attorney for defendant agreed with plaintiff to satisfy the judgment on payment of a certain sum of money. Plaintiff, relying on this agreement, did not move for a new trial, and tendered the amount agreed on to defendant's attorney, who, after the time to move for a new trial had expired, refused to accept it, and to satisfy the judgment. Held, that the enforcement of the judgment would be enjoined.

3. Injunction will lie to restrain the enforcement of a judgment already satisfied.

SHARPSTEIN, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

A suit in equity by Thompson against Laughlin to enjoin the enforcement of a

judgment. Judgment for plaintiff. Defendant appeals. Affirmed.

Dooner & Burdett, for appellant. Wells, Guthrie & Lee, for respondent.

DE HAVEN, J. On November 8, 1889, in the superior court of Los Angeles county, the defendant herein obtained a judgment against the plaintiff in this action for the recovery of the possession of a certain lot of lumber, or, in case a delivery thereof could not be had, then for its value, found to be \$1,000; and also for \$250 damages, and costs of the action. This action is brought to enjoin the enforcement of said judgment for damages, and also the alternative part for the value of the lumber. The court below rendered judgment enjoining the defendant from collecting the said sum of \$1,000, and requiring him to satisfy the judgment to that extent. The defendant appeals.

The court below found, and, indeed, the fact is not denied in the answer, that during the pendency of the action brought by the defendant against the plaintiff, but after issue joined therein, the plaintiff returned to the defendant all of the lumber sued for. It also appears that during the trial, which resulted in the judgment referred to, the plaintiff herein offered to show this fact, but the court held the evidence inadmissible under the pleadings. The findings further show that, after the rendition of said judgment, and within the time allowed by law to move for a new trial, the attorney for the defendant that action agreed with the plaintiff's attorney therein that upon payment of the said sum of \$1,000, and costs the said judgment should be satisfied; and that, in accordance with this agreement, the plaintiff moved for a new trial; and time to move for a new trial was granted; and the attorney for the defendant accepted the said sum of \$1,000, and costs, to satisfy said judgment.

The court below found, and, indeed, the fact is not denied in the answer, that during the pendency of the action brought by the defendant against the plaintiff, but after issue joined therein, the plaintiff returned to the defendant all of the lumber sued for. It also appears that during the trial, which resulted in the judgment referred to, the plaintiff herein offered to show this fact, but the court held the evidence inadmissible under the pleadings. The findings further show that, after the rendition of said judgment, and within the time allowed by law to move for a new trial, the attorney for the defendant that action agreed with the plaintiff's attorney therein that upon payment of the said sum of \$1,000, and costs the said judgment should be satisfied; and that, in accordance with this agreement, the plaintiff moved for a new trial; and time to move for a new trial was granted; and the attorney for the defendant accepted the said sum of \$1,000, and costs, to satisfy said judgment.

It would be an act of gross negligence on the part of appellant to collect upon the collection of the alternative judgment for \$1,000; and there can be as little doubt that it is within the power of a court of equity to prevent it. As already stated, the court below finds, and the defendant does not deny, that before the rendition of the judgment the plaintiff had in fact returned to him the lumber sued for, and that he has used and sold the same. This being so, the judgment, in so far as it awarded to the defendant here the right to recover said lumber, or its value if no delivery could be had, has already been satisfied. That judgment, in the form in which it was entered, was in accordance with former decisions of this court. *Berson v. Numan*, 63 Cal. 550; *Arzaga v. Villalba*, 85 Cal. 195, 24 Pac. Rep. 656; *Brichman v. Ross*, 67 Cal. 606, 8 Pac. Rep. 316. But, although the judgment was in that form, it did not entitle appellant to both property and value. It affirmed his right to the possession of the property, and was in legal effect an adjudication that the plaintiff here wrongfully detained it from him at the date of the commencement of that action, and that since then he had ac-

quired no right to retain its possession from the appellant. In *Arzaga v. Villalba*, supra, this court said: "But the judgment must always be in the alternative. Even when the possession not only can be, but has been, delivered, (under provisional process,) the judgment must nevertheless be for the recovery of the property, or its value in a specified sum in case possession cannot be had. *Berson v. Nunan*, 63 Cal. 552; *Brichman v. Ross*, 67 Cal. 206, 8 Pac. Rep. 316. And it by no means follows that the plaintiff is to have both the property and its value. So far as this part of the judgment is concerned, it is for one thing or the other, not both; and, if possession has already been delivered to the plaintiff, the court would not allow him to proceed with his execution for that part of the judgment." It makes no difference in the application of this rule that in the former action between plaintiff and defendant the property sued for was voluntarily delivered to the defendant here, and not under provisional process in that action. The only effect of this difference in the way the lumber was returned is in the nature of the evidence by which the fact is shown to the court. But the fact, when once made to appear, has the same force in both cases. All that the defendant was entitled to by his judgment was either the property or the value, and not both; and, having the lumber in his possession, equity, treating that as done which ought according to justice to be done, will consider that the defendant received the same in satisfaction of his judgment, and will enjoin its further execution.

2. But, on the other hand, if it should be assumed that the judgment has the effect claimed for it by appellant, and that the previous return of the lumber does not operate as a satisfaction of any part of it, then, upon the facts alleged, the plaintiff here was entitled to the injunction obtained, on account of the agreement of appellant's attorney to accept \$150, and cause the judgment to be satisfied. The court finds that this agreement was made, and that in consequence the plaintiff neglected to move for a new trial of the action, and that appellant's attorney repudiated the agreement after the time to move for a new trial had expired. It must be presumed that by reason of this conduct of appellant's attorney the plaintiff was deprived of the substantial right to have the judgment set aside, and a new trial of the action; for it cannot be supposed that this motion would have been denied if the granting thereof was necessary in order to work that justice which is sought in this action. It may be true that this agreement was not put in such form that it could be enforced, and that the attorney had no authority as such to release the judgment for the sum agreed upon. But this is not an action to enforce the agreement, but it is to prevent the appellant from retaining the benefit of an unfair advantage, obtained by the representations and assurances of his attorney, and which would be an act of fraud upon the part of the appellant to retain, with knowledge of the facts, "Fraudulent conduct and deceitful representations upon the part of

plaintiff in an action at law, by means of which defendant, having a meritorious defense, is prevented from interposing it, afford frequent ground for application for the aid of an injunction to restrain the enforcement of judgments thus fraudulently obtained." High, Inj. § 199. And the same rule must necessarily obtain where, by reason of such conduct of his adversary, a party has lost the right to move for a new trial. "It is also to be noticed, in connection with the jurisdiction of equity in restraint of judgments upon the ground of fraud, that the cases in which the relief is granted are not limited to those where the fraudulent representations are those of plaintiff in person, but that the fraudulent conduct of plaintiff's attorney in the case may afford sufficient ground for enjoining a judgment which is obtained by means of such fraud. * * * So, where defendant in the judgment shows a good equitable defense thereto, which he was prevented from making by relying upon the representations of the solicitors for plaintiff in the action, proceedings under the judgment may properly be enjoined." High, Inj. § 202. For cases illustrative of this rule, see *Holland v. Trotter*, 22 Grat. 136; *Kent v. Richards*, 3 Md. Ch. 392. And we do not think that in failing to move for a new trial, under the circumstances here disclosed, plaintiff was guilty of such negligence as to deprive him of the right to appeal to a court of equity to restrain the defendant from reaping the full fruits of the broken agreement of his attorney, and to permit which would be a fraud on plaintiff, and a reproach to the law and to the courts administering it. Upon both of the grounds here discussed the judgment appealed from is right.

3. The remedy by injunction was proper, in this case, even conceding that the court in which the judgment was rendered might have the power to grant the same relief upon motion to stay the execution. *Crawford v. Thurmond*, 3 Leigh, 85. Besides, the defendant waived any objection to the remedy by answering without first moving to dismiss the action on the ground that plaintiff should have proceeded by motion. *Wood v. Currey*, 49 Cal. 359. Judgment affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; PATERSON, J.; HARRISON, J.

GAROUTTE, J. I concur in Justice DE HAVEN's opinion upon the first ground discussed. The judgment in *Laughlin v. Thompson* was a valid, binding judgment, but in all respects save as to costs is fully satisfied, for the property has been returned to Laughlin. Why should he object because Thompson returned him the property sooner than was required? If Thompson had retained the property and returned it after judgment, that would have strictly comported with the requirements of the judgment. Is he to suffer a grievous wrong because he was too alert in giving Laughlin his rights? If Laughlin *vi et armis* had taken the property from Thompson, and thus have prevented Thompson from returning it, could it be pretended that he would be entitled to ex-

ecution to recover its value? The law contemplates the recovery of the property or its value; never both property and value. The execution should be quashed on motion. It should be restrained because it would be unconscionable to satisfy it by sale of Thompson's property. I think an attorney unprofessional that would attempt to enforce it.

SHARPSTEIN, J. I dissent. This appeal is by the defendant from a judgment that he be perpetually enjoined from levying any execution or other process upon any of the property of the plaintiff for the collection of \$1,000, the value of lumber for which he, defendant, obtained judgment in the superior court of Los Angeles county in the suit therein, wherein defendant herein was plaintiff and plaintiff herein defendant; and that defendant herein further be enjoined from attempting to or incumbering the property of plaintiff herein by any lien by reason or virtue of said judgment to the extent of said \$1,000, or from demanding any sum of money by reason or by virtue of said judgment to the extent of \$1,000, value of said property; and defendant herein was required to satisfy said judgment in said superior court to the extent of said \$1,000. Prof. Pomeroy says: "It was a settled doctrine of the equitable jurisdiction, and is still the subsisting doctrine, except where it has been modified or abrogated by statute, or has become obsolete through the enlarged powers of the law courts to grant new trials, that where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part or on the part of his agents, then a court of equity will interfere at his suit, and restrain proceedings on the judgment which cannot be consistently enforced." The material allegations of the complaint are "that the plaintiff, a constable, by virtue of a writ of claim and delivery issued out of a justice's court in an action wherein one Wilson and others were plaintiffs and Laughlin and Berkle were defendants, levied upon and took possession of 29,274 feet of lumber. That thereafter an action was commenced by the defendant herein against the plaintiff herein to recover the possession of said lumber, and for damages for the detention thereof. That action was tried, and a judgment was rendered in favor of the plaintiff herein. On appeal to this court by the defendant herein said judgment was reversed, and the cause remanded for a new trial, which was afterwards had, and a judgment rendered in favor of the defendant herein and against the plaintiff herein that he return the lumber so seized by him, or, upon failure to do so, he pay in lieu thereof one thousand dollars, and two hundred and fifty dollars damages for detention," etc. "That, after the rendition of said judgment and the release of said property by order of said superior court, an action was commenced

in said justice's court against said Laughlin and Berkle, and a writ of attachment issued therein and placed in the hands of the plaintiff herein as such constable as aforesaid, and said plaintiff, in pursuance of said writ, attached the said lumber, and held the same in his possession until judgment in said action was rendered in said justice's court in favor of said Laughlin and Berkle, when plaintiff herein, by order of said justice's court, released said lumber from said attachment, and turned the same over to the defendant herein; but plaintiff herein failed to take a receipt from said defendant herein for said lumber, and said defendant herein continued to prosecute his said action of claim and delivery in said superior court against plaintiff herein. That on the trial of said action in said superior court plaintiff herein was not permitted to give evidence of the return of said lumber to defendant herein, because said return had not been pleaded in said action." After judgment was rendered plaintiff's and defendant's attorneys agreed the plaintiff would pay defendant \$150, and that defendant would accept that sum in full satisfaction of said judgment. That after the lapse of more than 10 days after plaintiff was informed of said agreement he tendered said \$150 to defendant's attorney, who refused to accept the same, and repudiated said agreement. Plaintiff made no motion for a new trial. The attorney who conducted his defense in the action is insolvent. The complaint was demurred to by the defendant herein on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled.

Did the court err in overruling said demurrer? In other words, does the complaint state facts sufficient to constitute a cause of action? The only ground stated in the complaint for equitable relief of the kind prayed in this action is that the plaintiff had a perfect defense, which he did not plead, to the action in which the execution of judgment rendered against him in said action is sought to be enforced. Why said defense was not pleaded is not stated. It is not alleged that the defendant herein is in any way responsible for the omission. The attempt to introduce evidence to prove that defense was defeated by the objection that such evidence was not admissible under the pleadings. The ruling of the court in sustaining said objection is not complained of, but plaintiff alleges that he then ascertained "for the first time" that his attorney had not pleaded said defense. It does not appear that any application was made to the court to amend the answer, so as to obviate the objection to the introduction of evidence to prove the only defense, so far as disclosed by the complaint in this action, the plaintiff had to the action which defendant was prosecuting against him. That such an amendment might have been allowed under section 473 of the Code of Civil Procedure, is made clear by various decisions of this court. No motion for a new trial, although a new trial may be granted on the ground of accident or surprise, which ordi-

nary prudence could have guarded against, was made. Code Civil Proc. § 657. It is alleged that defendant's attorney agreed with plaintiff's attorney to accept \$150 in full satisfaction of the judgment, and that plaintiff tendered that sum more than 10 days after the agreement was made, and after the time within which notice of motion for a new trial might be given, but it is not alleged that plaintiff was prevented from giving the notice by reason of the pendency of said agreement; and within six months after the judgment was rendered the court in which it was rendered might have relieved the plaintiff therefrom, provided said judgment was taken against him through his mistake, inadvertence, surprise, or excusable neglect. Section 473, Code Civil Proc. Chancellor KENT says: "The rule is that chancery will not relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or unless he was prevented from availing himself of the defense by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part." *Foster v. Wood*, 6 Johns. Ch. 87. "A court of equity does not interfere with judgments at law unless the complainant has an equitable defense, of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law which he was prevented of availing himself of by fraud or accident, unmixed with negligence of himself or his agents." *Hendrickson v. Hinkley*, 17 How. 443. Here the plaintiff had a good defense at law, but he was not prevented from availing himself of it by fraud or accident, unmixed with negligence of himself or agent. No element of fraud or accident is apparent, but the negligence of the plaintiff or his agent is conspicuous. The application of the rule laid down by the eminent authorities to which I have above referred leaves the plaintiff no equities whatever. I think the party who employs an attorney, who appears and conducts his defense, cannot make the negligence of such attorney a ground for equitable relief from a judgment which might have been prevented by reasonable diligence. I know of no case in which the incompetency or neglect of an attorney has been held to be a sufficient ground for the relief prayed and granted in this case. The complaint, in my judgment, does not state facts sufficient to constitute a cause of action, and the demurrer to it on that ground should have been sustained.

91 Cal. 518

PRESCOTT *et al.* v. GRADY. (No. 14,016.)

(Supreme Court of California. Oct. 5, 1891.)

ACTION ON DEMAND NOTE—PLEADING—ANSWER—RECORD.

1. On a demand note providing for a reasonable attorney's fee in case of suit thereon, the maker is entitled to demand of payment before suit can be brought, and it is error, in an action on such a note, to render judgment for plaintiff on the pleadings, if the answer alleges that payment was not demanded.

2. In such an action, under an allegation in the answer that the amount demanded in the complaint as a reasonable attorney's fee is not reasonable, defendant has a right to show that plaintiff is not entitled to any fee, or that the fee demanded is not reasonable; and judgment against him on the pleadings is error.

3. Where a judgment on motion on the pleadings recites that the motion was heard on June 20th, it will not be disturbed for want of notice to defendant of the hearing, in the absence of a bill of exceptions, on what purports to be a notice of a hearing on May 30th, a legal holiday, inserted in the transcript, since such notice constitutes no part of the judgment roll, and does not warrant a conclusion that it was the notice on which the final hearing was had.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; WILLIAM O. MINOR, Judge.

Action by F. K. Prescott and others against W. D. Grady, on a note executed by defendant. Judgment for plaintiffs. Defendant appeals. Reversed.

Grady & Austin, for appellant. *Church & Cory*, for respondents.

TEMPLE, C. This action is brought upon a promissory note executed by defendant. Judgment was entered against him on the pleadings, and it recites that the defendant was duly and regularly served with notice of the time and place of hearing the motion. There is inserted in the transcript, however, what purports to be a notice of the hearing of the motion May 30, 1890, a legal holiday. The judgment recites that the motion was heard June 20, 1890. There is no bill of exceptions, and we cannot conclude that the notice, inserted without authority in the transcript, is the notice in pursuance of which the motion was finally heard. The notice constitutes no part of the judgment roll. The judgment shows that it was entered upon the pleadings, on the theory that the answer raises no issue, and the question is whether this ruling was correct. The suit is upon a promissory note, which is set out at length in the complaint. It is in the usual form, except that it contains this stipulation: "And if this note is collected by suit, I agree and promise that the court having jurisdiction allow a reasonable attorney's fee, together with all legal expenses, to be made part of the judgment." It is also averred that payment has been demanded and no part paid, and that \$75 is a reasonable attorney's fee. The answer denies that payment of the note was ever demanded, that \$75, or any other sum, is a reasonable attorney's fee, and alleges that that stipulation for an attorney's fee was without consideration. All the other facts constituting plaintiff's cause of action are expressly admitted.

Appellant does not wish to open the well-settled question whether suit may be brought upon a note payable on demand without other demand than the bringing of the suit, but he claims that the contract sued on is more than a promissory note; that it contains a stipulation for special damage in case suit be brought, and that he ought not to be held to have incurred this liability until he is in default according to the terms of his contract; that is, until he has failed to

pay on demand. On principle it is difficult to resist this argument. It is well settled that suit may be brought at once on a demand note, but the rule does not seem to be in accord with the general principles of pleading. The cause of action would consist of the right to the money on demand, the demand, and the breach of the agreement, to-wit, failure to pay. If the bringing of the suit is the demand, still before suit brought there was no breach. It is an exception to general rules established by precedent, and, when confined to a recovery of the debt, there is no great harm in the exception; but, where special damage results from a merely imaginary breach of the contract, the case is different. Upon giving a note payable on demand, one naturally expects that some time would be allowed. Under our Code, for the purpose of fixing the liability of indorsers, the apparent maturity of such a note bearing interest is one year. It is not to be supposed that a debtor would add to his debt the liability for an attorney's fees if he expected to be sued at once. But, on giving such a note, he adds an inducement to sue at once, and without—on the view adopted by the court—a chance to escape the damage. In this light, such a stipulation is simply calculated to encourage litigation, and has in some states been declared against public policy, and void. *Bullock v. Taylor*, 39 Mich. 137; *Witherspoon v. Musselman*, 14 Bush, 214. It becomes solely an inducement to sue, and not an indemnity for a dereliction on the part of the debtor. In *Adams v. Seaman*, 82 Cal. 536, 23 Pac. Rep. 53, it was held that such a stipulation constitutes a material part of the contract, and destroys its negotiability. It would seem that it should also take it out of the limited exception to the general rules of pleading, and that such damage cannot be recovered until there has been a breach of the contract.

The answer also denies that \$75, or any other sum, is a reasonable attorney's fee. Respondent claims, and the court must have held, this to be an immaterial denial, on the ground that it was not necessary to aver what a reasonable fee would be. In *Carriere v. Minturn*, 5 Cal. 435, in an action to foreclose a mortgage which stipulated for a fee of 5 per cent., it was said that it was not necessary to aver that 5 per cent. was a reasonable fee, because the fee did not constitute the cause of action, but was an incident to it, like costs. Costs are not an incident to the cause of action, but to the judgment; and neither in the practice act as it then was, nor under the Code, could this fee be entered as costs, or be reached by a motion to retax costs. Such a ruling apparently denies the right of the mortgagor to be heard at all upon the question of fixing the attorney's fee, although it may amount to thousands of dollars, and the effect of the decisions are that the fee is in the nature of damages to indemnify the creditor against the necessity of paying an attorney's fee. *Carriere v. Minturn*, supra; *Patterson v. Donner*, 48 Cal. 369; *Bank v. Treadwell*, 55 Cal. 379. *Carriere v. Minturn* is not authority, however, for the

proposition that such stipulation must not be pleaded, although it was apparently so construed in *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. Rep. 514, and in *Bank v. Holt*, 87 Cal. 158, 25 Pac. Rep. 272, and *White v. Allatt*, 87 Cal. 245, 25 Pac. Rep. 420. But whether these cases were rightly decided or not will not determine this question. They were all for the foreclosure of liens, and the charges were expressly authorized by statute. It might, with some plausibility, be argued in such cases that the charge is in the nature of costs, or like the allowance of a fee by a chancellor, when the rules of law justify it. Here the case is at law, and the charge not authorized by any statute. It is by virtue of the contract only. The Code determines the damages for the breach of a contract for the payment of money. This is a special damage, expressly authorized by the contract to be recovered in addition to general damages. The rules of pleading require such damages to be specially averred. A defendant may always admit the breach of the contract, and defend as to the amount of damage. Unless he can raise an issue as to such damage, he cannot have his day in court. We think under this answer defendant could have shown either that plaintiff was not entitled to any fee, as in *Bank v. Treadwell*, 55 Cal. 379, or could have been heard as to what would have been a reasonable fee; and perhaps might have made some other defense.

Appellant has not raised the question whether such a stipulation is valid, or whether judgment could be entered on the pleadings, where evidence would be required, even on default. We think the judgment should be reversed.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

(91 Cal. 432.)

SAN LUIS OBISPO COUNTY V. WHITE.
(No. 13,556.)

(Supreme Court of California. Sept. 23, 1891.)

HIGHWAY TAXES—BRIDGES—COUNTIES—CORRECTION OF ASSESSMENTS—ELECTION PROCLAMATIONS.

1. Pol. Code Cal. § 3671, provides that taxes upon road-districts shall be collected in the same manner as county taxes. St. 1880, p. 136, provides that a county may maintain an action, in its own name, for the recovery of delinquent taxes. *Held*, that a county can maintain an action in its own name to collect delinquent taxes which were levied upon a road-district.

2. St. Cal. 1883, p. 299, provides that the board of supervisors of a county shall have power to levy taxes upon the taxable property in any district in their county for the construction and repair of roads, provided the proposition be submitted to and received by a majority of the qualified voters. Pol. Code, § 2618, defines a bridge to be a highway. *Held*, that it is within the power of the board, provided the proposition is approved by a majority of the voters, to levy a tax on a road-district to build a bridge.

3. An election proclamation, ordered published by the board of supervisors, pursuant to Pol. Code Cal. § 1056, is not invalid because the clerk affixed a scroll thereto, instead of his offi-

cial seal, though the county government act (St. Cal. 1883, p. 299, § 20, subd. 8) makes it the duty of the clerk to place his seal upon all proceedings of the board, whenever the same are ordered published.

4. If the clerk of the board of supervisors neglects to enter an order for the publication of a special election proclamation upon the minutes, as he is required to do by law, parol evidence is admissible to prove that such an order was made.

5. Code Civil Proc. Cal. § 2010, provides that evidence of the publication of a notice required by law may be given by the printer's affidavit annexed to a copy of the notice. *Held*, that an objection that the contents of an election proclamation could not be proven by a printed copy with the affidavit of publication annexed, on the ground that the original had not been sufficiently accounted for, was properly overruled, where the court was not requested to limit such evidence to the purpose for which it was admissible.

6. Pol. Code Cal. § 1055, provides that the board of supervisors, upon the receipt of the governor's proclamation of a general or special election, shall cause a copy of the same to be published in some newspaper printed in the county, and posted in each place of election, and, in the case of a special election to fill vacancies in certain state offices, they shall post or publish a copy of such proclamation upon the receipt thereof. Section 1056 provides that whenever a special election is ordered by the board of supervisors they must publish and post a proclamation in the same manner as a proclamation issued by the governor. *Held* that, if a proclamation by the board of supervisors of a special election, on a proposition to levy a tax to build a bridge, was published in a county newspaper, it was not necessary that it be posted also.

7. Upon an assessment roll, the decimal parts of the dollar were separated from the units and tens by the subdivisional account-book lines instead of the decimal point, and the word "cents" was omitted from the top of the column. *Held*, that an objection that the tax was not entered upon the assessment roll, on the ground that the decimal point and word "cents" were omitted, is untenable, and that it was competent for the district attorney to permit the assessor to add the abbreviation "cts." at the top of the column, over the space intended for the decimal parts.

8. Pol. Code Cal. § 3881, provides that omissions, errors, or defects in an assessment book may, with the consent of the district attorney, be supplied or corrected by the assessor at any time before the sale for delinquent taxes. *Held*, that it is competent for the assessor, under the written instructions of the district attorney, to supply the omission on the original roll of the "total tax" in the column provided for it, where the total tax appeared in the column headed "Road Tax."

San Luis Obispo Co. v. White, 24 Pac. Rep. 864, affirmed.

In bank. On rehearing.

PER CURIAM. We are satisfied with the opinion filed in this case on October 2, 1890, (24 Pac. Rep. 864.) and for the reasons therein stated the judgment and the order denying defendant's motion for a new trial are affirmed.

91 Cal. 440

Ex parte SOLOMON. (No. 20,881.)

(Supreme Court of California. Sept. 29, 1891.)

CITY ORDINANCES—VALIDITY—EXCESSIVE PENALTY—POSSESSION OF LOTTERY TICKETS.

Pen. Code Cal. §§ 320-326, make it a misdemeanor to conduct the drawing of a lottery, or to sell tickets, or to open any office or any other place for the sale of tickets, or to permit any building to be used either for the drawing or sale; and, as a punishment, impose a fine of not exceeding \$500, or imprisonment in the county jail not exceeding 6

months, or both. *Held*, that order No. 1,587, § 70, of the city of San Francisco, providing as a punishment for having lottery tickets in one's possession a fine of not less than \$250 nor more than \$1,000, or imprisonment for not less than 3 months nor more than 6 months, or both, is unreasonable and void, as out of harmony with the general laws of the state; and a person who is imprisoned under its provisions should be discharged. In re Ah You, 88 Cal. 99, 25 Pac. Rep. 974, followed.

In bank. Application for writ of *habeas corpus*.

Alex. Campbell and Humphreys & Flournoy, for petitioner.

DE HAVEN, J. The petitioner was convicted in the police court of the city and county of San Francisco of "having lottery tickets in his possession," which is made an offense by section 70 of order No. 1,587 of that city, and is now suffering imprisonment therefor. The ordinance provides that the offense of which petitioner was convicted is punishable "by a fine of not less than two hundred and fifty dollars, nor more than one thousand dollars, or by imprisonment for not less than three months nor more than six months, or by both such fine and imprisonment." Under the general law of the state found in sections 320 to 326 of the Penal Code, it is made a misdemeanor either to conduct the drawing of a lottery or to sell lottery tickets, or to aid in the drawing of a lottery or the selling of tickets therein, or to open any office or other place for the sale of such tickets, or to let or permit to be used any building for the drawing of any lottery, or for the purpose of selling such tickets therein, but the extent to which any of these offenses may be punished is a fine not exceeding \$500, or by imprisonment in the county jail not exceeding 6 months, or by both such fine and imprisonment; and it is therefore possible that upon conviction of either of said offenses under the state law there may, in a wise discretion, be imposed upon the offender only a nominal fine, while, for the comparatively trifling offense of having a lottery ticket in possession, the discretion to impose a fine of less than \$250 is taken away from the court by this ordinance, and the fine may be double that which can be imposed for the more serious offenses named in the general law. Such an ordinance is not in harmony with the general laws of the state, and is unreasonable and void, within the rule announced in *Ex parte Ah You*, 88 Cal. 99, 25 Pac. Rep. 974; and upon the authority of that case the petitioner is discharged.

We concur: BEATTY, C. J.; HARRISON, J.; SHARPSTEIN, J.; GAROUTTE, J.

PATERSON, J. I concur. There is nothing in the nature of the offense which calls for any severer penalty for its commission in a thickly settled community than for its commission in the country. The acts constituting the offense in no way tend to create a breach of the peace, nor do they tend to injure the person or property of another. The minimum penalty was fixed, doubtless, at \$250, to cut off any leniency on the part of the court in which the con-

viction might be had. But the reasonableness or unreasonableness of an ordinance does not depend upon the difficulty of enforcing its penal provisions. The object of the ordinance is plain, but, as it in effect provides a greater penalty than that provided by the statute for kindred offenses, it is unreasonable in law, and therefore void.

91 Cal. 488

SIMPSON et al. v. BUDD. (No. 14,470.)

(*Supreme Court of California.* Oct. 2, 1891.)

MOTION FOR NEW TRIAL — STIPULATION FOR EXTENSION OF TIME.

Code Civil Proc. Cal. § 283, provides that an attorney can bind his client in any of the steps of an action by written agreement filed with the clerk, or entered upon the minutes of the court. Section 1054 provides that when an act to be done relates to the preparation of bills of exception, or to the service of notices other than of appeal, the time may be extended by the court; but that such extension shall not exceed 30 days, without the consent of the adverse party. *Held*, that the statutory time for giving notice of intention to move for a new trial and the preparation of a bill of exceptions may be extended without an order of court, by stipulation of the attorneys, even though the stipulation itself be not filed within the time limited for doing the acts themselves.

In bank. Application by Simpson and Gray for a writ of mandate against Budd for refusal to settle a bill of exceptions. Writ ordered.

Nicol & Orr and Carter & Smith, for petitioners. *Joseph H. Budd*, (*F. T. Baldwin*, of counsel,) for respondent.

DE HAVEN, J. In an action by Simpson and Gray, the petitioners herein, against Peyton et al., tried in the superior court of San Joaquin county, the findings of the court were filed, and judgment thereupon rendered and entered, December 22, 1890, against said petitioners. It does not appear that any notice of the decision was ever served upon petitioners, but on January 2, 1891, a stipulation was filed in said court, which shows they had actual knowledge at that date of the rendition of the judgment, and for the purposes of this decision it will be assumed that they had notice thereof at that time. Five days thereafter the attorneys for the defendants in that action signed and delivered to the attorneys of the petitioners a written stipulation, by which it was stipulated and agreed that the petitioners here should have 30 days from date thereof "within which to prepare, serve, and file a bill of exceptions, notice of motion for a new trial, and statement on motion for a new trial." This stipulation was not filed with the clerk of the court until April 15, 1891, nor was there any order of the court, or of the judge thereof, extending the time within which the acts named in the stipulation might be done. The notice of motion for a new trial was filed and served within the time given by the stipulation, and within 10 days thereafter, to-wit, on February 14, 1891, the petitioners prepared and served a proposed bill of exceptions, and the defendants in that action prepared amendments thereto, and the same afterwards came before the

respondent for settlement. No objection was made to the settlement of the bill of exceptions for the reason that the notice of motion was not given in time, but objection was made to such action upon the ground that the copy of said notice, served upon the attorneys for defendant therein, was not signed by the attorneys for petitioners. The respondent refused to settle the bill of exceptions, upon the ground that the notice of intention to move for a new trial was not served and filed in time, and that the proposed bill of exceptions was not prepared and presented in time.

Upon these facts the only question for decision is whether the statutory time for giving notice of intention to move for a new trial and the preparation of bills of exception can be extended by a stipulation of counsel not filed within the statutory time, and of this we entertain no doubt. An attorney has authority to bind his client in any of the steps of an action or proceeding by his agreement in writing, filed with the clerk, or entered upon the minutes of the court. Section 283, Code Civil Proc. The service and filing of notices of motion for a new trial and proposed bills of exception are steps in an action within the meaning of this section, and the stipulation is filed in time if it is on file, with the consent of the adverse attorney, when the court is called upon to act upon the matter affected by the stipulation. Section 1054 of the Code of Civil Procedure¹ does not limit the authority of attorneys, as given by section 283 of the same Code, nor prescribe the exclusive mode by which the time for giving notices or the service of proposed statements or bills of exception may be extended, but it only imposes a limitation upon the power of the court to extend such time without the consent of the adverse party. It is undoubtedly true, as has often been decided by this court, that the right to move for a new trial is statutory, and, unless the prescribed steps are taken within the time allowed, the right does not exist as against a party who stands upon the statute and insists upon strict compliance with every provision of the law relating thereto, and intended for his benefit; but it has never been held that such provisions may not be waived by the party otherwise entitled to claim their benefit. On the contrary, it has been assumed in many cases, if not directly decided, that the time for giving notice of motion for a new trial, as well as every other step to be taken in relation thereto, may be waived or extended by consent. *Hobbs v. Duff*, 43 Cal. 485; *Brichman v. Ross*, 67 Cal. 602, 8 Pac. Rep. 316; *Patrick v. Morse*, 64 Cal. 462, 2 Pac. Rep.

¹ Sec. 1054. When an act to be done, as provided in this Code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparations of statements or of bills of exceptions or of amendments thereto, or to the service of notices other than of appeal, the time allowed by this Code may be extended, upon good cause shown, by the court in which the action is pending, or a judge thereof; but such extension shall not exceed thirty days without the consent of the adverse party.

49; *Gray v. Nunan*, 63 Cal. 220; *Schieffery v. Tapia*, 68 Cal. 184, 8 Pac. Rep. 878; *Curtis v. Superior Court*, 70 Cal. 390, 11 Pac. Rep. 652. We are of the opinion that the parties may, within the time allowed by law to give notice of intention to move for a new trial, stipulate that the time for giving such notice may be extended, and that such stipulation has effect without any order of the court ratifying the same. The question in such cases is one which most immediately concerns the parties to the action, and attorneys may be safely intrusted to look after the rights of their respective clients in such matters. Peremptory writ of mandate ordered.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; HARRISON, J.; PATERSON, J.; GAROUTTE, J.

CLARK v. BUDD. (No. 14,469.)

(*Supreme Court of California*. Oct. 2, 1891.)

In bank. Application for writ of mandate prayed against a superior judge of San Joaquin county.

Nicol & Orr and Carter & Smith, for petitioner. *Joseph H. Budd*, (*E. T. Baldwin*, of counsel,) for respondent.

DE HAVEN, J. The question for decision here is substantially the same as that decided in *Simpson v. Budd*, 27 Pac. Rep. 758, (No. 14,470,) the opinion in which has been this day filed, and upon the authority of that case a peremptory writ of mandate is ordered herein.

We concur: BEATTY, C. J.; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.

91 Cal. 463

JACKSON v. HYDE. (No. 14,065.)

(*Supreme Court of California*. Oct. 1, 1891.)

PUBLIC LANDS — ASSIGNMENT OF CERTIFICATE OF PURCHASE—TRUSTS.

1. The assignee of a certificate of purchase of land from the state holds the same, or a patent issued to him thereon, in trust for those to whom, with his knowledge, his assignor has previously sold and conveyed the land. *Henderson v. Grammar*, 66 Cal. 332, 5 Pac. Rep. 488, followed.

2. Where such assignee has been decreed to hold the patent in trust for the grantees of his assignor, and ordered to convey to them, he is properly allowed reimbursement of his expense in procuring the patent.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by Andrew Jackson against H. R. Hyde to compel defendant to convey land alleged to be held by him in trust for plaintiff. Judgment for plaintiff. Defendant appeals. Affirmed.

Meux & Edwards, for appellant. *Geo. A. Nourse*, for respondent.

McFARLAND, J. The purpose of this action is to have it decreed that plaintiff is the equitable owner of a certain described 80-acre tract of land; that defendant holds the legal title thereto in trust for plaintiff; and that defendant convey the same to plaintiff. Judgment was rendered for plaintiff, and defendant appeals.

The material facts in the case are these: On September 2, 1867, one Gabriel Moore purchased said tract of land from the

state, paying 20 per cent. of the purchase money and one year's interest, and received a certificate of purchase therefor. He occupied and held possession of the land under said certificate from its date until his death, which occurred in May, 1880; having paid most of the accruing interest. He died intestate, and his only heirs were his widow, Mary Moore, and his son, Ephraim Moore, who were appointed administratrix and administrator, and occupied said land until they conveyed it as hereinafter stated. By a final distribution of the estate of said Gabriel Moore, made May 21, 1881, said land was distributed to said Mary and Ephraim. On September 12, 1885, said Mary conveyed said land to said Ephraim by a deed duly executed, and recorded on the same day. On July 20, 1887, said Ephraim, by deed recorded that day, conveyed said land to John H. Byrd; and on July 26, 1887, said Byrd, by deed recorded that day, conveyed said land to plaintiff herein. These conveyances were made for valuable considerations, and plaintiff and his grantors have been continuously in undisturbed possession of said land. The said certificate of purchase seems to have remained in the possession of said Mary and Ephraim; and afterwards,—the said Mary on May 2, 1889, and the said Ephraim on May 7, 1889,—by written instruments attached to said certificate, they assigned the same, for the expressed consideration of one dollar, to the defendant, Hyde, and delivered to him the certificate. Thereupon the said defendant presented said certificate to the register of the state land-office, together with said assignments, and proof of the said distribution to said Mary and Ephraim; and, upon payment of the balance due the state thereon, procured a patent for said land to be issued to himself. The register was ignorant of said conveyances of said land as aforesaid, but the defendant had full knowledge thereof.

We think that the judgment of the court below was clearly right. The case cannot be distinguished, on the point involved, from *Henderson v. Grammar*, 66 Cal. 332, 5 Pac. Rep. 488. The only difference is that in the *Henderson* Case the purchaser of the lands from the state had mortgaged them, and plaintiff there claimed under a sheriff's deed obtained upon foreclosure and sale, the defendants there having obtained the certificates and procured a patent; while, in the case at bar, the plaintiff holds through a direct conveyance from the original purchaser from the state. The court there held, which is the law, that, in such a case, a conveyance of the land carries the title, of which the certificate is merely evidence. McKINSTRY, J., delivering the opinion of the court, says: "Plaintiff became the owner of the title of which such certificates were evidence, and from the time he so became the owner it was the manifest duty of defendants to assign the certificates to him. And so, when they acquired the state title, by and through the certificates, it was their duty to convey it to plaintiff." We do not deem it necessary to notice at length the quite able argu-

ments of counsel for appellant, or the many authorities cited. The cases to which they call our attention are not applicable to the case at bar. The law which governs this case is as above stated. The judgment provides for the payment by respondent to appellant of the amount expended by the latter in procuring the patent, which is proper. The judgment is affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.

91 Cal. 465

PEOPLE v. NEIL. (No. 20,834.)

(Supreme Court of California. Oct. 1, 1891.)

ELECTIONS — FRAUDULENT VOTING — INDICTMENT AND INFORMATION.

1. An information charging that defendant "fraudulently voted at an election when he was not entitled to vote," though in the language of the statute, (Pen. Code Cal. § 45,) is not sufficient to state an offense, but must set forth the facts relied on to show fraudulent voting. *People v. McKenna*, 81 Cal. 159, 22 Pac. Rep. 488, followed.

2. Such information is also fatally defective unless it states the particular fact or facts showing that defendant was not entitled to vote.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; B. N. SMITH, Judge.

Information against James Neil for fraudulently voting at an election. Judgment of conviction. Defendant appeals. Reversed.

Hugh J. & Wm. Crawford, for appellant. *Atty. Gen. Hart*, for the People.

FITZGERALD, C. The defendant was tried and convicted in the court below upon an information charging him with illegal voting, and sentenced to imprisonment in the state-prison for the term of one year. The information, which charges, in the language of the Code, that the defendant fraudulently voted at an election when he was not entitled to vote, was demurred to on the following grounds: *First*, that the facts stated in the information do not constitute a public offense; *second*, "that the information does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code, in this: that it is alleged that defendant was not entitled to vote at the election therein mentioned, but it is not alleged what qualification of a voter he does not possess." The demurrer was overruled. After verdict, and before the defendant was called for judgment, he moved the court in arrest of judgment on the first ground stated in the demurrer, which motion was denied by the court. The case is brought here by appeal, upon the judgment roll, from the judgment rendered upon the conviction, and from the order denying the defendant's motion in arrest of judgment.

The only question presented for decision involves the validity of the information, on the ground that it is not direct and certain, for the reason that it omits to set forth the particular circumstances of the offense charged, and which are necessary to be alleged in order to constitute a complete offense under the law. Section 45 of the Penal Code, or rather that part of it

upon which the information herein is founded, reads as follows: "Every person not entitled to vote, who fraudulently votes at any election, * * * is guilty of a felony." Section 1 of article 2 of our state constitution prescribes the qualifications and disabilities of electors, and sections 1083 and 1084 of the Political Code are in the exact language of this section of the constitution. The information, as we have before stated, charges the offense in the language of the Code, and it is well settled, under our system of pleading in criminal cases, that this will generally be held to be sufficient; but where the particular circumstances of the offense are necessary to constitute a complete offense they should be stated and averred, and a failure to do so will vitiate the information or indictment. It is objected by appellant "that the allegation contained in the information that the defendant 'fraudulently voted' is insufficient, and this, notwithstanding those are the words of the statute." In *Hirschfield's Case*, 13 Blatchf. 331, it was said by BENEDICT, J., that "the averment that the accused fraudulently registered is insufficient, although those are the words of the statute. Something more must be stated in order to give the accused any proper notice of the charge which he is to meet. It is impossible for the accused to determine, from this indictment, whether he is required to show in his defense that he was twenty-one years of age, or to show that he resided in a certain place, or to show that he bore a certain name, or to show that he was a native, or that he was a naturalized citizen, of the United States. An indictment under this statute should point out the fraud which it is supposed the accused committed, so that he can know what it is that he is called on to explain, and be enabled to prepare his defense." And in *People v. McKenna*, 81 Cal. 159, 22 Pac. Rep. 488, it was said by Mr. Justice PATTERSON that "the question whether a thing has been done fraudulently is a matter of law, and an allegation of fraud, in general terms, presents no issuable fact." "It is a sound principle that an indictment charging fraud of any kind should aver with particularity the facts relied upon to show fraud. Many of the niceties and technicalities which existed under former methods of pleading are not allowed to prevail under the provisions of our Code, but the rule still exists that an indictment must be certain and clear as to the particular circumstances of the offense charged, when they are necessary to constitute a complete offense." *Id.* On the authority of that case it follows that the objection to the information on this ground was well taken.

It is further objected "that the information is fatally defective for omitting to state facts showing that the accused was not entitled to vote." The facts which constitute a qualified elector are those which are prescribed by the sections of the constitution and the Political Code above referred to, and there are many causes of disqualification therein enumerated, but as to which one of them the defendant labored under the information does not disclose. The averment that the defendant was not

entitled to vote is not the averment of a fact, but of a conclusion of law. The material facts necessary to be charged, and upon which this legal result, that he is not entitled to vote, is founded, are those facts prescribed by the constitution and the Code as constituting the qualifications and creating the disabilities of electors. Mr. Bishop, in the first volume of his work on Criminal Procedure, (3d Ed. §627.) says: "Whether one is a qualified voter or not is a result deduced by the law from the facts, and, though a statute may mention a legal result in defining an offense, this is not the province of an indictment. It must state the facts out of which such result comes; thus giving the defendant notice of what is charged against him, and putting upon the record a proper case for the adjudication of the court." In *People v. Standish*, 6 Parker, Crim. R. 111, it is said: "*Prima facie* every white man of the age of twenty-one years is entitled to vote, and when he offers a vote it must be received, unless some fact is shown or appears which disqualifies him; and, when charged with voting without being legally qualified, the indictment should show the fact or facts which disqualify him." To the same effect are *State v. Moore*, 27 N. J. Law, 105; *State v. Tweed*, Id. 111; *Gallagher v. State*, 10 Tex. App. 469; *Pearce v. State*, 1 Sneed, 63; *Gordan v. State*, 52 Ala. 308; *U. S. v. Hirschfeld*, 13 Blatchf. 331; *Quinn v. State*, 35 Ind. 487. When these cases were decided, the statutes of most of those states were substantially the same as our own. The principal cases to the contrary are *State v. Douglass*, 7 Iowa, 414; *Com. v. Shaw*, 7 Mete. (Mass.) 52; *State v. Marshall*, 45 N. H. 281; *U. S. v. Quinn*, 12 Int. Rev. Rec. 153. Upon a careful examination of these cases on this point, we are satisfied with the reasoning and the conclusion reached in the former. It therefore follows that the information is fatally defective in omitting to state the particular fact or facts showing that the defendant was not entitled to vote. The judgment and order should be reversed, and the information dismissed, and we so advise.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the court below is directed to dismiss the information.

91 Cal. 400

DE GUYER *et al.* v. BANNING. (No. 13,240.) (Supreme Court of California. Sept. 26, 1891.)

PUBLIC LANDS—MEXICAN GRANTS—BOUNDARIES AND EXTENT.

1. Where there is a conflict between the boundaries of a Mexican grant as given by the decree of confirmation and those fixed by the survey upon which the patent is based, the patent, while it remains in force, must control; and, although the survey itself be incorrect in not including all the land contained in the decree, it cannot, after approval by the land department, be impeached or disregarded in an action of ejectment by one who claims under the proceedings of which it is an essential part.

2. An island within the exterior boundaries of the inner bay of San Pedro was claimed as

part of a Mexican grant. The survey recited that it was made in conformity to the boundaries specified in the decree of confirmation; and, after giving certain boundaries which it was contended were the same as those fixed in the decree, excepted from the tract surveyed "that portion thereof covered by the navigable waters of the inner bay * * * which are included within the following described lines, to-wit;" the lines referred to being those which marked the exterior boundaries. It also designated the tract, exclusive of that covered by the navigable waters, as certain numbered lots on the plats of the public survey. Held, that inasmuch as the bay was marked "Excepted" upon the map accompanying the patent, and none of the lots referred to included any portion of the land within the exterior boundaries of the bay, the exception must be construed to include, not simply the lands covered by the navigable waters, but all those within the exterior boundaries.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Action of ejectment by De Guyer and others against Banning. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Houghton, Silent & Campbell and *J. S. Chapman*, for appellants. *Bicknell & White*, (*Smith, Winder & Smith*, of counsel,) *J. E. Foulds*, and *Lee & Scott*, amici curiæ.

DE HAVEN, J. This is an action to recover possession of a tract of land known as "Mormon Island," lying within the exterior boundaries of the inner bay of San Pedro. The plaintiffs claim the land in controversy as a part of the Rancho San Pedro, the title to which is a Spanish grant, confirmed by the United States district court on appeal thereto from the board of land commissioners appointed under the act of congress of March 3, 1851, to ascertain and settle private land claims in this state, and a United States patent therefor dated December 18, 1858. This patent conveys the land embraced in the said Rancho San Pedro, as the same was surveyed by the United States surveyor general after the confirmation of said grant, the patent referring to the survey and plat thereof for purposes of description. The survey recites that it was made in conformity to the boundaries specified in the decree of confirmation, and after giving certain named exterior boundaries, which it is contended by plaintiffs are the same as those fixed in the decree of confirmation, it proceeds as follows: "Excepting, reserving, and excluding from the tract as thus surveyed that portion thereof covered by the navigable waters of the inner bay of San Pedro, and which are included within the following described lines, to-wit;" the lines thus referred to as following this general description being those which mark the exterior boundaries of the inner bay of San Pedro. The judgment of the superior court was in favor of defendant, and the plaintiffs appeal.

The whole controversy in this case grows out of the alleged difference between the boundaries of the said grant, as given in the decree confirming it, and those fixed in the patent; this difference being made by the exception contained in the survey above referred to. The appellants con-

tend: (1) That they have title to all the land within the specific boundaries of the Rancho San Pedro, as fixed in the decree of confirmation, and that the exception contained in the patent and survey must be disregarded as unauthorized and void. (2) That, if the exception is not held to be void, it should be construed only as embracing the navigable waters of the inner bay of San Pedro, and not all the land within the exterior boundaries of such inner bay, in which case the land sued for would not be within the exception.

1. In support of their first proposition, the appellants insist that in surveying the Rancho San Pedro no discretionary power was vested in the United States surveyor general, and that his only authority was to make a survey which would conform to the boundaries given in the decree of confirmation, and that, as by this exception land is excluded from the survey which was included within the boundaries of the rancho as confirmed, it is void. It is true the duty of that officer was to locate the confirmed grant in conformity with the decree. The *Fossat Case*, 2 Wall. 714. But it does not follow that, when the survey has been made, approved, and acted upon by the land department, its correctness may be impeached or disregarded in an action of ejectment, and that, too, by one who claims under the very proceedings of which the survey was one essential part. To avoid the force of this position, the appellants insist upon the broad proposition that the location of the grant was not fixed and established by the survey and patent, but by the decree of confirmation; and that, in case of a conflict between the boundaries given by the decree and those fixed by the survey upon which the patent is based, the descriptive calls given in the decree are controlling. This position cannot be upheld, and the contrary is, we think, the established doctrine. *Moore v. Wilkinson*, 13 Cal. 478; *Teschmacher v. Thompson*, 18 Cal. 11; *Leese v. Clark*, Id. 535; *Chipley v. Farris*, 45 Cal. 527; *Cassidy v. Carr*, 48 Cal. 339; *People v. San Francisco*, 75 Cal. 388, 17 Pac. Rep. 522; *Wright v. Seymour*, 69 Cal. 122, 10 Pac. Rep. 323; *Beard v. Federy*, 8 Wall. 478. The reasoning in *Chipley v. Farris*, supra, appears to be particularly applicable to this case. In that case it was contended that the confirmation of the grant gave the claimant a perfect title, and that he could not be divested of his title to any such lands by a patent which did not embrace them all. In answer to this the court said: "A patent, issued under the act of 1851, is, as has often been held by this court, the final act in proceedings instituted for the confirmation of the claim of the patentee to land which had been granted by the former government, and for the segregation of such land from the public lands of the United States; and it is a record which binds both the government and the claimant, and cannot be attacked by either party, except by direct proceedings instituted for that purpose. *Leese v. Clark*, 18 Cal. 535. While it stands, the claimant, or those deriving title through him, will not be permitted to

aver that the claim comprised other or different lands from those mentioned in the patent. * * * It is contended by the plaintiffs that the survey, which is incorporated into the patent, does not accord with the decree of confirmation, and that they are entitled to rely upon the decree—which is also incorporated into the patent—for title to lands within the decree, but not within the survey. This position cannot be maintained consistently with the views already expressed as to the nature and effect of the patent. The patent purports to convey the lands described in the survey, and its scope cannot be extended, nor on the other hand can it be limited, by showing that the decree comprised a greater or less area than the survey. Nor can the claimant, after admitting, as he must, the conclusive effect of the patent, make out title to lands not conveyed by the patent, by the production of the proceedings which culminated in the patent. The patent, while it remains in force, conclusively determines what lands the claimant was entitled to under his claim and the decree of confirmation. The claimant can neither reform the patent nor show that it is in any respect incorrect, in an action of ejectment." It is unnecessary to quote further from the decisions on this point. Those above cited establish the proposition that upon the confirmation of a Mexican grant the patent issued by the United States to the claimant is the only evidence of the extent of the grant. The obligation assumed by the United States to protect the rights of claimants under Mexican grants was political in its character, and the manner in which this should be met, and the effect to be given the prescribed proceedings in relation to the establishment of such rights, were matters of legislative policy, and the evident purpose of the act of March 3, 1851, was not only to confirm and protect the rights of claimants under Mexican grants, but also to segregate from the public domain the lands thus confirmed to such grantees, so that it might be known what lands in the state were subject to settlement by citizens of the United States. To accomplish this end the act provided for a survey of all confirmed grants to be made under authority of the government, and for the issuance of a patent thereon, which should be conclusive evidence of the location of the grant. It follows from this that, in ascertaining the boundaries of the Rancho San Pedro, we must look to the patent, and, if there is a conflict as to its location and extent between it and the decree of confirmation, the patent must control.

2. The remaining question is whether the land in controversy is included within the exception; and, as to this, we entertain no doubt that the exception, properly construed, embraces all the lands within the exterior boundaries of the inner bay of San Pedro, as shown on the map accompanying the patent, and is not confined simply to such land as is covered by the navigable waters of that bay. That this is the true meaning of the exception is made to appear, not only from the fact that the inner bay of San Pedro

is marked "Excepted" upon the map referred to, but is also conclusively shown by the concluding portion of the survey itself, as returned and certified, in which, after giving the boundaries of the land surveyed by courses and distances, it designates the land surveyed, "exclusive of the lands above described, as covered by the navigable waters of the inner bay of San Pedro," as being certain numbered lots on the plats of the public survey, neither of which lots includes any portion of the land within the exterior boundaries of the inner bay of San Pedro, as marked on said map. We hold, therefore, that the land in controversy is not a part of the Rancho San Pedro, as patented by the United States, and the judgment of the superior court is right. Judgment and order affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; HARRISON, J.; GAROUTTE, J.; SHARPSTEIN, J.

91 Cal. 436

BARRY v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 14,436.)

(*Supreme Court of California.* Oct. 2, 1891.)

CONTEMPT—JUDGMENT—RIGHT TO ENTER SECOND JUDGMENT.

A judgment that a person be imprisoned for contempt five days and pay a fine, and, if the fine be not paid, that he be further imprisoned at the rate of one day for each two dollars, until it is paid, is final; and the court has no authority, at the end of the five days, to enter another judgment for the fine, and issue execution, but only to enforce the original judgment according to its terms.

In bank. Proceeding by *certiorari* to review the action of the superior court, city and county of San Francisco, in rendering two different judgments for contempt against James H. Barry.

Reddy, Campbell & Metson, for petitioner. Atty. Gen. Hart and W. S. Barnes, Dist. Atty., (J. A. Hosmer and Wm. Fitzmaurice, of counsel,) for respondent.

DE HAVEN, J. On September 30, 1889, in the superior court of the city and county of San Francisco, it was adjudged that the petitioner here was guilty of a contempt of court, and that he be punished therefor by imprisonment in the county jail of said city and county for five days, and pay a fine of \$500, and, if such fine was not paid at the end of said five days' imprisonment, that he be further imprisoned until said fine should be satisfied, at the rate of one day for each two dollars of the fine unpaid. On October 4, 1890, in department No. 8 of said superior court, on motion of the district attorney, another judgment was entered in the same proceeding for contempt, which, after reciting that the five-days term of imprisonment had expired, and that no part of the \$500 had been paid, proceeded as follows: "It is therefore ordered that judgment be entered herein against said James H. Barry for \$500 and costs, and that execution issue against said James H. Barry for \$500 and costs, to the sheriff of the city and county of San Francisco. Wherefore, by virtue of the law, and by reason of the

premises aforesaid, it is ordered, adjudged, and decreed that judgment be, and the same is hereby, entered herein against said James H. Barry for the sum of five hundred (\$500.00) dollars, with interest thereon at the rate of seven per cent. per annum from the date hereof till paid." This judgment was entered without any notice to the petitioner. This is a proceeding upon *certiorari* to review the action of the court in rendering the last judgment, and our inquiry is confined to the single question, whether in that the court exceeded its jurisdiction. We are of the opinion that when the court rendered its judgment in the contempt proceeding on September 30, 1889, it did not retain jurisdiction to enter another and different judgment in the same matter on October 4, 1890. The first judgment was final, and the only authority of the court thereafter, in the matter concluded thereby, was the power to enforce the judgment according to its terms, so far as it was capable of enforcement. The order and judgment of October 4, 1890, are annulled.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; SHARPSTEIN, J.; PATERSON, J.

91 Cal. 458

BRANDT v. THOMPSON et al. (No. 14,021.)

(*Supreme Court of California.* Oct. 1, 1891.)

QUIETING TITLE—RIGHTS OF MORTGAGEE.

In an action to quiet title, the court found that plaintiff, to secure a loan, had conveyed the land to B. by absolute deed, which was intended only as a mortgage, and that T. purchased from B. with knowledge of the nature of B.'s title. Held, that it was error to quiet title to the land in plaintiff against T., "except as a mortgagee thereof having a mortgagee's interest therein, to be determined by a proper suit of foreclosure;" since, it having been determined that T. stood in the position of a mortgagee, the only way for plaintiff to quiet title was to pay the mortgage.

Department 2. Appeal from superior court, Fresno county; J. C. CAMPBELL, Judge.

Action to quiet title by Otto Brandt against C. M. Thompson and Herman Brandt. Judgment for plaintiff. Defendant Thompson appeals. Reversed.

N. O. Bradley and E. D. Edwards, for appellant. Geo. A. Norse and Justin Jacobs, for respondent.

MCFARLAND, J. This action was tried upon the second amended complaint. What the preceding complaints were does not appear. The second amended complaint presents simply an action to quiet title. It is averred that plaintiff is, and for a long time has been, the owner in fee and in the actual possession of certain described land; that defendants claim and assert an interest of some kind in said land; and that defendants, or either of them, have no right, title, or interest whatever in said land. The prayer is that defendants be required to set forth the nature of their asserted claims, and that it be decreed that they have no right, title, or interest in said land, and that plaintiff has an absolute title thereto. The defendant Herman Brandt, who is plaintiff's brother, made no defense.

Defendant Thompson filed an answer in which it is denied that since March 4, 1885, plaintiff has been the owner, or in possession, or entitled to possession, of the said land; and in which it is averred that from said March 4, 1885, to April 23, 1888, the defendant Herman was the owner in fee and in possession of said land; that on April 23d Thompson held a mortgage on said land, amounting at that time, principal and interest, to \$13,679.50, and that said Herman proposed to him that if he would satisfy said mortgage, and pay said Herman the sum of \$6,200, the latter would sell and convey said land to him, (Thompson;) that he accepted the proposition, released said mortgage, paid said \$6,200 to said Herman, and that the latter on said 23d day of April, 1888, conveyed said land to Thompson, since which time he has been the owner in fee and entitled to the possession of said land. The court below found that on March 3, 1885, plaintiff was owner in fee and in the possession of said land, and has ever since been in possession, holding the same adversely to defendant and all the world, and that neither of the defendants have been in possession of the same, or any part thereof; that on said March 3, 1885, plaintiff borrowed of Thompson \$8,500, and to secure the same executed to him a mortgage on said land; that on the next day (March 8th) plaintiff executed and delivered to his said brother Herman (defendant herein) a deed of conveyance of said land, absolute in form, but intended only as security for \$6,000, borrowed by plaintiff from said Herman; that afterwards, on March 19, 1888, Thompson "paid to the said Herman Brandt the said sum of six thousand dollars, (\$6,000,) which he, the said Herman Brandt, had loaned to plaintiff, together with two hundred dollars (\$200) interest, and satisfied on the records the said mortgage of \$8,500 from plaintiff to Thompson;" and that on said March 19, 1888, said Herman made a deed of conveyance of said land to said Thompson. It is found, also, that at the time of said last conveyance Thompson knew that the said deed from plaintiff to said Herman of March 4, 1885, was intended as security for the said loan of \$6,000. And upon these facts the court found that the said deed of March 4, 1885, from plaintiff to Herman, was a mortgage to secure \$6,000, and did not pass the title, and that the deed from Herman to Thompson carried to the latter only Herman's interest, viz., that of a mortgagee; that plaintiff is the owner in fee of the land as against Thompson, and that Thompson has no right, title, or interest therein, except as a mortgagee thereof, having a mortgagee's interest therein to be foreclosed by a proper suit of foreclosure against plaintiff herein; and that plaintiff is entitled to a decree as prayed for to "quiet title" to said land against Thompson, and those claiming under him, "except as a mortgagee thereof having a mortgagee's interest therein, to be determined by a proper suit of foreclosure." A judgment was rendered in accordance with these conclusions; that is, it was decreed that plaintiff is the owner in fee-simple of the land, and that

Thompson has no interest therein except that of a mortgagee, "to be determined by proper suit of foreclosure against plaintiff herein." Thompson appeals from the judgment and from an order denying a new trial. We think the evidence sufficient to warrant the findings of the court that the deed from plaintiff to his brother Herman was given to secure \$6,000 borrowed money; that it was therefore only a mortgage; and that Thompson knew the nature of said deed when he took his conveyance. And the court was correct in holding that it did not pass the title. The doctrine of *Hughes v. Davis*, 40 Cal. 117, has been abrogated, and the rule stated in *Jackson v. Lodge*, 36 Cal. 28, and *Cunningham v. Hawkins*, 27 Cal. 603, restored, by sections 2924 and 2925 of the Civil Code. See *Taylor v. McLain*, 64 Cal. 514, 2 Pac. Rep. 399; *Healy v. O'Brien*, 66 Cal. 519, 6 Pac. Rep. 386; *Hall v. Arnott*, 80 Cal. 348, 22 Pac. Rep. 200.

Neither do we think that the decree (assuming that it was based upon a proper theory) excludes Thompson from enforcing his rights as a mortgagee under the said mortgage from plaintiff to Herman Brandt, with respect to which Thompson would be subrogated to the rights of Herman. It merely undertakes to reserve to Thompson the right, "by proper suit of foreclosure," to have determined his interest "as a mortgagee," without declaring what that interest is.

But the judgment must be reversed for other reasons. It is somewhat difficult to say from the pleadings in this case what issues were really before the court; but the court found certain facts upon which the validity of the judgment in favor of respondent must be determined. Now, upon those facts, respondent stands simply in the position of a mortgagor seeking to quiet his title against a mortgagee, without paying, or tendering or offering to pay, the debt for which the mortgage was given. But such a result cannot be achieved. It would be against general equitable principles and adjudicated cases. *De Cazara v. Orena*, 80 Cal. 132, 22 Pac. Rep. 74; *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. Rep. 225; *Spect v. Spect*, (Cal.) 26 Pac. Rep. 205. In the case of *Booth v. Hoskins* the rule was applied when the mortgage debt was barred by the statute of limitations. The only way for a party in respondent's position to quiet a mortgage is to pay it. The decree in the case at bar first undertakes to quiet respondent's title, and then disturbs it again by declaring appellant's right to foreclose. If appellant's debt should become barred by the statute of limitations, then, by this decree, respondent would have his title quieted without paying the mortgage debt; the very thing which equity says cannot be done. Respondent can have no remedy in the premises without paying or tendering the amount due appellant on his mortgages, and the court erred in holding otherwise. No doubt both parties, with a better understanding of their rights, can reconstruct their pleadings so as to better present those rights to the court. The judgment and order appealed from are reversed, with leave to both par-

ties to amend their pleadings as they may be advised.

We concur: BEATTY, C. J.; DE HAVEN, J.

91 Cal. 500

OLSEN v. LOVELL. (No. 14,191.)

(Supreme Court of California. Oct. 8, 1891.)

SPECIFIC PERFORMANCE—DAMAGES.

1. Where one owning land in common with another contracts to sell and convey the same to another, signing his own name, and, without authority, his co-tenant's name also, he cannot be compelled to convey to the vendee his undivided half of the land, on his co-tenant's repudiating the contract, since it would be to enforce specific performance of a contract which he did not make or contemplate. *Jackson v. Torrence*, 88 Cal. 521, 28 Pac. Rep. 695, followed.

2. Nor can he be made to respond in damages for breach of the contract, since the contract sued on is one which he did not make.

Department 2. Appeal from superior court, Sacramento county; W. S. VAN FLEET, Judge.

Action by Alfred Olsen against C. A. Lovell for specific performance. Judgment for defendant. Plaintiff appeals. Affirmed.

Robt. T. Devlin, for appellant. *McKune & George*, for respondent.

MCFARLAND, J. Plaintiff brought this action to compel defendant to specifically perform a certain contract for the conveyance of land. Defendant demurred on the general ground of want of facts, and also on certain special grounds. The demurrer was sustained, and judgment was rendered for defendant. Plaintiff appeals.

It appears from the complaint that on January 21, 1880, a certain written contract was entered into, which purports upon its face to have been made by plaintiff, as a party of the first part, and the defendant C. A. Lovell and one F. E. Judson, as parties of the second part. By this contract plaintiff was to convey to defendant and Judson a certain tract of land in Placer county, and pay them \$1,750; and defendant and Judson were to convey to plaintiff a certain lot of land in Sacramento city. The contract was signed by plaintiff and by defendant, but was not signed by Judson. Judson's name was signed to the contract by defendant in this manner: "F. E. Judson, by C. A. L." There is nothing else on the face of the contract, or in any way attached to it, to intimate that defendant was the attorney in fact or agent of Judson, and he does not assume to sign Judson's name as his attorney; and, indeed, it appears from other averments in the complaint that plaintiff did not rely upon any legal authority of defendant to bind Judson, but upon the probability that the latter would agree to whatever defendant might promise for him in the premises. No fraud is alleged against defendant. It is averred that Judson resided at the time in the eastern states, and that defendant in fact had no authority to bind Judson, who, it is to be inferred from the complaint, although not directly averred, has repudiated the contract. It is further averred that plain-

Cal. Rep. 26-28 P.—43

tiff tendered to defendant the sum of \$875, being one-half of said \$1,750 mentioned in the contract, and offered to grant him the undivided one-half of said land in Placer county, or, if defendant preferred, the one-half of said land in severalty; and thereupon plaintiff demanded of defendant that he convey to plaintiff the undivided one-half of said lot of land in Sacramento, and tendered him a conveyance thereof, and demanded that he execute the same, but that the defendant refused to execute the deed to plaintiff of said undivided one-half, or of any interest in said lot in Sacramento. The prayer is that defendant be adjudged to convey to plaintiff said undivided one-half of said lot in Sacramento, upon the payment to plaintiff of said \$875, and his execution of a deed to the one-half of said land in Placer county.

The case at bar cannot be distinguished in principle from *Jackson v. Torrence*, 88 Cal. 521, 28 Pac. Rep. 695. In that case Torrence and wife signed a written contract to convey certain land in which the wife had a separate interest. The wife afterwards repudiated the contract, and, as she had not acknowledged it, she could not be compelled, under the statute, to perform it. It was then sought to compel the husband to convey his interest in the property, on receipt of his proportion of the agreed price; but it was held that this could not be done. It is true that in *Jackson v. Torrence* the parties were husband and wife, and this court in its opinion in that case very naturally notices some of the peculiar results which would follow a specific performance by the husband, as, for instance, that the wife would be left a tenant in common with strangers. But the ground upon which the decision rested was that to force such a specific performance upon W. H. Torrence would be to compel him "to perform a contract which he never made or intended to make." This court there says: "The only contract he executed, or intended to execute, was a contract in which his wife was to join, for the conveyance of the whole property for a round sum. Until the contract was completed by the accession of his wife, there was no contract of which there could be any breach or failure to perform." And so in the case at bar. To compel defendant to convey an undivided half of the Sacramento lot would be to force him "to perform a contract which he never made, or intended to make." He did not contract to convey his half of the lot, thus making plaintiff and Judson co-tenants thereof, or to take in exchange an undivided half of the Placer county land, and half of the \$1,750, thus becoming a tenant in common with plaintiff. The reasons why he might not want so to do may not be so striking as in the case of Torrence and wife; but the principle to be applied is the same. The contract upon its face clearly means that defendant and Judson were to convey the whole of their land in exchange for the whole of plaintiff's land, together with the whole of a certain named sum of money; and, if such contract cannot be specifically enforced as

written, then it cannot be so enforced at all. We think, therefore, that the demurrer was properly sustained.

There is also a claim in the complaint, not separately stated, in which it is averred that, by reason of "the breach of covenant to convey on the part of the defendant hereinbefore set out, and of his failure to specifically perform the same," plaintiff has sustained damages in the sum of \$3,000, for which he also prays judgment. But, waiving respondent's point that such a cause of action could not be joined with the other, and that it should have been specifically stated, we do not see how, upon the averments in this complaint, appellant could recover damages because respondent did not do what he was not legally liable to do. The question whether, with proper averments, defendant could be held in damages in an action based upon some such ground as deceit or fraud, does not here arise.

Judgment affirmed.

I concur: DE HAVEN, J.

BEATTY, C. J., (*concurring*.) The decision in *Jackson v. Torrence* does not, in my opinion, apply to the facts of this case, but I concur in the judgment on the ground that Lovell's contract to convey his interest in the Sacramento lot cannot be enforced, except upon condition of giving him what he bargained for, viz., a half interest, undivided, in the Placer land, with Judson for co-tenant. He did not agree to take such interest with plaintiff as co-tenant, nor did he agree to take a divided half of the land in severalty. He has never been offered, and he cannot get, what he agreed to take. Therefore he cannot be compelled to convey; and, for the same reason, he is not liable in damages unless, as suggested by Justice McFARLAND, for fraud or deceit.

91 Cal. 510

Ex parte SAM WAH. (No. 20,882.)

(Supreme Court of California. Oct. 3, 1891.)

TAXATION—OBSTRUCTING COLLECTION.

Pen. Code Cal. § 428, which provides that every person who obstructs or hinders any public officer from collecting taxes "in which the people of this state are interested" is guilty of a misdemeanor, does not apply to the act of obstructing a town officer in the collection of a town tax.

In bank. Original proceedings in *habeas corpus* by Sam Wah against C. W. Rogers, sheriff of Contra Costa county. On *ex parte* hearing, petition was dismissed.

Smith & Murasky, for petitioner.

DE HAVEN, J. The petitioner was convicted in a justice's court of Contra Costa county of the alleged offense of hindering and obstructing the town marshal of the town of Martinez, in that county, in the collection of certain street poll-taxes of and in that town. The alleged obstruction consisted in petitioner's refusal to give his true name to the officer when requested to do so. It is claimed that this act was a violation of section 428 of the Penal Code, which reads as follows "Every

person who willfully obstructs or hinders any public officer from collecting any revenue, taxes, or other sums of money in which the people of this state are interested, and which such officer is by law empowered to collect, is guilty of a misdemeanor." It appears that Martinez is a town of the sixth class, and by section 862 of the municipal corporation bill, approved March 13, 1883, towns of that class are given power "to impose on and collect from any male inhabitant, between the ages of twenty-one and sixty years, an annual street poll-tax, not exceeding two dollars," and are also authorized to levy and collect a property tax for street work and other municipal purposes. It is very clear to us that the money levied and collected under this grant of power belongs to the municipality, and not to the state, and that, therefore, section 428 of the Penal Code has no application to the charge made against the petitioner. It is true that such taxes are held in trust by the municipal corporation, and are to be expended only for public purposes; but the trust is for the immediate benefit of the inhabitants within the corporate limits, although incidentally the people of the state who may have occasion to come within such limits may also share in such benefits. It is, under existing laws, left entirely to the option of towns of the class to which Martinez belongs whether any street poll-tax shall be imposed upon their inhabitants, and such taxes, when collected, belong in the municipal treasury, and are to be expended only by the town, and the people of the state do not have any interest therein, within the meaning of section 428 of the Penal Code. That this section does not apply to the collection of a municipal tax is also apparent from other sections of the chapter in which it is found. Section 424, relating to embezzlement or other misuse of public moneys, or falsification of accounts by public officers, is made expressly to apply to city, town, and district officers. Under section 425, every officer charged with the receipt or disbursement of "public moneys," who fails to keep and pay the same in the manner provided by law, is guilty of a felony; and the succeeding section defines the phrase "public moneys," as used in the two preceding sections, to include, among other things, "all moneys belonging to the state, or any city, county, town, or district therein." In view of the care taken to specifically define general words in the preceding sections so as to include public moneys of towns and cities, it becomes plain that the language of section 428 of the Penal Code, which makes it an offense to obstruct an officer in the collection of "any revenue, taxes, or other sums of money in which the people of the state are interested," was not intended by the legislature to apply to the act of obstructing a town officer in the collection of a town tax. It follows that the petitioner is entitled to be discharged. So ordered.

We concur: BEATTY, C. J.; HARRISON, J.; SHARPSTEIN, J.; PATERSON, J.

(91 Cal. 535)

PEOPLE ex rel. ATTORNEY GENERAL v. WALLACE. (No. 14,766.)

(Supreme Court of California. Oct. 6, 1891.)

COURTS—JURISDICTION—SEAM CONTROVERSY.

Where an application to the supreme court of California for a writ of review is made merely to test the validity of the grand jury, and presents no real controversy between the parties to the record, the court will not take cognizance of it.

In bank. Application by attorney general against Wallace for a writ of review. Application dismissed.

Atty. Gen. Hart, for petitioner. Creed Haymond and W. H. L. Barnes, for respondent.

PER CURIAM. The court is unanimously of the opinion that this is not a case which the court can entertain in the shape in which it is presented. When the question of the legality of this grand jury arises in a real controversy between parties opposed in interest, the court will decide it as promptly as it can. This case does not present a real controversy. It is a made-up case, in which the parties to the record are not opposed in interest. It is simply a submission of a series of questions which numbers of people undoubtedly have a curiosity or a desire to have decided by this court, but is not a case of which the court can take cognizance. The court cannot sit here to answer questions proposed by anybody. We decide real controversies. If the grand jury is an illegal body, there are various regular ways of presenting the question, but it cannot be presented in this way. The application is dismissed.

(91 Cal. 512)

WORLEY v. NETHERCOTT. (No. 14,236.)

(Supreme Court of California. Oct. 5, 1891.)

VENDOR AND VENDEE—FAILURE OF TITLE—REMEDY OF VENDEE.

A vendee, who goes into possession of land under a contract of sale, is not entitled, on the vendor's failure or inability to convey a perfect title as agreed, to retain both the land and the purchase money until such a title be offered him, but his remedy is to rescind and restore the possession; and in that case he can recover the money already paid, together with the value of his improvements, less a reasonable rental during the time of his occupancy.

Commissioners' decision. Department 1. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Ejectment by W. H. Worley against Robert Nethercott. There was a judgment for defendant, and plaintiff appeals. Reversed.

John F. Ellison, for appellant. Wm. Nagle, for respondent.

BELCHER, C. In January, 1889, the plaintiff was residing upon and claiming to own certain real property in the town of Red Bluff, Tehama county. On the 26th of that month plaintiff verbally agreed to sell the real property and some personal property to the defendant for the sum of \$1,800, and to let him take immediate possession thereof. Plaintiff was to give a warranty deed of the real property, conveying a good and perfect title thereto, and defendant was to pay \$1,000 cash, and

give his note for \$800, bearing interest at the rate of 10 per cent. per annum, but it was not stated how long the note might run. Defendant paid \$10 to bind the bargain, and asked plaintiff if he had a good title to the property, and the latter replied that he thought he had; that he had a warranty deed of it. Defendant asked for an abstract of the title, and plaintiff agreed to furnish one. On the 29th of the month defendant took possession, and about that time the abstract was made out and put in the hands of Mr. Ellison, an attorney at law. On the 4th of February the parties met, and went to Mr. Ellison's office, and defendant testified: "When I entered Mr. Ellison's office, knowing that he had the abstract, I said to him, 'As an attorney, can you say that the title is perfect?' He said, 'No, I can't.' He said, 'I have looked over it, and I can't say that it is perfect.' A few days later the parties again met, and plaintiff testified: "I went to him and told him I was going away, and I wanted to settle it up one way or another. He wanted to know what I wanted to do, and I asked him if he was satisfied with the title, and he said he wasn't. Then I told him we would say quits. He said he had been out considerable in moving down there, and would be in moving away. I asked him how much, and he said about \$20. I told him I would pay it, and he would give up possession. He said he didn't care to do it." Defendant then proposed to retain possession of the property, and to make some improvements upon it, and plaintiff agreed that he might make improvements costing from \$100 to \$150. Before the end of February plaintiff went to the mountains, and he did not return till some time in August. During his absence defendant made improvements on the property, costing, as he testified, \$388.21, besides his own work, which he estimated to be worth \$125. The matter remaining unsettled, plaintiff in October executed a warranty deed of the property, and on the 2d of November tendered it to the defendant, and demanded of him payment of the balance of the purchase money, namely, \$1,870. The defendant refused to accept the deed or to pay the money, but he on the same day tendered and asked plaintiff to execute a warranty deed for an undivided one-half of the property, and in connection therewith offered to pay him \$1,075, for the real and personal property. The plaintiff refused to execute this deed or to accept the payment as offered. The plaintiff then served on defendant a notice reading as follows: "Mr. Robert Nethercott—Dear Sir: Having refused to pay me the contract price for the land hereinafter described, I hereby notify you that the contract of sale for said lots is hereby rescinded. I hereby offer to pay you for any improvements you have made upon said property the amount they have cost you, upon being satisfied of the true amount, and also the \$10 you paid thereon, with legal interest, deducting therefrom the rent of said premises during the time you have occupied them; and I hereby demand that you leave said premises, and surrender up to me the possession

thereof. [Then follows a description of the property.] [Signed] W. H. WORLEY." Possession was not surrendered, and the plaintiff brought this action of ejectment to recover the same. The defendant answered denying all the averments of the complaint, and, for a second defense, setting up the contract of sale and plaintiff's failure and inability to convey a good and perfect title, and his own readiness and ability to perform his part of the contract on receiving a conveyance of such title. The court below gave judgment for the defendant, from which, and from an order denying him a new trial, the plaintiff appeals.

It appears from the evidence that the plaintiff did not have a perfect title to the whole of the property which he agreed to sell; and it is claimed for respondent that under such circumstances he was not obliged to accept plaintiff's deed or to pay the purchase money, but that he could retain both the land and money until a perfect title should be offered him. We do not think this position can be maintained. In *Gates v. McLean*, 70 Cal. 42, 11 Pac. Rep. 489, the action was brought to recover the possession of certain land which the plaintiff had contracted to sell to the defendant, and the court, on page 50, 70 Cal., and page 492, 11 Pac. Rep., said: "Even where the contract provides for the vendee taking possession, the remedy of the purchaser, where the title of the vendor fails, or he is unable to make conveyance as stipulated in the contract, is to rescind the contract, or offer to, and to restore the possession, in which case he may recover the purchase money advanced and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably have been worth. If, on the other hand, the purchaser chooses not to rescind, but to retain possession under the contract, he can do so only on the condition that he pays the purchase money and interest according to the contract. In the latter case, it is considered that he is willing to receive such title as the vendor is able to give, and is content with the personal responsibility of the vendor upon his covenants." In *Rhorer v. Billa*, 83 Cal. 54, 23 Pac. Rep. 274, the court said: "A purchaser cannot remain in possession of lands under a contract, and at the same time refuse to pay the purchase price. If the title fails, or the vendor refuses to convey, an action on the covenants of his deed or contract will give him all the relief to which he is entitled." It is urged for respondent that what is said in the above quotation from *Gates v. McLean* was not necessary to the decision of that case, and was merely *obiter dictum*; and that it was not a correct statement of the law, and ought not to be followed. We cannot assent to the conclusion reached by counsel. In our opinion, the law was correctly declared, whether what was said was necessary to the decision of that case or not. To hold otherwise would in many cases work very great injustice. It follows, in our opinion, that the findings and judgment were erroneous, and that they ought not to be permitted to stand.

We advise, therefore, that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: FITZGERALD, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

91 Cal. 449

PACIFIC RY. CO. et al. v. WADE, Judge.
(No. 14,593.)

(Supreme Court of California. Sept. 30, 1891.)

STREET RAILWAYS—RIGHT TO USE EACH OTHER'S TRACKS—COMPENSATION—PROCEDURE.

Since Civil Code Cal. § 499, provides that two lines of street railway under different managements may use the same street for the distance of five blocks, each paying an equal portion for the construction of the road used by them jointly, a street-railway company, on receiving a franchise, has an absolute right to use so much of the tracks of another company, and does not thereby take the property of the other company, so that the laws relating to ascertaining the compensation to be paid on taking property under the right of eminent domain do not apply; and where the property of the first company is in the hands of the court through its receiver, the court may, on application of the second company, without the intervention of a jury, determine the amount of one-half the cost of constructing so much of the road as is sought to be used jointly, and allow such use on payment of the same.

In bank. Application for an alternative writ of prohibition by the Pacific Railway Company, whose road is in the hands of a receiver, to prevent the court which appointed the receiver from allowing the Los Angeles Consolidated Electric Railway Company to use part of petitioner's road, and from determining the amount to be paid petitioner for such use. Application denied, and alternative writ discharged.

S. C. Hubbell, (Houghton, Silent & Campbell, of counsel,) for petitioner. *John D. Pope and Chapman & Hendrick*, (Dom & Dom, S. C. Denson, and W. S. Goodfellow, of counsel,) for respondent.

PATERSON, J. The Pacific Railway Company is the owner of a street railroad, operated by means of a wire cable, for the carriage of persons in the city of Los Angeles. On January 20, 1891, Edward W. Russell commenced an action against said company, its stockholders, and a large number of creditors, alleging, among other matters, that he was a judgment creditor, that the company was indebted in large sums to divers persons, without means or revenue to pay the same, except by the operation of its railroad system, and the proceeds thereof were wholly insufficient; that suits had been brought and many attachment suits would follow, unless steps be taken to prevent the same, and the operation of the road would be suspended; that to protect all parties a receiver was necessary; wherefore plaintiff prayed for the appointment of a receiver, to take charge of and control the property of said company, and, if necessary, to sell the same for the payment of the debts. On the day the complaint was filed J. F.

Crank was appointed receiver, with directions to take charge of the street railways owned by and under the control of the Pacific Railway Company, together with all its real and personal property, and to manage and conduct the business thereof, and from time to time render his accounts. Crank qualified and took possession, and has ever since continued to operate the road under the order of the court. On January 28, 1891, the Los Angeles Consolidated Electric Railway Company presented to the superior court a petition in said cause, setting forth that the petitioner had entered upon the construction of its line of road, as authorized by certain ordinances, and in the further prosecution of its work it was necessary that it should intersect the tracks of the Pacific Railway Company, and run along the same for a distance of three blocks; and praying an order authorizing it to operate over and on said tracks for said distance, and directing the receiver to grant all necessary facilities therefor, and for a further order fixing the amount of compensation which petitioner should pay for the right to use the tracks as aforesaid. At the time fixed for hearing, the petitioners herein appeared, and objected to any proceedings being taken, on the ground that the court had no authority to grant the relief asked. The court overruled the objection, and decided that it had jurisdiction to determine the amount of damages which would be occasioned by making the connections referred to in the petition, and continued the matter for hearing to July 16, 1891. Thereupon petitioners applied to this court for an alternative writ of prohibition, which was granted. In response to the order to show cause why he should not be restrained from any further proceedings in said matter the judge filed an answer, admitting the facts stated, and alleging that the order appointing the receiver was made on motion of the plaintiff in the action, and with the consent of the defendants therein; that on February 13, 1891, the plaintiff Russell filed a petition setting forth that there was some doubt whether the order appointing the receiver was sufficient of itself to vest in him the title to the property, especially the real property, so as to enable him to exercise all the powers and perform all the duties which the exigencies of the case might require, and asking for an order directing the Pacific Railway Company to assign its property to the receiver; that the order was made as prayed for, with the consent of the Pacific Railway Company.

Section 499 of the Civil Code provides that "two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the track and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively." The petitioner contends that, as the ordinances granting the franchises do not provide how compensation shall be ascer-

tained, the electric company must proceed under the provisions of subdivision 6 of section 465, Civil Code. That section is a part of the chapter on the enumeration of the powers of every railroad corporation, and provides that "every corporation whose railroad is, or shall be hereafter, intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersection and connections, and grant facilities therefor and, if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of such crossings, intersections, and connections, the same shall be ascertained and determined as is provided in title 7, part 3, Code of Civil Procedure." But title 7, pt. 3, prescribes rules for the assessment of compensation and damages (section 1248, Code Civil Proc.) inconsistent with the measure of compensation established by section 499, Civil Code, and the latter must control, as it relates particularly to street railroads. What counsel for the petitioner means to claim, doubtless, is that the procedure prescribed by title 7 must be followed; that there must be an effort to agree with the cable company as to the amount to be paid; and, upon disagreement, an action against the receiver in the manner and form required by the title on eminent domain, including a trial by jury, if the defendant insist upon it.

The question to be determined is simply whether the court, which, through its receiver, has the custody and control of the insolvent corporation's property, has the power to determine the compensation, viz., one-half of the cost of the construction of the tracks and appurtenances used by the companies jointly, or whether the electric company must treat with the cable company, and, upon failure to agree as to the amount to be paid, bring an action therefor against the receiver, with the permission of the court. There are none of the elements of an ordinary condemnation proceeding involved in the litigation. There is no private property to be taken for public use,—no occasion to exercise the right of eminent domain. The cable company did not acquire by the grant of its franchise any proprietary interest in the street. There can be no private property in a street, except the fee of the owner, which is held subject to the easement as long as the public continue to use the street as a highway. "The maintenance of horse railroads and running of cars upon the public streets of the city of San Francisco, designed for the carriage of passengers, is a mere special mode of using the highway, nothing more. The right to maintain such a railroad does not exclude the public from the use of the street." *Market St. R. Co. v. Central R. Co.*, 51 Cal. 586. The franchise of the cable company gave it no exclusive use of that portion of the street upon which its road was constructed. It gave to the company the right to construct its road in such a place and manner as not to interfere with the use of the street by the public. The material placed in the street, it is true, is still the property of the cable company; but it was placed where it is

with full knowledge on the part of the company that the latter would have no exclusive right to its use, so long as it should remain in the street. The right of the public to drive vehicles over and upon its road, and the right of the mayor and council to grant to another street-car company a franchise to connect with its track, and to use the same for a distance not exceeding five blocks, entered into its contract with the city as fully, under the provisions of section 499, Civil Code, then in force, as if the condition had been expressly stated in the grant; and, as the cable company took its franchise with the understanding—in effect an express stipulation—that any other company authorized by the mayor and council might use the track jointly with itself, it cannot now be heard to say that such a taking is without its consent, and is a taking of private property for public use, which can be done only by proceedings under the statute relating to eminent domain. The grant to the cable company was made to facilitate, not to abridge, the public use of the street; and, the subsequent franchise having been granted to the electric company in accordance with the provisions of the statute, it cannot be said to be a taking of the property of the cable company for any higher or different purpose than that to which it had already been devoted. Civil Code, §§ 497-499; Railway Co. v. Baldwin, 57 Cal. 178; Jersey City & H. H. Ry. Co. v. Jersey City & B. Ry. Co., 21 N. J. Eq. 556; Kinsman St. Ry. Co. v. Broadway, etc., Ry. Co., 36 Ohio St. 239; Railway Co. v. Kerr, 45 Barb. 138; People v. Kerr, 37 Barb. 357; Chicago, etc., R. Co. v. Dunbar, 100 Ill. 138; St. Louis Ry. Co. v. Southern R. Co., 15 S. W. Rep. 1013, 16 S. W. Rep. 960.

If it be true that the grant of the franchise to the electric company gave to it an absolute right, under the statute, (section 499, Civil Code,) to use the tracks of the cable company upon payment of one-half of the cost of construction of the tracks and appurtenances used jointly by the companies, and that there is no question as to the right of eminent domain involved in the matter before us, the question whether the respondent has the right to fix the amount of damages or compensation to be paid by the electric company is a simple one. The property of the cable company is *in custodia legis*. The receiver is indifferent between the parties. His possession is the possession of the court for the benefit of all persons interested, whether named as parties in the action or not, and it cannot be disturbed without the consent of the court. No one claiming a right paramount to that of the receiver can assert it in any action without the permission of the court. No sale can take place, no debt can be paid, no contract can be made, which does not receive the sanction of the court. The receiver, with permission of the court, can do anything the corporation might have done to make the most out of the assets in his hands. It has been held that in a proper case he may settle disputed claims and compromise with debtors of the corporation; he may lease other lines of rail-

ways, and operate them; he may complete the construction of unfinished lines of railroad, and negotiate loans for the payment of the cost thereof; he may enter into contracts by the terms of which the owners of other roads may use the road under his control at given rates; and he may charge the rates agreed upon prior to his appointment between the company he represents and another railroad corporation. Code Civil Proc. § 568; Beach, Rec. §§ 268, 335, 360, 406; Gluck & B. Rec. pp. 106, 107, 131, 140, 241; In re New Jersey, etc., Ry. Co., 29 N. J. Eq. 67; Wiswall v. Sampson, 14 How. 65; Gibert v. Railway Co., 33 Grat. 556. In the case before us the electric company has the right, under the statute and its franchise, to use the tracks of the cable company upon payment of one-half of the cost of the construction thereof. The only question to be determined is, what is the amount due the cable company? It is like any other claim for damages or compensation in favor of a corporation whose property is in the hands of a receiver, and is to be determined in the same way. As to the manner of determining such question there has been some discordance of opinion among judges, but, so far as we have investigated the subject, there has been no conflict of decision. The cases all hold that, while it is, under certain circumstances, proper to direct the prosecution of an action at law against the receiver to determine the amount of compensation or damages to be paid, the better and more commonly recognized practice is to apply for relief by petition to the court in which the receiver is acting. The rule applies to all cases of damages to person or property, whether occasioned prior or subsequent to the appointment of the receiver. In re Merrill, 54 Vt. 200; Redf. Ry. (6th Ed.) 378, 380; High, Rec. §§ 139, 255, 256; Mills, Em. Dom. § 75; Olyphant v. Steel Co., 28 Fed. Rep. 729; Central Trust Co. v. Wabash, etc., Ry. Co., Id. 871. Any party deeming himself aggrieved by the judgment of the court has the right of appeal. First Nat. Bank v. Barnum Wire, etc., Works, 58 Mich. 315, 25 N. W. Rep. 202; Porter v. Kingman, 126 Mass. 141. It is claimed by petitioner that this view of the case deprives it of the right to have the question of compensation determined by a jury,—a right which is guaranteed to it by the constitution, art. 1, § 14; but, as it is not a case involving the exercise of the right of eminent domain,—is not a taking of private property for public use,—the contention is without merit. In Barton v. Barbour, 104 U. S. 126, the court, speaking to a similar objection, said: "The argument is much pressed that, by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation or the receiver will be deprived of a trial by jury. This, it is said, is depriving the party of a constitutional right. * * * But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial

of questions involved in it belongs to the court itself, no matter what may be its importance or complexity. * * * The new and changed condition of things which is presented by the insolvency of such a corporation as a railroad company has rendered necessary the exercise of large and modified forms of control over its property by the courts charged with the settlement of its affairs and the disposition of its assets." See, also, *Joy v. City of St. Louis*, 138 U. S. 1, 11 Sup. Ct. Rep. 243.

It is unnecessary, in view of what has been said, to consider the questions raised by respondent, whether prohibition is the proper remedy, and whether the petitioner is competent to invoke it. The question as to whether the East & West Los Angeles Railroad Company sold or leased its tracks on Washington street to the petitioner is a matter to be considered by the superior court on the hearing of the petition, and is not the subject of inquiry in this proceeding. *Bishop v. Superior Court*, 87 Cal. 238, 25 Pac. Rep. 435. The respondent declares in his answer filed herein that "neither the said court nor the judge thereof ruled or intimated that he had any power to fix the compensation or authorize the connection with any railway tracks not belonging to the Pacific Railway Company, or any property not in the custody and control of the court." The application is denied, and the alternative writ is discharged.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.

91 Cal. 523

MADDUX v. BROWN. (No. 14,260.)

(Supreme Court of California. Oct. 8, 1891.)

SWAMP LANDS—PURCHASE—CERTIFICATE OF SURVEY—ACTUAL SETTLERS.

1. Pol. Code Cal. § 3445, provides that persons desiring to purchase swamp lands which have been segregated by authority of the United States, but which have not been sectionized by the same authority, must apply to the county surveyor to have the desired lands surveyed, and that a certificate of such survey must be attached to the affidavit of purchase. *Held*, that an application for purchase, not accompanied by such certificate, is invalid.

2. Where a survey was made on plaintiff's application, defendant cannot defeat plaintiff's claim by making application for the land based on a certificate of such survey, issued prior to a certificate furnished to plaintiff.

3. Where defendant's application was based on a survey made by one not the county surveyor, and whose only authority for making the survey was given him by the county surveyor in his private capacity, the application is void.

4. Where plaintiff removed his family from the land temporarily only, and because of the ill health of a member thereof, such removal is no evidence that he was not an actual settler.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by R. A. Maddux against R. A. Brown. Judgment for defendant. Plaintiff appeals. Reversed.

Lambertson & Taylor, for appellant. *W. B. Wallace*, for respondent.

TEMPLE, C. Contest for the right to purchase swamp land which is suitable

for cultivation. The land was segregated by the authority of the United States in 1855, but has not been sectionized. The court found in favor of defendant, and that plaintiff was not an actual settler. The appeal is from the judgment and from an order refusing a new trial. Objection was made to certain rulings admitting evidence, and that the evidence was insufficient to sustain the findings.

The defendant made two applications to purchase. One was based upon an alleged survey by one Newman, who assumed to act as deputy of the county surveyor of Tulare county. His appointment as such deputy was by a certificate signed by one A. T. Fowler, as a private individual, and not in his official capacity. It did not purport to appoint Newman as deputy surveyor of Tulare county, but that "I, A. T. Fowler, by these presents do make, constitute, and appoint H. Newman my true and lawful deputy to survey lot 7," etc. The certificate of appointment, with the official oath of Newman, was not filed until after the survey. Evidently Newman was not a deputy surveyor. Conceding that a deputy might be *de facto* such, though not *de jure*, there is still no evidence tending to establish such fact. The appointment being void, the application founded upon the survey was void, and the finding relating to that issue is unsupported by competent evidence.

Plaintiff and defendant each claimed to be living on the land, and had both previously applied to purchase, and had had a similar contest over the right. The court in that contest had found that neither was entitled to purchase. There seems to have been something of a scramble to make the new application. Defendant states that he applied to the county surveyor for a survey; that, being busy, at the request of defendant, he deputized Newman, with the result appearing above. Plaintiff also applied to the county surveyor for a survey, and this the surveyor made in person, July 30, 1889. Apparently defendant received from the county surveyor a certified copy of the record of this survey before it was furnished to plaintiff, for whom it was made, and on August 1, 1889, made out another application to purchase, which was filed in the office of the surveyor general, August 2, 1889. Plaintiff made out his new application to purchase, August 3, 1889, which was filed with the surveyor general, August 6, 1889. It would not do to hold, as a general proposition, that a person desiring to purchase swamp lands which have been segregated as such, but not sectionized by the officers of the United States, finding on record in the office of the county surveyor a survey of the same, can get a certified copy of such record, to be used in lieu of a certificate of a survey made at his request, as required by section 3445¹ of the Political Code.

¹Section 3445 provides that persons desiring to purchase swamp lands which have been segregated by authority of the United States, but which have not been sectionized by the same authority, must apply to the county surveyor to have the desired land surveyed, and that a certificate of such survey must be attached to the affidavit of purchase of the land.

Such survey may not have been made with a view to a compliance with this statute, and unless made for one desiring to purchase, and for that purpose, the county surveyor cannot be said to have been acting as an officer of the state land-office. *People v. Cowell*, 60 Cal. 400.

The second application of Brown is not accompanied by a certificate of a survey of the land he desired to purchase, made upon his application by the county surveyor, as required by section 3445 of the Political Code.

The court held that plaintiff was not an actual settler upon the land. We fail to discover any evidence in the record which would justify that finding, unless the court found that plaintiff's evidence was unworthy of credence. If he did remove his family from the place temporarily only, and because it became necessary for the health of a member of the family, such fact did not even tend to show that he was not an actual settler. We think the judgment and order should be reversed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

91 Cal. 391

HAYES et al. v. FINE et al. (No. 13,865.)
(Supreme Court of California. Sept. 26, 1891.)

APPLICATION FOR NEW TRIAL — GROUNDS OF MOTION — STATUTE OF FRAUDS — INTEREST IN WATER-RIGHT.

1. Where a complaint for diverting water alleges that plaintiffs extended and enlarged a certain ditch upon the express agreement that they should have an interest therein in common with the owners, and there is no exception to a finding that there was no such agreement, an order granting a new trial upon the ground that such a finding is not justified by the evidence should be reversed, where all the other findings are justified by the evidence and sustain the judgment of themselves.

2. A contention that the labor of plaintiffs had destroyed the ditch described in the complaint, and created a new one, in which they were entitled to share as tenants in common by virtue of their labor, is irreconcilably inconsistent with the allegation that they became tenants in common by express agreement.

3. An agreement for an undivided interest in a ditch and water-right is within Code Civil Proc. §§ 1971, 1973, declaring that no estate or interest in real estate, other than leaseholds for a year, can be created except by conveyance in writing, and that no agreements other than those which are to be performed within a year can be proved except by some note or memorandum in writing.

Commissioners' decision. In bank. Appeal from superior court, Tulare county
WILLIAM W. CROSS, Judge.

Brown & Daggett, for appellants. *N. O. Bradley* and *Oregon Sanders*, for respondents.

VANCLIEF, C. Action to enjoin defendants from diverting water from plaintiff's lands. Judgment for defendants. A new trial was granted, and this appeal is from the order granting a new trial.

The material allegations of the complaint are substantially as follows: That

in 1869 the defendants constructed a water-ditch, known as the "Rhodes and Fine Ditch," conveying water from Tule river a distance of about five miles, and being of a average width of eight feet on the bottom, and one foot deep; and acquired rights to water therefor, to be used in irrigating their lands. That, in 1876, the plaintiffs and others, "with the knowledge and consent of the then owners of said ditch and water-rights, [defendants and their grantors.] and with the assistance of said owners, enlarged said ditch to a width of about sixteen feet on the bottom for a distance of about one mile from the head thereof, and deepened said ditch about one foot for a distance of about four miles from the lower end thereof; and about the same time, and with the knowledge and consent of the then owners of said ditch and water-rights, and with their co-operation and assistance, extended said ditch about three miles further in a westerly direction from the mouth thereof; said extension being about three feet deep and eight feet wide on the bottom. That at the time said ditch was so extended and enlarged it was expressly understood and agreed by and between the then said owners thereof" and the plaintiffs or their grantors that the latter named parties, "in consideration of such work of extending and enlarging such ditch as aforesaid, should become tenants in common with said owners in said ditch and extension, and of all water-rights and privileges thereto pertaining." That the plaintiffs and defendants are now, and for more than 10 years last past have been, the owners and in the possession and use of said ditch and the extension thereof and the water flowing therein, as tenants in common; the plaintiffs being the owners of the undivided twenty-nine sixty-sixths thereof. That during said period of 10 years the plaintiffs, with their said co-tenants, have kept said ditch in repair, "and have used the waters thereof for the purpose of irrigating their lands situated along the line of said extension, * * * and have used their said share of the waters * * * openly, peaceably, continuously, notoriously, uninterruptedly, and under a claim of right, and adversely to the defendants and to the whole world, and with the knowledge and acquiescence of said defendants, except when prevented by the wrongful and unlawful acts of said defendants, as hereinafter stated." That in March, 1888, the defendants wrongfully diverted the water from the ditch at a point about one and a half miles above the head of said extension to such a degree that plaintiffs were, and ever since have been, thereby deprived of the use of their portion of the water; and that defendants threaten and intend to continue such diversion, etc. In their answer the defendants deny all the material allegations of the complaint, except that they constructed the original ditch, and continued to own and use it from 1869 until 1876; and they aver that they still own the whole of it, and are entitled to the use thereof. They deny that they co-operated or assisted in the construction of any extension of

the original ditch, and disclaim any interest in such extension, which, they say, is improperly called an extension of their ditch, and which they allege was constructed by plaintiffs and others for the purpose of taking up and utilizing surplus water which defendants permitted to flow from the lower end of their ditch, and there abandoned. They admit that, as a neighborly accommodation, they have permitted the water to flow through their ditch to that of the plaintiffs (the alleged extension) whenever they (defendants) had no use for it. They do not deny the diversion of the water from their own ditch, as alleged in the complaint, but claim they were entitled so to divert it. The court filed written findings upon all the issues in favor of the defendants, and rendered judgment accordingly.

The plaintiffs moved for a new trial, upon the grounds that certain findings of fact are not justified by the evidence, and that errors in law were committed at the trial. In granting the motion for a new trial, the court rendered an opinion stating the ground upon which the motion was granted. The following is a copy of the opinion as brought here with the record, and certified to be correct by counsel for both parties: "Plaintiffs' motion for a new trial of the above-entitled action came on regularly to be heard this day upon the judgment roll and the bill of exceptions settled and filed in said cause, upon the ground stated in their notice of intention to move for a new trial, and it satisfactorily appearing to the court that the evidence introduced and received upon the trial of said cause is insufficient to sustain the second finding of facts heretofore found and filed by this court in this particular only, to-wit: Said evidence shows that the Rhodes and Fine ditch, mentioned in the pleadings in said cause and in said findings of fact, was during the winter of 1876, by work then done thereon by the persons named in the complaint, other than the defendants, from the head thereof down to the upper end of Kellogg cut, being a distance of about one mile and a half, was enlarged from an average width of eight feet on the bottom to an average width of twelve feet on the bottom, and below the head of said Kellogg cut said ditch was not and has not been materially enlarged by artificial means; that such enlargement was not done by or under any contract or agreement, and defendants did not assist therein, but they assisted in building and putting in the head-gate at that time; that, with the exception above stated, said findings of fact are correct, and this court is satisfied with its conclusions of law heretofore filed,—and this court being of the opinion that said erroneous finding will prevent the plaintiffs being able to present to an appellate court the points of law on which they rely with the same force and effect as if said findings of fact had been originally correct in the above particulars; and this court being of the opinion that, after judgment entered, and on motion for a new trial, it has no jurisdiction or authority to amend its findings: Now, therefore, because of the

insufficiency of the evidence to support said finding as above specified, and for that reason only, it is ordered that said plaintiffs' motion for a new trial of said cause be, and the same is hereby, granted."

In view of certain undenied averments in the complaint, and findings of fact which are not excepted to, the ground upon which the new trial was granted is immaterial. The averments in the complaint that defendants constructed the ditch and acquired the water-rights in 1869, and owned both the ditch and water-rights until 1876, not being denied, but emphatically affirmed, by the defendants, must have been taken as conclusively true for all purposes of the trial. From these averments it necessarily follows that defendants by some means must have parted with whatever interest or estate the plaintiffs acquired in the ditch and water-rights in 1876 or thereafter; and, consistently with this, it is averred in the complaint that the plaintiffs acquired their alleged interest as tenants in common with the plaintiffs by express agreement with defendants, the consideration for which, moving from plaintiffs to defendants, is alleged to have been work done by plaintiffs on the ditch in extending and enlarging it. The denial of this agreement by defendants raises the principal issue of fact in the case. If this issue has been properly decided in favor of the defendants, the plaintiffs are not entitled to any relief whatever in this action; for, without the alleged agreement, the mere fact that plaintiffs did more or less work on the ditch in extending and enlarging it, gave them no estate or interest, as tenants in common or otherwise, in the original ditch or water-rights owned by defendants in 1876. The only agreement that could be implied from the mere fact that plaintiffs did the work alleged, even at the request of defendants, would be that defendants were to pay for the work so much as it was reasonably worth. Upon this issue the finding of the court is: "That there never was, either in 1876 or at any time, any contract, agreement, or understanding by or between the then owners of said Rhodes and Fine ditch and said S. E. Dale, A. E. Scruggs, and J. Cattaneo, or either of them, that said ditch should be enlarged or extended, or that, in consideration of such enlargement and extension, or for any consideration, said Dale, Scruggs, and Cattaneo, or either of them, should become tenants in common with said owners, either in said ditch or extension, or in any water-rights or privileges belonging to said ditch." This finding is not excepted to on any ground. It follows that, unless the order granting a new trial can be justified on some other ground than that upon which it is based by the opinion of the learned judge of the court below, it should be reversed.

It is conceded by counsel for respondents that there was no express agreement by which plaintiffs were to have or to acquire any interest in the ditch or water-rights; and that whether or not their alleged labor on the ditch, with the knowledge and consent of defendants, implied an agreement that they should become

tenants in common, etc., is the vital question in the case. On page 3 of this brief counsel for respondents says: "The first point made for appellants is that 'the plaintiffs failed to prove that they had acquired any title to the ditch in controversy.' This is the vital question in this case. If the work of enlargement made by plaintiff S. E. Dale and others did not give them an interest in the ditch as now found, then plaintiffs have no interest in it." All the findings of fact, except the second, as to which the new trial was granted, are fully justified by the evidence, and sustain the judgment without aid from the second finding.

The issues of fact seem to have been thoroughly tried. The testimony of 17 witnesses on the part of the plaintiffs and 12 for the defendants occupy 250 pages of the transcript; and it seems extremely improbable that a materially different state of facts could be elicited by a new trial. Certainly the facts alleged in the complaint could not be disputed by plaintiffs, and there is no exception to the finding that there was no agreement that plaintiffs should have an interest in the ditch or water-rights, and no pretense that there was any such express agreement.

None of the errors in law specified in the bill of exceptions are well taken. The only one of them that can be said to be involved in any point urged here by appellant's counsel is that the court erred in deciding that the agreement alleged in the complaint, by which the plaintiffs were to acquire interests as tenants in common with defendants in the ditch and water-rights, is within the statute of frauds, and cannot be proved, except by some note or memorandum thereof in writing. In this there was no error, since the estate in the ditch and water-rights, the acquisition of which plaintiffs sought to prove, is other and greater than a leasehold for one year. It is absolute ownership of an undivided part of the ditch and water-right for the protection of which plaintiffs ask a perpetual injunction. That such an estate in the ditch and water-rights is real property, and that an agreement for a conveyance thereof is within the statute of frauds, there is no question in this state. Code Civil Proc. §§ 1971, 1973.¹ *Smith v. O'Hara*, 43 Cal. 371; *Bradley v. Harkness*, 26 Cal. 77; *Lower Kings R. W. D. Co. v. Kings River & F. C. Co.*, 60 Cal. 408; *Ang. Water-Courses*, §§ 168-171; *Washb. Easem.* pp. 23, 24; *Gould, Waters*, §§ 300, 321. After the court had ruled that the agreement

could not be proved by parol evidence, plaintiff's counsel asked and the court granted them leave to introduce evidence of the labor done by plaintiffs on the ditch, on the condition that they should afterwards connect it with written evidence of the agreement. On this condition, and without any apparent restriction, plaintiff not only gave evidence of the labor done on the ditch, but of all that was orally said by both parties in connection with that labor, yet failed to introduce or to offer any evidence, parol or written, tending to prove the express agreement alleged in their complaint. The evidence fails to show the amount or the proportion of the work done by the plaintiffs, or by either of them, but does show that a considerable portion of the work in repairing the ditch was done by persons who are not parties to the action, and who never claimed any interest in the ditch, but who were occasionally permitted by defendants to use portions of the surplus water. Counsel for respondents contends that the labor done by them and the defendants in enlarging the ditch destroyed the identity of the original ditch as described in the complaint, and created a new ditch, in which, by virtue of their labor, plaintiffs are entitled to share as tenants in common with defendants in the proportion that their labor bears to the whole labor of construction. To say nothing of the impracticability of ascertaining on this theory what proportion of the alleged new ditch they are entitled to, the theory itself is inconsistent with the complaint. The allegation in the complaint that plaintiffs should become tenants in common with the defendants in the ditch and water-rights by express agreement with the defendants—"the then owners"—in consideration of plaintiffs' labor, is irreconcilably inconsistent with the theory that they became such tenants in common by merely assisting in the labor of enlarging the ditch. Their allegation is, in effect, that they acquired such title as they claim by purchase from the defendants, for which purchase their labor was the consideration. They now ignore the purchase theory, and claim title to an undivided portion of the ditch, by virtue of having created it by the same labor that is alleged to have been the consideration for their purchase. Other apparently valid objections might be made to this unpleaded theory; but, for the purposes of this appeal, it is enough that the theory is inconsistent with plaintiffs' complaint.

It is further contended for respondents "that defendants are estopped from denying that plaintiffs have an interest in said ditch and water;" and also that plaintiffs acquired title by adverse user of the water for a period of more than five years. Conceding that the facts necessary to sustain these points are averred in the complaint, (which is doubtful,) such facts are negatived by findings of the court which are fully justified by the evidence.

As the record discloses no ground upon which a new trial should have been granted, nor any reason for believing that a new trial can justly result in a judg-

¹ Code Civil Proc. Cal. § 1971, provides that no estate or interest in real property other than leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared otherwise than by operation of law, or a conveyance or other instrument in writing. Section 1973 provides that an agreement which by its terms is not to be performed within a year is invalid unless the same or some memorandum thereof be in writing, and that proof of such an agreement cannot be received without the writing or secondary evidence of its contents.

ment more favorable to the plaintiffs, I think the order granting a new trial should be reversed.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order granting a new trial is reversed.

91 Cal. 492

WATKINS v. BRYANT *et al.* (No. 14,288.)

(Supreme Court of California. Oct. 3, 1891.)

SETTING ASIDE DECREE—LIMITATION OF ACTIONS—PARTIES.

1. An action to set aside, on the ground of fraud, a decree annulling a deed of trust as fraudulent against the grantor's creditors, if not brought within three years (the statutory period) after rendition of the decree, is barred, and the complaint is demurrable, where plaintiff merely avers that he had no notice of the fraud until after rendition of the decree, without alleging that he discovered the fraud within three years before commencing the suit.

2. A decree annulling, on the ground of fraud, a deed of trust given to secure creditors not named therein, rendered on default of the trustee in an action in which he was a party, is not absolutely void as to creditors who were not made parties to the action, since they were represented therein by the trustee.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Action by C. G. Watkins against M. E. Bryant and others, on behalf of plaintiff and other creditors of said Bryant, to set aside a decree annulling a deed of trust, and to enforce the trust. Judgment for defendants. Plaintiff appeals. Affirmed.

John B. Hall, for appellant. Baldwin & Campbell and Wilkes & Rutherford, for respondent.

VANCLIEF, C. A demurrer to the complaint in this action was sustained. The plaintiff declined to amend his complaint, and thereupon judgment was rendered in favor of defendants. This appeal by the plaintiff from the judgment presents the general question whether or not the demurrer should have been sustained. The complaint purports to be on behalf of the plaintiff and of such other creditors of Bryant as will come in and contribute to the expenses of the suit, and occupies 27 pages of the transcript; but the following is deemed a sufficient statement of its substance for all purposes of the appeal: On January 17, 1885, the defendant Bryant made two promissory notes to the defendant Tully, each for the sum of \$500, payable six months after date, with interest at the rate of 1½ per cent. per month. On the same day Tully indorsed the notes to plaintiff in these words: "Without recourse on me, John Tully." The consideration for the notes was a loan from plaintiff to Bryant of \$1,000, which loan had been negotiated by Tully, and the notes were intended to secure payment of that loan. At the time of making these notes, "Bryant was indebted, and still is indebted in divers sums, to many persons besides this plaintiff," amounting to not less than \$35,000, upon promissory notes made by him to Tully, and indorsed by

Tully to them. On October 1, 1885, for the purpose of securing the payment of the above-mentioned promissory notes, and like notes to be thereafter made, the whole not to exceed \$60,000, Bryant executed to John S. Davis a deed of trust of some 11 tracts of land, described by legal subdivisions, and 3 town lots, aggregating about 1,400 acres. John Tully was named as party of the third part to this deed of trust, and authorized to pay the taxes on the land, and to prosecute or defend suits considered necessary to protect the trust and the title to the land. In case of Bryant's default in making payment of any of the debts secured, the trustee, Davis, is authorized to sell so much of the trust property as necessary, and to apply the proceeds to the payment of such debts. None of the creditors intended to be secured, except Davis and Tully, are named in the trust-deed. Davis expressly accepted the trust. The execution of this instrument was acknowledged by Bryant on the day of its date, and on the 9th day of October, 1885, was duly recorded. On February 16, 1886, Bryant, in accordance with the provisions of the Civil Code, made an assignment of all his property, subject to the trust created by the above instrument, to the defendants Wilhoit, Langford, and Bemert, for the benefit of his creditors; and on the same day filed in the office of the county recorder an inventory of his estate, including all the land described in the above deed of trust, and wherein the defendants Davis and Tully are listed as creditors for large sums of money, and wherein it is stated that said lands were incumbered by certain mortgages other than the deed of trust, and also that one quarter section of the land was exempt from execution, it being his homestead. On April 6, 1886, the assignees, Wilhoit, Langford, and Bemert, commenced an action against Davis, Tully, and Bryant to set aside and annul the deed of trust above set out, on the ground of fraud, and that it was never delivered to Davis by authority of Bryant, the acts constituting the fraud being stated in the complaint, and being sufficient to warrant the relief asked, as against Davis, Bryant, and Tully, the only defendants in that action; but neither the plaintiff in this action, nor any other creditor of Bryant, except Davis and Tully, were made parties to that action. The defendants were duly served with summons, but made default, and on May 27, 1886, judgment was rendered against them to the effect that the trust-deed of October 1, 1885, was fraudulent, and a cloud upon the title of the plaintiffs in that action, as assignees for the creditors of Bryant; that it be annulled and canceled; that Davis convey the lands to the assignees by good and sufficient deed, etc., within five days; and that Davis and Tully be perpetually enjoined from asserting any title to or claim upon the lands under or by virtue of the deed of trust.

After stating the above facts, the complaint herein proceeds to allege that the material averments of the complaint of the assignees against Davis, Tully, and Bryant, as to fraud and non-delivery of

the deed of trust, were false and known to be so by Davis, Tully, and Bryant at the time they made default, and at the times their default was entered, and judgment taken against them; that the plaintiff herein, Watkins, "had no notice or knowledge either of said suit or the decree therein, until after the rendition of said decree;" and that divers other creditors of Bryant, designated in said deed of trust, had no notice or knowledge of said suit and decree before the rendition and entry of said decree. The complaint herein further states that Davis has not done any act or thing in or towards the execution of his trust, or the performance of his duty under the deed of trust, and "at all times since the date of said decree has refused to perform the said trust, and the duties connected therewith." That in the years 1886 and 1887 several portions of the land described in the deed of trust were sold under several decrees of court, to satisfy mortgages thereon prior to the deed of trust, and that such mortgages were satisfied from the proceeds of such sales. From the description of the land thus sold by legal subdivisions, it must amount to over 600 acres. That an additional one-quarter section of said land (the homestead quarter) was sold under a foreclosure decree on April 27, 1889, to satisfy a mortgage executed by Bryant to defendant Wilkes on February 17, 1886, to secure a note of that date for \$9,033, but that the consideration for this note consisted solely of the sum of several smaller notes, made before the date of the deed of trust, and which were secured by the deed of trust. This quarter section was purchased by Wilkes at the foreclosure sale for the sum required to satisfy the foreclosure decree, viz., \$12,125.58. Wilkes had notice of the deed of trust at and before the time he took the mortgage thus foreclosed. That, on one of the foreclosure sales above mentioned, the sheriff reported a surplus of \$1,533.40, which was ordered by the court to be paid to the assignees without notice to Davis or to plaintiff. That the assignees sold the right of redemption to another tract which had been sold at a foreclosure sale for \$9,000, which they now hold in their hands. That the assignees redeemed from the foreclosure sale the three town lots, and resold them at a profit of \$1,000; and, further, that they have received and hold in their hands, of the income, rents, and profits derived from said lands since February 16, 1886, (date of assignment,) about \$10,000. That Bryant has no property subject to the payment of his debts except the real estate described in the deed of trust, and plaintiff has no security except his lien upon that property or its proceeds by virtue of the deed of trust. That no part of his debt has been paid, and that the trust remains unexecuted, and will so continue unless enforced by decree of this court. It is also alleged in the complaint that on July 13, 1889, the plaintiff commenced an action against Bryant on the two promissory notes indorsed to him by Tully, as above stated, and obtained a personal judgment against Bryant for the sum of \$2,342.60, including

interest and costs. The prayer of the complaint is that it may be adjudged that the decree canceling and annulling the deed of trust "is in fraud of the rights of, and of no effect as against, this plaintiff; that the several tracts, pieces, or parcels of land in said deed described, * * * not heretofore sold for the satisfaction of the mortgages to which said deed of trust refers, together with the said surplus," viz., the sums alleged to be in the hands of the assignees, Wilhoit, Langford, and Bemert, amounting to about \$21,000, be adjudged subject to said deed of trust; that the last above described lands be sold under the direction of the court, and the proceeds thereof, together with the money in the hands of the assignees, Wilhoit, Langford, and Bemert, "be applied to the payment in full, or the payment ratably, of this plaintiff's said demands, with those of all other creditors meant, mentioned, or intended to be secured by the said deed of trust, and who may come in and contribute to the expenses of this suit; and that the mortgage of February 17, 1886, to the defendant Wilkes, was subsequent and subordinate to the equitable lien of this plaintiff," and for such other relief, etc. To this complaint the defendants Wilhoit, Langford, and Bemert, the assignees, and Wilkes demurred, on the general ground that it does not state facts sufficient to constitute a cause of action, and on the special grounds of non-joinder of parties plaintiff and defendant, misjoinder of causes of action, and that the causes of action appear to be barred by sections 318, 337, 333, and 343 of the Code of Civil Procedure. The other defendants, Bryant, Davis, and Tully, made default.

1. Conceding, without deciding, that there is not a misjoinder of causes of action, still the complaint shows that the judgment of May 27, 1886, canceling the deed of trust, ordering Davis, the trustee, to convey the trust property to the assignees, Wilhoit, Langford, and Bemert, and perpetually enjoining Davis and Tully from asserting any title or claim to the trust property, is an insuperable obstacle to any relief sought in this action so long as that judgment remains in force; and this is the theory of the complaint, which charges that that judgment was obtained by and through the fraudulent default of Davis and Tully, and, on the ground of this alleged fraud, seeks to annul it in this action. The prayer of the complaint is that it be adjudged that that judgment "is in fraud of, and of no effect against, this plaintiff." If this relief cannot be granted, it is plain that the deed of trust, canceled by that judgment, cannot be enforced in this action, either through the instrumentality of Davis, or any trustee appointed by the court. Therefore, if it appears that the cause of action to annul and set aside that judgment on the ground of fraud is barred by the statute of limitations, the plaintiff can have no cause of action upon the canceled deed of trust, and the demurrer to the complaint was properly sustained on that ground. This action was not commenced within three years after the rendition of the judgment annulling the deed of trust, and, conse-

quently, not within three years after the acts constituting the fraud by which that judgment is alleged to have been obtained; yet there is no averment in the complaint that the fraud was first discovered within three years next before the commencement of this action, (*People v. Blankenship*, 52 Cal. 610,) the only averment in this respect being that the plaintiff "had no notice or knowledge either of said suit or the decree therein until after the rendition of said decree."

It is contended, however, for the appellant, that the decree canceling the deed of trust, etc., was absolutely void as to this plaintiff, as he was not a party to the suit in which that decree was rendered. The answer to this is that, although not named as a party to that action, he was represented therein by the trustee, Davis. Says Mr. Pomeroy, in his work on Remedial and Remedial Rights, (section 357:) "There is a broad distinction between the case of an action brought in opposition to the trust, to set aside the deed or other instrument by which it was created, and to procure it to be declared a nullity, and that of an action brought in furtherance of the trust, to enforce its provisions, to establish it as valid, or to procure it to be wound up and settled. In the first case the suit may be maintained without the presence of the beneficiaries, since the trustees represent them all, and defend them." This, as an exception to the general rule, applies to the case at bar, and seems to be well supported by the following and other authorities: *Kerrison v. Stewart*, 98 U. S. 155; *Corcoran v. Canal Co.*, 94 U. S. 744; *Rand v. Walker*, 117 U. S. 344, 6 Sup. Ct. Rep. 769; *Richter v. Jerome*, 123 U. S. 246, 8 Sup. Ct. Rep. 106; *Railroad Co. v. Doll*, 124 U. S. 171, 8 Sup. Ct. Rep. 433; *Rogers v. Rogers*, 3 Paige, 378; *Winslow v. Railroad Co.*, 4 Minn. 313, (Gil. 230;) *Paul v. Fulton*, 25 Mo. 156; *Bank v. Suydam*, 6 How. Pr. 379; *Mitchell v. Bank*, 7 Minn. 252, (Gil. 192;) *Jonas, Mortg.* 1399; *Code Civil Proc.* § 369; *Chew v. Brumagen*, 13 Wall. 497. Admitting that, in a case of this kind, the beneficiaries would have been proper parties, and also that, in case they were not made parties, it was the duty of the trustee to notify them of the pendency of the suit, yet it does not appear in this case that either the trustee, Davis, or the plaintiffs in the action to annul the trust-deed, knew, or had the means of ascertaining, who were the beneficiaries. The deed of trust did not name nor describe any one of them. Nor did it classify them by reference to any common attribute, except that the class consisted of all such persons as held negotiable notes made by Bryant to Tully, and indorsed by the latter, amounting to not more than \$60,000, and which may have been made either before or after the execution of the deed of trust. There may have been 30, 60, or 120 holders of these notes, and many of the notes may have been negotiated after their indorsement by Tully. Suppose a holder of any one of these notes, made after the execution of the deed of trust, had been found, how could it have been ascertained whether his note was within or in excess of the \$60,000 limit? Under these

circumstances, the application of the exceptional rule permitting the trustee to represent the holders of these notes is peculiarly appropriate. Besides, it seems at least doubtful whether or not the deed of trust was void for uncertainty as to the beneficiaries.

2. It is claimed by appellant that the court erred in refusing to give judgment against the defaulting defendants, Bryant, Davis, and Tully; but, inasmuch as the complaint shows that the deed of trust upon which the action was brought had been canceled, the plaintiff was not entitled to any relief against Davis or Tully. No personal judgment against Bryant on his promissory notes is asked; besides, such a judgment would have been superfluous, as plaintiff had obtained a personal judgment against Bryant on those notes in July, 1889.

As the foregoing considerations dispose of the case finally, it is not necessary to consider the point as to laches and equitable estoppel. I think the judgment should be affirmed.

WE CONCUR: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

91 Cal. 477

WIXON v. DEVINE. (No. 14,365.)

(*Supreme Court of California.* Oct. 2, 1891.)

PLEADING—AMENDMENT OF ANSWER—EVIDENCE.

1. In an action to determine plaintiff's rights in a water-course, he claimed title by actual appropriation in 1883. Defendant in his answer asked no affirmative relief, but, to defeat plaintiff's claim, set up a prior appropriation by himself in 1877, and also an adverse user for more than six years before commencement of the action. No other denial of plaintiff's claim was made. *Held*, that evidence on defendant's behalf that, in 1865, one under whom he claimed his land by mesne conveyances appropriated the waters, was properly excluded, as not within the issues raised by the pleadings.

2. Where evidence gotten into the case without objection is entirely without the issues raised by the pleadings, and it appears that the court expressly denied the right to amend so as to bring it within the issues, no issue will, on the principle of estoppel, be taken to have been raised by the introduction of evidence.

3. In an action to determine plaintiff's rights in a water-course, he claimed by actual appropriation. Defendant, to defeat his claim, merely set up prior appropriation by himself in 1877. After the taking of evidence at the trial had almost concluded, an amendment of the answer was offered alleging an appropriation in 1865 by one from whom defendant claimed title to his land by mesne conveyances. Facts similar to those in the proposed amendment had been pleaded by the same attorneys as a defense eight years before, in another suit between some of the same parties, litigating some of the same rights. Defendant could not have been misled by believing the evidence admissible under his original answer, and the amendment was contradictory to an admission in his answer. *Held*, that the court did not abuse its discretion in refusing to allow the amendment.

Department 1. Appeal from superior court, Sierra county; J. M. WALLING, Judge.

Action by J. S. Wixon against Thomas Devine to establish his rights in a certain

water-course. Judgment for plaintiff. Defendant appeals. Affirmed.

H. L. Gear and *F. R. Wehl*, for appellant.
T. L. Ford and *S. B. Davidson*, for respondent.

GAROUTTE, J. This is an action to determine the rights of the parties to the waters of Kentucky ravine and its east and west branches, located in Sierra county, Cal. The court adjudged the plaintiff to be entitled to 25 inches of the waters of said ravine under a 4-inch pressure. Defendant appeals from the judgment and order denying his motion for a new trial, and for grounds of reversal insists (1) that certain evidence offered was improperly rejected; (2) the court erred in refusing to allow the defendant to amend his answer during the progress of the trial. Plaintiff claimed title to these waters by actual appropriation in 1883. Defendant claimed no affirmative relief in his answer, but, for the purpose of defeating plaintiff's right, set up a prior appropriation of these waters by himself in 1877; and he also relied upon an adverse user for a period of more than six years before the commencement of this action. During the progress of the trial, while the defendant was presenting his evidence to the court, he offered to prove "a prior actual appropriation and diversion of all the waters of Kentucky ravine in the year 1865 by James Galloway; that he was the original claimant and possessor of the land described in the answer as the 'Doyle Ranch,' and that it was then known as the 'Galloway Ranch;' that said appropriation and diversion was made at a point above plaintiff's dam and ditch; that said waters, by actual use and enjoyment, were made an appurtenance to said ranch, and passed with the ranch by mesne conveyances to defendant," etc. An objection was sustained to the admission of the foregoing testimony, upon the ground that it was not within the issues made by the answer. Appellant insists that he was entitled to make such proof under the general issue. If his answer had contained a specific denial of plaintiff's right to the waters of the ravine, we are not prepared to say but that, under the following authorities, he would have been entitled to make the proof sought by virtue of such denial. *Marshall v. Shafter*, 32 Cal. 192; *Bruck v. Tucker*, 42 Cal. 346; *Daniels v. Henderson*, 49 Cal. 247; *Roberts v. Columbet*, 63 Cal. 25; *Hyde v. Mangan*, 88 Cal. 325, 26 Pac. Rep. 180, and cases there cited. But the record upon this appeal does not present the question to us for consideration. There is no specific denial of any material allegation of the complaint. The answer raises no "general issue" within the meaning of the statute and authorities. In his answer, defendant denies plaintiff's right to these waters, "except as hereinafter expressly stated." Again, he admits plaintiff's right, "subject to the prior right of defendant," specially referring to his right under acts of appropriation in 1877. In short, the answer confesses plaintiff's right, but seeks to avoid it by asserting a particular prior right in defendant. Under this condition of the pleadings the evi-

dence was properly rejected as not being within the issues made.

It appears that the witness Galloway, without objection, did testify generally to many of the facts encompassed in the proposed amendment to the answer, and appellant insists that such evidence was sufficient to defeat plaintiff's right of recovery, and that the court should have so found. It is unnecessary to enter into a detailed examination as to the sufficiency of this evidence in point of fact to defeat plaintiff's right of recovery. As we have already seen, such evidence was not only entirely without the issues as made by the pleadings, but the court expressly denied the right to amend so that this particular evidence might become germane by being brought within the issues as made by the amended pleading. Referring to this question in *Ortega v. Cordero*, 88 Cal. 227, 26 Pac. Rep. 80, the court said: "To justify this application of the principle of estoppel it should appear, from the record on appeal, among the other elements of an estoppel, that the issue was actually and intentionally tried by the introduction of pertinent evidence, and that the party against whom the estoppel is invoked consciously participated or acquiesced in such trial as if the issue had been made by the pleadings, and in such manner as may have induced the other party to believe that the issue had been properly made, or diverted his attention from the fact that it was not made by the pleadings." Applying the foregoing rule to the case at bar, it can hardly be contended that the evidence of Galloway and the acts and conduct of the parties created an issue as to the appropriation by Galloway of the waters of this ravine in 1865, and that the court was in error in not finding upon such issue.

It is insisted that the court erred in refusing to allow the proposed amendment to the answer. The amendment, in effect, was "that an actual appropriation and diversion of all the waters of Kentucky ravine was made by James Galloway, the original claimant and possessor of the tract of land owned by defendant, by means of a ditch constructed by said Galloway in 1865, at a point above where plaintiff's dam and ditch are now located, and the right to the waters of said ravine, by actual use and enjoyment, became appurtenant to said ranch for the irrigation thereof, and passed by conveyance to defendant herein." While the power of the court in granting amendments to pleadings should be freely and liberally exercised, in order that all the substantial merits of a cause may be reached and determined without unnecessary delay and in one suit, yet, when the court has exercised that power by granting or refusing an amendment to a pleading, such ruling is only subject to review by this court, when it is apparent that an abuse of discretion has occurred. From an examination of the record, it appears there are sufficient grounds to support the ruling of the court in the exercise of its discretion in denying this proposed amendment to the answer. We will not review all these grounds *in extenso*. It appears that the taking of evi-

idence at the trial had almost concluded at the time the proposed amendment was offered; that the same attorneys, in another suit between some of the same parties, in litigating some of the same rights here involved, eight years prior, pleaded as a defense in that suit facts very similar to those set out in the proposed amendment. Again, defendant could not have been misled by believing the evidence admissible under the allegations of his answer as it was framed; and also the proposed amendment was directly contradictory to an admission in the answer, to-wit: "That plaintiff had a right to twenty-five inches of the waters of Kentucky ravine, subject to defendant's right, by prior appropriation and diversion in 1877." As an additional ground to sustain the action of the lower court, we would say that while the amendment proposed shows that the location and diversion of the waters of the ravine occurred at a point above plaintiff's dam and ditch, yet the evidence offered to the court to support the amendment shows that, for the purposes for which the water could be claimed as appurtenant to defendant's ranch, it was taken from the ravine at a point below plaintiff's ditch and dam; and it must be conceded that the prior decisions of this case found in 67 Cal. 341, 7 Pac. Rep. 776, and 80 Cal. 385, 22 Pac. Rep. 224, when taken together, at least settle one principle of law as between these parties beyond doubt, and this is, that plaintiff has the first right to 25 inches of water at a point upon the ravine where his dam and ditch are located. If the defendant's evidence is too weak to support the pleading, it would be idle to allow the amendment. Several years ago, in writing an opinion in this case, (67 Cal. 345, 7 Pac. Rep. 776,) SEARLS, C., said: "There should be a limit to litigation." This cause has been dragging its slow length along the judicial highway for nearly a decade, and is now with us for the third time, and we think it in order to repeat the words of the learned commissioner, "There should be a limit to litigation;" and we believe, for the foregoing reasons given, the limit in this case has been reached. Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

(91 Cal. 526)

RUTLEDGE v. CRAWFORD. (No. 14,584.)

(Supreme Court of California. Oct. 8, 1891.)

ELECTIONS AND VOTERS—LEGALITY OF BALLOTS—ELECTION CONTEST—PLEADING.

1. The fact that on the back of a ballot, otherwise regular, is a faint type impression of the face of a similar ticket, caused by there having been too much ink on the type, or that there is a small piece of red sealing wax, or a stain, as from a drop of oil, does not, in the absence of evidence of unlawful intent in causing the impression, make the ballot illegal, within the meaning of Pol. Code Cal. §§ 1206, 1207, which provide that a ballot must be rejected if it bears on the outside any impression, device, color, or thing "designed" to distinguish it from other legal ballots, or "intended" to designate or impart knowledge of the person who voted it.

2. A ballot read: "18. Judge of the Superior Court, R. 19. Judge of the Superior Court, O.

20. State Senator, 10th District, H." The name H. was erased, and opposite, or in line with it, was written the name of respondent, who was a candidate for judge of the superior court. Held, that it was error to count the ballot for respondent, as candidate for judge.

3. Where the printed name of one candidate on a ballot is erased with an indelible pencil or with red ink, and the name of another written opposite with the same kind of pencil or ink, the ballot should be counted for the latter, under Pol. Code Cal. § 1204, providing that when one name has been erased on a ballot, and another substituted therefor, in any other manner than by the use of "a lead-pencil or common writing ink," the name erased must be counted; it being the intention of the legislature merely to prohibit erasures and substitutions in any other style or form, or with any different effect, than would be produced by the use of a lead-pencil or common writing ink.

4. If no name is substituted for a name erased on a ballot, the erased name must be counted, under the provisions of Pol. Code Cal. § 1204; such requirement of the statute not being unconstitutional as requiring an educational qualification for the voter, nor as requiring him to disclose the secrecy of his ballot, nor for any other reason.

5. In an action by a candidate to establish his right to an office to which the opposing candidate has been illegally declared elected, the complaint is not fatally defective in not alleging that plaintiff possesses the qualifications for the office; but, if it alleges that he is an elector, it shows his right to contest defendant's right to the office, and may be amended so as to allege that plaintiff is qualified to hold it.

In bank. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

Action by one Rutledge against one Crawford to contest defendant's right to an office. Judgment for defendant. Plaintiff appeals. Reversed.

A. P. Ware, (T. J. Geary, of counsel,) for appellant. C. S. Farvuar and J. A. Barham, for respondent.

DE HAVEN, J. The parties to this action were opposing candidates for the office of judge of the superior court of Sonoma county at the general election of 1890. The respondent, Crawford, received a certificate of election, and this is an action contesting his right thereto. As a result of the trial and recount in the superior court, it appearing that the defendant received one vote more than the plaintiff, the court, on motion of defendant, granted a nonsuit and dismissed the proceedings. The plaintiff appeals from this judgment, and claims that the court erred in counting certain ballots for the respondent, and in refusing to count others for the appellant.

1. Two ballots, regular on their face, and with the appellant's name printed thereon for judge of the superior court, were not counted by the court for the reason that there was on the back of each a faint type impression of a portion of the face of a similar ticket. The impression is known among printers as an "off-set," and, if there is too much ink upon the type used, is produced when one ticket is placed face downward upon the back of another, which has preceded it from the press. In our opinion the court erred in its refusal to count these ballots for appellant. Section 1206 of the Political Code provides: "When a ballot found in any ballot-box bears upon the outside thereof

any impression, device, color, or thing, or is folded in a manner, designed to distinguish such ballot from other legal ballots deposited therein, it must, with all its contents, be rejected." Prior to the adoption of the Code it was the usual practice to have the tickets of the different political parties of a different color or weight or size, so that an observer at the polls could see at a glance and detect which party ticket was deposited by the voter. It was to prevent this, and secure to the citizen absolute secrecy for his ballot, that the section above quoted, and others of the same Code, were enacted, prescribing for ballots uniformity of paper, color, and size; and, in order to justify the rejection of a ballot under this section, it must appear that such "impression, device, color, or thing," on the outside thereof, was intended to distinguish it from other legal ballots, (*Wyman v. Lemon*, 51 Cal. 273;) and the court is not authorized to find such design when it is just as reasonable to attribute the appearance of the ticket to accident as design. It is not doubted, as was argued here, that tickets may be marked as these were for the purpose of distinguishing them from other ballots, and to be furnished only to a certain class of voters. But in the absence of any proof tending to show this the presumption must be that such an impression was the result of accident, and not intended, and therefore within neither the letter nor spirit of this section, or section 1207 of the same Code, which provides that when a ballot bears upon it any impression, device, color, or thing intended to designate or impart knowledge of the person who voted it, it must be rejected.

2. What is said in the preceding paragraph will apply with equal force to the two ballots not counted for appellant, one of which had upon its back a very small piece of red sealing wax, and the other a small stain as if made by a drop of oil, or something of that nature. It is far more reasonable to suppose that the wax was accidentally placed upon the ticket by the officers of election in sealing the package in which it was returned than to believe that it was designedly placed there as a distinguishing mark before its deposit in the ballot-box; and, as to the other, the mark or discoloration is of that character that the most natural conclusion in relation to it is that it was due to some accidental cause, and was not intended to distinguish the ballot, or impart knowledge of the person who voted it.

3. The court erred in counting ballot marked "Exhibit 37" as a vote for the respondent. The ticket, so far as necessary to be set out, is as follows: "18. Judge of the Superior Court, Thomas Rutledge. 19. Judge of the Superior Court, J. W. Oates. 20. State Senator, Tenth District, Robert Howe,"—with the name Robert Howe erased, and that of the respondent written opposite, or in line with it. We do not see how this ticket can be read as a vote for respondent for the office of judge of the superior court. A ballot is to be construed as any other writing; and, while a resort to parol evidence of

extrinsic circumstances may be had for the purpose of interpreting what would otherwise be doubtful, it cannot be shown, by such or any evidence, that the intention of the voter was anything different from what plainly appears upon the face of the ballot. *People v. Seaman*, 5 Denio, 409. And, when the ballot intelligently shows that a particular person is voted for to fill a particular office, it cannot be counted differently because the court may believe that the voter made a mistake in preparing his ticket. Voting for a person to fill an office for which he is not a candidate may be the result of mistake, or it may be merely the frivolous exercise of the right of suffrage; but, no matter whether such action be attributed to folly or mistake, the ballot is the only expression of the voter's will, and it must be counted according to its legal effect. The intention of the voter as it appears upon the face of this ballot was to vote for respondent for state senator, and not for judge of the superior court, and it should be so counted.

4. Upon certain ballots the printed name of the respondent was erased with an indelible pencil, and the name of the appellant written opposite thereto with the same kind of pencil. The court refused to count the same for appellant, but did count such ballots as votes for respondent. The respondent insists that the rulings of the court in relation to the counting of these ballots are justified by section 1204 of the Political Code. That section declares: "When upon a ballot found in any ballot-box a name has been erased, and another substituted therefor, in any other manner than by the use of a lead-pencil or common writing ink, the substituted name must be rejected, and the name erased, if it can be ascertained from an inspection of the ballot, must be counted." There was evidence introduced tending to show that indelible pencils are not in fact lead-pencils, nor commonly known as such by merchants selling them. The question is thus presented, whether a voter must follow the very letter of this section of the Code in preparing his ticket, or have his vote for a particular candidate rejected. We think it very clear that such is not the purpose or the meaning of that section. The Code commissioners, in their note to this section, say: "This section is intended to prevent the use of nitrate of silver, or any other chemical substance which may be written over a name and not be distinguishable until time brings out the impression; also, to prevent the use of pasters, the use of which is subject to two objections: *First*, their liability to come off; *second*, their liability to be fraudulently taken off." This object of the law—and it is apparent that the legislature could have had no other in view—is attained if the erasure and substitution are made in such a manner as to present at the time and retain the same general appearance as if made by a lead-pencil or common writing ink. This section, in declaring that erasures and change of names shall not be made "in any other manner than by the use of a lead-pencil or common writing ink," really means that the

erasure and substitution shall not be made in any other style or form, or with any different effect than would be produced by the use of a lead-pencil or common writing ink. The law looks only to matters of substance, and does not waste its energy in pursuit of shadows; and, if the appearance of having been made with a lead-pencil is produced by the use of an indelible pencil, there is a substantial compliance with the statute, although such a pencil may not, strictly speaking, be known as a lead-pencil. Any other construction would sacrifice the spirit and reason of the law to the mere letter; and yet it is one of the great maxims of interpretation to keep always in view the general scope, object, and purpose of the law, rather than its mere letter. "He who considers merely the letter of an instrument goes but skin deep into its meaning." Broom, Leg. Max. 811. "A rigid and literal meaning would, in many cases, defeat the very object of the statute, and would exemplify the maxim that 'the letter killeth, while the spirit keepeth alive.' Every statute ought to be expounded, not according to the letter, but according to the meaning. * * * And the intention is to govern, although such construction may not in all respects agree with the letter of the statute." Tracy v. Railroad Co., 38 N. Y. 437.

5. The court erred in counting ballot No. 8 as a vote for the respondent. Upon this ticket the printed name of respondent was erased with red ink, and that of J. W. Oates written in place of it, also in red ink. The respondent contends that red ink is not common ink, within the meaning of the statute. We cannot say that it is not such ink, and it is clear its use is not within the mischief which it is the object of the law to prevent.

6. Upon several ballots the name of appellant was erased, and no name substituted therefor, and the words "No vote" were not written after the name erased. These were counted as votes for appellant. The court was correct in this ruling. The statute, in order to guard against fraudulent erasures, has provided this as the only way in which the voter can manifest his intention to erase a name, when he does not substitute another, and under such circumstances the erasure is not complete unless followed by these words. There is no valid constitutional objection to this requirement. It does not prescribe any educational qualification for the voter, nor require him to disclose the secrecy of his ballot, as contended.

7. The statement or complaint filed herein by appellant does not allege that he possesses the qualifications required by the constitution of this state to make him eligible to the office of judge of the superior court, and it is claimed by respondent that the statement is therefore fatally defective, and for that reason the judgment dismissing the proceeding should be affirmed. It is true that in order to entitle appellant to the full relief asked for, to-wit, a judgment that he was elected instead of respondent, the statement should have alleged facts showing that he was eligible. But the statement

is not fatally defective, if it states a case for any relief. *Perri v. Beaumont*, (Cal.) 27 Pac. Rep. 584, pt. 10. And we think that it does. It is alleged that the appellant is an elector of the county of Sonoma; and, such being the case, he was authorized to commence this proceeding, and upon proof of facts alleged in his statement was entitled to a judgment annulling the election of defendant. As the case must be remanded for a new trial, the court below should, upon application, permit the appellant to amend his statement so as to allege the necessary facts showing his eligibility to be chosen to the office, the election to which is in controversy here. *Perri v. Beaumont*, supra. Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; SHARPSTEIN, J.; PATERSON, J.

(91 Cal. 470)

PEOPLE v. BIBBY. (No. 20,798.)

(Supreme Court of California. Oct. 1, 1891.)

FORGERY—ORDER OF SCHOOL TRUSTEES—INDICTMENT—EVIDENCE—COMPARISON OF HANDWRITING.

1. Pen. Code Cal. § 470, declaring guilty of forgery "every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any * * * writing obligatory, * * * bond, * * * check, draft, bill of exchange, contract, promissory note, due-bill for the payment of money, * * * county order or warrant, or request for the payment of money," is sufficiently broad in its terms to include the offense of forging an order of the trustees of a school-district upon the county superintendent of schools for a requisition upon the auditor for a county warrant.

2. Pol. Code Cal. § 1543, subd. 3, relating to the duties of the county superintendent of schools, provides that "no requisition shall be drawn up on the order of the board of trustees against the county fund of any district, except for teachers' salaries, unless such order is accompanied by an itemized bill." Held that, in a prosecution for the forgery of such an order, it was unnecessary to allege or prove the accompaniment of an itemized bill. *People v. Todd*, 77 Cal. 404, 19 Pac. Rep. 883, followed. *People v. Tomlinson*, 35 Cal. 503, distinguished.

3. The order being valid upon its face, and subscribed with the names of B. and C., "school trustees of Pleasant Valley district," it was unnecessary to allege the existence of the district, or the fact that the persons named were trustees of that district.

4. In a prosecution for forging a money order other instruments of the same general character, proven in defendant's handwriting, are admissible before the jury for the purpose of comparison, and also, it would seem, for the purpose of showing his guilty knowledge in passing the said order.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Hinds & Merriam, for appellant. *Atty. Gen. Hart and Geo. E. Church*, for the People.

GAROUTTE, J. This is an appeal from a judgment of conviction for the crime of forgery, and also from the order denying defendant's motion for a new trial. The defendant was the deputy county superintendent of schools of Fresno county, and

the information charged him with forging, uttering, and passing with intent to defraud the First National Bank of Fresno a certain writing of the following tenor, to-wit: "Order upon the county superintendent of public schools No. 3, Oct. 23, 1889. The county superintendent of public schools of Fresno county will draw a requisition on the county auditor against the county school fund in favor of B. N. Colwell, or order, to the amount of one hundred and twenty dollars, for material and work from ——— to ———, during the present school year, in the Pleasant Valley school-district; monthly salary of teacher, \$——. T. T. BARNES, J. W. Cox, School Trustees of Pleasant Valley District. \$120." The defendant filed a demurrer to the information upon various grounds, which demurrer was overruled. He also moved an arrest of judgment for the same reasons, which motion was denied.

Section 470 of the Penal Code¹ is very broad in its terms, and, we think, sufficiently broad to include the offense of forging an order of the trustees of a school-district upon the county superintendent of schools for a requisition upon the auditor for a county warrant.

Appellant contends that the order is illegal upon its face, for the reason that it does not appear by the information that it was accompanied by a bill of items; that such an order is worthless paper, save for the purpose of forming a foundation upon which to issue a requisition to the auditor for a county warrant; and that no requisition could issue in this case, because the order was not accompanied by a bill of items. Section 1543, subd. 3, of the Political Code, in stating the duties of the county superintendent of schools, provides, among other things: "No requisition shall be drawn unless the money is in the fund to pay it; and no requisition shall be drawn upon the order of the board of trustees against the county fund of any district, except for teachers' salaries, unless such order is accompanied by an itemized bill showing the separate items, and the price of each, in payment for which the order is drawn," etc. Appellant's contention cannot be supported. The case at bar, in this regard, bears a striking likeness to the Hawkeswood Case, East, P. C. 955. Hawkeswood was indicted for forgery of a bill of exchange, and objection was taken that, not being stamped, it was no bill of exchange, and that this was an objection apparent upon the face of it, and no person could be deceived or defrauded thereby, unless he took it without looking at it, which would be gross negligence. The court held that, as the stamp act was merely a revenue law, and did not purport in any way to alter the crime of forgery, and as the false instrument had the semblance of a bill of exchange, and

was negotiated by the person as such, the conviction was proper. The judgment being respited, all the judges were of opinion that "the prisoner was properly convicted; for the stamp act, in saying that a bill without a stamp shall not be pleaded or given in evidence, or available in law or equity, means only that it shall not be made use of to recover the debt; and, besides, the holder might get it stamped after it was made." In *Com. v. Costello*, 120 Mass. 367, where the defendant was charged with forging a bond to be used for the purpose of dissolving an attachment, the court held that an instrument falsely made with intent to defraud is a forgery, although, if it had been genuine, other steps must have been taken before the instrument would have been perfected, and those steps were not taken. It was contended that the bond was worthless upon its face, as it was not approved, and until approved could not serve to dissolve the attachment. The court said: "It is true that the false making of an instrument merely frivolous, or one which upon its face is clearly void, is not forgery, because from its character it could not have operated to defraud, or been intended for that purpose; but if the instrument is one made with intent to defraud, although before it can have effect other steps must be taken or other proceedings had upon the basis of it, then the false making is a forgery, notwithstanding such steps may never have been taken or proceedings had." In *Ex parte Finley*, 66 Cal. 264, 5 Pac. Rep. 222, the defendant was convicted of forging a decree of divorce; and it was held that the information was sufficient without averring a marriage of the parties to the forced decree, as "on its face the writing shows that it may have been used to consummate a fraud." In *People v. Todd*, 77 Cal. 464, 19 Pac. Rep. 883, where the defendant was charged with forging a will, upon demurrer it was held not necessary to state in the indictment that the testator had property that might have been affected by the will. Appellant's views are not supported by the case of *People v. Tomlinson*, 35 Cal. 503. The instrument alleged in that case to have been forged was a *nudum pactum*, and so appeared by its face; and, after citing many authorities, the court said: "These cases establish the doctrine that, to constitute forgery, the forged instrument must be one which, if genuine, may injure another." We think the present cause comes clearly within the foregoing rule. The order is a valid order upon its face. It fulfills every requirement of the law; and, if genuine, would have a distinct, well-defined value. A bill of items is no part of the order, and is only required to accompany the order when a requisition is demanded from the county superintendent. At that time, and only at that time, has the bill of items any value. The county superintendent of schools is prohibited from drawing the requisition until there is money in the fund of the school district. The inhibition in this regard is equally as strict as in drawing a requisition without the bill of items; yet, could it be contended that the order of the board of trustees could not be forged

¹ Pen. Code Cal. § 470, provides that "every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any * * * writing obligatory, * * * bond, * * * check, draft, bill of exchange, contract, promissory note, due-bill for the payment of money, * * * county order or warrant, or request for the payment of money, * * * is guilty of forgery."

because there was no money in the fund? This order is certainly as valid, for the purposes of a forgery, as a bill of exchange without a stamp, or a bond without the approval of the court. If genuine, it has a value; for, if issued by the board of trustees to the proper party without an accompanying bill of items, no reason is apparent why legal proceedings could not be taken by the holder of the order to compel the furnishing of a proper bill by such board in case of a refusal. We conclude that the information was sufficient, the instrument being a valid instrument upon its face, and that it was neither necessary to allege nor prove that a bill of items accompanied the order.

The instrument being valid upon its face, it was not necessary to allege the existence of "Pleasant Valley school-district," or the fact that T. T. Barnes and J. W. Cox were trustees of such district. In *Ex parte Finley*, supra, the court declared that "the rule does not require that the indictment or information shall contain an express allegation of the existence of every fact, the existence of which is assumed in the forged instrument. It is enough if the writing is one which, if genuine, might apparently be of legal efficacy." Appellant complains of the conduct of the prosecution in introducing before the jury other orders of the same general character as the one set out in the information herein. Having proven these orders to be in the handwriting of defendant, there was no valid objection to their admissibility as evidence to be considered by the jury for the purpose of determining by comparison whether the defendant was the forger of the order recited in the information. While those orders may have, unfortunately to the defendant, demonstrated his ample capabilities in the line of the creation of spurious paper, still that fact afforded no legal objection to their admissibility as evidence of his handwriting; and it was upon this ground alone, as stated by the district attorney at the time, that they were offered and received in evidence. Aside from the foregoing reasons, it would seem the evidence of the forgery of other orders of the same character, and at about the same time, by appellant, in the line of a systematic course of conduct, would be admissible for the purpose of showing the guilty knowledge of appellant when he passed the forged order relied upon in this case. *People v. Frank*, 28 Cal. 515; *People v. Gray*, 66 Cal. 270, 5 Pac. Rep. 240; 2 Russ. (Crimes, p. 404. Let the judgment and order be affirmed.

WE CONCUR: DE HAVEN, J.; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

3 Cal. Unrep. 432

FIRST NAT. BANK OF SANTA MONICA v.
KOWALSKY. (No. 14,765.)

(Supreme Court of California. Oct. 12, 1891.)

APPEAL—FAILURE TO FILE TRANSCRIPT.

An appeal will be dismissed after the time allowed for filing a transcript has elapsed, if no transcript has been filed, nor attempt made to prepare one, and no sufficient excuse is offered for failure to do so.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by the First National Bank of Santa Monica against H. I. Kowalsky Judgment for plaintiff. Defendant appeals. Appeal dismissed.

A. Courey & Miller, for appellant. H. I. Kowalsky for respondent.

PER CURIAM. Motion to dismiss appeal. The transcript has not been filed, nor have any steps been taken to prepare a transcript, although the time allowed for that purpose has fully elapsed, and no sufficient excuse is offered for failure to comply with the rule. Appeal dismissed.

91 Cal. 538

PALMDALE IRRIGATION DIST. et al. v

RATHKE et al. (No. 14,700.)

(Supreme Court of California. Oct. 14, 1891.)

APPEAL—NOT TAKEN IN TIME—ESTOPPEL.

1. The running of the 10 days within which an appeal must be taken under Act Cal. March 16, 1889, (St. 1889, p. 213, § 6,) in a proceeding to determine the validity of the organization of an irrigation district, and orders for the issuance of bonds, is not affected by the fact that appellants had no notice of the entry of the judgment, since the statute does not require such notice.

2. A stipulation by respondents on appeal that the transcript is correct, and that the appeal has been duly perfected, means nothing more than that the papers in the transcript are correct copies of the record, and that a sufficient undertaking was properly filed by appellants, and does not estop them to ask dismissal of the appeal if it was not taken in time.

In bank. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Proceeding by the Palmdale Irrigation District and others against one Rathke and others. Judgment for defendants. Plaintiffs appeal. Appeal dismissed.

R. H. F. Varlet and Spencer G. Millard, for appellants. Louis Luckel, for respondents.

PER CURIAM. Motion to dismiss appeal. This is a proceeding under the act of March 16, 1889, (St. 1889, p. 212,) to determine the validity of the organization of an irrigation district, and certain orders for the issuance of bonds, etc. Judgment in favor of the defendants was entered August 8, 1891, and notice of appeal therefrom was filed and served August 21, following. But the statute (section 6, p. 213) requires that the appeal in this class of cases shall be taken within 10 days after entry of judgment, and therefore this appeal was not taken in time. Appellants admit that it appears from the record that the appeal was not taken within 10 days after the entry of judgment, but they show by affidavit that they had no notice of such entry until a day or two before the appeal was taken. The statute, however, does not require notice of the entry of judgment in order to set the time for appeal running.

Appellants also claim that respondents are estopped by their stipulation to the correctness of the transcript, and that the appeal has been duly perfected. But

we understand this stipulation to mean nothing more than that the papers in the transcript are correct copies of the record, and that a sufficient undertaking was properly filed within five days after notice of appeal. In that sense it does not conflict with the proof afforded by the record that the appeal was not taken in time to confer jurisdiction upon this court to review the judgment of the superior court. Appeal dismissed.

(91 Cal. 540)

McTARNAHAN et al. v. PIKE. (No. 14,269.)
(Supreme Court of California. Oct. 15, 1891.)

EJECTMENT—PLEADING—TITLE—ENTRY OF MINERAL LAND.

1. In ejectment, a portion of defendant's answer, alleging that plaintiffs' claim of title arises from a pretended entry of the land in the United States land-office as a placer mining claim, and a certificate of purchase based thereon, which they induced the local land-office to issue to them by means of false affidavits and testimony, and that defendant had filed a protest against the allowance of the entry in the general land-office, is properly stricken out, since it does not show that any question as to the validity of plaintiffs' entry and purchase was then pending and undecided in the land-office.

2. The fact that the secretary of the interior directed a hearing and determination of defendant's protest against plaintiffs' entry nine months after the trial of the ejectment action does not render the striking out of the above portion of the answer erroneous, since the action of the secretary of the interior could not have been anticipated by the court.

3. Where plaintiffs in ejectment claim title under an entry and purchase of the land from the federal government, defendant cannot set up title in himself by adverse possession before plaintiffs' entry, since the statute of limitations does not run against the federal government.

4. Where defendant in ejectment for mineral land alleges, and introduces evidence to prove, adverse possession by himself at the time of its location by plaintiffs, who claimed under a certificate of purchase from the federal government pursuant to such location, a failure by the court to find as to such adverse possession is reversible error, since Code Civil Proc. Cal. § 1925, which renders a certificate of purchase or location of land, issued by the federal government, *prima facie* evidence of title in the holder, also provides that such evidence may be overcome by proof that at the time of the location the land was in the adverse possession of the adverse party.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Ejectment by Carroll McTarnahan and others against Ward C. Pike. From a judgment in plaintiffs' favor defendant appeals. Reversed.

F. P. Otis, for appellant. *F. W. Street*, for respondents.

In bank.

BEATTY, C. J. Justice GAROUTTE is, for the purpose of a decision herein, assigned to department 2.

VANCLIFF, C. The action is ejectment to recover possession of 50 acres of placer mineral land, described by legal subdivisions of section 22, township 2, range 14 N., M. D. M., and called "Crystal Spring Gravel Placer Mine," situate in the county of Tuolumne. The complaint is in the

most general form, alleging, in substance, that plaintiffs own the demanded premises, and are entitled to the possession thereof, and that defendant is wrongfully in possession, and wrongfully withholds the possession from the plaintiffs. The answer of the defendant specially denies each allegation of the complaint, except that he withholds the possession, and affirmatively alleges that defendant is entitled to the possession by right and title derived from his grantors, who, in April, 1873, had entered and paid for the land in the United States land-office, and received a certificate of purchase therefor. Further answering, defendant alleged that for more than 7 years last past he had been in the open, continuous, notorious, exclusive, peaceable, and adverse possession of the demanded premises as against all persons except one Wiggins, who was a tenant in common with him, and especially as against the plaintiffs; and further alleges that he and his grantors and tenants in common have been in like adverse possession for more than 15 years last past. In the seventh division of his answer the defendant alleges as a further defense, among other things, substantially that the only right or title under which plaintiffs claim arises from "a pretended entry of said land at the United States land-office" as a placer mining claim, which entry was founded upon fraudulent proceedings, and false testimony and affidavits as to having posted on the claims the plat and notice for the period of 60 days, and as to having done \$500 worth of work, as required by law. *That, when said attempted locations were made, all of said land was, and long prior thereto had been, and now is, in the adverse, open, notorious, continuous, exclusive, and peaceable possession of said defendant; and that said plaintiffs and applicants well knew such to be the case.*" That the register and receiver of the land-office were deceived and imposed upon by the aforesaid false affidavits and testimony, and were thereby induced to issue to plaintiffs the certificate of purchase under which they claim the land. That defendant, by his attorney, has filed in the general land-office at Washington a protest against the allowance of said entry by plaintiffs, in which is set forth all the facts showing the invalidity of the application and entry by plaintiffs, and he verily believes a hearing will be granted in the matter, and that said entry will be canceled. On motion of plaintiffs, the seventh division of the answer, except the above italicized quotation therefrom, was stricken out by the court. The court found the facts as follows: "(1) That on January 1, 1889, the plaintiffs were, and have ever since continued to be, the owners of and entitled to the possession of all that certain placer mining claim, described as follows, to-wit, [here follows the description:] (2) that on January 1, 1889, the defendant was, and has ever since continued to be, in possession of a portion of said mining claim, against the will and without the consent of plaintiffs, and has refused, and continues to refuse, to yield possession thereof to plaintiffs; (3) that defendant has no

title to said mining claim or any portion thereof, either by adverse possession or otherwise, and has no right to the possession thereof, nor to the possession of any portion thereof." Upon these findings judgment was rendered in favor of the plaintiffs for possession of the land, and costs; from which, and from an order denying his motion for a new trial, the defendant appeals.

1. It is contended for appellant that the court erred in striking out part of the seventh division of defendant's answer. Perhaps this point would be good if the seventh division of the answer had stated facts showing that the question as to the validity of the entry in the land-office, under which the plaintiffs claim, was then pending and undecided; as in such case a very serious question at least would have been raised as to whether the certificate of purchase issued to plaintiffs should have been considered *prima facie* evidence of title under section 1925 of the Code of Civil Procedure.¹ *Campbell v. Buckman*, 49 Cal. 362. But as the answer does not state the pendency of any question in the land-office as to the validity of plaintiffs' certificate of purchase, admitted to have been issued to them, nor facts from which the pendency of such question must necessarily be inferred, I think the court did not err in striking out that portion of it which was stricken out.

Counsel refer to a decision of the secretary of the interior, rendered nine months after the trial of this cause, directing a hearing and determination of the matter of defendant's protest against the entry under which plaintiffs claim, and suspending that entry pending the investigation, and also directing, in a certain contingency, a readjudication of the matter of the cancellation of the entry under which defendant claims, and a restatement of it. 12 Dec. Dep. Int. 125. But nothing of this could have been anticipated by the court below.

2. It is claimed that the third finding is not justified by the evidence; but as the statute of limitation did not run against the government, and less than two years intervened between the date of plaintiffs' entry and the commencement of this action, the finding that defendant acquired "no title by adverse possession," whether a fact or a conclusion of law, is correct. For the mere purpose of proving title by prescription, defendant's alleged adverse possession before plaintiffs entered and paid for the land counted for nothing.

3. It is further claimed that the decision is against law, for the reason that the court did not find upon all the material

issues of fact; and I think this point is well taken. There was no other evidence of plaintiffs' title or right of possession than their certificate of purchase, dated May 23, 1888, the effect of which, as evidence in this action, might have been overcome "by proof that, at the time of the location" of the mining claim upon which the certificate issued, the land was in the adverse possession of the defendant. Code Civil Proc. § 1925; *Witcher v. Conklin*, 84 Cal. 500, 24 Pac. Rep. 302, and cases there cited. This, however, goes on the assumption that section 1925 of the Code of Civil Procedure applies to certificates of purchase of mineral land, as I think it does, and there is no controversy here on this point. But if that section does not apply to mineral lands, then there is no evidence to sustain the first finding, since it is by virtue of that section alone that certificates of sale are made "primary evidence" of ownership, (*Haven v. Haws*, 63 Cal. 452;) and the result would be that appellant's point that the first finding is not justified by the evidence should be sustained. The answer, as above shown, raises the issue as to defendant's adverse possession at the time of the location of the mining claim upon which plaintiffs' certificate of purchase was issued, and thence until the commencement of this action, and there was evidence upon that issue strongly tending to prove such adverse possession; yet there is no finding upon that issue. The third finding, that defendant "has no title by adverse possession," being perfectly consistent with the adverse possession alleged, does not touch the issue as to the existence of such adverse possession. The adverse possession may have been such as contemplated by section 1925 of the Code of Civil Procedure, and quite sufficient to overcome the evidence afforded by plaintiffs' certificate of purchase, and yet insufficient to prove title by prescription, for reasons above indicated. For the failure to find upon this issue as to adverse possession, I think the judgment and order should be reversed, and a new trial granted.

WE CONCUR: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted.

64 Cal. 32

COX et al. v. HAYES.²

(Supreme Court of California. July 25, 1888.)

DEED—DESCRIPTION—WHAT PROPERTY PASSES.

A land-owner, having sold 22.29 acres of the south-easterly portion of a certain quarter section, conveyed to another person "the east one hundred acres [of the quarter section.] commencing on the west bank of the F. river, and running back to the westward far enough so as to contain one hundred acres, and so as to comprise the east one hundred acres [of the quarter section,] excepting therefrom a small piece of land" previously sold. Held, that the deed conveyed 77.71 acres. *McKee, J.*, dissenting.

¹This section provides: "A certificate of purchase or of location of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes."

²This case, filed July 25, 1888, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

In bank. Appeal from superior court, Butte county.

Action of ejectment by Thomas Cox and others against John Hayes. Judgment for plaintiffs. Defendant appeals. Reversed. *I. S. Belcher*, for appellant. *Reardan & Freer*, for respondents.

Ross, J. F. R. and A. O. Larkin, being the owners of a certain quarter section of land, conveyed to one Campbell a small portion of it taken from the south-easterly part of the quarter section, and containing 22.29 acres. Afterwards the Larkins conveyed to one Hudson, and Hudson to the plaintiffs, "the east one hundred acres [of the quarter section,] commencing on the west bank of the Feather river, and running back to the westward far enough so as to contain one hundred acres, and so as to comprise the east one hundred acres [of the quarter section,] excepting therefrom a small piece of land sold by F. R. and A. O. Larkin to A. W. Campbell." If by this deed 100 acres of the quarter section were conveyed, the judgment should be affirmed. If, on the other hand, from the 100 acres mentioned in it is to be deducted the tract previously conveyed to Campbell, the judgment must be reversed. The language of the deed is awkward, but we think its true construction is that it conveys the east 100 acres, etc., excepting therefrom the 22.29 acres previously conveyed to Campbell. In other words, that the deed in question conveyed 77.71 acres only. Judgment reversed, and cause remanded for a new trial.

McKINSTRY, THORNTON, MYRICK, and SHARPSTEIN, JJ., concurred. McKEE, J., dissented.

64 Cal. 34

LYON *et al.* v. CROSBY *et al.*¹

(*Supreme Court of California.* July 26, 1883.)

INSOLVENCY—JURISDICTION—MEETING OF CREDITORS.

Where, on petition of creditors, the court orders a person to show cause why he should not be adjudged insolvent, and the person appears with attorney, the court has jurisdiction to adjudge him insolvent, without waiting for a meeting of creditors.

Department 2. Appeal from district court, Sacramento county.

Action by E. Lyon and another against C. C. Crosby, sheriff, and another, upon the sheriff's official bond. Judgment for defendants. Plaintiffs appeal. Affirmed.

Grove L. Johnson and *D. E. Alexander*, for appellants. *Hale & Craig* and *J. M. Fulweiler*, for respondents.

MYRICK, J. Upon receiving the petition of three creditors of Bryant, the debtor, the court made an order that Bryant show cause why he should not be adjudged an insolvent debtor, and a surrender of his estate be made for the benefit of his creditors. On the return-day of the order Bryant appeared in person and

with counsel, and, after hearing statements and admissions made by him and his counsel, the court adjudged him an insolvent debtor, and ordered that all proceedings against him and his property be stayed. The court also appointed a receiver of his property, and ordered notice to be given to creditors by publication. At this point in the history of the case, the sheriff, Crosby, who had previously attached goods of Bryant for a debt due the plaintiffs, and had advertised a sale under execution, turned the property over to the receiver. This action is brought to recover of the sheriff and his bondsmen the value of the property so turned over. We are of opinion that the court had jurisdiction to adjudge Bryant an insolvent in an involuntary proceeding, without waiting for the meeting of creditors. We think the evidence sustains the findings of the court as to the fraudulent procurement of the attachment and obtaining the judgment, as against the insolvent law. We see no error in the record. Judgment and order affirmed.

SHARPSTEIN and THORNTON, JJ., concurred.

64 Cal. 1

BOSWORTH v. WEBSTER, Tax Collector.²

(*Supreme Court of California.* July 2, 1883.)

TAXATION—ASSESSMENT ROLL—MANDAMUS—PLEADING.

1. The words, "To all owners and claimants, known and unknown, in A. township," in the heading of an assessment roll, are an idle recital, and do not vitiate the assessment.

2. Where, in the tabular part of the assessment roll, under the heading "Tax-Payer's Name," appear the words, "Place, Wilson, Newman, and others," the assessment is invalid.

3. A writ of mandate will not issue to compel a tax collector to issue a certificate and deed to a purchaser at a tax-sale, where the petition fails to aver that the property was assessed, that any taxes were levied, or that the taxes were unpaid.

Department 1.

Application for writ of *mandamus* by William Bosworth against James A. Webster, tax collector. Denied.

E. A. & G. E. Lawrence, for petitioner.

MYRICK, J. This is an application for a writ of mandate that the respondent issue to petitioner a certificate and deed of certain premises alleged to have been purchased by him at a sale for unpaid taxes.

1. As to the taxes for 1870-71. The heading of the assessment roll reads: "Assessment of property for the fiscal year ending April 1, 1871. To all owners and claimants, known and unknown, in Alameda township." In *San Francisco v. Phelan*, 61 Cal. 619, we held that this recital in the heading was an idle recital, which did not vitiate the assessment. In the tabular part of the assessment roll, under the heading "Tax-Payer's Name," are the words, "Place, Wilson, Newman, and others." This places the assessment within *Hearst v. Eggle-*

¹ This case, filed July 26, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

² This case, filed July 2, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

stone, 55 Cal. 365, and *Brady v. Dowden*, 59 Cal. 51. A certificate and deed, based on such an assessment, (or, rather, alleged assessment,) would convey no title, and the issuance thereof would be vain; therefore the application of the petitioner is denied as to the certificate and deed based on the alleged assessment for 1870-71.

2. As to the petition, so far as it relates to taxes for the year 1877-78, there is no averment that the property referred to was assessed for taxes, nor that any taxes were levied, or that taxes were unpaid. Application denied.

SHARPSTEIN, J., and THORNTON, J., concurred.

64 Cal. 2

*Low et al. v. McCallan et al.*¹

(*Supreme Court of California*. July 2, 1883.)

NEW TRIAL—AMENDMENT OF STATEMENT ON MOTION—EVIDENCE—SUFFICIENCY.

1. The fact the trial court allowed a party to amend his statement on motion for a new trial is not error where it does not appear that the other party was injured thereby.

2. An order granting a new trial on the ground of the insufficiency of the evidence to support the finding will not be reversed where no error appears from the record, and the evidence is conflicting.

Department 2. Appeal from superior court, Butte county.

Action by F. F. Low and another against Ellen McCallan and another. Verdict for plaintiffs. New trial granted. Plaintiffs appeal. Affirmed.

Reardan & Freer, for appellants. *Gruy & Sexton* and *Chas. F. Lott*, for respondents.

MYRICK, J. 1. When the defendants' motion for a new trial came on for hearing in the court below, the court permitted the defendants (respondents here) to amend their statement by adding and inserting the words "or predecessors" after the word "grantors," in specification 1. We do not see that any injury resulted to the plaintiffs.

2. It was material whether the land between the ditch of plaintiffs and the building of the defendant McCallan had ever been located as a portion of a mining claim, and, if so located, whether an abandonment had occurred. The court granted the new trial on the sole ground that the evidence did not establish the fact that the premises had, prior to the year 1868, been located and appropriated as a mining claim; or, if so located and appropriated, that plaintiffs had succeeded to the rights of the locators. We do not find, from an examination of the evidence, that the court committed an error in so holding. As to abandonment in fact, whether properly located or not, the evidence, in the most favorable aspect for plaintiffs, is conflicting. The order is affirmed.

SHARPSTEIN and THORNTON, JJ., concurred.

¹ This case, filed July 2, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

BUTLER v. AUSTIN.*

(*Supreme Court of California*. July 3, 1883.)

TRUSTS—ACCOUNTING BY TRUSTEES—INTEREST.

1. Where a trustee held certain moneys on condition that he would pay interest thereon at the rate of 1½ per cent. per month after demand, and, in an action for an accounting, no demand was found, it was error to compute interest at that rate.

2. In an action for an accounting, the trustee should not be charged with the principal or interest of sums received by him after the filing of the complaint, where no amended or supplemental complaint was filed.

3. It was error to charge the trustee with sums paid to discharge a debt which, unless connected with the trust, was barred by limitations, where no such connection appears.

Department 2. Appeal from district court, twelfth judicial district.

Action for an accounting by C. C. Butler against F. B. Austin. Judgment for defendant. Plaintiff appeals. Reversed.

L. Quint and *Wilson & Wilson*, for appellant. *E. Kirkpatrick* and *John P. Hoge*, for respondent.

MYRICK, J. The plaintiff alleged in his complaint that defendant was indebted to him as a balance for moneys paid out and expended in the sum of \$2,434.32, and asked that an accounting be had. This complaint was filed October 7, 1875. On the 19th of October, 1877, the defendant filed his answer, which set up several matters by way of counter-claim, and alleged that plaintiff was indebted to defendant in large sums of money, for principal and interest. This pleading seems to have been regarded by the parties as a cross-complaint, and was demurred to by the plaintiff. The demurrer was overruled. By stipulation, the case was referred to a referee, with instructions to take the testimony and report the same, together with the findings of fact. On the 27th of October, 1879, the referee made his report, in which he stated the aggregate amount held in trust by plaintiff for defendant to be \$22,960.57, and the aggregate amount paid by plaintiff for account of defendant \$252.71. Judgment was thereupon rendered for defendant and against plaintiff for \$22,707.76.

1. The instrument in writing executed by plaintiff to defendant, by the terms of which he was to account for and pay to defendant the moneys therein specified, provided for the payment of interest at the rate of 1½ per cent. per month after demand. No demand was found; therefore it was error to compute interest at that rate.

2. The cross-complaint was filed October 19, 1877. The report of the referee was filed October 27, 1879. The referee heard evidence of and charged the plaintiff with amounts received between those dates. This was error, there being no amended or supplemental cross-complaint. The plaintiff was called upon to meet only the transactions occurring prior to October 19, 1877.

* This case, filed July 3, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

3. The referee allowed to the defendant computations of interest on amounts received by plaintiff after the filing of the cross-complaint. This also was error.

4. It does not appear from the findings that either of the sums paid to Lloyd Baldwin and in satisfaction of the judgment in *Vassault v. Austin* was in any connected with the relations of trust existing between the parties or the accounts thereof. If not so related, they would be barred by the statute of limitations.

5. The referee charged the plaintiff with \$598 (and interest thereon) received by him in 1879 from the San Francisco & Point Lobos Road Company. There was no pleading to justify this.

6. The referee allowed the defendant and charged the plaintiff with rents received after the trial.

For these reasons the judgment and order are reversed, and the cause is remanded for a new trial.

THORNTON and SHARPSTEIN, JJ., concurred.

64 Cal. 5

CANAVAN v. GRAY *et al.*¹

(Supreme Court of California. July 20, 1883.)

FORCIBLE ENTRY—WHEN LIES—TRESPASS.

Code Civil Proc. Cal. § 1159, provides that "every person is guilty of a forcible entry who either, (1) by breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, enters upon or into any real property; or (2) who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct the party in possession." *Held*, that a person in the wrongful possession of real property cannot maintain trespass against the owner, who has the right to possession, but makes a forcible entry, since the remedy provided by the statute is exclusive.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Jane Canavan against Hamilton W. Gray and others in trespass. Judgment for plaintiff. Defendants appeal. Reversed.

William Reude and B. S. Brooks, for appellants. *M. C. Hassett*, for respondent.

SHARPSTEIN, J. On the 19th day of August, 1875, James Canavan, who was then the husband of the plaintiff, was the lessee and in the possession of the 50-vara lot on the south-east corner of Third and Brannan streets, in San Francisco, and was the owner of all the frame buildings thereon; and on that day he assigned said lease and sold said buildings to the defendant H. W. Gray. On the same day he signed and delivered to said Gray an instrument in writing, of which the following is a copy: "This is to certify that I have rented four rooms, upper story, south-east corner Third and Brannan streets, at (\$20) twenty dollars per month; and I hereby agree to deliver up possession of the said rooms upon receipt of ten days' notice, said notice to take effect from 13th day of August, 1875."

¹This case, filed July 20, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

On the 20th of September, 1875, said Gray commenced an action against said James Canavan for the possession of said premises, and on the 27th of the same month Canavan went away, leaving his family, including his wife, the plaintiff herein, in said rooms. He has never occupied said rooms since. But the plaintiff has continued to occupy them without paying any rent for the use and occupation thereof. On the 5th day of April, 1879, some persons, who had been employed by said Gray for that purpose, unroofed the house containing said rooms, and, by so doing, damaged the personal property of the plaintiff herein, and this action was brought to recover the damages which the plaintiff thereby sustained. Upon these and other facts which do not change the legal aspect of the case, a verdict was rendered in favor of the plaintiff for \$1,000. A motion for a new trial was made by the defendants, and denied by the court, on condition that the plaintiff should remit \$250 of the damages, which she did. The appeal is from that order and the judgment. The vital question is, can the plaintiff, upon these facts, maintain an action of trespass against the defendant? Upon that question the cases are conflicting, and we shall not attempt to enumerate them on the one side or the other, but will briefly examine the grounds upon which the opinions *pro* and *con* are based. All agree that at common law the plaintiff could not, upon the facts disclosed by this record, maintain any action whatever against the defendants. It is also conceded that the only change which has been made in the law relating to this subject is that made by the statute, which in this state, as in many others, provides a summary remedy for forcible entry upon or into any real property. It is only as to the extent of the change wrought by this statute that there is any difference of opinion. The insistence on one side is that "the statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is therefore unlawful. If unlawful, it is a trespass, and an action for the trespass must necessarily lie." *Reeder v. Purdy*, 41 Ill. 279.

On the other side it is urged that the remedy given by the statute is exclusive. In this state the plaintiff, in an action of forcible entry, may recover the damages occasioned thereby, together with a judgment for the restitution of the premises.

The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the Code of Civil Procedure, but it establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice. Code Civil Proc. § 4. An action of forcible entry would be a proceeding under the Code, and its provisions relating to that subject, in such a proceeding, would have to be liberally construed. The Code has established the law of the state respecting that subject. It has provided a remedy

and prescribed a course of procedure in cases of forcible entry. And all statutes, laws, or rules on that subject heretofore enforced in this state, whether consistent or not with the provisions of the Code on the same subject, are repealed and abrogated. Id. § 18. It is doubtless the duty of courts, in actions of forcible entry, to construe the provisions of the Code relating to that subject so as to suppress the mischief and advance the remedy; that is, the remedy given by the statute. The legislature has provided a remedy for forcible entry, no matter by whom made. But it has provided only one remedy. Before there was any legislation on the subject, a person in the actual rightful or wrongful possession of real estate could maintain trespass against any one, not having a right to enter, for a forcible entry upon it. A person in the wrongful possession could not maintain an action against the owner, having a right to enter, for a forcible entry. But the statute gives a person, even in the wrongful possession, a right of action, and prescribes its form, against the owner having a right to enter, if he make a forcible entry. Neither expressly nor by necessary implication does the statute give to a person in the wrongful possession the right to maintain any other than the action of forcible entry when such entry is made by the owner, having the right to enter.¹ The legislature has provided a particular remedy for a forcible entry made under such circumstances, but we are unable to see upon what principle it can be held that another and different remedy, and one which did not exist at common law, and is not given by statute, is equally available in such a case. That the legislature, by giving a person in the wrongful possession of the real estate of another the right to bring an action of forcible entry against him for entering forcibly upon that which he had a right to enter upon, impliedly gives a right to maintain trespass in such a case, is, at best, a very doubtful implication, and the rules of the common law are not to be changed by doubtful implication. Wilbur v. Crane, 13 Pick. 284.

As the evidence shows that the premises upon which the alleged trespasses were committed were owned by the defendant H. W. Gray, and that he was entitled to the immediate possession of the same, and that the plaintiff was in the wrongful possession thereof, the defendants' motion for a new trial should have been granted on the ground that the evidence was insufficient to justify the verdict. The case was tried upon what we deem to be an erroneous theory, and the errors committed by the court, in the course of the trial, are attributable to that fact. If the theory upon which the case was tried had been the correct one, none of the exceptions

could be sustained. It is therefore unnecessary to dwell further upon them. Judgment and order reversed.

THORNTON and MYRICK, JJ., concurred.

Hearing in bank denied.

64 Cal. 9

SHARP v. DYE.²

(Supreme Court of California. July 20, 1888.)

LETTERS OF ADMINISTRATION—PRESCRIBED FORM—SEAL OF THE COURT.

Code Civil Proc. Cal. § 1862, provides that letters of administration must be signed by the clerk under the seal of the court, and "substantially" in the following form: "State of California, county or city and county of ——. C. D. is hereby appointed administrator of the estate of A. B., deceased. [Seal.] Witness: G. H., clerk of the superior court of the county or city and county of ——, with the seal thereof affixed, the —— day of ——, A. D. 18—. By order of the court. G. H., Clerk." Civil Code, § 1628, provides that a corporate or official seal may be affixed to an instrument by a mere impression on the paper or other material on which such instrument is written. *Held*, that letters of administration commencing, "State of California, county of Sacramento—ss.: S. D. is hereby appointed administrator of the estate of J. W. S., deceased;" followed by the attestation clause; then the oath of office, with jurat; after which the seal of the court was affixed to the left of the signature of the clerk,—are not subject to an objection that the seal of the court is not affixed in the place indicated in the prescribed form, since it is not material that the seal should be affixed at the place indicated in the form.

Department 2. Appeal from superior court, Sacramento county.

Action by J. S. Sharp against Sperry Dye, administrator, for the revocation of letters of administration, and for the issuance of special letters. Judgment for plaintiff. Defendant appeals. Reversed.

L. S. Taylor, for appellant. Elwood Bruner, for respondent.

PER CURIAM. Letters of administration must be signed by the clerk under the seal of the court, and substantially in the following form: "State of California, county or city and county of ——. C. D. is hereby appointed administrator of the estate of A. B., deceased. [Seal.] Witness: G. H., clerk of the superior court of the county or city and county of ——, with the seal thereof affixed the —— day of ——, A. D., 18—. By order of the court. G. H., Clerk." Code Civil Proc. § 1862. The document to which our attention is directed is in the form above prescribed, except that the seal is not affixed between the principal and attestation clauses, but is affixed at the bottom of the page which contains said clauses, and to the left of the signature of the clerk to the jurat of the administrator's oath of office. On the argument a paper was exhibited to the court, by consent of counsel on both sides, as a *fac-simile* of the paper under which appellant claims to have been appointed administrator. It commences: "State of California, county of Sacramento—ss.: Sperry

¹ Code Civil Proc. Cal. § 1159, provides that "every person is guilty of a forcible entry who either, (1) by breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, enters upon or into any real property; or (2) who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct the party in possession."

² This case, filed July 20, 1888, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

ry Dye is hereby appointed administrator of the estate of John W. Sharp, deceased." Next follows the attestation clause; then the oath of office, with the jurat. and then the seal of the court affixed to the left of the signature of the clerk. It is contended by respondent's counsel that these are not "letters of administration," because the seal of the court is not affixed at the place indicated in the form prescribed by the Code above cited. But the Code only requires that they shall be substantially in that form; that is, essentially, by including the material or essential part. And it is not material or essential that the seal should be affixed at the place indicated in the form, unless the fact of a place being so indicated makes the affixing of it at that particular place material or essential. But that would be to so construe the law as to require a literal, where it expressly requires only a substantial, compliance with the form prescribed. The Civil Code provides that "a corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written." Civil Code, § 1628. It was not necessary to affix a seal of the court to any other matter contained on the sheet or page upon which the letters of administration were written, but it was necessary to affix one to said letters, and we think, under the circumstances, that the affixing of a seal upon the paper on which said letters were written was a substantial compliance with the law. Order reversed.

WALLACE et al. v. OWSLEY.

(Supreme Court of Montana. Oct. 12, 1891.)

CHANGE OF VENUE—WHEN GRANTED.

Code Civil Proc. Mont. § 59, provides that an action shall be tried in the county in which defendant resides at the commencement of the action, or where plaintiff resides and defendant may be found. Actions on contract may be tried in the county in which the contract was to be performed, subject to the power of the court to change the place of trial as provided in the act. Section 62 provides that the court may for good cause change the place of trial when the county designated in the complaint is not the proper county, when the convenience of witnesses and the ends of justice would be promoted by the change. *Held*, that where the complaint, in an action for goods sold, merely alleged that plaintiffs were doing business in the county where the action was brought, and made no mention of where the contract was to be performed, and a motion for change of venue was made before answer on an affidavit that defendant was a resident of another county, the change should have been granted, though there were counter-affidavits as to where the contract was to be performed, and plaintiff made affidavit that it would be for the convenience of witnesses to have the action tried in the county where it was commenced, as a motion for change on account of convenience cannot be made until after answer, and the fact that the contract was to be performed in the county where the action was brought could not be shown, it not being shown by the pleadings when defendant appeared.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

Action by F. R. Wallace and others against William Owsley for goods sold. From an order denying defendant's mo-

tion for change of venue, defendant appeals. Reversed.

Word & Smith, for appellant.

BLAKE, C. J. This action was commenced March 9, 1891, in the district court of the first judicial district, in and for the county of Lewis and Clarke; and the complaint alleges that the plaintiffs are, and at the times mentioned were, doing business in Helena, in said county, and that they sold in December, 1889, goods, wares, and merchandise to the defendant. The summons was served personally March 23, 1891, in the county of Silver Bow, upon the defendant, who appeared in the court below and filed a demurrer, and also a motion for a change of the place of trial, together with his affidavit in its support. The following recital in this affidavit is not controverted: "That he [the defendant] is now, and was at the time of the commencement of this action, a resident of Silver Bow county, state of Montana, and has resided for many years in the said Silver Bow county, and that he is not, and has never been, a resident of the county of Lewis and Clarke." The affidavit further states that the contract referred to in the complaint "was to have been executed and performed in the county of Silver Bow." The plaintiffs filed an affidavit which says that the contract "was to be wholly performed within the county of Lewis and Clarke; * * * that the plaintiffs will have several witnesses on the trial of said case, all of which witnesses reside within the county of Lewis and Clarke, * * * and their convenience will be much greater served by said cause being tried in the county of Lewis and Clarke."

The court made, June 1, 1891, the following orders, and overruled the motion for a change of venue, "without prejudice to renew motion when answer is filed," and also overruled the demurrer and granted the defendant 20 days in which to plead. Did the court err in this ruling upon the motion? The provisions of the Code of Civil Procedure which are applicable to this question are clothed in this language: "In all other cases the action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or where the plaintiff resides, and the defendants, or any of them, may be found. * * * Actions upon contract may be tried in the county in which the contract was to be performed, * * * subject, however, to the power of the court to change the place of trial as provided in this act." Code Civil Proc. § 59. "The court may, on good cause shown, change the place of trial * * * when the county designated in the complaint is not the proper county, * * * when the convenience of witnesses and the ends of justice would be promoted by the change." Code Civil Proc. § 62. The complaint does not contain any allegation concerning the place where the contract was to be performed, and the affidavits upon the subject are conflicting. The right of the appellant to a change of the venue must be determined "by the condition of things existing at the

time the parties claiming it first appeared in the action." Buell v. Dodge, 57 Cal. 645; Sewing-Mach. Co. v. Cole, 62 Cal. 311; Ah Fong v. Sternes, 79 Cal. 30, 21 Pac. Rep. 381. It should be observed that the appellant filed a demurrer with his motion, and the authorities are harmonious in holding that "neither a plaintiff nor a defendant can move for a change of the place of trial, because of the convenience of witnesses, until after answer." Thomas v. Mining Co., 65 Cal. 600, 4 Pac. Rep. 641; Cook v. Pendergast, 61 Cal. 72; Williams v. Keller, 6 Nev. 141. The conditions of the case of Heald v. Hendy, 65 Cal. 321, 4 Pac. Rep. 27, are similar to those which confront us, and the court ordered that "further hearing of defendant's motion be postponed until defendant files his answer to plaintiff's complaint, and that plaintiff's cross-motion be heard at the time when the further hearing of defendant's motion is heard." The cross-motion was to retain the cause in the original county "for the convenience of witnesses." The court said: "This order, in its legal effect, was an order denying defendant's motion for a change of the place of trial. It effectually deprived him of his right to have his demurrer heard in San Francisco." See, also, Ah Fong v. Sternes, supra; Yore v. Murphy, 10 Mont. 304, 25 Pac. Rep. 1039. It is therefore ordered and adjudged that the order appealed from be reversed, and that the cause be remanded to the district court with directions to grant the motion of the appellant for a change of the place of trial to the said county of Silver Bow.

HARWOOD and DE WITT, JJ., concur.

GASSERT v. BLACK *et al.*

(Supreme Court of Montana. Oct. 13, 1891.)

MORTGAGE FORECLOSURE—SUFFICIENCY OF ANSWER
—ACCOUNTING—CROSS-COMPLAINT FOR REFORMATION.

1. A complaint on foreclosure of a mortgage alleged default in the payment of interest, and that the mortgage provided for foreclosure for principal and interest in case of such default. The answer alleged that plaintiff and defendants were partners when the note and mortgage were given, and that they were still partners, but that the business had entirely ceased; that the note and mortgage were given to raise funds to carry on the business; that the partnership agreement provided that each partner should contribute his labor, skill, and services, and should defray expenses in proportion to his interest; that services which should have been rendered by plaintiff were rendered by defendants, and that advances were made by them, whereby plaintiff was indebted to the partnership and defendants in a certain amount; that there had been no settlement or accounting of the partnership affairs. *Held*, that the answer alleged sufficient facts to entitle defendants to an accounting, the indebtedness as alleged being a proper matter of defense.

2. The allegations that the parties agreed that the mortgage should not be foreclosable on default in the interest; that they intended that the written agreement should express this agreement; and that the mortgage, by a mutual mistake, contained a provision making it subject to foreclosure on non-payment of annual interest, —are sufficient to sustain a cross-complaint for reformation.

Appeal from district court, Park county; FRANK HENRY, Judge.

Action by Harry Gassert against M. M. Black, Rosa Black, and William H. Randall. Demurrer to the answer and cross-complaint was sustained, and defendants appeal. Reversed.

The district court sustained a demurrer to the defendants' answer and cross-complaint. Judges then followed for the plaintiff. The sufficiency of the defendants' pleading is therefore the question on review. It becomes necessary to state quite fully the complaint, answer, and cross-complaint, and the demurrer thereto.

The complaint sets forth that defendants Black and Randall, on December 9, 1888, gave their promissory note to plaintiff in the following words: "\$13,334.00. Bozeman, M. T., December 9th, 1888. (On or before the ninth (9th) day of December, 1892, we promise to pay to H. Gassert the sum of thirteen thousand three hundred and thirty-four dollars, (\$13,334.00,) for value received, interest at the rate of ten per cent. per annum from date until paid. Interest payable annually. W. H. RANDALL. M. M. BLACK." That, to secure the payment of said principal sum and interest, defendants executed and delivered to plaintiff a mortgage of even date upon property, (describing it,) and conditioned for the payment of said sum and interest at the rate and at the times and in the manner specified in said note, and according to the conditions thereof. The mortgage was duly acknowledged and recorded, and a copy with the indorsements is annexed, and made a part of the complaint. The complaint was filed December 24, 1889. It further alleges that no part of the principal or interest is paid; that the interest from December 9, 1888, to December 9, 1889, \$1,333.40, is past due and unpaid; that plaintiff is owner and holder of the note and mortgage. The mortgage pleaded contains the clause: "But, in case default be made in the payment of the principal sum or interest as above provided, [the mortgage having set forth the note in full,] then the party of the second part, his executors, administrators, and assigns, are hereby empowered to sell the premises above described," etc., "and out of the money arising from such sale to retain said principal and interest," etc. The complaint then contains the ordinary prayer for judgment and foreclosure.

The amended answer and cross-complaint, upon which the case was determined, were filed October 9, 1890. This pleading is in three divisions, which may be stated as follows: (1) That at the date of the execution of the note and mortgage, and a long time prior thereto, to-wit, on February 5, 1886, the plaintiff Gassert and one Jacob Reding and defendants, Black and Randall, were copartners, under the firm name of Gassert, Black & Co., in a business, (describing it.) It may be observed here that Rosa Black is a party simply as having signed the mortgage in release of her dower as wife of M. M. Black. That shortly after the formation of the copartnership Reding sold

his interest to Gassert, who succeeded thereto with the consent of defendants, and who ever since has been and now is a member of the firm composed of Gassert, Black, and Randall, and no other persons are interested in the firm. But the allegation is that Reding was a member of the firm at the time of the execution of the note and mortgage. Originally the partnership was an equal one between Gassert, Reding, Black, and Randall. After Gassert's succession to the Reding interest, Gassert had a half, and Black and Randall a half. When this succession took place does not appear in this division of the answer, except that it was subsequent to the giving of the note. That by the terms of the copartnership agreement each should contribute his labor, skill, and services, and defray expenses in proportion to his interest. The indebtedness mentioned in the complaint grew out of and was connected with the copartnership business, and was given to raise funds to carry on the same. At no time prior to the execution of the note did plaintiff contribute his labor, skill, or services to the business, but defendants did so do. That the labor, etc., which should have been rendered by plaintiff, and which was rendered by defendants, up to the date of the execution of the note, amounted to \$2,551.67, and that the advances made by defendants in money, property, and effects up to said date and during the copartnership in and about the business amounted to \$10,358.75, and on account whereof the plaintiff was at the time said interest became due and payable indebted to defendants in the sum of \$12,910.41, which he promised and agreed to pay, and which is due, and grew out of the transaction for which the note was given. This is the substance of the first division of defendants' pleading. They then go into another matter, and set out: (2) They repeat the allegation of partnership, and say that the note and mortgage were executed for the purpose of raising money to be used in the copartnership business, and were not to include and did not include therein the amount due these defendants on account of labor, skill, and services rendered by them for the firm, or the advances of money, etc., by them brought into the firm up to the date of the execution of the note and mortgage. Since the giving of such note and mortgage the copartnership business has entirely ceased. And that said note, not having been used to raise funds for the copartnership, is but an account stated as to the expenditures of the plaintiff. That said partial payment was made, and the note and mortgage executed, for the said purpose of raising money, and in the absence, at the time, of the facilities for making a full settlement of the affairs of the copartnership, and for the sole and only additional purpose of recognizing and acknowledging the amount due to the plaintiff on account of advances made by him. That therefore the settlement of the amount due to defendants, as before set forth, was deferred, and left to be completed

within a reasonable time. That no settlement or accounting thereof has ever been had, as understood and contemplated, and there is now due and owing to defendants from plaintiff the sum aforesaid, which defendants pray may be allowed as an equitable counter-claim and set-off to the note. (3) Then, for cross-complaint, defendants set up as follows: That, at the time of the execution of the note and mortgage, Black and Randall and Gassert were partners, owning, Gassert half, and Black and Randall half, of said business. That prior to said partnership the plaintiff and Reding were copartners under the name of Gassert, Black & Co. That Gassert purchased Reding's interest, and became the owner of one-half the said business. That at the time of the execution of the note and mortgage it was expressly understood and agreed that plaintiff would not require the payment of the interest before the maturity of the principal of the note, and that there was no agreement that upon failure to pay the interest the note should become due, or that the right to foreclose the mortgage should accrue on that account, but it was agreed that the indebtedness should not become due until the maturity of the note. That for the purpose alone of enabling the plaintiff to use said note and mortgage as collateral security to raise money, which he claimed was necessary to carrying on the business, the same was executed, and has not been used therefor. The interest upon said note was made payable annually, whereby these defendants became liable for the payment thereof accordingly. That the provisions of the mortgage whereby, upon failure to pay interest upon maturity of the same, the plaintiff was empowered to sell the premises, etc., occurred through a mutual mistake made by plaintiffs and defendants, and in violation of the agreement before set forth. The mistake occurred through the fact that said Black performed the clerical work in preparing the mortgage, and the provisions as to foreclosure upon failure to pay interest were not observed or noticed, and therefore do not contain the true agreement of the parties, and by which said money was to be raised without any such conditions, which mutual mistake was not discovered by defendants until this suit was commenced. That defendants relied upon the agreement as really made, and that a reformation of said mortgage in accordance with the real agreement is necessary and proper for the preservation of the rights of defendants. That the partnership has never been settled and a dissolution of the same has never been had. The prayer is that the mortgage be reformed: that the right of recovery of plaintiff be limited to his interest in said note, and in accordance with the terms thereof; that the partnership be dissolved; that an accounting be had; that defendants have judgment for what may be found due above the half interest in the note.

Plaintiff demurred to this pleading that it did not set forth facts sufficient to cou-

stitute a defense or counter-claim, and separately to each division of the defendants' pleading, which grounds of demurrer are set out as follows: (1) That no defense is set up in this section of the answer. That the matter therein set up shows a partnership between plaintiff, defendants, and Reding, and does not show that any accounting or settlement was ever made between them or any of them, nor does it show that there was ever any agreement between plaintiff and Reding or defendants by which the indebtedness of said firm was to be paid by plaintiff, nor does it show that any indebtedness which would be chargeable to Reding upon an accounting between the members of the firm was ever agreed to be paid by plaintiff, nor does it show that plaintiff ever agreed to pay defendants for their services to the copartnership. (2) As to the second section of the answer, the demurrer is practically upon three grounds: (a) That the matter is not a defense or counter-claim, as covered by the first paragraph of the demurrer. (b) That the matter set up shows a copartnership between plaintiff and defendants, and does not show an accounting or settlement, and that therefore the claim of defendants is not a set-off; (c) that the matter set up is uncertain, unintelligible, and contradictory, in that it alleges that the note and mortgage were made for the purpose of enabling plaintiff to raise money on the same to be used in the copartnership business, and again that the note and mortgage were executed for the sole and only additional purpose of recognizing and acknowledging the amount due to plaintiff on account of advances made by him, and further set forth that the parties to the action are still copartners, and that at the time of the execution of the note the copartnership had ceased. (3) As to the third portion of the answer, —that designated as the cross-complaint, —the demurrer is upon two points: (a) That the matter does not set forth a defense or counter-claim; (b) that the cross-complaint is uncertain and unintelligible, in that it alleges that the note and mortgage were made with the understanding that the interest was not to be paid until the maturity of the note, and further it is alleged that the interest was made payable annually so as to enable the plaintiff to raise money by using it as collateral security for a loan. Again, it is alleged that a mistake was made in making the interest payable annually, and that no mistake was made in the note, and that a mistake was made in the mortgage given to secure the note. This demurrer was by the district court sustained, and judgment accordingly entered for the plaintiff. The demurrer to the answer is now for review before this court.

Toole & Wallace, for appellants. *Savage & Day*, for respondent.

DE WITT, J., (*after stating the facts.*) If any defense or counter-claim is set up in the answer, the demurrer thereto must be overruled. We need not inquire what would be the value of the matter set up

in defendants' pleading as a legal defense to the note; but, looking for an equitable defense to a legal action, and having regard to the facts pleaded, we will ascertain whether defendants allege sufficient to grant them relief. They certainly allege that the partnership is still in existence. They say that the business, not the partnership, has ceased. But the allegation is positive that the partnership is not dissolved, and they pray for a dissolution, settlement, and accounting, and that they have the benefit of such accounting in the result as an offset against the note sued upon. They show that neither settlement, dissolution, nor accounting has been had. They plead that the note grew out of the partnership business; that defendants owe the plaintiff some sum; and that plaintiff owes the partnership or the defendants something for money, property, and effects put into the business, and all connected with the same transactions in which the note in question was given. On demurrer, of course, the allegations are taken as true. If it can be gleaned from the answer that any defense or counter-claim is set up which the court can entertain, the demurrer must fall. Viewing sections 1 and 2 of the answer in their entirety, we incline to the opinion that sufficient facts are alleged to entitle defendants to an accounting; and if such indebtedness, in money, property, and effects furnished, exists as defendants allege, it is a proper matter of defense.

The third section of the answer is a cross-complaint praying for a reformation of the mortgage. In order that a written instrument may be reformed in equity for mistake, it must appear that the parties agreed upon a certain contract; that they executed a contract, the one sought to be reformed; that the contract executed was not the one agreed upon; that the variance between the contract agreed upon and the one executed occurred by mistake; in what the mistake consisted; and that the mistake was mutual. As the matter at bar is now before this court, the facts are all admitted by the demurrer. It appears to us that the defendants allege and the plaintiff admits that the parties agreed that the mortgage should not be foreclosable on default in the annual interest; that they intended that the written instrument should express this agreement; that the mortgage by mistake contained a provision making it subject to foreclosure on non-payment of annual interest; and that this mistake was mutual. These allegations seem, under the authorities, to be sufficient to sustain a pleading for reformation. *Boone*, Code Pl. § 170, and cases cited; 2 *Estee*, Pl. & Pr. 2804, 2805, and cases; *Story*, Eq. Jur. c. 5, "Mistake;" Chancellor *KENT* in *Gillespie v. Moon*, 2 Johns. Ch. 585; *Barton v. Sackett*, 3 How. Pr. 358; *Wemple v. Stewart*, 22 Barb. 154; 2 *Pom. Eq. Jur.* § 839 et seq. The judgment of the district court is reversed, and the case remanded, with directions to that court to overrule the demurrer.

BLAKE, C. J., and HARWOOD, J., concur.

(6 N.M. 54)

TORLINA v. TRORLICHT et al.

(Supreme Court of New Mexico. July 25, 1891.)

ATTACHMENT—GROUNDS—SUFFICIENCY OF EVIDENCE.

1. Under Comp. Laws N. M. § 923, providing that an attachment may be issued where a debtor is about fraudulently to convey or assign, conceal or dispose of, his property so as to hinder, delay, or defraud his creditors, it is not a sufficient ground for an attachment that a debtor is about to make an assignment of property, the effect of which will be to delay creditors, where the delay will not be unreasonable, and the debtor is acting in good faith.

2. The defendant, being pressed for money, wrote to plaintiff, who was his heaviest creditor, offering to make an assignment to him. The plaintiff had attachment papers filed against defendant, but, upon an examination of the business of the latter, he told him not to make an assignment, and, it appeared, determined not to levy his attachment. The defendant swore that the proceeds of his business above expenses were applied to the payment of his debts. *Held*, when the plaintiff afterwards sought to levy his attachment on the ground of fraud, that a finding that no fraud existed would not be disturbed.

3. On a review of the findings of a court, the same rules should be applied with regard to the sufficiency of the evidence to support such findings as prevail on the review of the verdict of a jury.

21 Pac. Rep. 68, affirmed.

On rehearing. Modified and affirmed. For prior case see 21 Pac. Rep. 68.

The petition for rehearing was chiefly based on the following letter from the defendants: "Magdalena, N. M., May 2, 1885. Mr. John D. Torlina—Dear Sir: We think that we are not able to meet our accounts, therefore think it best to make an assignment. Business is terrible dull and we can't take in enough to meet our bills. If you want us to make an assignment to you please telegraph us at once. Think if we make an assignment for 12 months we can save ourselves, as business will pick up, which we have hopes for. The outlook is very good for the future. [Signed] TRORLICHT & HOHNSTRATER. Telegraph so they won't understand." And also on the testimony of the defendant in error Trorlicht, on cross-examination, as follows: "Question. And you thought if you could carry on your business through another 12 months that you would be all right? Answer. Yes, sir. Q. That if you could defer the payment of the claims against you for that length of time, you would pull through; that is true, isn't it? A. Yes, sir."

LEE, J. The plaintiff in error on the 20 day of March, 1889, filed in this court his petition for rehearing, supported by forcible and able argument. The questions discussed are those considered by the court in the opinion heretofore rendered. The defendants in error in their brief originally filed presented two points for consideration. The first was, where a question of fact had been submitted to the court and passed upon without a jury, the appellate court could not review the rulings of the court below thereon. The court held adversely to the proposition, as it was urged by the defendants, and fully considered all the questions of error presented by the plaintiff. This question has

since been before this court, and it was held that, under the statutes of the territory as they then existed, authorizing the waiving of a jury and trial by the court, the general verdict of the court might be reviewed, the same as a general verdict of a jury. Therefore nothing would be considered in the case except such rulings of the court, during the progress of the trial, as have been duly excepted to and brought before the appellate court by a bill of exceptions. *Lynch v. Grayson*, (N. M.) 25 Pac. Rep. 992. But as the judgment of the court below, as well as the opinion of this court sustaining the same, in effect is in harmony with the views as expressed in the case referred to, we will not further consider the point than as it may have the effect to limit our consideration to the exact questions decided by the court below, and which have been properly brought up for our determination. As before held, "the weight of evidence and the inferences of fact must be drawn by the court below, as it was the judge of that court, and not the supreme court, that was substituted by agreement of the parties in the stead of the jury." *Insurance Co. v. Folsom*, 18 Wall. 237.

The second point made in the brief of defendants in error is thus stated by them: "But, even if the court can review the refusal to give the instruction asked by plaintiff, such refusal was not error. The court fully and fairly declared the law in the instructions given or adopted. Refusal to give instructions in the abstract is no ground of reversal, where they could not have been applicable to any evidence, and proper instructions, appropriate to the case, were given so that the party preferring those refused cannot have been injured by the refusal. If the law arising from the evidence is fairly charged, or, as in this case, fully recognized, the court's refusal to give other instructions to the same effect is not error." It is too well settled to need citation of authorities that, if the court below fully and fairly declares the law applicable to the whole case and the several parts thereof, the court of last resort will not reverse the cause for any alleged error in refusing other instructions asked on the other trial, but not given. In this case the instructions given, or rather declared and held by the court, do fully declare the law as applicable to the issue and evidence. Two questions reasonably arose in the trial court upon the evidence: *First*, were the defendants about fraudulently to dispose of their property at the time the writ of attachment issued, so as to defraud their creditors? *Secondly*, were they about to dispose of their property subject to execution, so as to hinder and delay their creditors, in such manner as that such hindering and delaying would amount to fraud in law, without reference to the actual intent present in the minds of the defendants at the time of the transaction? The law, as held by the court below, is in favor of the plaintiff on the first point. As to the second one, the trial court, in the third and fourth declarations, held that an assignment for the purpose of delaying creditors 12 months,

or indefinitely, until business improved, or until such time as the property should so advance in value as to pay all the debts of the debtor, would be an unreasonable delay, and therefore fraudulent. The law, as held by the trial court, and applied to the evidence, was in favor of the plaintiff, both as to the question of actual fraudulent intent and such unreasonable postponement of payment as to constitute fraud in law, following on those questions the law of the case as contended for by the plaintiff below. On these two points that court, however, evidently held the evidence not to prove either actual fraudulent intent, or such unreasonable delay as to amount to fraud in law; otherwise the court would have found for plaintiff on that branch of the issue. The finding of the court on the weight of evidence is discussed at some length in the former opinion, but the action of the court below for an alleged error as to the conclusions to be drawn from the evidence is not reversible here, if there is any substantial evidence in support of the finding of the court below. The inquiry before this court is whether the trial court erred in its refusal to give the instructions, or to declare the law to be as asked by the plaintiff. If the court below had found the evidence to have proven that the defendants intended to make such an assignment of their property as to delay their creditors in the collection of their debts 12 months, or so as to create an unreasonable delay, it would certainly have found for the plaintiff, under the view of the law declared by that court in the points held or the instructions given. If, however, the court found that the evidence proved an intention on the part of the defendants, before the writ of attachment issued, to make an assignment of their property, which would create but slight delay, and also held that such an assignment was not fraudulent in law, such finding would have been, as it was, for the defendants, because the law, as declared by the trial court upon such a state of facts, would be with the defendants. The record is silent, except as the same may be inferred, as to the actual views entertained by the trial judge at the trial, as it only shows on that question that the case was tried at the special September term; taken under advisement; and on the 14th day of October, 1886, a general finding for the defendants entered; so we are unable to determine, even if the question were important, whether the ruling here is placed on the same ground as that upon which the cause was determined below. It seems to us unimportant as to the ground on which the trial court predicated its action, as the question here is, does there exist reversible error in the record? If the defendants in error had rested their cause here upon the single point that the court could not review the proceedings below, even then, if the court deemed that contention not well taken, it would not be justified in reversing the cause, unless some error was found in the record, and would be bound, before reversing, to examine the whole record to determine whether reversible error was

apparent. Certainly this court could not reverse the cause merely because it deemed its powers of review to be greater than defendants argued in one point of their brief. Nor could the court reverse the cause if in its judgment the court below decided right, even though this court should be of opinion that the decision below was placed on wrong grounds. In the opinion originally announced, the instructions refused are set out. A consideration of the instructions given will throw some light upon the point in the mind of the trial court at the time of its refusal to give the instructions about which complaint is now made. It is evident by the instructions declared that the court below on the trial of the cause had in mind the question considered in the opinion in this cause, which we are now asked to withdraw or modify. The court below refused to declare the law as stated in the second, fifth, and sixth propositions asked, but held the law to be as stated in the third, fourth, and seventh propositions. These various propositions are here treated as instructions asked, as the cause was tried without the intervention of a jury, and asking the court to declare the law was equivalent to asking an instruction. The points of law given or declared, and held on the trial to be applicable to the evidence asked for by the plaintiff, are as follows: "*Third*. If it appears from the evidence in this cause that the defendants were about to make an assignment of their property for the purpose of deferring payment of any or all of their creditors for a period of twelve months, or until business improved, then such intention on the part of defendants was a sufficient warrant to plaintiff in suing out the writ of attachment in this cause, and the finding should be for the plaintiff. *Fourth*. If it appears from the evidence in this cause that the defendants, before suing out of the writ of attachment herein, were about to make an assignment of their property to prevent a sacrifice thereof, and that the intention existed in the minds of the defendants, or either of them, to place their property beyond the reach of their creditors, or any of them, until such a time as it should advance in value, or until business should improve or times get better, then the finding should be for the plaintiff, even though it was the intention of the defendants ultimately that their creditors should receive the entire proceeds of a sale of their property." "*Seventh*. Any assignment contemplated by the defendants, the reasonable and probable result of which was to defraud their creditors in the collection of their debts, is sufficient to sustain the attachment in this cause."

In this connection it may be observed that the plaintiff in error, in his argument for rehearing, says: "Is this court prepared to say that an assignment whereby the assignor retains dominion over his property, and prevents his creditors from the collection of their debts for a period of twelve months, is not, under the decision of every respectable court in Christendom, including Missouri, fraudulent in law?" This court has certainly not said

so, either in terms or in effect, and the trial court on the hearing expressly declared the contrary doctrine, as appears by a careful reading of the third and fourth points or instructions above set out. The court on the trial as to that question of law was evidently with the plaintiff, but against him on the evidence relating to that proposition; but on the point that delay merely, such delay as might reasonably be necessary to convert the defendant's goods into cash to pay debts, embraced in all the points refused by the court, but more clearly in the fifth and sixth, the court below was against the plaintiff in error on the law, but might have been with him as to the facts relating to that question. A careful reading of the instructions asked on the trial by the plaintiff makes it apparent they were critically drawn, and so considered on the trial. The fifth and sixth instructions are in exactly the same language, except that in the fifth the word "hinder" is used, while in the sixth the word "delay" is found, evidently on purpose, to raise and save any question that might exist as to the meaning of the two words. In the first and second instructions the words "hinder" and "delay" are both used, with the addition of the words "or defraud," so that in each of the four instructions refused is contained the proposition that, if the defendants were about to sell, convey, assign, or dispose of their property, so as to delay, even in the least degree, their creditors, such an act would be fraudulent. The instructions embracing that proposition of law were refused, presumably because the court below, whatever its opinion might be as to the facts relating to the proposition of law, did not believe that a sale of the defendants' property, or an assignment thereof, creating slight or necessary delay incident to a conversion of the property into money, was fraudulent in law. The third and fourth points, or instructions asked and given, relate also to the question of delay. The third expresses the idea of delay in the words, "deferring payment of their creditors, or until business improved," while the fourth expresses the idea of unreasonable delay in this way: "That the intention existed in the minds of the defendants, or either of them, to place their property beyond the reach of their creditors, or any of them, until such time as it should advance in value, or until business should improve or times get better, then the finding should be for plaintiff." It will thus be seen that the instructions contained a clear distinction between the effect of delay merely in the assignment, such delay as is necessary, usual, and reasonable, to enable the debtor to convert his assets in that way into cash, and such unreasonable and unusual delay as would unjustly postpone the creditor in securing payment, and therefore operate on him as a fraud. This distinction is made very apparent by contrasting the third and fourth instructions given with the fifth and sixth refused. In view of the terms of these instructions, it does not seem to us that the contention in the petition for a rehearing, that the court

in the original opinion departed from the question before the trial court, is well founded. As the opinion heretofore filed sustains the trial court on the questions of law, it may be that the points relating to the evidence might have been more briefly disposed of by a mere reference to the rule that this court will not reverse on any question relating to the weight of the evidence, where there is substantial evidence to support the action of the court below; but this court, properly, as we think, was of opinion that some consideration of the evidence would throw light on the questions so involved, and be more satisfactory to those interested.

Complaint is made of the following statement in the opinion: "The court below was not asked to declare that every assignment having the effect to create an unreasonable delay to the creditors should be held fraudulent, but to so declare if the assignment resulted in delay merely, however short the time might be, or however beneficially it might result to the creditors." The statement in the original opinion is evidently an inadvertence of statement, and, in view of the third and fourth declarations heretofore set out, the opinion heretofore rendered is so far modified as to withdraw therefrom the above-quoted expression, which no doubt unintentionally found its place in the opinion heretofore rendered. This, however, in no way affects the reasoning of the opinion, or the conclusion reached, but is a mere modification of an unintentional expression made by the court in the course of statement.

It is strongly urged by the plaintiff that the supreme court of the United States holds a doctrine at variance with that declared by this court; and we are especially referred to the case *Means v. Dowd*, 128 U. S. 280, 9 Sup. Ct. Rep. 65, as supporting the plaintiff in his application for rehearing. We have carefully examined that case, and are of the opinion that the general expressions used by the court therein must be considered, when it is looked to as authority, with reference to the instrument then under consideration, to determine the point really decided by the court. The facts of that case as they appear in the record are the following: April 24, 1876, Montgomery & Dowd were merchants in North Carolina, greatly embarrassed, and they made a conveyance of all their goods and property to other parties, Davidson & Dowd. It was provided in the assignment that the assignors, Montgomery & Dowd, should remain in possession of the assigned property, and continue to sell the same at their own discretion, and collect the moneys therefor. The funds so collected were to be by the assignees deposited weekly in bank, and the stock from time to time replenished from the proceeds of the sales under the direction of the assignees; the assignees were to be paid their commission; and, after expenditures for replenishing stock and incidental expenses, the surplus was to be applied to the payment of certain preferred debts, first, and finally the residue to general creditors, with the remainder, if any, to assignors. This

all appeared upon the face of the assignment, the validity of which the supreme court had under consideration. In addition, the facts established, as throwing light upon the instrument, that the preferred creditors were the near relatives of the debtors. The instrument, although made in April, 1876, was not placed on record until July of the same year, and the assignors, from April to the last-named date, remained in the actual control of the property assigned, selling the same in the usual course of business, collecting the proceeds of such sales, and carrying on the business generally, under the protection afforded by the deed of assignment. This is the kind of instrument which the supreme court in that case, under the circumstances stated, had under consideration, to which it gave construction holding the same to be fraudulent. The language used by the court should be considered with reference to the instrument being construed, and not as intending to give a general rule for the construction of conveyances or assignments wholly different, in important particulars, from the one then in the mind of the court. The fact that the assignors, Montgomery & Dowd, were to remain in possession of the goods, carry on business as usual, make collections, replenish stock, etc., under cover of the assignment, make it clearly apparent that the instrument under consideration in that case was on its face fraudulent; and under like circumstances this court would be bound, not only upon the authority of Means v. Dowd, but also in view of other cases giving construction to like instruments, to hold a like rule. But in the case here there is nothing from which this court, against the finding of fact by the court below, can say that any such device was intended by the defendants in error. If it was clearly apparent that the defendant in this case intended such unreasonable delay as that contemplated by Montgomery & Dowd, of course the rule there adopted would be applied. In that case, in the view of the court, the instrument was so fraudulent upon its face that the court said with respect thereto: "In the case before us the whole face of the instrument has the obvious purpose of enabling the insolvent debtors who made it to continue in their business unmolested by judicial process. * * * It specifically provides that the grantors should remain in possession of said property and chases in action, with the right to continue to sell the goods and collect the debts under control of the grantees. * * * It is difficult to imagine a scheme more artfully devised between insolvent debtors and their preferred creditors to enable the former to continue in business, at the same time withdrawing their property used in its prosecution from the claims of other creditors, which might be asserted according to the usual forms of law." In view of the facts of that case, and the expressions of the court upon the case as a whole, together with what the court has said and decided in other causes on the same subject, both before the decision of Means v. Dowd and since that time, it does not seem to us

that the court decided, or intended to decide, that the mere slight delay necessarily incident to the conversion of the property of the debtor by assignee, whereby to apply the same to the payment of his debts, amounts to fraud in law; and that principle is the one embraced in the instructions which the court refused to give, and about which complaint is made, in the cause now in this court under consideration.

In *Brashear v. West*, 7 Pet. 608, the supreme court upholds an assignment tending in a considerable degree to delay creditors in the collection of their debts by the usual process of law, and in the course of discussion makes the following statement, in speaking of the assignment in that case: "It is also objected that the assignment is in general terms. That a general assignment of all a man's property is *per se* fraudulent has never been alleged in this country. The right to make it results from that absolute ownership which every man claims over that which is his own. That it is a circumstance entitled to consideration, and in many cases to much consideration, is not to be controverted. If a man were to convey his whole estate and afterwards to contract debts, there would be much reason to suspect a secret trust for his own benefit. The transaction would be closely inspected, and a sweeping conveyance of his whole property would undoubtedly form an important item in the testimony to establish fraud. So in many other cases which might be adduced; but a conveyance of all his property for payment of his debts is not of this description. It is not of itself calculated to excite suspicion. Creditors have an equitable claim on all the property of their debtor; and it is his duty, as well as his right, to devote the whole of it to the satisfaction of their claims. The exercise of this right by the honest performance of this duty cannot be deemed a fraud. If transferring every part of his property, separately, to individual creditors, in payment of their several debts, would be not only fair, but laudable, it cannot be fraudulent to transfer the whole to the trustees for the benefit of all. In England such an assignment could not be supported, because it is by law an act of bankruptcy, and the law takes possession of a bankrupt's property, and disposes of it; but in the United States, where no bankrupt law exists for setting aside a deed honestly made transferring the whole of the debtor's estate for the payment of his debts, the preference given in this deed to favored creditors, though liable to abuse, and perhaps to serious objection, is the exercise of a power resulting from the ownership of property which the law has not yet restrained. It cannot be treated as a fraud."

Mayer v. Hellman, 91 U. S. 496, is a case in point. On the 3d of December, 1873, George Bogen and Jacob Bogen, composing the firm of G. & J. Bogen, and the same parties, with Henry Muller, composing the firm of Bogen & Son, by deed executed of that date, individually and as partners assigned certain property held by them, including that in controversy in the

case, to three trustees, in trust for equal and common benefit of all their creditors. The deed was delivered upon its execution, and the property taken possession of by the assignees. To carry out this assignment necessarily involved a delay to the creditors, such a delay as would enable creditors to convert the property into cash for distribution for payment among creditors. As a matter of fact, some six months did occur before any effort was made to disturb the assignees. More than six months after the execution of the assignment a petition was filed in the district court of the United States, controverting the right of the assignee to hold the property, and in the last-named court an assignee in bankruptcy was appointed to take possession of all the assigned property, and administer the same under the bankrupt law then in force. This assignee brought his action against the first assignee to procure possession of the property assigned to him by virtue of the assignment therein dated December 3d, so that the question arose as to the legality of the first assignment. The contention was that the first assignment was fraudulent and void, and title was in the assignee under the second assignment. The court held, however, that the first assignment, although it disposed of all of the assignee's property in such a way as to create some delay, was not fraudulent and void, but to the contrary, and upheld the first assignment. It is said by that court, Mr. Justice FIELD delivering the opinion: "The validity of the claim of the assignee in bankruptcy depends, as a matter of course, upon the legality of the assignment made under the laws of Ohio. Independently of the bankrupt act, there could be no serious question raised as to its legality. The power which every one possesses over his own property would justify any such disposition as did not interfere with the existing right of others; and an equal distribution by a debtor of his property among his creditors, when unable to meet the demands of all in full, would be deemed, not only a legal proceeding, but one entitled to commendation. Creditors have the right to call for the application of the property of their debtor to the satisfaction of their just demands; but, unless there are special circumstances giving priority of right to the demands of one creditor over another, the rule of equity would require the equal and ratable distribution of the debtor's property for the benefit of all of them. And so, whenever such a disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding. The hindrance and delay to particular creditors, in their efforts to reach before others the property of the debtor that may follow such a conveyance, are regarded as unavoidable incidents to a just and lawful act, which in no respect impair the validity of the transaction."

Applying the statement of the supreme court of the United States to the terms of the instructions which the court below in this case refused to give, it will be observed that the very hindrance and delay

which the court below was asked to declare to be a fraud in law our court of last resort declared not to be so, and it is this distinction between a delay so great and unreasonable in character as necessarily to work injury to the creditor, and slight and necessary delay, incident to the conversion of property into cash, stated by the supreme court in *Mayer v. Hellman*, which this court had in view in the original opinion, as applied to the proposition of law embraced in the instructions refused. It will be borne in mind that in *Mayer v. Hellman* the assignee under the second assignment began his proceeding in the district court of the United States against the first assignee to recover the property, and one of the theories sought to be maintained by the plaintiff in that case was that the first assignment was absolutely void. The district court took that view of the question, and decided against the first assignee, who carried the case to the supreme court of the United States, and there the ruling of the district court was reversed, and the law held to be in favor of the first assignee. In discussing the question in that case in the supreme court, an argument is made which clearly indicates that the exact point in the mind of that court is as to the fraudulent character of the first assignment. The court observed: "The counsel of the plaintiffs in error have filed an elaborate argument to show that assignments for the benefit of the creditors generally are not opposed to the bankrupt act, though made within six months of the filing of the petition. Their argument is that such an assignment is only a voluntary execution of what the bankrupt court would compel; and as it is not a proceeding in itself fraudulent as against the creditors, and does not give a preference to one creditor over another, it conflicts with no possible inhibition of the statute. There is much force in the position of counsel, and it has the support of a decision of the late Mr. Justice NELSON in the circuit court of New York in *Sedgwick v. Place*, 1 N. B. R. 204, and of Mr. Justice SWAYNE in the circuit court of Ohio in *Langley v. Perry*, 2 N. B. R. 180. Certain it is that such an assignment is not absolutely void."

In the case we are considering, the proposition of law clearly involved in the instruction which the court refused to give seems to us to be set at rest by the declaration of the supreme court of the United States that such delays as are unavoidable incidents through a lawful act in no respect impair the validity of the transaction. *Reed v. McIntyre*, 98 U. S. 507, also sustains the opinion heretofore rendered in this court in the cause under consideration. *Reed v. McIntyre* was commenced in the circuit court of the United States for the district of Minnesota. Substantially the facts were that William H. Shuey, a merchant of St. Paul, executed in March, 1874, a deed of assignment conveying his entire property to William S. Combs, in trust for the equal benefit of all his creditors. Upon the same day, immediately after the acknowledgment of the deed of assignment, Combs' assignee entered upon the discharge of his duties as such, and

took possession actually of Shuey's stock of goods. During the succeeding day Mrs. Reed obtained a judgment in one of the state courts of Minnesota against Barnard & Shuey for the sum of \$5,000. She immediately issued execution on her judgment, and levied the same on the stock of goods belonging to Shuey in the hands of Combs, the assignee. The question arose in the circuit court of the United States as to the legality of the assignment to Combs. The circuit court upheld that assignment. Mrs. Reed appealed. On this appeal the supreme court also sustained the assignment to Combs, as being legal and binding. It is said by the court in the opinion: "It is stated in the printed argument of counsel for the appellee that the statement is not controverted by opposing counsel that, at the date of the assignment to Combs, there was no statute of Minnesota relating to assignments by debtors for the benefit of creditors. In determining, therefore, the validity and effect of the assignment in question, we must look to the doctrines of the common law, and to the provisions of the bankrupt act. * * * The right of a debtor at common law to devote his whole estate to the satisfaction of the claims of creditors results, as Mr. Chief Justice MARSHALL declares, 'from that absolute ownership which every man claims over that which is his own.' *Brashear v. West*, 7 Pet. 608; *Mayer v. Hellman*, 91 U. S. 496. Assignments of property for such purposes, not made with the intent to hinder, delay, or defraud creditors, were upheld at common law, even where certain creditors were preferred in the distribution of the debtor's effects. Nor, according to the doctrine of the common law, could the validity of the assignment to Combs be assailed simply because its effect was to prevent the appellant obtaining, by judgment and execution, a priority and preference over other creditors. An assignment which had the effect to delay a creditor in the enforcement of his demand by the ordinary process of law was not for that reason alone fraudulent and void. If not made with the intent to hinder, delay, or defraud creditors, it was sustained at common law. Such an intent was often conclusively presumed, if the assignment contained provisions inconsistent with good faith, or so unreasonable or unusual in their character as to justify the conclusion that it was, in the language of Lord MANSFIELD in *Cadogan v. Kennett*, Cowp. 432, 434, a mere trick or contrivance to defeat creditors. But where its provisions were consistent with an honest purpose to deal fairly and justly with them, the deed reserving, for the benefit of the debtor or his family, no control over or interest in the property, and imposing no improper restrictions upon its speedy sale and distribution in satisfaction of the debts, the consequent temporary interference with the prosecution by particular creditors of their claims by the ordinary legal remedies was regarded at common law as a necessary and unavoidable incident in the discharge by a debtor of his duty to creditors. *Mayer v. Hellman*, supra. Such interference was not regarded as hindrance and delay, within the mean-

ing of the statutes against fraudulent conveyances. * * * Our conclusion, therefore, is that the assignment to Combs could not, upon common-law principles, be impeached simply because it had the effect to prevent the appellant, by means of the execution levy, from securing priority over all other creditors."

So it may be said in the case now under consideration, even if the evidence proved—a question it was for the court below to determine—that the defendant in error contemplated such an assignment as would prevent the appellant, by means of the attachment levy, from securing priority over all other creditors on common-law principles, the transaction could not be impeached for that reason, and in so dealing this court would have the support of the authority above quoted. The authority will appear more applicable when it is remembered that in this territory, when this cause was commenced, there was no statute regulating assignments, and the question here, as in the Minnesota case above cited, must be determined on common-law principles. In a later case, (*Peters v. Bain*, 133 U. S. 685, 10 Sup. Ct. Rep. 354,) the same question is again considered. The court says: "The deed of assignment was attacked as fraudulent in law and in fact. We understand counsel to contend that the deed contains certain provisions which must so hinder, delay, and defraud creditors that fraud in its execution is to be conclusively presumed without regard to the intention of the parties. The doctrine in Virginia, settled by a long and uninterrupted line of decisions, is that, while there may be provisions in a deed of trust of such character as of themselves to furnish evidence sufficient to justify the inference of a fraudulent intent, yet this cannot be so, except where the inference is so absolutely irresistible as to preclude indulgence in any other; hence provisions postponing the time of the sale, and reserving the use of the property of the grantor meanwhile, though perishable and consumable in use; permitting sales on credit; for the payment of surplus after satisfaction of creditors secured; the omission of a schedule or inventory, and the like,—have been regarded as insufficient to justify the court in invalidating the deed for fraud in point of law. The fraudulent intent is held not to be presumed, even under such circumstances, and, in its absence, the fact that creditors may be delayed or hindered is not of itself sufficient to vacate the instrument." The court not only thus recognizes and applies the established law of Virginia on that subject, but also in its discussion considers the question somewhat upon its own merits. The court adds: "The question is not whether the trustees might prove unfaithful,—a contingency of which there is no intimation here,—but whether the provisions of the deed, if carried out according to their intent, would be fraudulent in their operation." In view of the authorities cited, and others examined and not cited, this court remains of the opinion that it is a safe and sound doctrine to hold that a conveyance, otherwise honest and in good faith, of the property of a debtor for the purpose of applying the

same to the payment of his debts, but involving some slight incidental delay, necessary to the conversion of the same, by reasonable and fair means, into cash with which to pay debts, is not because of such delay fraudulent in law, and hence the petition for rehearing is overruled.

O'BRIEN, C. J., and McFIE and SEEDS, J.J., concur.

(3 Wyo. 489)

ARP v. JACOBS.

(Supreme Court of Wyoming. Oct. 13, 1891.)

EJECTMENT—PLEADING—GIFTS TO WIFE—HOMESTEAD RIGHT OF HUSBAND.

1. In ejectment, plaintiff alleged that she was the owner in fee of the premises. Defendant answered, alleging an equitable title in himself, arising out of the fact that he had purchased the property with his own means, but had the conveyance made to his wife as a matter of convenience; that he and his wife were subsequently divorced; and that the wife had afterwards conveyed to plaintiff, who had knowledge of all the facts. Plaintiff replied that the land had been purchased with the wife's separate property. *Held*, that the material issue raised by the pleadings was as to who had title to the property; that it was immaterial how it was acquired; and that a finding that it was in plaintiff because defendant had directed the conveyance to be made to his wife as a gift or advancement, and not as a matter of convenience, was within the issue raised by the pleadings.

2. An allegation in plaintiff's reply that she purchased the land from R. does not render erroneous a finding in her favor that she purchased it from A., where the evidence shows that the two names represent one and the same person.

3. A husband, free from debt, has the right to purchase land, and have it conveyed to the wife; and the presumption from such a conveyance is that he intended it as a gift or advancement to her as her separate property, and subject to her sole disposition.

4. Under Rev. St. Wyo. § 3780, which vests every householder, "being the head of a family," with a homestead right, a husband who, with his family, lives on the wife's land, loses his homestead right therein by permitting his wife and family to separate from him, followed by a divorce in her favor, though he continues to occupy the land, since he is neither the owner of the land, nor the head of a family.

Error to district court, Laramie county; WILLIS VANDEVANTER, Judge.

Ejectment by Mary M. Jacobs against Henry A. Arp. Judgment in plaintiff's favor, and defendant brings error. Affirmed.

Bryan & Thompson, for plaintiff in error. John H. Symons, for defendant in error.

GROESBECK, C. J. The defendant in error, Mary M. Jacobs, brought suit against Henry A. Arp, the plaintiff in error, in the district court for Laramie county, to recover the possession of certain parcels of land situate in the city of Cheyenne, alleging her ownership in fee of the demanded premises, and praying damages for the detention thereof, and for the rents, issues, and profits. The plaintiff in error answered, denying each allegation in the petition except the averment of his possession, and for a further defense alleging that in May, 1881, he purchased and paid for the premises with his own money, and placed all the improvements thereon at

his own expense; that, at the time he purchased the property, he had the same conveyed to his wife, Magdalena C. Arp, as he then expected to seek employment and a home in New Mexico, and desired to have his wife sell the property and make the proper conveyance, thus avoiding the delay of sending to New Mexico for the execution of the deed by him; that he altered his purpose, and remained at Cheyenne, and being a householder, and the head of a family, consisting of himself, his wife, and two children, he entered upon the said premises as a homestead, and has since continuously lived there and occupied the same as such for a period of about nine years; that in 1887 his wife deserted and left the said homestead, and has ever since remained therefrom. He charges upon information and belief that his wife made a pretended conveyance of said premises to said Mary M. Jacobs, for the purpose of enabling them to get possession thereof, which conveyance was only colorable, the plaintiff acquiring no title thereby; that he is now, and ever since the purchase of said premises has been, the owner and holder of the equitable title thereto, and now is entitled to the possession thereof, all of which was well known to the plaintiff at the time and long before she made said pretended purchase. He prayed judgment for the right of possession, for costs, and that his title to said premises be forever quieted as against the plaintiff in the suit and persons in privity with her, and for all other proper relief. To this answer the plaintiff in the court below filed a reply denying each allegation set forth therein as a defense to the cause of action alleged in her petition, and further alleging that on the 12th day of March, 1890, she purchased the premises described in her petition from one Magdalena C. Rushworth, who was formerly the wife of said Arp; that said Rushworth and Arp were married October 2, 1877, and shortly thereafter they removed to Cheyenne, Wyo., where, on June 22, 1881, while they were living together as husband and wife, Mrs. Arp purchased from one Richard Blackstone, who was the owner thereof in fee, the lots described in said petition, paying therefor the sum of \$75, from her own personal earnings for several months prior to that time, taking the deed in her own name; that the buildings and other improvements erected on the lots were also paid for out of the earnings of Mrs. Arp; that two children were born as the fruit of said marriage; that said Arp for one year or over neglected and refused to provide the common necessities of life for the support of his wife and children, and because of this and other cruel and inhuman treatment Mrs. Arp was obliged to leave said premises to make a living for herself and children, whom she took with her; that on the 28th day of January, 1888, Mrs. Arp commenced a suit against her husband for divorce in the district court for Albany county, Wyo., on the grounds above stated; that personal service of the summons in said suit was had upon said Arp; that on the 26th day of May, 1888, a final decree and judgment for divorce were granted to Mrs. Arp, and the custody of

the children awarded to her; that said Arp made no claim whatever in said suit to the said premises now claimed by him.

The cause was heard, tried, and determined by the court below, and at the request of the plaintiff in error the court stated separately its findings of fact and its conclusions of law thereon. They are in substance as follows: On June 22, 1881, defendant, Henry A. Arp, and Magdalena C. Arp were husband and wife, and were living together as such at Cheyenne, Wyo., and continued such relation and cohabitation until January, 1887; that on said June 22, 1881, Arp with his own separate means purchased and paid for the real property described in the petition, and at his request the same was conveyed to his wife, and thereafter Arp and his wife occupied said property as their home while living together, and during that time valuable improvements were erected thereon by him, and were paid for by him, without any understanding or agreement that he should be reimbursed therefor; that in January, 1887, Arp and his wife separated, and did not live together thereafter; that in May, 1888, Mrs. Arp obtained a divorce from her husband; that Arp continued to reside upon and occupy said premises from the time of the separation; that at the time of the purchase of the premises, or at any time, there was no understanding or agreement that Mrs. Arp should hold the said realty in trust for her husband, and the conveyance to her was not made as a matter of convenience for her husband; that on March 12, 1890, Mrs. Arp, for a valuable and adequate consideration, by her separate deed, conveyed the said realty to Mary M. Jacobs, the plaintiff, who knew that Arp was in possession thereof, claiming to be the owner; that on March 13, 1890, the plaintiff, Jacobs, informed Arp of her purchase, and demanded possession of the premises, but Arp refused to vacate the same, and still continues in possession thereof; that the reasonable rental value of the premises is \$40 since said March 13, 1890; that said property was always returned for taxation and assessed in the name of Mrs. Arp, and since the separation, in January, 1887, the taxes thereon were paid by her from her own separate means. As its conclusions of law on the foregoing facts, the court finds that Arp, the defendant, caused the realty to be conveyed to his wife as a gift and advancement to her from him, and thereupon the same became the separate property of the wife, and subject to her sole disposition; that the plaintiff, Mary M. Jacobs, had and still has the legal estate in, and was entitled to the immediate possession of, said realty; that defendant, Arp, has kept her out of the same unlawfully, as alleged in the petition. The court assessed the damages of the plaintiff at \$40, and gave judgment for the recovery of the premises, for damages and costs, and awarded execution therefor.

We have found it necessary, under the assignment of errors, to thus review at length the pleadings of the parties, and the findings of fact and conclusions of law. It must be done in order to clearly comprehend the matters complained of. The

evidence adduced in the trial court was not brought here for review, and we are to determine solely whether or not the conclusions of law were correctly found and determined by the trial court on its findings of fact. We must take as absolutely true the facts as found from the evidence, as a guide in settling the law of the case.

1. It is insisted by plaintiff in error that the conclusion that the property was conveyed to Mrs. Arp, at the instance of her husband, as an advancement to her, is immaterial, as no such issue was made by the pleadings. On the one hand, Arp claims that he paid for the property, and had the conveyance made to his wife as a matter of convenience, and on the other it was alleged that Mrs. Arp paid for the property and made all the improvements from her own personal earnings. But these are collateral averments, and no way affect the question of title and possession on the part of Mrs. Jacobs. It becomes useless in this cause to inquire how Mrs. Arp came by her title. If she was the owner, Mrs. Jacobs, who derails title from her, is the owner. Whether Mrs. Arp bought the property, or it was given to her, is of no importance. The district court found that she was the owner, and that there was no understanding or agreement between her and her husband at the time of the purchase, or at any time, that he should be reimbursed for his outlays thereon, or that she should hold the title as trustee in trust for her husband. The finding was to the effect that the title was directed to be put in her name as the property was a gift and advancement to her, and not as a matter of convenience. The defense of Arp is an equitable one, and the court had a right, being possessed of the whole matter in dispute, to make such a judgment or decree as was warranted by the evidence, without reference to any partisan allegations in the pleadings.

2. It does not matter that the court below found that the plaintiff in error made all the advances and furnished all the moneys for the purchase and improvement of the property. A husband, free from debt, has an undoubted right to purchase real estate and have it conveyed to his wife, and when this is done without any fraudulent intent the property conveyed becomes her separate property,—as much so as if purchased by her with money that she had obtained prior to coverture. *Wing v. Goodman*, 75 Ill. 159. Courts of equity have recognized the duality of husband and wife, even before the rigor of the common law as to the rights of married women was softened by statutes enlarging her rights. Deeds directly from husband to wife are often unlawful, but generally, if creditors are not prejudiced, they are good in equity and may be good at law. *Stew. Mar. & Div.* § 224, and the cases there cited. A fraudulent conveyance may be held to be valid as between the parties, but void as to others whose rights are affected. If a husband purchase realty, and has the title made to a wife or child, the presumption of law is that the conveyance is in-

tended as an advancement; but this presumption may be removed by evidence. *Wormley v. Wormley*, 98 Ill. 553, citing *Perry on Trusts*, and a number of decisions. It seems from the findings of the court below that this presumption was not overcome by proof to the contrary, as the conclusion of law on this point is that the realty was conveyed to Mrs. Arp by the grantor, Blackstone, at the request of her husband, as a gift and advancement to her from him, and thereupon it became her sole and separate property, and subject to her sole disposition. This conclusion is not in conflict with the findings of fact, but seems to be in harmony with them. In the divorce suit the court had full power to make such disposition of the property of the husband as to provide support for the wife, (Rev. St. § 1581;) but it is not pretended that there was any adjudication in such action of the rights of either party to the premises in dispute in this action. The counsel for the plaintiff in error contend that he (Arp) has rights under our homestead laws of which he was not and could not be divested after acquisition.

3. In some jurisdictions the right to a homestead allowed by statute is a joint right of husband and wife; in others, the homestead may be selected from the separate property of either spouse by the one having title. In this state this right is vested in every householder, being the head of a family. The homestead may consist of a house and lot or lots in any town or city, or of a farm not exceeding 160 acres, but the value thereof must not exceed \$1,500. It is exempt from execution and attachment arising from any debt, contract, or civil obligation entered into or incurred; and it is so exempt while occupied as a homestead by the owner thereof or the person entitled thereto, or his or her family, except from execution for the purchase money. The method of determining the value of the homestead is regulated by statute, and, upon sale, the proceeds, to the extent of the exemption, \$1,500, must be paid to the owner, and if the homestead does not sell for more than this sum the proceedings must cease; and they cannot affect or impair, in that event, the rights of the owner. The wife must join in every instrument conveying, disposing of, or incumbering the homestead, and must acknowledge such instrument separate and apart from her husband; and the officer taking the acknowledgment must apprise her of her rights, and of the effect of signing and acknowledging the same. It is further provided by statute that when any person dies seised of a homestead, leaving a widow or husband or minor children, such widow or husband or minor children shall be entitled to the homestead, but in case there is neither widow, husband, nor minor children, the homestead shall be liable for the debts of the deceased. Rev. St. Wyo. §§ 2780-2791, inclusive. It was not necessary that Arp should join in the deed to Mrs. Jacobs, as he was no longer husband of the grantor, his former wife; their marital relations having been severed by the decree of divorce some time be-

fore the date of the purchase by Mrs. Jacobs of Mrs. Arp. Indeed, it is doubtful if the signature of the husband would have been necessary to the deed if made during the coverture of the parties. The protection is given to the wife, and not to the husband; and if the homestead be in her name, and the full title thereto vested in her, there is no requirement that she should join in the deed, under our statute. It seems, under section 2782 of the Revised Statutes, *supra*, that a husband of a deceased wife, who was seised of a homestead in her life-time, would be entitled to the homestead upon her death; but the interest of the husband in the property is only that of a surviving spouse, and Arp certainly could not and cannot have this right *in futuro*, as the divorce dissolving the marriage tie prior to the purchase of the property by Mrs. Jacobs, the defendant in error, terminated all his rights, whether complete or inchoate, in the premises, and *as jure uxoris*. The decree of divorce destroyed all the rights of survivorship. *Shoemaker v. Chalfant*, 47 Cal. 432; *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. Rep. 715. The findings of the district court do not disclose whether or not the allegation in the reply of defendant in error that Mrs. Arp at the time of the separation took with her the minor children, and supported them from her own earnings, was substantiated by proof; but the findings show that the plaintiff in error, and presumably no one else, occupied the premises as his "home" since the purchase of the same, in 1881. He certainly did not occupy them as the owner or person entitled thereto, and it is tolerably clear, from the findings, that no member of his family resided with him since the separation in 1887. It is true that a husband may preserve his rights to a homestead of which he has the title even though he may be abandoned by his wife and minor children. *Pardo v. Bittorf*, 48 Mich. 275, 12 N. W. Rep. 164; *Griffin v. Nichols*, 51 Mich. 575, 17 N. W. Rep. 63. But where he permits his family to separate, and the homestead is not in his own name and has lost the homestead character, through what has been adjudged as his fault, the conditions have changed. He had no longer a homestead for his family, ceased to be the head of a family, and at the passing of the decree of divorce he lost completely all rights he had in the premises, even that of a possible survivor of his former wife. *Cooper v. Cooper*, 24 Ohio St. 488. Having intelligently and designedly put this property in the name of his wife, and under her control, he is now in no condition to assert any rights thereto, or to repent the effect of his generous act, which he has allowed to pass unchallenged for so many years. His tenure to the property was too slight to be recognized by the courts wherein he has been a litigant, and he had no rights therein that a purchaser for value, even with full knowledge of the facts, was bound to notice. His rights to have the property set off to him as his absolute estate having been denied by the trial court, where he was fully heard, upon evidence that we cannot gainsay, we have

no right to disturb the judgment in that respect, and we do not believe that he has any homestead rights in the premises which can be recognized either at law or in equity.

4. The record before us shows conclusively that Magdalena C. Arp and Magdalena C. Rushworth are one and the same person, and although the allegation is that the defendant in error purchased of Magdalena C. Rushworth, and the court found that such purchase was made from Magdalena C. Arp, this is immaterial, as there can be no question of the identity of the grantor of the defendant in error.

The conclusions of law of the court below were, in our judgment, properly based upon its findings of fact, and the judgment entered thereon was proper. The judgment therefore must be affirmed.

CONAWAY and MERRELL, JJ., concur.

(3 Wyo. 508)

SMITH v. HARRINGTON.

(Supreme Court of Wyoming. Oct. 13, 1891.)

ABATEMENT AND REVIVAL — SUBSTITUTION OF TRANSFEREE — AFFIDAVIT — DISCRETION OF COURT.

1. An affidavit by a third person, who asks to be substituted as plaintiff in ejectment, which states that, during the pendency of the action, the original plaintiff transferred, by warranty deed, all her interest in the premises to the applicant, and then died, and that the applicant is now the owner of the property, does not state with sufficient clearness a case entitling the applicant to the substitution, since the deed, while absolute in terms, may be in effect only a mortgage, or it may be a mere colorable conveyance, or void for want of consideration, or procured by duress or fraud.

2. Where plaintiff in ejectment, pending the action, transfers her interest in the land, and then dies, a motion by her assignee, on notice to defendant alone, to be substituted as plaintiff, should be denied for want of notice to the heirs or devisees of the deceased plaintiff.

3. Rev. St. Wyo. § 2401, which provides that, where a party to an action transfers his interest therein, the action "may" be continued in the name of the original party, or the court "may" allow the person to whom the transfer is made to be substituted for him, vests the trial court with a discretion in determining whether or not an application by a transferee to be substituted as a party should be granted; and its decision on the question is not subject to review, except for abuse of discretion.

Error to district court, Laramie county.

Ejectment by Mary Boughton against Henry Harrington. An application by William G. Smith to be substituted as plaintiff was denied, and he brings error. Affirmed.

E. W. Mann, for plaintiff in error. C. N. Potter and Lucey & Vandevanter, for defendant in error.

GROESBECK, C. J. One Mary Boughton brought suit in ejectment against the defendant in error, Henry Harrington, in the district court for Laramie county, by filing her petition in said court on the 5th day of April, 1889. The defendant in error answered, and nothing appears to have been done in the case until June 2, 1890, when there was filed in said court a motion or application by and on the part of the

plaintiff in error, Smith, suggesting the death of the original plaintiff, Mary Boughton, July 16, 1889, and alleging that, previous to her death, said plaintiff, Boughton, transferred to said Smith all her interest in the matter and property in controversy. The applicant, Smith, asked that said action may be revived, and that his name may be substituted for that of Mary Boughton, as plaintiff therein. An affidavit was filed in support of this motion and application, stating that Mary Boughton died at Sturgis, Dak., on the day above named; that in her lifetime, she, by warranty deed of date May 6, 1889, transferred to said Smith all her right, title, and interest in the property and real estate which is in controversy in the action; that said deed was recorded in the office of the county clerk of Laramie county, Wyo.; that said applicant, Smith, is still the owner of the property, and has not transferred his rights acquired by said deed; and that there was no administration of the estate of the deceased plaintiff. It does not appear, from this motion and affidavit, whether or not the said plaintiff, Boughton, died intestate, or left heirs or devisees. It was conceded in the argument of the case that no notice of the motion and application was given to any one, except the defendant in the case below, who appeared by counsel and resisted it. After taking the matter under advisement, the district court overruled the motion, and denied the application. The record does not disclose that any testimony was taken below, in addition to that contained in the affidavit of the applicant, Smith, and the decision here must rest upon the motion and the affidavit.

1. The substitution of the transferee in lieu of the original plaintiff has not been considered by the courts as a matter of absolute right. The court may impose conditions, and it seems that the application must be made by the transferee, and that he cannot be compelled to come into the litigation. *Howard v. Taylor*, 11 How. Pr. 380; *Packard v. Wood*, 17 Abb. Pr. 318; *Chisholm v. Clitherall*, 12 Minn. 375, (Gil. 251.) The application must show a clear *prima facie* case before the applicants can be permitted to be made parties, (*St. John v. Croel*, 10 How. Pr. 253, 258;) and the applicant must allege and prove assignment in his own name, (*Virgin v. Brubaker*, 4 Nev. 81; *Mill Co. v. Vandall*, 1 Minn. 246, Gil. 195.) Moreover, the court has a right to inspect the conveyance or transfer, and to determine whether or not it is absolute in its terms. The bare statement that the conveyance is a warranty deed is not sufficient, as the instrument passing from Boughton to Smith might be a deed of warranty only in name, and in effect a mortgage or trust-deed. Again, it might be a mere colorable conveyance or a pretended transfer, or void for want of consideration, or procured by duress or fraud, and could be successfully attacked by the heirs or devisees, if any. The case presented by the motion of Smith does not state with sufficient clearness a case to entitle him to the relief sought.

2. The following cases cited hold that notice of applications, like or similar to the one at bar, must be given to the heirs, devisees, or personal representatives of the deceased plaintiff, and we cite the principle apparently governing the decision in each case: The alleged purchaser should give notice to the plaintiffs as well as to the defendants. *Howard v. Taylor*, 11 How. Pr. 380, *supra*. "There is no inflexible rule that the court, in a case like this, cannot proceed without the appointment of an administrator of the original plaintiff. The interest of the appellants in the question is that the person substituted should be the real owner of the claim, or, if not, that the real claimant should be concluded by the order." *Schell v. Devlin*, 82 N. Y. 333. Where a plaintiff had, pending an action, transferred his interest, and died, and after his death his assignee, on notice to the defendant alone, moves to be substituted as plaintiff, the motion should be denied for want of notice to the personal representatives of the deceased plaintiff. *McLaughlin v. Mayor, etc.*, 58 How. Pr. 105. Referring to this principle, the court observe: "This decision has been followed for over eighteen years in this court, [New York common pleas,] and has not been, as far as we have any knowledge, questioned in this or any other court of the state. The practice so established seems to be eminently proper. It is intended as a check upon any possible fraud upon the estate of the deceased plaintiff and upon defendant. If the alleged assignment were a forgery, defendant, after paying the judgment obtained by the assignee, would be compelled to pay the claim over again when the action was revived by the personal representatives of the deceased and prosecuted to judgment. In that aspect of the case, defendant has a vital interest in the inquiry as to the genuineness of the alleged transfer. On the other hand, should the pretended assignee exhaust the liability of defendant by his execution, the estate of the deceased plaintiff would be afterwards deprived substantially of the debt. Defendant has therefore an interest in the order, and the representatives of the deceased a still greater interest. It may be said that the defendant had the right, upon the motion, to produce proofs of the want of genuineness of the paper; but greater protection is afforded defendant by notice to the representatives of the alleged assignor of the application for substitution of the assignee, for such notice would work an estoppel against the estate in favor of the defendant. There might be delay to the assignee because of failure to apply for letters of administration on the estate of the deceased plaintiff, but an assignee who elects to prosecute an action in the name of his assignor takes the chances of inconvenience and delay arising from the death of the latter." So it was held in a leading case in Texas: "If a suit be instituted in the name of one person professedly on its face for the benefit of another, then, on the death of the nominal plaintiff, the suit may proceed in the name of the beneficiary, without reviving in the name of the representatives or heirs. *Pasch. Dig. art. 10; Price v.*

Wiley, 19 Tex. 144; *Clark v. Hopkins*, 34 Tex. 139. If, however, the suit appears on its face to be for the benefit of the plaintiff, we know of no authority, neither under our statutes and system of procedure, nor under the rules of pleading and practice in equity, for allowing it, after the death of the plaintiff, to proceed in the name of an alleged assignee or beneficiary, until the representatives or heirs of the deceased have been cited and allowed an opportunity to admit or contest the right claimed. It is true that, in equity, suits do not abate on death, but that a bill of revivor will lie by the personal representative or heir according to the nature of the bill, and that in favor of a devisee or purchaser a bill in the nature of a bill of revivor will lie; but to a bill of the latter class the heirs or representatives of the deceased must be parties. Says Justice STORY: "When a party plaintiff dies, whose interest is transmitted to some other person, if the title be that of mere representative in law, there is no change in the title itself, and the only question that arises is, who is the person entitled to take as representative? that is, in respect to real estate, who is the heir, and, in respect to personal estate, who is the executor or administrator? When this fact is ascertained, the person succeeds by operation of law to the whole title of the deceased. A bill of revivor in such case merely substitutes the representative in lieu of the deceased, and states no new fact as to title, except that of transmission by operation of law. The title of representative or heirship, at least in a court of chancery, is not disputable; but the person in whom it is vested is alone to be ascertained. But, when a party plaintiff claims a title by purchase or devise, he introduces a new title not previously in the case, and which is controvertible, not merely by the defendants in the bill, but also by the heirs at law. As to these parties, the suit is original; it does not merely revive the old suit, but it states new supplementary matter calling for an answer. So far, then, as it states such matter, it is an original bill; and so far as it seeks to revive upon that matter, it is in the nature of a bill of revivor." *Slack v. Walcott*, 8 Mason, 512. In the same opinion, Justice STORY quoted from Lord Chief Baron GILBERT, who, in giving his reasons why "a devisee or assignee of any plaintiff cannot have a *subpoena ad revivendum* after the decease of such plaintiff," says: "Because, where a party devises or assigns his interest, and dies, if the devisee or assignee were to bring his bill of revivor against the defendant, the heir or executor would be pretermitted, who might have a right to contest such disposition; and therefore he must bring his original bill, and make the heir or executor a party." See, also, STORY, *Eq. Pl.* § 379; 2 Daniel, *Ch. Pr.* (4th Amer. Ed.) pp. 1518-1524; *Russell v. Craig*, 3 Bibb, 377; *Webster v. Hitchcock*, 11 Mich. 56; *Peer v. Cookerow*, 14 N. J. Eq. 361." *Moore v. Rice*, 51 Tex. 292. In reviewing this decision, and affirming it, the Texas court say, in a later opinion: "This subject was examined with care in the case of *Moore v. Rice*, 51 Tex. 290, and the conclusion was substantially as ex-

pressed in the above proposition. On the death of parties to a suit pending, their place must be supplied by the appearance of, or citation to, their legal personal representatives, and not by a voluntary substitution of other parties foreign to the record. In case of the death of the plaintiff, an alleged assignee cannot, over the objection of the defendant, come in and prosecute the suit until the representatives or heirs of the deceased have had an opportunity to admit or contest his right. If, however, the defendant acquiesces in such a procedure, he may be precluded from subsequently objecting." *Howard v. McKenzie*, 54 Tex. 183. See, also, *Sedgwick v. Cleveland*, 7 Paige, 287; *Northrop v. Smith*, 9 N. Y. Supp. 802. Some of these cases just cited relate to the practice in courts of equity, but all codes of civil procedure have been largely modeled after the remedial system of courts of equity. *Carter v. Jennings*, 24 Ohio St. 182; *Beach v. Reynolds*, 53 N. Y. 1, and the opinion of *TALCOTT, J.*, at general term, following; *Coit v. Campbell*, 82 N. Y. 509; *Chisholm v. Clitherall*, 12 Minn. 375, (Gil. 251.) An action at the common law absolutely abated at the death of a party, so far as his interest in the suit was concerned; and the inconvenience resulting from this stringent rule led to the adoption of the more liberal chancery procedure in this regard in the reformed procedure, and therefore the decisions of chancery courts are of great value on the point in dispute here. We have been unable to discover a single authority which dispenses with the salutary rule of giving notice of the application for the substitution of an assignee or transferee in the place of a deceased plaintiff to the defendant and to the heirs, devisees, or the personal representative of the deceased plaintiff. The reason given in the case of *McLaughlin v. Mayor, etc.*, 58 How. Pr. 105, *supra*, why the heirs or representatives of a deceased original plaintiff should be notified of the application for substitution of the assignee of a chose in action, might not apply with much force in the case here, as the action is in ejectment here, and for damages for the detention of the demanded premises, or mesne profits in the sum of \$3,600. If the applicant had been substituted as plaintiff in the suit, and the result of the action would be the ousting of the defendant, the heirs or personal representatives would not be without remedy, as they could, if the transfer to Smith was void, defective, or fraudulent, oust him by their suit in ejectment; but, as to the mesne profits, the same difficulty might arise as in the case of an assignment of a chose in action sounding in contract. The principle announced and adhered to with so much fidelity by all the courts who have passed upon it is a general one, and we do not wish to adopt a different one, which would be well termed an innovation.

3. The defendant in error insists that the whole matter was addressed to the discretion of the trial court, before whom this application was made, and the following authorities seem to support this view: *Beach v. Reynolds*, 53 N. Y. 1; *Packard v. Wood*, 17 Abb. Pr. 318; *Shel-*

don v. Havens, 7 How. Pr. 269; *Chickasaw Co. v. Pitcher*, 36 Iowa, 593; *Carter v. Jennings*, 24 Ohio St. 182; *Emmet v. Bowers*, 23 How. Pr. 331, overruling *Shearman v. Coman*, 22 How. Pr. 517. In the case of *Medbury v. Swan*, 46 N. Y. 200, the word "may," as used in a statute similar to ours, was held to be permissive, and not mandatory; and under section 177 of the New York Code, as it then stood, the right to set up new matter by supplementary pleading was held not to be absolute, but within the discretion of the court. The Code of New York was amended in 1879, and this discretion was taken away, and the following cases have passed upon this amendment, viz.: *Coit v. Campbell*, 82 N. Y. 509; *Greene v. Martine*, 84 N. Y. 648, affirming 21 Hun, 136; *In re Palmer*, 115 N. Y. 493, 22 N. E. Rep. 221; *Lyon v. Park*, 111 N. Y. 350, 18 N. E. Rep. 863; *Holsman v. St. John*, 90 N. Y. 461. The section of our statute, so far as this application is pertinent, is as follows: "Upon the disability of a party, the court may allow the action to continue by or against his representative or successor in interest; and upon any other transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted for him." Rev. St. Wyo. § 2401. This is almost identical with the provision of the Codes of the states holding that the word "may" is permissive, and not mandatory. We apprehend that the undisputed rule is that the court may grant the application in its discretion, which may not be subject to review except for its abuse. The matter certainly should be within the discretion of the trial court, in order to protect the rights of all the parties, and of those to whom they may have been transmitted either by death, devise, assignment, or transfer. Certainly, if the legislature had intended that the application for substitution should be granted as a matter of right, the usual and proper words "shall," "will," or their equivalents would have been used.

The disposition of the questions raised renders it unnecessary, or perhaps improper, to review further the sections of our Code referred to in the brief of the plaintiff in error. We deem it our duty to call the attention of the bar to the decisions bearing upon some of these sections, as they construe provisions of the same character. The plaintiff in error insists that he has a right to be let into the suit, under subdivision 4 of division 3 of the Code, (Rev. St. Wyo. § 2531 et seq.;) and also under that portion of section 2401, Rev. St., quoted *supra*. The first cited sections relate to the revivor of actions, but it is doubtful if they have any application here; as they provide that the action, upon death of a party, may be revived in the name of the personal representative, successor in interest, heir, or devisee, according to the circumstances. The applicant can certainly claim no more than to be a "successor in interest" of the deceased plaintiff, but the decisions upon this point which we have necessarily considered,

though few, do not consider the transferee or assignee to be meant by this term. It was held by the superior court of the city of New York, in a case decided May 5, 1890, that "the decision below involved the construction of section 757, Code Civil Proc. N. Y. The section is that, in case of the death of a sole plaintiff or a sole defendant, if the cause of action survives or continues, the court must, upon motion, allow or compel the action to 'be continued by or against his representative or successor in interest.' The question is, what is the meaning of 'successor in interest?' I am of opinion that the words refer to the possessor of an interest which, apart from the right of the interest, however that may be created, commences, or as to right of enjoyment depends, upon the fact of the death concurring; and they do not refer to an interest gained by transfer from the party by assignment which transfers the interest before the party's death. So far as the petitioner rested his motion upon the assignment by the plaintiff in his life-time, the motion should have been denied, irrespective of the consideration that the transfer assigned the judgment only, which has since been reversed upon appeal." This was an action by Charles Northrop against Alfred H. Smith, and the defendant appealed from an order granting the petition of William A. Harding to be substituted as plaintiff. The order was reversed. *Northrop v. Smith*, (In re Harding,) 9 N. Y. Supp. 802.

An examination of the provisions of our Code relating to revivor of actions, referred to, fortifies this position, as the conditional order of revivor therein allowed "may be made on the motion of the adverse party, or of the representative or successor of the party who died, or whose powers ceased, suggesting his death, or the cessation of his powers, which, with the name and capacities of his representative or successor, shall be stated in the order." Rev. St. Wyo. § 2537. And section 2540, Rev. St., provides that, "upon the death of the plaintiff, the action may be revived in the names of his representatives to whom his right has passed. If his right has passed to his personal representatives, the revivor shall be in his name; and if it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names." Do not these provisions mean that a successor in interest is one who succeeds to the whole or some portion of the estate of a party at death, and not one who obtained title in some portion or even the entire estate in her life-time by voluntary transfer? Again, in section 2401, *supra*, the rights of a transferee seem to belong to some other "transfer" than the disability of a party. Even here it has been held that there was no relief. If the original plaintiff were living, the substitution might be made, but the right to continue it in the name of the original party is gone when the death of the plaintiff is suggested, and the court cannot longer so continue it. Can the transferee then be substituted? It was held to the contrary in New York, in the case of *Kissam v. Hamilton*, 20 How. Pr. 377. The

court says: "Nor can Mr. Shepard come in under the clause of section 121, Civil Code N. Y., which provides that, in case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. This clause contemplates a transfer other than by death; contemplates an existing pending action, and the substitution of one person in the place of another, not a case where the action has abated by the death of a party." Yet it has been held in Kansas that where a plaintiff in an action on a note and mortgage assigns the same to a third person, and afterwards dies, it is error to allow such action to be prosecuted to final judgment in the name of the administrator of the estate of the deceased plaintiff; and in such a case, where the assignee is not a party to the action, it is error to render judgment in favor of the administrator, even though expressed as being "to the use of" such assignee. It was held that the action should be revived and prosecuted in the name of the assignee, who is there termed the "successor in interest," and not in the name of his personal representative, to whom his right did not pass. The court stated that "there might be cases where it would be proper for both the administrator and the person claiming to be the successor in interest to be made parties, and to allow them to interplead for the purpose of determining which was entitled to the judgment that might be recovered." *Reynolds v. Quaily*, 18 Kan. 361. It is not necessary in this opinion to attempt to reconcile these apparently diverse views as to the construction of the remedies provided for by the Code, or to state what steps the plaintiff in error should take to secure a footing in the courts. His application has not met any of the requirements prescribed by an unbroken line of precedents in cases in point, to which we have referred and which we have cited. It did not present a clear *prima facie* case, such as would entitle him to recognition. Notice was not given to the heirs or devisees of the deceased original plaintiff. If there was any evidence presented to the court below, it must have been deemed insufficient to sustain his right, and without such evidence before us for review we cannot pass upon its sufficiency. Without it, and under the motion and affidavit presented, we think that the district court was justified according to all precedent in denying his motion. The record shows that application was made after the adverse ruling of the court upon the application of plaintiff in error to have the guardian of the minor heirs of the deceased plaintiff, Mrs. Boughton, made the plaintiff, which was also denied, and the case dismissed. We cannot pass upon this question, as it is not before us in this proceeding. Whether or not the guardian of such heirs could have any standing in court, under the rules of the common law and under the provisions of our statutes, it is not our province in this matter to say; neither do we intimate whether or not

the district court erred in dismissing the case. The order and judgment of the district court denying the application and overruling the motion of plaintiff in error is affirmed.

CONAWAY and MERRELL, JJ., concur.

SMITH v. CITY OF CHEYENNE.

(*Supreme Court of Wyoming.* Oct. 13, 1891.)

Error to district court, Laramie county.

Ejectment by Mary Boughton against the city of Cheyenne. An application by William G. Smith to be substituted as plaintiff was denied, and he appeals. Affirmed.

E. W. Mann, for plaintiff in error. *O. N. Potter*, for defendant in error.

GROESBECK, C. J. The record in this case discloses that the case presented is the same as that in *Smith v. Harrington*, 27 Pac. Rep. 803, (decided at this term.) For the reasons assigned therein the judgment of the district court of Laramie county is affirmed.

CONAWAY and MERRELL, JJ., concur.

TRAVELERS' INS. CO. v. JONES.

(*Supreme Court of Colorado.* Sept. 21, 1891.)

MORTGAGES—PAYMENT AND RELEASE—PRINCIPAL AND AGENT—EQUITY.

1. Plaintiff applied to a trust company for a loan to be secured by a mortgage, and the company procured it from defendant. Defendant sent the money to the trust company, but plaintiff's title not being good, the company refused to pay it over to him, but afterwards paid part of it. The company's business was to negotiate loans for eastern parties, one of whom was defendant, and it collected the interest on loans made for defendant. *Held*, that the trust company was defendant's agent in making the loan.

2. In an action to cancel a note and release a mortgage given by plaintiff to secure a loan from defendant, the complaint alleged that plaintiff had not received all the money loaned. On the trial the evidence showed that plaintiff had received all the money he actually received. *Held*, that there was no variance between the case made by the complaint and the case as proven, it not having been necessary for plaintiff to allege repayment of the money in his complaint.

3. Where a mortgagee fails to pay over to the mortgagor the full amount of the loan which has been secured by the mortgage, the mortgagor, on repaying the amount actually received, with interest, may sue in equity to cancel his note, and have the mortgage released.

Appeal from district court, Arapahoe county; VICTOR A. ELLIOTT, Judge.

Suit in equity by Amanzo L. Jones against the Travelers' Insurance Company to cancel a note and release a deed of trust given by plaintiff to secure a loan from defendant. Judgment for plaintiff. Defendant appeals. Affirmed.

The appellee, Amanzo L. Jones, was plaintiff below. The following appears, *inter alia*, from the complaint: In February, 1884, he was the owner of certain described real estate situate in Jefferson county, Colo., upon which one Lothrop held a mortgage to secure the sum of \$8,400; this mortgage being in the form of a deed absolute on its face. The plaintiff, being desirous of discharging this and other claims, applied to the Colorado Loan & Trust Company for a loan of \$10,000 for that purpose, and offered to secure the same

by a deed of trust on the said lands; whereupon the trust company presented to him a blank on which to make out a written application for the loan, which he filled out in the usual manner. Afterwards, upon making a second visit to the office of the trust company, he found prepared for him to sign a principal note for \$10,000, together with 10 interest coupons, for \$500 each, all made payable to the Travelers' Insurance Company; also a certain trust-deed of the lands aforesaid, securing the payment of the same, in which the said Colorado Loan & Trust Company was named as trustee. He subsequently executed the notes and deed of trust, and delivered the same to the Colorado Company. Thereupon this company drew its check for \$8,400, payable to its attorney, who obtained the money thereon, and tendered the same for plaintiff to said Lothrop, who refused to receive it. It is further alleged that the money was immediately returned to the bank from which it had been obtained. Plaintiff, expecting Lothrop to change his mind and accept the money, desired the trust company to allow it to remain in the bank for that purpose. It being agreed that plaintiff could withdraw it at any time by giving 30 days' notice, and producing an abstract showing a clear title to the land. The difference between the \$8,400 and the \$10,000 was also promised. About January 1, 1885, Lothrop consenting to accept the \$8,400, and release the land, plaintiff gave the trust company the required 30 days' notice. It failed, however, to get the money for him, and he was compelled to borrow the same from another source, and execute a new note for its repayment. With the money so borrowed he paid off Lothrop's claim, and procured the release of the trust-deed. This amount was afterwards refunded by the Colorado Company. The remainder, however, was never received by Jones. The defendant, answering, alleges that the loan and trust company was the agent of appellee in making the application for the loan referred to in the complaint, and that it did loan to appellee the full sum of \$10,000, sending the money to appellee's said agent, and receiving from it the note, coupons, and trust-deed specified in the complaint; that no part of the money had ever been repaid to it. The replication contains a denial of all the new matter set out in the answer.

A trial to the court resulted in findings and decision of the tenor following: *First*. That as between the plaintiff and the Travelers' Insurance Company, the Colorado Loan & Trust Company was the agent of the latter in negotiating the loan. *Second*. That on the 18th day of February, 1884, the Travelers' Insurance Company remitted to and the Colorado Loan & Trust Company received the sum of \$10,000, being the amount of the plaintiff's note which had been delivered to said insurance company, but that the Colorado Loan & Trust Company received said sum as agents of the Travelers' Insurance Company, and not as the agent of the plaintiff; and that said moneys were not at the time paid to the plaintiff by the Col-

orado Loan & Trust Company, but were misappropriated by said trust company to its own use. *Third.* That, of the moneys so negotiated by the plaintiff from the defendant, the Travelers' Insurance Company, the sum of \$9,024.38 was paid to and received by the plaintiff on the 2d day of February, 1885, and that only said sum of \$9,024.38 has been received by the plaintiff. *Fourth.* The delay in the payment was neither the fault of the plaintiff nor of the defendant. *Fifth.* That the plaintiff has paid all such interest as was fair and equitable between the parties on account of such loan, up to the said 2d day of February, 1885. *Sixth.* That he is now liable to the Travelers' Insurance Company, defendant, upon the note described in the complaint, in the sum of \$9,024.38, with interest thereon from the 2d day of February, 1885, at the rate of 10 per cent. per annum, and that the land of plaintiff, mortgaged as described in the pleadings herein, is chargeable only with that sum as a lien. *Seventh.* That plaintiff did not agree to pay commissions to any one for procuring this loan. *Eighth.* That the plaintiff has this day paid to the defendant, the Travelers' Insurance Company, the sum of \$10,000.36, which amount has been indorsed upon said note. Thereupon a decree was entered requiring—*First.* That the coupon note given by said plaintiff, Amanzo L. Jones, to the defendant, the Travelers' Insurance Company, for the sum of \$10,000, dated the 15th day of February, 1884, is no longer an indebtedness due from said plaintiff to said the Travelers' Insurance Company, and that it be delivered up and surrendered to plaintiff. *Second.* That the deed of trust executed by the plaintiff to the Colorado Loan & Trust Company, as trustee, to secure the payment of said \$10,000 coupon note, be delivered up and surrendered, and that said Colorado Loan & Trust Company shall execute, acknowledge, and deliver a good and sufficient release deed to said plaintiff, releasing to him all the right, title, and interest it acquired under and by virtue of said deed of trust. *Third.* The defendant is perpetually enjoined from selling, transferring, pledging, or in any way or manner negotiating the said note. *Fourth.* That each of the parties to this action pay their own costs.

Charles H. Toll and E. W. Reynolds, for appellant. L. C. Rockwell, for appellee.

HAYT, J., (after stating the facts.) Three objections are urged in this court against the decree of the district court. These objections will be considered in the order presented by the counsel.

1. Insufficiency of the evidence to support the finding that the loan and trust company in making the loan was the agent of the Travelers' Insurance Company. The trial below was had to the court without a jury. That court having had the advantage of observing the witnesses upon the stand, by a familiar rule this court is precluded from examining the evidence merely for the purpose of substituting its judgment upon its weight for the conclusion of the trial court. A resort to the rule is not necessary, how-

ever, in this case. The evidence points so strongly to the agency of the loan and trust company, as found by the district court, as to leave no room for an opposite conclusion. It is shown that the principal business of the loan and trust company was to negotiate loans for eastern parties. It was its habit, upon receiving an application for a loan, to forward the same to some one of its correspondents in the east for approval and acceptance. The Travelers' Insurance Company was one of such correspondents; in fact, it may be said that it was the one with which the loan and trust company principally transacted such business. In pursuance of this custom, when the application of Jones was received it was forwarded to the Travelers' Insurance Company for its approval. The abstract of title at this time had not been prepared. Appellant approved the Jones loan, and forwarded the amount (\$10,000) to its correspondent in New York, and had it placed to the credit of the Colorado Company. If Jones' title to the land, given as security, had been perfect, the loan would, without doubt, have been consummated, and the money paid without delay; but it was found that his title was not good, and for this reason the money was withheld by the loan company. A pertinent inquiry in this connection is, For whose benefit and protection was the payment of this money refused? There can be but one answer to this question, under the evidence: It was withheld for the protection of the insurance company. And certainly in so doing the Colorado Company was still acting as the agent of the insurance company. Had it been acting as the agent of Jones, it would have paid the money to him, or, if it had refused, payment could have been compelled by Jones. It certainly cannot be claimed, in view of the failure of the title, that Jones could have compelled the payment of this money to him. This strongly tends to show that the Colorado Company was at that time not acting as the agent of Jones.

It is claimed by appellant, and numerous authorities are cited in support of the claim, that the Colorado Company acted as broker in the transaction, and, as Jones first employed it to procure the money for him, that in law it must be considered as his agent for the entire transaction so far as any agency resulted therefrom. It is a sufficient answer to this contention to say that the Colorado Company was the agent of the Travelers' Insurance Company for the purpose of making loans long prior to the time of the Jones application. It was not only negotiating loans for the Travelers' Insurance Company, but it was collecting interest upon such loans, as the same fell due from time to time, and forwarding the same to the company's principal office at Hartford, Conn. It was doing this at the request of the insurance company and as its agent. It is further shown by the testimony of Barrows, an employee of the insurance company, and its witness, that the Colorado Company was authorized to and did collect interest upon this very claim; and that it was some time after trouble had

arisen between the insurance company and the Colorado Company before the former revoked the agency of the latter. It then expressly notified its borrowers, including appellee, that the Colorado Company was no longer authorized to collect the interest, and issued a general circular to this effect. If, as now claimed, the Colorado Company was not authorized to collect the interest, and had not been in the habit of so doing, why was such a circular necessary or proper? It is in evidence that Jones, entertaining the belief that Lothrop, upon reflection, would release his claim, requested the Colorado Company to hold the money. It is claimed that Jones by this made the Colorado Company his agent, and consequently can only look to it for redress. Jones only made this request, however, after payment to him had been refused. He did it at a time when the Colorado Company held the money as the agent of the insurance company, and would not pay the money, although he stood ready to receive it. In this extremity he asked that, instead of returning it, it should be retained, in order that he might yet secure it, should he be able to present a satisfactory title. Eventually he succeeded, so far as the title was concerned. Still the money was withheld. In this state of the record we see no reason for interfering with the finding of the trial court upon the question of the agency.

The remaining objections have been argued together by counsel. They are two in number: A variance is claimed between the case made upon the trial and the case stated in the complaint; and it is urged that the case made is not one cognizable in equity. The only variance between the proof and the complaint arises out of the payment by Jones of the money which he had received. This occurred at the trial, and it was neither necessary nor proper to anticipate it in the pleading. Appellee having paid and appellant having accepted all the money that he had received upon his note, together with all the interest due upon the same, the insurance company was placed in the position of holding a note secured by a deed of trust for a claim that had been fully satisfied. The principal contention below was upon the liability of appellee for the money advanced by the insurance company to the loan and trust company, which he had never received. It appearing that the Colorado Company was the agent of the Travelers' Insurance Company in receiving this money, and no fraud being shown on the part of Jones, he was in no way responsible for the money withheld by the Colorado Company; and, his liability having been fully discharged, he was entitled to have his notes canceled, and the cloud of the trust deed removed from his title. The jurisdiction of courts of equity in such cases is too firmly established to be now made the subject of controversy. Finding no error in the record, the judgment of the district court is affirmed.

ELLIOTT, J., having presided at the trial below, did not participate in this decision.

EDWARDS v. SMITH.

(Supreme Court of Colorado. Sept. 21, 1891.)

TRIAL—STIPULATION—OBJECTIONS TO INSTRUCTIONS.

1. Where parties appear, and by stipulation submit their controversy to a court having jurisdiction of the subject-matter thereof, they cannot afterwards be heard to question the authority of such tribunal.

2. An objection to instructions should be specific, so as to afford the trial court an opportunity for reviewing and correcting the charge, if found erroneous.

(Syllabus by the Court.)

Appeal from district court, Eagle county; L. M. GODDARD, Judge.

This action was originally begun before a justice of the peace. Subsequently an appeal was taken to the county court, where the following stipulation was entered into: "It is stipulated by and between the parties to this action that the venue therein be changed from the county court of Eagle county, Colo., to the district court. * * * And it is further stipulated and agreed that, upon the trial of this action in the said district court of Eagle county, all matters and differences arising and growing out of the use, injuries, or damages to the team of horses and wagon, which defendant now has possession of by virtue of a judgment rendered at the June term, A. D. 1887, of said district court, sitting in and for Eagle county, in an action between the parties hereto, may be adjudicated upon, up to and including the day of trial, by said district court." The cause being called for trial in the district court, it was further "agreed by the parties hereto, in open court, that six jurors shall try this cause." The trial resulted in a verdict and judgment in favor of the plaintiff, Smith, for the sum of \$174.75. The defendant, Edwards, appeals to this court.

A. F. Gunnell and A. R. Brown, for appellant. Montgomery & Frost, for appellee.

ELLIOTT, J., (after stating the facts as above.) It is contended by counsel for appellant that the action is one of equitable cognizance, and so not within the jurisdiction of the justice of the peace before whom the suit was originally instituted. Upon this ground it is assigned for error that the district court was without jurisdiction to try the cause. Whether the objection to the jurisdiction of the district court might have been maintained if it had been insisted on in apt time, without waiver, we need not consider. There being no necessity for written pleadings in cases originating before justices of the peace, the question whether the justice has jurisdiction in a particular case must ordinarily be determined from the evidence. In this case, however, we regard the stipulation entered into between the parties as decisive of the jurisdictional question. After the cause had reached the county court the parties entered into a stipulation in writing, making it a part of the record, to the effect that the cause should be removed into the district court, and that certain specified matters and differences between them should be there tried. The parties ap-

peared in the district court, and went to trial in pursuance of such stipulation. Having thus voluntarily submitted their controversy to a court having jurisdiction of the subject-matter thereof, they cannot afterwards be heard to question the authority of such tribunal. This is no violation of the principle that consent cannot confer jurisdiction over the subject-matter of a cause. The constitutional jurisdiction of the district court extends to "all causes, both at law and in equity." It was competent for the parties, by stipulation, to waive any objection they might have to the trial of the cause by the county court on appeal, or by the district court on change of venue, and to voluntarily submit their matters of difference to trial by the district court, which they did. *Lyon v. Washburn*, 3 Colo. 201; *Behymer v. Nordloh*, 12 Colo. 352, 21 Pac. Rep. 37, and cases there cited.

The court charged and instructed the jury orally by consent. It does not appear that any specific objections were made to any part of the charge. At the close of the charge exception was taken as follows: "To which charge and instructions to the jury, and each and every part thereof, said plaintiff, by his counsel, then and there duly excepted." It is well settled that general exceptions taken in this way are not sufficient, since it is evident they do not point out any specific objection so as to afford the trial court an opportunity for reviewing and correcting the charge, if found erroneous. *Keith v. Wells*, 14 Colo. 321, 23 Pac. Rep. 991, and cases there cited. This disposes of the assignments of error so far as they are properly presented by the abstract and brief of appellant. The case has been twice tried, first by the justice of the peace, and second by a jury in the district court, with substantially the same result at each trial. No substantial errors have been made apparent on this appeal. The judgment of the district court is affirmed.

TOWN OF SALIDA v. MCKINNA.

(Supreme Court of Colorado. Oct. 5, 1891.)

DEFECTIVE STREETS—LIABILITY OF CITY—DEDICATION—OBJECTIONS NOT RAISED BELOW—INJURIES TO WIFE—RIGHTS OF HUSBAND.

1. An incorporated town may be held liable for damages occasioned by a defective street, provided there has been a dedication of the street to public use, and an acceptance of such use by the proper authorities.

2. Evidence that a street through the main business part of a town is a public thoroughfare, generally traveled, and that the municipal officers have voluntarily assumed to keep the same in repair, is sufficient *prima facie* to warrant a finding that the street has been duly dedicated and accepted as a public highway.

3. Objections to pleadings and evidence, raised for the first time in this court, must be considered, if at all, with much allowance.

4. Upon a cause of action to recover for certain expenses, evidence that the expenditures "might amount to \$200, probably," is too indefinite to found a recovery upon.

5. Even if a husband may in extreme cases recover for his services in nursing his wife, where her injuries have been caused by the negligence of another, the recovery must be for the value of his services as a nurse, and not for the

amount of wages lost by abstaining from other employment.

6. When certain testimony has been erroneously admitted, and submitted to the jury, the error may, under certain circumstances, be cured by a modification of the verdict and judgment, so as to save the necessity of a new trial.

(Syllabus by the Court.)

Appeal from district court, Chaffee county; WILLIAM HARRISON, Judge.

This was an action by Sarah McKinna, plaintiff below, for a personal injury occasioned by falling into an excavation in the street of the town of Salida. The excavation was about 6 feet in width, 8 or 9 feet in depth, and extended about 70 feet along the sidewalk of the main business street of the town. The plaintiff testified, in substance: "On July 29, 1887, I had occasion to go over to town for some necessities for the house. * * * I did not know anything about that excavation being there. I had not been by that excavation at all. I did not run against anything. I moved, made one step, and fell." She had fallen into the excavation, and was severely injured. The accident occurred about 9 o'clock at night, and there was no light or fence about the excavation at the time. The plaintiff was a woman 36 years old, strong and healthy. She lived with her husband, John McKinna, and was the mother of six children. She did the work for the family. The evidence of plaintiff's attending physician shows that her injury consisted of a fracture of the upper thigh-bone about two inches below the hip-joint. Plaintiff was confined to her bed between three and four months, and suffered intense and excruciating pain from her broken limb. Her physician further testified that, by reason of the injury, the broken limb was at the date of trial (ten months after the accident) one inch shorter than the other; that the injury permanently impaired plaintiff's health; and that he thought she would suffer pain at every change of the weather. The plaintiff recovered a verdict and judgment for \$5,500. The defendant appeals.

G. K. Hartenstein, for appellant. R. K. Hagan, for appellee.

ELLIOTT, J., (after stating the facts as above.) The facts of this case are practically undisputed, the defendant having offered no testimony at the trial. Two questions only require consideration upon this appeal.

1. It is admitted by the answer that the defendant below was, at the time of the happening of the injury complained of, a duly-incorporated town in this state. It is conceded by counsel for appellant that such a municipality may, under certain circumstances, be held liable for damages occasioned by a defective street, provided there has been a dedication of the street to public use, and an acceptance of such use by the proper authorities. But in this case it is contended that neither the allegations nor the evidence show that the street where the injury occurred had been thus dedicated and accepted, so as to make it incumbent upon the town to keep the same in repair. What does the record

disclose in regard to this contention? In the complaint it is alleged, in substance, that it was the duty of the town to keep its streets in good order; and that the street and sidewalk where the injury occurred were at the time common thoroughfares, constantly and always used by the citizens of said town and others as such. These averments, though not according to the most approved precedents, are sufficient, in substance, to support a judgment in favor of plaintiff, the defendant having joined issue upon them and gone to trial and verdict without objection. On the trial evidence was given by competent witnesses to the effect that the excavation where the injury occurred was in a street running through the main business part of the town; that both sides of said street were occupied by business houses and residences; that banking-houses, post-office, opera-house, stores, and doctors' offices fronted upon the street; that the street was a public thoroughfare, generally traveled by the citizens of Salida; and that the excavation was in the sidewalk on the main residence side of the street. The street and water commissioner testified, in substance, as follows: "The excavation was commenced about the middle of February, and completed about the middle of April, 1887. I gave the owner of the adjacent property, who made the excavation, notice, and he put up a fragile fence. That was in March, 1887. He kept up the fence for some weeks, and then it fell down. I reported the fact to the mayor, and he told me to request the owner to put up red lights. The next night I saw two red lights, one at each corner. The fence did not remain up more than three or four weeks. After that, temporary fences were put up at the corners. I think there had not been any lights there for some time before the accident. The owner said it was impossible to keep a fence up. I reported the same to the committee on streets, and they told me to have him put up red lights. I reported him so often I got tired. I reported to the mayor after he allowed the lights to go out, and also to the chairman of the committee on streets and alleys. They instructed me to request or command the owner to put up the fence and also the lights. I don't think the town took any steps after I notified the officers that the owner failed to keep the lights and the fence up. Probably it was two or three weeks since I had seen any lights before the accident. I had difficulty with the owner of the property. I was trying to get the water through the street on that side, so that it would run through the business part of the town. I had to put a flume in on the outside to protect the wall. I built a flume at the expense of the city to protect the owner's wall." The evidence as above stated was sufficient *prima facie* to warrant the jury in finding that the street where the injury occurred had been duly dedicated to public use; that the town had accepted and recognized the same as a public highway, and had voluntarily assumed the responsibility of keeping the same in repair. Bouv. Law Dict.; 2 Dill. Mun. Corp. § 642, and notes; Manderschild v. City of Dubuque, 29 Iowa, 78.

The evidence was also sufficient to warrant the finding that the proper town officials had due notice, but did not exercise reasonable diligence in their efforts to keep the street where the accident happened free from danger. The special objection that the pleadings and evidence are insufficient to show a dedication and acceptance of the street is raised for the first time in this court, and so must be considered, if at all, with much allowance. If such objection had been interposed in apt time in the court below, the allegations and proof might perhaps have been made more specific. Bliss, Code Pl. § 438; Machette v. Wanless, 1 Colo. 229; Higgins v. Armstrong, 9 Colo. 38, 10 Pac. Rep. 232.

2. As a second and separate cause of action, the plaintiff seeks to recover certain damages alleged to have been sustained by her husband by reason of her injuries. The supposed damages of the husband are specially set forth, with an averment that he had by writing duly assigned the same to plaintiff. On the trial, objection was interposed to the introduction of evidence in support of such assigned claim. The objection was overruled, and the jury were instructed that, if they should find for plaintiff, they should include in their verdict, in addition to her own damages, the expenses incurred by her husband, and also the value of his services in nursing and attending her. It is unnecessary to determine whether plaintiff could, under any circumstances, recover upon the second cause of action as alleged. Even though the husband may, in cases of this kind, maintain an action for such damages as he himself has specially sustained on account of his wife's injuries, and even though such cause of action may be assignable so as to entitle the assignee to sue in his own name under our practice,—a point we do not decide,—still the evidence offered in this case was not sufficient to warrant a recovery upon the second cause of action. The husband's testimony was that during his wife's sickness he spent money for medicines, stimulants, and other necessities for her benefit, and that the same "might amount to \$200, probably." This was too indefinite and uncertain to found a recovery upon. He also testified that he lost four months' time from his work at "the round-house of the railroad" in consequence of attending upon his wife during her illness, and so lost his wages, which were from \$50 to \$53.75 per month. Even if the husband may recover for his services in nursing his wife in extreme cases of this kind, the recovery must be for the value of his services as a nurse to his sick wife, and not for the amount of wages lost by abstaining from other employment. There was no testimony showing the value of his services as a nurse. 2 Thomp. Neg. 1240; Smith v. City of St. Joseph, 55 Mo. 456. The submission of the testimony concerning the husband's expenditures and loss of wages to the jury, as a basis for increasing the plaintiff's damages, is the only substantial error apparent in the record. It is clear, however, that the jury could not have been led to increase the verdict more than \$200 on account of the

alleged expenditures, nor more than \$215 on account of the alleged loss of time and wages. Hence the prejudice caused to appellant by the introduction and submission of the improper testimony may be completely removed by a modification of the judgment, and thus the necessity of another trial may be obviated. The supreme court of Wisconsin pursued this course in a similar case. *Kavanaugh v. City of Janesville*, 24 Wis. 618. In accordance with the foregoing views, the judgment is reversed, and the cause remanded, with directions to the district court to allow the plaintiff to remit from the verdict the sum of \$415, and that, upon remitting such amount, she may have judgment entered in her favor, for the residue of the verdict and costs, as of the day when the original judgment was rendered. If plaintiff shall refuse to remit such sum, then the district court is directed to set aside the verdict altogether, and grant a new trial. The appellant shall recover costs in this court. Reversed, with directions.

(2 Wash. St. 422)

SMITH v. TAYLOR.

(*Supreme Court of Washington*. June 10, 1891.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENT.

A certain person bought land, and took the deed in his own name. After his death, his mother obtained a decree that she was the equitable owner, and that decedent held the legal title in trust for her. She brought ejectment against a tenant who had gone into possession soon after the purchase. The latter admitted her title, but set up a parol agreement with the decedent wherein he had agreed to purchase at any time within 10 years, and was entitled in the mean time to the possession. Code Wash. § 389, in force at the commencement of the action, provided that where the adverse party sues or defends as executor, administrator, or "legal representative" of any deceased person, a party in interest or to the record shall not be admitted to testify in his own behalf. Said section was modified before the trial, by the Laws of 1889-90, so as to provide that where the adverse party sues or defends as above specified, or "as deriving right or title by, through, or from any deceased person," a party in interest or to the record shall not be permitted to testify "as to any transaction had by him with, or any statement made to him by, any such person." *Held*, that the defendant's testimony was incompetent under either provision.

Appeal from superior court, Clarke county; N. H. BLOOMFIELD, Judge.

Ejectment by Virginia W. Taylor, executrix, etc., against Michael J. Smith. There was judgment for plaintiff, and defendant appeals. Affirmed.

Miller & Stapleton, for appellant. *W. Byron Daniels, Geo. H. Stewart, and Gilbert & Snow*, for respondent.

HOYT, J. In 1885 Frank E. Taylor purchased the land in controversy herein, and took a deed therefor in his own name. Soon after such purchase the defendant in this action went upon said land, and has ever since resided thereon. After said Taylor's death his mother, as executrix of the last will of her husband, obtained a decree of the district court holding terms at Vancouver, Clarke county, in which it was determined that she was the equitable owner of said land, and that said Tay-

lor held the legal title in trust for her. The court thereupon decreed the entire title to be in her. After such decree was entered, she demanded of said defendant possession of the premises, and, the same being denied, brought her action in ejectment to recover the same. Defendant answered, practically admitting her title, but setting up a certain alleged oral agreement between himself and the said Taylor by virtue of which he was entitled to the possession of said land under an agreement to purchase the same for the sum of \$3,000 at any time within 10 years. The contract as set out in the pleadings made it obligatory on the said Taylor to sell and the said defendant to purchase, but in the proofs defendant's own statement showed that at most the arrangement between him and said Taylor was an option under which he might purchase if he saw fit to do so, but with no agreement or obligation on his part to take the land at the price agreed upon. There was no proof worthy of the name as to any arrangement between said Taylor and the defendant excepting the testimony of the defendant himself; for, while there was some evidence of admissions and loose statements of the said Taylor by other persons than defendant, they were altogether too indefinite to found a right upon. The court below, in deciding the controversy, disregarded the testimony of said defendant, and its action in so doing constitutes one of the principal grounds of complaint here. I think that the action of the court in this matter was right, as in my opinion such evidence was inadmissible under the provisions of our statute in relation thereto. Section 389 of the Code of Washington is as follows: "Sec. 389. Any person offered as a witness shall not be excluded from giving evidence by reason of his interest in the event of an action as a party thereto or otherwise, but such interest may be shown to affect his credibility: provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased or insane person, or as a guardian of a minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf." And this was the law in force at the time of the commencement of this action. It was modified, however, by the Laws of 1889-90, so that the last clause now reads as follows: "Provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person," etc., "then a party in interest or to the record shall not be permitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person," etc. And the law as thus modified was in force at the date of the trial. The law as thus modified seems broad enough to cover a case of this kind, beyond question. It is

clear that plaintiff claimed by, through, or from the deceased person, and that consequently the declarations of said deceased person to either party to the record could not be testified to by them. But appellant contends that the law in force at the date of the commencement of the action should govern, and not that of the date of the trial. I think, however, that, as these statutes provided only a rule of evidence, and did not affect any right, this contention cannot be sustained. But, be that as it may, it can make no difference with the question under discussion; for, under the section of the Code above quoted, before it was amended the testimony was equally as inadmissible as after such amendment. The words "legal representative" therein used, in my opinion, were intended to, and did, bring the plaintiff within the provisions of said section. The appellant seems to have confounded the words "legal representative" with "personal representative," while it is clear that, as used in this section, such words have an entirely different meaning, and are broad enough to include the plaintiff in this case as being such a representative of the deceased person as contemplated by such statute. See *Oneale v. Caldwell*, 8 Cranch, C. C. 312; *Johnson v. Ames*, 11 Pick. 173; *Wamsley v. Crook*, 3 Neb. 350.

Appellant takes exceptions to the manner in which the objections to the testimony of said defendant were taken in the court below, and if this were an action at law there might be some force in what he says; but it must be remembered that by the answer of defendant this action was made a proceeding in equity, and that in such cases this court looks at the substance of the case as presented below, and not at any technical exceptions or objections made therein. Besides, if I were of the opinion that the testimony of said defendant had been improperly excluded in the court below, and should investigate the rights of the parties in view of all the evidence introduced, including that of the defendant, the result arrived at would not be more favorable to the appellant. The contract as testified to by him was clearly a unilateral one, under which all the rights were on his side, and none on that of the other party. By the terms thereof, he was to be allowed to buy at any time within 10 years, but was under no obligation to buy at all, unless he saw fit to do so. Such a contract could only be enforced in a court of equity where it appeared that one acting thereunder had made great improvements, or otherwise put himself in such a situation that it would be unconscionable to deprive him of the benefits of the position into which the acts of the other party had led him. Defendant's own statement, however, shows that this is not such a case; for, while it is true that he makes use of some loose expressions as to the amount of his improvements on said land, yet when he is required to particularize he is only able to show four or five hundred dollars' worth of improvements during the whole time he was in possession, and a portion at least of this was for his own benefit,

as lessee in possession, and not for the permanent improvement of the place, while a fair rental value of the premises for the time occupied by him was at least \$500.

The case made by defendant, even upon his own showing, is insufficient to authorize a court of equity to interfere with the title to the land. To authorize such action a clear case must be made, not only as to the equities which the proof tends to show, but as to the proof itself. The equitable defense failing, and the title of the plaintiff being admitted, she was entitled to the possession of the land, and the judgment of the lower court in so decreeing will be affirmed.

STILES and SCOTT, JJ., concur.

DUNBAR, J. I concur in the result.

(47 Kan. 178)

SHIPPEN v. KIMBALL.

(Supreme Court of Kansas. Oct. 10, 1891.)

MORTGAGEE — FORECLOSURE — PARTIES — PUBLIC LANDS.

1. In an action to foreclose a mortgage based on service by publication only, the affidavit to obtain the same alleged that personal service could not be made upon the defendant within the state, and "that this is an action brought for the recovery of real property under a mortgage situated in said county of Lyon," and it was contended that the affidavit did not sufficiently state the nature of the action. *Held*, that it is imperfect in this respect, but not so defective as to render a judgment based thereon null and void or subject to a collateral attack.

2. Wells entered a tract of public land at the United States land-office, and obtained a certificate of entry, and immediately thereafter, and before the patent was issued, gave a mortgage thereon to Walker, to secure the purchase money, which was furnished by Walker, which mortgage was at once placed upon record. Shortly afterwards Wells conveyed his interest in the land to C. by an assignment of the certificate of purchase, but this assignment was never recorded nor brought to the notice of the mortgagees. Later, default was made in the payment of the debt secured by the mortgage, and Walker brought an action against Wells, the mortgagor, to foreclose, but obtained only constructive service upon him, and, not knowing that C. was the assignee of the mortgagor, he was not made a party to the proceeding. A decree of foreclosure was rendered, and the land sold thereunder to Walker, which sale was confirmed by the court, and a proper sheriff's deed was executed to Walker for the land. Afterwards, in pursuance of a judgment rendered against Walker, and a judicial sale on said judgment, the sheriff duly executed and delivered to K. a sheriff's deed, which conveyed the entire interest of Walker in the land; thus giving to K., through the foreclosure of the mortgage, the judgments and the judicial sales, a clear chain of title from Wells, the common source of title, before C., who also claims under Wells, had any title or claim whatever on record. Up to this time the land was vacant, unoccupied, and unimproved, and the patent for the same had not been issued. Afterwards the patent from the United States was issued directly to C., as the assignee of Wells. *Held* that, as C. had no title of record, the failure to make him a party to the foreclosure proceedings did not render the judicial sales and the purchases by Walker and K. void; and further held, that the equities and interest of the purchasers at such sales are superior and paramount to those of C. *JOHNSON, J.*, dissenting.

3. An assignment of the certificate of purchase of land from the United States may, under

the registry laws, be proved or acknowledged and filed for record in the office of the register of deeds; and where it is neither proved nor acknowledged, nor so filed for record, it is void, under the registry laws of 1859, as to all subsequent purchasers for a valuable consideration without notice, (Act 1859, relating to conveyances, § 13,) and void, under the registry laws of 1868, as to all persons except such as have actual notice of the assignment, (Act 1868, relating to conveyances, §§ 19, 21.) JOHNSTON, J., dissenting.

(Syllabus by the Court.)

Error from district court, Lyon county; CHARLES B. GRAVES, Judge.

Action between Joseph Shippen and A. S. Kimball. Judgment for Shippen. Kimball brings error. Affirmed.

C. N. Sterry, for plaintiff in error. J. H. McClure, for defendant in error.

VALENTINE, J. A controversy arose between the parties to this proceeding with reference to the ownership of the S. W. $\frac{1}{4}$ of section 10, township 18 S., of range 10 E., situated in Lyon county, Kan. Each of the parties had obtained a judgment upon constructive service quieting the title to the real estate in himself, but these judgments were vacated by stipulation, and the question as to who was the actual owner of the real estate as between them was submitted to the trial court without pleadings, and upon an agreed statement of facts, under the provisions of section 525 of the Civil Code. From the stipulated facts it appears that the land in controversy was purchased at the United States land-office at Leocompton on October 6, 1859, by one Wesley Wells, by the location of a land-warrant upon it issued under the act of congress of March 3, 1855. On the day of the location Wesley Wells executed to T. H. Walker a mortgage on the same tract of land, to secure the payment of a promissory note given by him to Walker for the sum of \$175.70, being the purchase money for the land so purchased. The mortgage was recorded on October 7, 1859. On November 25, 1859, Wesley Wells made a written assignment of the certificate of location issued to him by the land-office, and delivered the same to Morris Cohn, and authorized the assignee to receive the patent for the land; and on May 4, 1878, the United States issued to Morris Cohn, as the assignee of Wesley Wells, the patent for the land in controversy. This assignment of the certificate of location was never recorded nor brought to the notice of either Walker or Kimball until after each had procured his title. On August 10, 1863, Walker instituted a foreclosure proceeding against Wesley Wells alone, and endeavored to obtain constructive service upon him. The affidavit made and filed for the purpose of obtaining a constructive service stated, among other things, "that the service of a summons cannot be made on the said Wesley Wells within the state of Kansas; that this is an action brought for the recovery of real property under a mortgage situated in said county of Lyon." The notice published pursuant to the affidavit reads as follows: "Wesley Wells, in parts unknown, will take notice that Thaddeus H. Walker, of the county of Washington, state of New York, did,

on or about the 10th of August, A. D. 1863, file his petition in the district court of the fifth judicial district of the state of Kansas, within and for the county of Lyon, in said state, against Wesley Wells, setting forth that the said Wesley Wells gave a mortgage to the said Thaddeus H. Walker on the south-west quarter ($\frac{1}{4}$) of section, (10,) township eighteen, (18,) range ten, (10,) situated in said county of Lyon, to secure the payment of one hundred and seventy-five dollars and seventy hundredths, (\$175.70,) according to the terms of a certain note referred to in said mortgage, and dated October 6th, 1859, payable twelve months after date, with interest from the date until paid at the rate of 4 per cent. per month. The said Wesley Wells is further notified that he is required to appear and demur to or answer said petition on or before the 23d day of October, A. D. 1863, or the same will be taken as confessed, and judgment rendered accordingly." At the October term, 1863, a judgment was rendered in favor of T. H. Walker, decreeing a foreclosure and sale of the lands described in the mortgage; and, upon an order of sale issued on the judgment, a sale of the real estate was made by the sheriff of Lyon county on March 3, 1866, to T. H. Walker, which sale was confirmed by the court, and the sheriff executed and delivered to Walker a deed for the premises. On July 24, 1877, the sheriff of Lyon county, in pursuance of a judgment theretofore rendered by the district court against T. H. Walker, and a sale on said judgment, duly made, executed, and delivered to A. S. Kimball a sheriff's deed purporting to convey the land in controversy to A. S. Kimball; and it is agreed that Kimball by the deed received a conveyance of any and all interest which Walker ever had or obtained in the lands in controversy. On May 4, 1878, Morris Cohn, who obtained the patent for the land as the assignee of Wesley Wells, conveyed and transferred all the title and interest which he acquired in the land to Joseph Shippen, the plaintiff in error, and he founds his title to the real estate upon this transfer and conveyance. The land in controversy has always been vacant, unoccupied, and unimproved, and at the time when the foreclosure proceeding of Walker against Wells was commenced in the district court of Lyon county, and ever since, Wells has been absent from the state of Kansas, and service of summons could not be had upon him within the state. Upon these facts the trial court determined that the equity of the case was with Kimball, and that he was the owner and entitled to the possession of the land in controversy. Shippen excepted, and comes here asking a reversal.

It is conceded that when Wesley Wells purchased the land in controversy from the United States on October 6, 1859, he became the absolute owner thereof with the entire title thereto, except the bare, naked, legal title, which still remained in the United States, and would remain in the United States until the patent for the land should be issued. It is also conceded that Wells then had the right to mortgage the property to Walker as he did, or to

any one else, or to dispose of the same as he might see fit; and it must be held, under the authorities, that the service of summons in the foreclosure suit of Thaddeus H. Walker against Wesley Wells, made by publication, cannot in this collateral proceeding be held to be void, but must be held to be valid, although the affidavit for service by publication is to some extent defective. *Ogden v. Walters*, 12 Kan. 282; *Claypoole v. Houston*, Id. 324; *Pierce v. Butters*, 21 Kan. 124; *Gillespie v. Thomas*, 23 Kan. 138; *Rowe v. Palmer*, 29 Kan. 337; *Harris v. Claffin*, 36 Kan. 543, 551, 13 Pac. Rep. 830; *Bogle v. Gordon*, 39 Kan. 31, 17 Pac. Rep. 857. It is also conceded that, except for the title of Walker and Kimball to the property in controversy, the title of Shippen would be good, and he would be the owner of the property. All the transactions and proceedings had in the present case, giving to Walker his title, were had under the registry laws of 1859, c. 30; while all the transactions and proceedings had giving to Kimball his title, and transferring Walker's title to Kimball, were had under the registry laws of 1868, (Gen. St. 1868, c. 22,) which laws, with some amendments, are still in force. (Gen. St. 1889, c. 22;) and all the transactions and proceedings had which give to Shippen his title were had under the registry laws of 1859, up to October 31, 1868, when they were afterwards had under the registry laws of 1868. We think the questions involved in this case are governed and settled principally by the registry laws.

Both Kimball and Shippen claim title to the property in controversy under the same original owner, Wesley Wells, who was the original purchaser of the land from the United States. Walker furnished the purchase money. Wells purchased the property, received the certificate of purchase, and then mortgaged the property to Walker to secure the purchase money, and this mortgage was immediately placed upon record. Afterwards Wells assigned his certificate of purchase to Cohn; but it does not appear that this assignment was ever proved or acknowledged or filed for record, as it might have been under the provisions of the registry laws; and hence the assignment was void under the registry laws of 1859 as to all subsequent purchasers for a valuable consideration without notice, (Act 1859, relating to conveyances, § 13,) and void under the registry laws of 1868 as to all persons except such as had actual notice thereof, (Act 1868, relating to conveyances, §§ 19, 21.) Afterwards Walker foreclosed his mortgage against Wells, and obtained a sheriff's deed for the property; and afterwards, and on July 24, 1877, Kimball procured Walker's interest by virtue of another sheriff's deed executed under a judgment against Walker. Afterwards the patent for the land was issued by the United States to Cohn as the assignee of Wells, and afterwards Shippen succeeded to the interest of Cohn. In our opinion, Kimball's interest in the land, as found by the trial court, is superior and paramount to that of Shippen. The assignment of the certificate of purchase by Wells to Cohn was, under the

registry laws of both 1859 and 1868, void as to Walker and Kimball as purchasers, and, under the registry laws of 1868, was void as to them in all respects, and as to every other person, except such as had actual notice of the assignment. If it (the assignment) did not affect real estate at all, then, of course, it was void as to all persons; but, if it did affect the real estate in controversy, then it was void as aforesaid, for the reason that it had never been proved or acknowledged or filed for record within the requirements of the registry laws. Neither Walker, as the purchaser of the land at the foreclosure sale, nor Kimball, the purchaser of the land at the sheriff's sale on the judgment against Walker, nor any one else, at that time, not having actual notice of Cohn's interest, was bound to take notice thereof, for the reason, as before stated, that such interest was not known by them, nor shown by any record, and was void as to them. It was a mere secret equity, undiscoverable from any record, and void, as aforesaid, under the registry laws. No one not having actual notice is bound to take notice of what the statutes say is a nullity. At the time of the sale of the property to Walker, Cohn had no interest therein under the registry laws as against Walker; and, at the time of the sale of the property to Kimball, Cohn had no interest therein under the registry laws as against Kimball, or as against any one else not having actual notice of Cohn's interest. Under the registry laws, and as to Walker, Wells was the absolute and entire owner of the property at the time of the first sale, and Cohn had no interest therein; and under the registry laws, and as to Kimball, Walker was the absolute and entire owner of the property, and Cohn had no interest therein, and both Walker and Kimball obtained a clear title to the property by their purchases. Besides, how could Walker know that he should make Cohn a party to his foreclosure suit when he did not know, and had no reasonable means of knowing, that Cohn had any interest in the land? On the other hand, as Cohn's and Shippen's claims were wholly under Wells, they were bound, after the mortgage from Wells to Walker was recorded, to take notice of the recorded mortgage, and bound to take notice of the records of the register's office and of the district court as to what became of the mortgage, or what was done with reference to it, until they themselves made it known by the records or in some other way, that Wells had been completely divested of his interest in the property, and that they had succeeded to his rights. The equities of the case are certainly much stronger in favor of Kimball than of Shippen. Kimball's rights are prior in time, going back to the original purchase of the property from the government and the mortgage to Walker, and are founded upon a claim for the purchase money, and are also largely founded upon or evidenced by records, and so much so that Shippen was bound to take notice of them, while Shippen's claims are not founded upon or evidenced by records at all, but are secret, hidden, and practically undiscoverable.

ble equities. The judgment of the court below will be affirmed.

HORTON, C. J., concurs.

JOHNSTON, J. While I agree with the decision made upon the first point in the case, that the affidavit which formed the basis of jurisdiction was not so defective as to render a judgment based thereon absolutely void, I am unable to agree with the second and third propositions that have been decided, or with the judgment of affirmance which has been rendered. It seems to me that the foreclosure and proceedings against Wells were a nullity, for the reason that Wells had parted with his interest in the land before the foreclosure proceeding was begun, and that Cohn, who had before that time obtained the interest of Wells, was not made a party to the action. Wells entered the land and became the owner of all except the naked legal title, which, as has been stated, remained in the United States until May 4, 1878, long after the action of foreclosure was ended. It is true that Wells had authority to execute the mortgage to Walker, and also that the mortgage was duly recorded before Wells transferred his interest in the land to Cohn; and it is also true that, when Walker brought the action against Wells, he was the only person who by the record appeared to have any interest in the land. Notwithstanding this, I am of opinion that the foreclosure proceedings were absolutely null and void, for the reason that the assignee of the mortgagor, the only person who had any estate in the land, was not made a party. Wells sold the land to Cohn on November 25, 1859, shortly after the mortgage was executed, and thus Cohn acquired the entire interest held by Wells long before the foreclosure action was begun. It would hardly seem that the owner of the equitable title could be divested of his interest by a proceeding to which he was not a party, and of which he had no notice. It is true that he did not place on record the assignment which had been made on the certificate of location, but I do not regard either the certificate or the assignment thereon as a conveyance or an instrument affecting real estate, which, under the statutes, could have been recorded; and no record could be properly made by him until the patent was obtained from the United States. Walker acquired no estate in the land by the execution of the mortgage, and could not maintain ejectment against the mortgagor, or any one claiming under him, even after condition broken, until there had been a foreclosure and sale of the mortgaged premises. The purpose of a foreclosure is to divest the land of the equity of redemption or the right of the holder of the legal title; but where the mortgagor has transferred his interest and the equity of redemption to another, who is not a party to the proceeding, what interest is affected by such a proceeding, and whose interest can be transferred by a sale under such a proceeding? Certainly the

interest of one who is not before the court is not affected; and as the mortgagor, who was made a party, had no interest, there was nothing for the jurisdiction of the court to take hold upon, and therefore the judgment rendered is absolutely void. It must be remembered that Wells had no personal notice, and therefore a personal judgment could not be given against him for the debt secured by the mortgage; and, as he had parted with all his interest in the land, he was neither a necessary nor a proper party in a foreclosure proceeding where only constructive service was had. He was the only party brought into court, and he had no estate or interest to be affected by the proceedings. The patent to the land was issued directly to Cohn, so that he now holds the complete legal title. The record does not show that the sheriff's deed to Walker, or the one subsequently made to Kimball, were ever placed on record, and at this time Shippen has a perfect title, so far as the record shows. While there are some equities on the side of the defendant in error, it is difficult to understand how there can be any validity in a judgment given in a case in which there was no defendant who had any interest whatever in the subject-matter of the suit; and, as was said in *Shields v. Miller*, 9 Kan. 397, "the judgment cannot be void and the sale made under it legal and valid. If the judgment is illegal and void, the sale must also necessarily be illegal and void." If it is granted that by this proceeding against the mortgagor alone, and the sale made thereunder, Kimball acquired the interest and was subrogated to the rights of Walker, the mortgagee, still he would only have a lien against the premises, and could not divest the same of the equity of redemption except by bringing Cohn, or whoever owned the same, into court in some proper proceeding for that purpose. He could have no greater interest in the land than was held by Walker; and it was ruled in an early case that a mortgage "is a mere security, although in the form of a conditional conveyance, creating a lien upon the property, but vesting no estate whatever, either before or after condition broken. It gives no right of possession, and does not limit the mortgagor's right to control it, except that the security shall not be impaired. He may sell it, and the title would pass by his conveyance, subject, of course, to the lien of the mortgagee." *Chick v. Willetts*, 2 Kan. 391. From these considerations I am led to the opinion that Cohn was not divested of his interest by the foreclosure proceeding, and that Shippen, who holds under him, has the paramount title to the land. As sustaining this view, I cite *Britton v. Hunt*, 9 Kan. 228; *Lenox v. Reed*, 12 Kan. 223; *Richards v. Thompson*, 43 Kan. 213; 23 Pac. Rep. 106; *Curtis v. Gooding*, 99 Ind. 45; *Watson v. Spence*, 20 Wend. 260; 2 Jones, *Mortg.* §§ 1, 404-406. The judgment of the district court should be reversed, and the cause remanded, with the direction to enter judgment in favor of the plaintiff in error.

(47 Kan. 99)

MULLANEY *et al.* v. HUMES.

(Supreme Court of Kansas. Oct. 10, 1891.)

CASE ON APPEAL—CERTIFICATE OF OFFICIAL STENOGRAPHER.

Where a case is made for the supreme court, and such case is settled and signed by the judge of the district court, and attested by the clerk thereof, and attached to such case is a paper containing what purports to be the evidence introduced on the trial in the district court, and it is certified to be such by the official stenographer of the court, and such evidence is not otherwise identified or authenticated, *held*, that it cannot be considered as any part of the case made.

(Syllabus by the Court.)

Error from district court, Rooks county; LOUIS K. PRATT, Judge.

Action of replevin by Oliver Humes against R. W. Swan and J. F. Mullaney. Judgment for plaintiff. Defendants bring error. Affirmed.

W. B. Ham, for plaintiffs in error. M. C. Reville, for defendant in error.

VALENTINE, J. This was an ordinary action of replevin brought in the district court of Rooks county by Oliver Humes against R. W. Swan and J. F. Mullaney to recover certain live-stock. The defendants answered separately, each filing a general denial, the same attorney appearing for both. A trial was had before the court without a jury, and the defendants demanded that a separate judgment should be rendered as to each of the defendants; but the court, finding upon the evidence in favor of the plaintiff and against the defendants, rendered a joint judgment against them in the alternative for a return of the property, or for its value and for costs; and the defendants bring the case to this court for review. They allege in this court that the court below erred (1) in rendering judgment for the plaintiff upon the evidence; (2) in not rendering a separate judgment as to each of the defendants; (3) in its findings as to the value of the property; (4) and in overruling the defendants' motion for a new trial.

The decision of every question presented to this court by the defendants below, plaintiffs in error, depends upon a consideration of the evidence introduced upon the trial in the court below, and yet it cannot be said that we have such evidence before us in any such form that we can consider the same. The case is brought to this court upon a "case made" for the supreme court. This case made contains the following statements: "The foregoing contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, and proceedings upon which judgment was rendered. I, C. W. Smith, the undersigned attorney for the plaintiff in the foregoing suit, certify that the foregoing case made was duly served on me this 25th day of January, 1889. C. W. SMITH, Attorney for Oliver Humes, Plaintiff. State of Kansas, Rooks county—ss.: This is to certify that the foregoing above case made, and the amendments thereto, have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted for settlement and signing as required by law, by the parties to said cause; that

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the same, as above set forth, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings, and judgments had in such cause; and I hereby settle, allow, certify, and sign the same as true and correct; and hereby order that the clerk of the district court attest the same with the name and seal of said court, and file the same of record, as provided by law. Witness my hand at Norton, Kansas, this 29th day of March, 1889. LOUIS K. PRATT, Judge of District Court. Attest: GEO. O. FARR, Clerk of the District Court, Rooks County, Kansas. [Seal.] No evidence appears in the case made preceding these statements, but after these statements, and after the attestation of the case made by the clerk of the district court, is a paper attached containing about 40 pages of what purports to be the evidence introduced on the trial in the district court, which evidence is certified to by M. D. Barstow, the official stenographer of the district court, as follows: "State of Kansas, Norton county—ss.: I hereby certify that the foregoing is a true and correct transcript of the short hand notes taken by me of all the evidence produced on the trial of the above-entitled cause, and the same is correct, to the best of my knowledge and belief. M. D. BARSTOW, Official Stenographer of the 17th Judicial District of Kansas." There is nothing anywhere else to be found to identify this evidence, and without it we cannot review any of the alleged errors. It is certainly no part of the case made. The judgment of the court below will be affirmed.

(47 Kan. 101)

SCHOOL-DIST. No. 54 *et al.* v. GOFF *et al.*

(Supreme Court of Kansas. Oct. 10, 1891.)

Error from district court, Crawford county; GEORGE CHANDLER, Judge.

Action by William Goff and Charlotte H. Goff against School-District No. 54, Crawford county, and C. Beck, John Pauley, and Frederick Russell, for an injunction. Verdict and judgment for plaintiffs. Defendants bring error. Affirmed.

John T. Voss, for plaintiffs in error. D. B. Van Syckle and H. C. Root, for defendants in error.

PER CURIAM. This was an action brought in the district court of Crawford county, by William Goff and Charlotte H. Goff, husband and wife, against School-District No. 54, Crawford county, Kan., and C. Beck, John Pauley, and Frederick Russell, the officers of such school-district, to perpetually enjoin them from removing a certain building situated on the homestead of the plaintiffs and their children, which building had previously been occupied as a school-house. A trial was had before the court and a jury, and the jury made special findings of fact, and the court found generally in favor of the plaintiffs, and against the defendants; and upon the special findings of the jury, and the general findings of the court, the court rendered judgment in favor of the plaintiffs, and against the defendants, perpetually enjoining the defendants from removing said building; and the defendants, as plaintiffs in error, bring the case to this court for review. Within the authority of the decision in the case of Mullaney v. Humes, 27 Pac. Rep. 817, (just decided,) the judgment of the court below in the present case must be affirmed, as none of the evidence, nor any of the instructions of the court to the jury, are contained in the case

made, or presented to this court in any other proper manner. It is true that it is claimed that the petition below and the findings are not sufficient to sustain the judgment rendered; but it is so clear that they are, that we do not think that the question of their sufficiency requires any comment. The judgment of the court below will be affirmed.

(47 Kan. 136)

STATE V. COMBS.

(Supreme Court of Kansas. Oct. 10, 1891.)

EMBEZZLEMENT—INDICTMENT.

An information for embezzlement, under section 90 of the crimes act, charged that: "One A. M. Fearn did intrust to William Combs for safe custody five hundred and thirty dollars, current money of the United States, of the value of \$530, he (the said William Combs) receiving and accepting the same as the bailee of said A. M. Fearn. That said five hundred and thirty dollars consisted of United States national bills, commonly called 'greenbacks,' and national bank bills, silver certificates, and gold certificates. The denominations and names of each are unknown to said A. M. Fearn, the prosecuting witness, or your informant, but they all pass as current money of the United States, and all were of the value of five hundred and thirty dollars. That after the said William Combs received said current money, as aforesaid, as such bailee, and on said 10th day of March, A. D. 1891, at the county of Harvey, in the state of Kansas, did then and there unlawfully and feloniously embezzle and convert to his own use, and make way with and secrete, said five hundred and thirty dollars, current money of the United States, and of the value of five hundred and thirty dollars, belonging to and being then and there the money and property of said A. M. Fearn, without the authority, knowledge, or consent of said A. M. Fearn; and then and there, in the manner aforesaid, the said money, the property of said A. M. Fearn, did unlawfully and feloniously steal, take, and carry away." Upon a motion in arrest of judgment, it was objected that the information did not specify the nature of the bailment, that it did not contain an allegation of intent, and that it did not describe the money alleged to have been embezzled with a reasonable degree of certainty. *Held*, that the information is not fatally defective upon any of the grounds mentioned, and that its allegations are sufficient to resist objections which were not made until after trial and verdict.

(Syllabus by the Court.)

Appeal from district court, Harvey county; L. HOUK, Judge.

Prosecution against William Combs for embezzlement. Verdict of guilty, and judgment thereon. Defendant appeals. Affirmed.

J. B. Crouch and Madden Bros., for appellant. J. N. Ives, Atty. Gen., and C. S. Bowman, for the State.

JOHNSTON, J. This was a prosecution for embezzlement under section 90 of the crimes act. The defendant was convicted, and the judgment of the court was that he should be confined at hard labor for a term of two years in the state penitentiary. The information under which he was convicted charged as follows: "That on the tenth day of March, A. D. 1891, in said county of Harvey and state of Kansas, one A. M. Fearn did intrust to William Combs for safe custody five hundred and thirty dollars, current money of the United States, of the value of \$530, he (the said William Combs) receiving and accepting the same as the bailee of said A. M. Fearn. That said five hundred and

thirty dollars consisted of United States national bills, commonly called 'greenbacks,' and national bank bills, silver certificates, and gold certificates. The denominations and names of each are unknown to said A. M. Fearn, the prosecuting witness, or your informant, but they all pass as current money of the United States, and all were of the value of five hundred and thirty dollars. That after the said William Combs received said current money, as aforesaid, as such bailee, and on said tenth day of March, A. D. 1891, at the county of Harvey, in the state of Kansas, did then and there unlawfully and feloniously embezzle and convert to his own use, and make way with and secrete, said five hundred and thirty dollars, current money of the United States, and of the value of five hundred and thirty dollars, belonging to and being then and there the money and property of said A. M. Fearn, without the authority, knowledge, or consent of said A. M. Fearn; and then and there, in the manner aforesaid, the said money, the property of the said A. M. Fearn, did unlawfully and feloniously steal, take, and carry away, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Kansas." After the verdict, the defendant moved to arrest the judgment upon the ground that the facts stated in the information did not constitute a public offense. This motion was denied, but the defendant still insists that the information was fatally defective, and on that ground he asks a reversal. Three objections are urged against the information: (1) That it does not specify the nature of the bailment; (2) that it contains no allegation of intent; and (3) that it does not describe the money alleged to have been embezzled with a reasonable degree of certainty.

It is to be observed that the sufficiency of the information was not raised by a motion to quash, nor until after trial and verdict, when the motion in arrest of judgment was interposed. "It was then too late to avail himself of technical error in form or mere imperfection in the statement of the complaint. Defects in a criminal pleading which might be held bad on a motion to quash, if one was made, are not always sufficient after a verdict of guilty to arrest a judgment." City of Kingman v. Berry, 40 Kan. 625, 20 Pac. Rep. 527; State v. Knowles, 34 Kan. 393; State v. Ratner, 44 Kan. 429, 24 Pac. Rep. 953. Although the charge does not fully state the facts and circumstances of the bailment, it fairly indicates the character of the same. It shows who placed the money in his hands, the purpose for which it was intrusted to him, and wherein he has failed to carry out the trust. It fairly states that the money was intrusted to him by Fearn for safe custody, but that, instead of safely keeping the money, he embezzled and converted the same to his own use, and did feloniously steal and carry it away. We are referred to State v. Griffith, 45 Kan. 142, 25 Pac. Rep. 616,

as sustaining the objection to this information. The sufficiency of the information in that case, however, was raised early in the prosecution by a motion to quash, and, unlike the charge in the present case, the information there failed to allege the name of the person from whom the property was received, the purpose for which it was placed in defendant's hands, or the conditions upon which he was expected to hold, dispose of, or return it. It was there decided that the defendant was entitled to be informed of the object of the trust, as claimed by the prosecution, and wherein he had failed to conform to that object. That has been sufficiently done in the charge under consideration to resist a motion in arrest of judgment.

The second objection—that the information contains no allegation of intent—cannot be sustained. The charge as stated includes the evil intent of wrongfully appropriated money intrusted to him by Fearn for a specific purpose to his own use, and sufficiently characterizes the intent with which the offense was committed. *State v. Smith*, 38 Kan. 194, 16 Pac. Rep. 254. It was hardly necessary to allege that the money was embezzled and converted with the intention to embezzle and convert the same. It is difficult to conceive how he could have honestly and innocently embezzled and stolen the money intrusted to him.

The last objection is that the money is not described with sufficient certainty. It is described as "\$530, current money of the United States, of the value of \$530, * * * consisting of United States national bills, commonly called 'greenbacks,' and national bank bills, silver certificates, and gold certificates." This description is coupled with an allegation of inability to give the denomination and number of each, or a better description of the money embezzled and stolen. With this excuse for the failure to give a more definite description, the information cannot be held fatally defective, and especially when the objection is not made until after a verdict has been returned. *State v. Henry*, 24 Kan. 457; *State v. McNulty*, 26 Kan. 533; *State v. Tilney*, 38 Kan. 714, 17 Pac. Rep. 606. The judgment of the district court will be affirmed. All the justices concurring.

(47 Kan. 208)

McNULTY *et al.* v. McNULTY.

(Supreme Court of Kansas. Oct. 10, 1891.)

DEED — RATIFICATION OF INVALID DELIVERY — FINDINGS.

Where the grantee has surreptitiously obtained possession of a deed duly acknowledged, but never lawfully delivered, such possession and invalid delivery may be ratified by the subsequent acts of the grantor, which show a clear recognition and acquiescence in the grantee's title to the land conveyed by such deed. *Held*, that the evidence and special findings of fact in this case show that the grantor ratified the act of the grantee in taking into his possession the deed of June 30, 1876, and that the conclusion of law, as found by the district court, that the grantor did not ratify such possession, is not warranted by the evidence and the special findings of fact.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Osage county; R. B. SPILLMAN, Judge.

Action by John W. McNulty against Joseph McNulty and Bridget McNulty, to set aside a deed. Verdict and judgment for plaintiff. Defendants bring error. Reversed.

A. Smith Devenney, for plaintiffs in error. *R. C. Helzer* and *I. Farley*, for defendant in error.

GREEN, C. Christopher McNulty, a bachelor, owned the W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 25, in township 18, in range 16, in Osage county. On the 6th day of September, 1872, he conveyed this land to his brother John W. McNulty, for the sum of \$500, and the grantee was placed in possession of the premises, and exercised acts of ownership over the same. It seems there were three brothers then living,—John W., the defendant in error in this case, Christopher, the grantor in the deed named, and Joseph, one of the plaintiffs in error. On the 30th day of June, 1876, John W. McNulty and wife made a deed to the land in controversy to Christopher McNulty, for the sum of \$500, which sum, it was claimed, was never paid. The grantor placed the deed in a bureau drawer in his own home, among his private papers, from which place it was taken several years afterwards by the grantee, and on the 22d day of August, 1884, by him placed upon record, without the knowledge or consent of the grantor. This action was brought on the 15th day of December, 1887, by John W. McNulty, to set aside this deed executed by him and his wife to Christopher McNulty, which he insists was never delivered, and a deed subsequently executed by Christopher to his brother Joseph, conveying the same land. The case was submitted to the court, and the following special findings of fact and conclusions of law were made:

"Special findings by the court: (1) That this action was instituted by John W. McNulty, plaintiff herein, against the said defendants herein, Joseph McNulty and wife, on the 15th day of December, A. D. 1887, in said court. (2) That said plaintiff and said defendant Joseph McNulty are brothers; the former being a resident, with his family, of Osage county, Kan., and the latter being a resident of Johnson county, Kan., and is the head of a family. (3) That one Christopher or 'Chris' McNulty died in Johnson county, Kan., on June 6, A. D. 1887, of consumption, at the residence of the said Joseph McNulty, who, as well as the plaintiff, was a brother of said decedent. The said deceased never having been married, he made his home, from the year 1871 to date of his death, alternately with his said brothers, John W. and Joseph, except when he was absent in California. (4) Prior to September 6, 1872, said Chris McNulty was the owner in fee of the west half ($\frac{1}{2}$) of the north-east quarter ($\frac{1}{4}$) of section twenty-five, (25,) township eighteen, (18,) range sixteen, (16,) in Osage county, Kan., and that on that day he executed and delivered to plaintiff, John W. McNulty, a warranty deed for said land, which deed was

duly recorded on the 20th of September, 1872. Said deed contained a recital of a consideration of five hundred dollars, and other than said recital there is no evidence of any consideration passing from said John W. McNulty to said Chris McNulty for said land. (5) That in 1872, and for several years prior to that year, the said Chris McNulty was engaged in business at Olathe, Kan., in company with one Charles Wagoner, and that, at the time said conveyance was made by said Chris McNulty to said John W. McNulty, the creditors of said firm of McNulty & Wagoner were pressing them for the payment of their debts, and that said conveyance was made by said Chris McNulty for the purpose of putting said land beyond the reach of the creditors of said firm. (6) Immediately after the execution of said deed to him, said John W. McNulty took possession of said land, and continued in the possession thereof, and in the full enjoyment of all rents and profits thereof, up to and including the year 1884, and paid the taxes thereon from 1873 up to 1883, both years inclusive, and the first half of the taxes of 1884. (7) That on the 30th day of June, 1876, said John McNulty, his wife joining with him, in the presence of said Chris McNulty, executed a warranty deed reciting a consideration of five hundred dollars, conveying said land to said Chris McNulty, which deed the said John W. McNulty, after the same was executed, retained in his own possession, and said deed was never at any time delivered by said John W. McNulty, or by any one for him, or by his authority, to any one acting for him, and the said John W. McNulty never intended to deliver said deed to the said Chris McNulty until the latter should pay to the former the consideration named in said deed. (8) That in the fall of 1883 said Chris McNulty, who had been for several years in California, returned to Kansas, and spent the remainder of that year, and a portion of 1884, at said John McNulty's; and, while living there, without the knowledge or consent of said John McNulty, he took said deed from among the private papers of the said John W. McNulty, and, without any authority from him, on the 22d day of August, 1884, filed it for record in the office of the register of deeds of Osage county, state of Kansas, and said John W. McNulty had no knowledge that said deed had come into the possession of said Chris McNulty until several weeks after it was recorded, and then only by learning that it had been recorded. (9) That Chris McNulty himself, with the full knowledge of the said John W. McNulty, and without objection on his part, rented said land for the year 1885 to John McNulty, son of said John W., who was living with his father, and took in payment of the rent a note from said John McNulty for one hundred and forty dollars, and afterwards, upon leaving for California, he left said note with the said John W. McNulty, as his agent, to collect the same, and said John W. McNulty did collect said note, and out of the proceeds thereof paid the taxes on said land for the last half of 1884, and the first half of 1885, in the name of said Chris McNulty, and

sent the balance to said Chris McNulty to California. (10) That in the year 1885 the said Chris McNulty put the agency of said lands, for the leasing thereof and collecting of rent for the year 1885, in the hands of one Peter Chevalier, with the knowledge and consent of said John W. McNulty; but no rents were collected for that year by the said Chris McNulty or his agent; the tenant to whom said Chevalier rented said land having appropriated the crops, and paid no rent to any person. (11) That in the year 1887 the said John W. McNulty rented said land as his own to his son Chris for one-third of the crop, and that part of the rent share of the crops raised by said defendant was by him delivered to his father, and a part of said rent share was delivered by said tenant, with the knowledge of said John W. McNulty, to defendant Joseph McNulty. (12) That in the spring of 1887 said Chris McNulty returned from California, and on the 25th day of March, 1887, he executed and delivered to said Joseph McNulty a warranty deed for said land, in which there is recited a consideration of \$800, which deed was duly recorded on the 29th day of March, 1887. The consideration was paid by said Joseph McNulty for said land, and at the time said deed was delivered to him by said Chris McNulty he knew that said John W. McNulty had never delivered said deed of June 30, 1876, unto the said Chris McNulty, and also knew how the latter had obtained possession of said deed. Said Joseph McNulty paid the last half of the taxes of 1885 on said land, and also the taxes for 1886 and 1887. (13) When said Chris McNulty returned from California in the spring of 1887, he held a note for one thousand dollars, dated April 29, 1884, executed to him by said John W. McNulty; and some time after his return, and a short time before his death, John W. McNulty visited him at the residence of said Joseph McNulty, and while there the said Chris McNulty surrendered and gave up the said note to said John W. McNulty. (14) That at a period between the date of the deed from John W. McNulty, and wife to Chris McNulty, for the lands in controversy, and the date of acquiring possession of said deed by Chris McNulty, the said John W. McNulty gave a mortgage upon said lands and tenements for the sum of \$400, which said mortgage hath not been paid, nor hath any portion thereof been paid; and that said mortgage was so given without the consent or knowledge of said Chris McNulty at the time it was given."

"Conclusions of Law: (1) That by the deed of September 5, 1872, so far as the parties to this case are concerned, John W. McNulty, the plaintiff, acquired a perfect legal title to the lands in controversy in this action. (2) That said John W. McNulty was not divested of the title so acquired by the deed of June 30, 1876, nor by the record of said deed. (3) That said John W. McNulty did not ratify the act of said Chris McNulty in taking into his possession and causing to be recorded the deed of June 30, 1876. (4) That the deed of June 30, 1876, from John W. McNulty to Chris McNulty, and the deed of March 23,

1887, from Chris McNulty to Joseph McNulty, the defendant, are null and void, and the plaintiff is entitled to have them so declared by decree in this action. (5) That the plaintiff is entitled to recover his costs in this action."

The vital question presented in this case is whether the defendant in error ratified the act of his brother Christopher McNulty in surreptitiously taking the deed, executed on the 30th day of June, 1876, from the bureau drawer, where the grantor had placed it, and delivering the same to the register of deeds of Osage county for record, on the 22d day of August, 1884. It is evident from the testimony and the findings of the trial court that there was no delivery of the deed by the grantor. The delivery of a deed being an essential requisite to effectually pass the title to real estate, the title to the land in controversy must have continued in the defendant in error, unless there was a subsequent ratification by him of the act of his brother in taking the deed without his knowledge. While a deed thus obtained is void, and possesses no greater validity than it would have if forged, still it may be ratified by the grantor after he has full knowledge of all the facts, by any words and acts of his which show a clear intention on his part that the deed should be regarded as properly delivered, and that the same conveyed the title to the property. *Tucker v. Allen*, 16 Kan. 312. The district court found, as a conclusion of law, that John W. McNulty did not ratify that act of his brother in taking into his possession, and causing to be recorded, the deed of June 30, 1876. The correctness of this conclusion of law is challenged by the plaintiffs in error, who contend that it is not warranted by the evidence and the special findings of fact. We have carefully examined the facts bearing upon the question of ratification by the plaintiff below. It must be remembered that the transaction was between brothers, and there were some irreconcilable statements made by each one of them; but the following undisputed facts may be gathered from all of the evidence: The plaintiff below learned in a few weeks after his brother Christopher took the deed that it had been placed upon record. The matter was afterwards talked over between him and his brother Joseph, and it was known by each how the deed was obtained. The next year after the deed had been obtained, the land was rented to a son of the plaintiff below, and a note for \$140 for the rent given, payable to the grantee, Christopher McNulty; and this note was delivered to the grantor for collection, and was by him collected, and a portion of the amount was used in paying the taxes, in the name of the grantee, and the balance was remitted to him in California by his brother. In the year 1886 the land was rented, with the knowledge of the grantor, to a German, by an agent of the grantee. The plaintiff below acknowledged that his brother Christopher took the agency of this land from him, and rented it to some one else for this year. One witness, who appears not to be related to the parties, testified that he rent-

ed the farm in 1887, for the year 1888; that he saw that some one had taken possession of the place in the early part of March of the latter year; that he went around, and saw John W. McNulty, who informed him that his son was going to farm the place, and, when informed that he had rented the place from Joseph McNulty, John W. McNulty replied that he had permission from his brother Christopher the year previous to rent the place, and had rented it to his son for one year, with permission to have it as long as he wanted, and, if he did not get written notice from Joseph, he was going to hold over. Subsequently, John W. McNulty stated to him that his son Christopher was going to hold the place; that Christopher's third was as good as that of the witness to Joseph; that, if a notice had been given, he would have given it up. It appears that John W. visited his brother Christopher in 1887 a short time before his death, and was presented with a note of \$1,000, and was informed by Joseph that Christopher had deeded him the land in controversy; and to this John W. made no objection. The plaintiff in error paid the last half of the taxes for 1885 and the taxes for 1886 and 1887.

Upon this evidence the district court made the special findings of facts, *supra*. As a conclusion of law, the court found that John W. McNulty did not ratify the act of his brother in taking into his possession, and causing to be recorded, the deed of June 30, 1876. In this we think the court erred. There was, in our judgment, such a state of facts as showed a ratification. The court found that Christopher McNulty, with the knowledge of his brother John W., and without objection upon his part, rented the land in controversy for the year 1885, and took a note for \$140, which he left with his brother, who afterwards collected the note, and accounted to his brother for the proceeds. The evidence upon which this finding is based indicates, to our minds, that there was a recognition upon the part of John W. McNulty of his brother's right to the land. He received the rents for his brother, and thus recognized his title, which could only come through the delivery of the deed of June 30, 1876. Having once acknowledged and recognized the title of his brother, we do not think he could afterwards be heard to say that his conduct and statements were the result of a doubt in his mind as to his legal rights. The grantor cannot recognize the possession of a deed as valid for some purposes, and then disclaim it as being nugatory for all others. *Cotton v. Gregory*, 10 Neb. 125, 4 N. W. Rep. 939. John W. knew that his brother had obtained possession of the deed, and placed it upon record, and for three years thereafter he recognized his brother's title to the land. It has become an axiomatic rule of law, which requires no argumentative demonstration or authority to support it, that that to which a person assents is not esteemed in law an injury. We think it clear, from the evidence, that there was no delivery of the deed of June 30, 1876, in the first instance; but we base our decision upon the fundamental truth

that a delivery may be made good by a subsequent assent, though originally invalid for the want of it, upon the well-settled principle that a subsequent ratification may have a retrospective effect. 3 Washb. Real Prop. 305; Holbrook v. Chamberlin, 116 Mass. 155.

While it is true that where possession has been obtained surreptitiously of a deed which has never been delivered it requires an express ratification, or, at least, an acquiescence, after knowledge of all the facts of such a character as would create a presumption of an express ratification, to give force and effect to the deed, (1 Devl. Deeds, § 268,) still, we are of the opinion that the evidence before the district court indicated such a ratification and acquiescence upon the part of the plaintiff below as to bind him, and to show that he recognized his brother's title after he had full knowledge of all the facts.

We think the second and third conclusions of law were not authorized by the evidence, or supported by the special findings of fact, and therefore recommend a reversal of the judgment, and that a new trial be granted.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 108)

HOPKINS V. HOPKINS.

(Supreme Court of Kansas. Oct. 10, 1891.)

APPEAL—RECORD—EVIDENCE—SETTING ASIDE DEFAULT.

1. Evidence purporting to have been given on the trial of a case, and certified to by the official stenographer and by the clerk of the district court to be true and correct, and attached to a transcript brought to the supreme court, forms no part of the record, and cannot be considered unless it is preserved either by a bill of exceptions or case made.

2. The setting aside of defaults and permitting pleadings to be filed out of time is largely discretionary with the trial court, and its rulings thereon will not be disturbed unless there is a clear abuse of discretion.

(Syllabus by the Court.)

Error from district court, Allen county; L. STILWELL, Judge.

Action by Emaline Hopkins against S. D. Hopkins. Judgment for plaintiff. Defendant brings error. Affirmed.

Knight & Foust, for plaintiff in error.
Benton & Scott, for defendant in error.

JOHNSTON, J. In this action Emaline Hopkins obtained a judgment against S. D. Hopkins for \$700, which judgment was declared a lien against certain real estate, the legal title of which was in S. D. Hopkins. He complains, and his proceeding in this court is based on a transcript of the record. The errors assigned are mainly those arising only upon the evidence and the rulings during the trial. Although what purports to be the evidence is attached to the petition in error, and certified to by the official stenographer and the clerk of the district court as being full and correct, it is not preserved either by a bill of exceptions or a case made. For this reason, neither the evidence nor

the proceedings of the trial which form no part of the record can be considered.

It is urged that the court erred in permitting plaintiff below to file a reply out of time. It appears a reply was filed a few days beyond the time allowed by the Code, and the court on application struck the reply from the files, but at once set aside the default and authorized the filing of another reply *instantly*. The trial did not occur, however, until about one year after the setting aside of the default and the filing of the reply, and hence the plaintiff in error could not have suffered any prejudice by the ruling. The matter of setting aside defaults and permitting pleadings to be filed out of time largely rests on the discretion of the trial court, and its rulings thereon will not be disturbed unless there is a clear abuse of discretion. *Spratt v. Insurance Co.*, 5 Kan. 155. There was no such abuse in this case, and there are no errors apparent on the face of the record. Judgment affirmed.

All the justices concurring.

(47 Kan. 197)

WATERS et al. v. TROVILLO et al.

(Supreme Court of Kansas. Oct. 10, 1891.)

COUNTY BOARD—CONTRACT WITH ATTORNEY.

A contract made by the board of county commissioners, for the county, with attorneys at law, for their services as such, which services are such as the law requires the county attorney to perform, is *ultra vires* and void.

(Syllabus by Strang, C.)

Commissioners' decision.

Original proceeding in *mandamus* by Waters, Chase & Tillotson against H. L. Trovillo, chairman of the board of county commissioners, and H. A. Platt, county clerk of Wichita county. Writ denied.

Waters, Chase & Tillotson, for plaintiffs.
W. B. Washington and A. P. Barker, for defendants.

STRANG, C. This is a proceeding in *mandamus* to compel the chairman of the board of county commissioners and the county clerk of Wichita county to issue to the plaintiffs the warrant of said county in the sum of \$6,000. The plaintiffs claim they entered into the following contract with the commissioners of Wichita county: "This contract, entered into this 5th day of September, 1888, by and between Waters, Chase, and Tillotson, attorneys at law, of Topeka, Kan., parties of the first part, and the board of county commissioners of Wichita county, Kansas, parties of the second part, witnesseth: That the parties of the first part, for the consideration hereinafter named, are to take and prosecute such legal proceedings as may be necessary to relieve the said Wichita county of any obligations that may have been incurred on account of an attempt heretofore made by the commissioners of said county to subscribe eighty thousand (\$80,000) dollars to the capital stock of the Chicago, Kansas and Western Railroad Company, and also an attempt to subscribe fifty-five thousand (\$55,000) dollars to the capital stock of the Denver, Memphis and Atlantic Railroad Company,

whereby it is claimed that said Wichita county should execute and deliver to said railroad companies the bonds of Wichita county for the amount so attempted to be subscribed. That in consideration of the services above set forth the parties of the second part agree to pay to the parties of the first part all their necessary traveling expenses incurred in such service, and thirty thousand (\$30,000.00) dollars, payable as follows: A retainer fee of six thousand (\$6,000.00) dollars, to be paid at the regular meeting of the board of county commissioners of Wichita county in October; and twelve thousand (\$12,000.00) dollars when the courts finally decide that Wichita county is not liable on the attempted subscription to the capital stock of the Chicago, Kansas and Western Railroad Company; and twelve thousand (\$12,000.00) dollars when the courts finally decide that Wichita county is not liable on the attempted subscription to the capital stock of the Denver, Memphis and Atlantic Railroad Company. Done this 5th day of September, 1888, in the city of Leoti, Wichita county, Kansas. [Signed] WATERS, CHASE and TILLOTSON. H. T. TROVILLO, Chairman; W. S. TEMPLE, CHAS. SINN, County Commissioners of Wichita County. Order to be made record of on commissioners' journal. H. T. TROVILLO, Chairman." That afterwards, October 1, 1888, the board of county commissioners in session allowed the claim of the plaintiffs in the sum of \$6,000, that being the amount to be paid down on said contract as a retainer fee, and directed the clerk and chairman of the county board to issue the warrant of the county to the plaintiffs for that amount. The affidavit for the order of *mandamus* alleges that the said chairman and clerk refuse to issue said warrant, and plaintiffs ask this court, by its order, to require them to do so. The chairman of said board, answering, says he is ready to sign the warrant whenever prepared by the clerk of the board. The clerk answers, and says (1) that the alleged contract is void because it was never made by the board of county commissioners, but was signed by the several commissioners each in the absence of the others, when not in session, and deny that the board ever ratified said contract; and (2) that said contract is void because the board of county commissioners had no power to make it. Counsel for the defendant clerk also says in his brief that the claim of the plaintiffs must be enforced by an action, and not by a proceeding in *mandamus*.

The briefs in this case show some misunderstanding between counsel as to what was introduced in evidence on the hearing of this case. It is the recollection of the commissioners that the county clerk produced and read in evidence the record of the board of county commissioners at their January, 1889, session, or so much of it as related to plaintiffs' claim, which record showed that the board at its January session reconsidered the action of the board at the former October session, in allowing the claim of the plaintiffs, and

rejected said claim. This evidence would probably show, as was argued by counsel for the plaintiffs, a ratification by the board of commissioners at the October meeting of the contract made by the commissioners individually September 5, 1888, by the allowance at that time of the plaintiffs' claim for \$6,000 provided for by said contract. Upon the theory, then, that the record was introduced, the case occupies in law exactly the position plaintiffs claim it occupies in fact by agreement, so that the misunderstanding as to the evidence is not material; for if the evidence was introduced, and showed among other things a ratification of the contract, it is the same in law as though it was agreed upon the trial of the case that the contract was ratified, as in either event the case turns upon the same question, to-wit, did the commissioners have power to make the contract in the case, or was the making of said contract *ultra vires*, and the contract itself void? This case was before this court on a motion to quash the return of H. A. Platt, the county clerk, March 9, 1889. The question raised by that motion was practically identical with the question before the court now. The court denied the motion to quash at that time in the following brief opinion: "Upon the authority of *Clough v. Hart*, 8 Kan. 487, the motion to quash will be denied." The consideration named in the contract under which the plaintiffs claim, for which the \$6,000 was to be paid, is legal services to be performed by the plaintiffs. There is nothing in the contract that shows whether such services were to be performed in the courts of Wichita county or elsewhere. But as the contract was made in Wichita county, and simply provides for legal services for the county, without showing that such services are to be performed outside of Wichita county, the fair presumption is that they were to be performed within the county, and this presumption is supported by the fact that the legal services actually performed by the plaintiffs under the contract consisted in bringing certain suits in the district court of Wichita county. The law provides an officer whose duty it is to conduct legal proceedings in behalf of the several counties of Kansas, in the persons of the county attorneys of said counties. This court, in the case of *Clough v. Hart*, *supra*, used the following language: "Where a written contract between a county and an individual shows upon its face that it was made by the county for the professional services of the individual as an attorney or counselor at law, which services are such as the law requires to be performed by the county attorney, such contract is *prima facie* void." We think the contract in this case falls within the rule laid down in that case, and that the writ now prayed for should be refused upon the law of that case. See, also, *Morrill v. Douglass*, 14 Kan. 294. We recommend that the writ be refused.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 112)

ATCHISON, T. & S. F. R. CO. v. PLASKETT,
(two cases, Nos. 5,664, 5,665.)

(Supreme Court of Kansas. Oct. 10, 1891.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS.

As it approached the crossing of another railroad in a city of 5,000 inhabitants, a freight train stopped not to exceed a minute, so as to block one of the principal streets of the city near a public school building. A boy seven years old tried to climb over the cars. He was not seen by the trainmen. The train started, and he was thrown off and injured. The jury found that the company was negligent, in that the trainmen knew that the crossing was frequented by children, and were not on the lookout. *Held*, that there was no evidence of negligence on the part of the company. 26 Pac. Rep. 401, 403, affirmed.

On rehearing.

PER CURIAM. In support of the motion for a rehearing in this case several cases have been cited, notably, *Railway Co. v. Wilcox*, (Ill. Sup.) 27 N. E. Rep. 893, *Avey v. Railway Co.*, (Tex. Sup.) 17 S. W. Rep. 31, and other like cases, deciding that where a child of tender years is injured by the negligence of another the negligence of his parents, even though present at the time of the accident, cannot be imputed to him. We may fully assent to all decided in those cases, but that does not change or modify the former opinion handed down. Even if it be conceded that the little boy who was injured is so young in years as to be incapable of such conduct as will constitute contributory negligence, and if it also be conceded that any contributory negligence on the part of the parents cannot be imputed to the boy, these do not supply the place of negligence on the part of the railroad company. If the company was not negligent, it is not liable for damages on account of the injury complained of. The former opinion disposes of the case upon the ground that negligence cannot be imputed to the company. The train was stopped, not exceeding a minute, as it approached a railroad crossing within the city of McPherson. Its stop at the railroad crossing was both necessary and lawful in order to prevent any collision with other trains which might have been on the Rock Island road. In stopping, no statute or city ordinance was violated or disregarded. The statute recognizes such stops before crossing the track of another company, where the railroad companies have not a system of interlocking or automatic signals. Gen. St. 1889, pars. 1362-1364. If it be urged that the brakemen or trainmen ought to have been at their stations to prevent school children from climbing on or under the cars during the momentary stoppage of the train, the answer is that the object of having brakemen upon the train is to enable them to be in a position where they may handle the brakes, give signals, etc. The lookout to be kept by the engineer, fireman, and trainmen is generally ahead of the train. If the boy had been seen upon the car by the trainmen, then it would have been their duty to have exercised proper care in not running over or injuring him. But when a train momentarily stops at a crossing, and the trainmen are not needed in the operation of the train at their re-

spective stations, it cannot be said the company is guilty of negligence because, although the train itself is properly operated, the trainmen are not given express instructions to keep away thoughtless children from climbing under or upon the train. If it were the duty of the trainmen to keep a lookout to prevent thoughtless children from climbing on or under their train when crossing the public street at a slow rate, or when momentarily stopping in a public street before crossing another railroad, then the brakemen or trainmen, instead of being at their usual or proper places upon the cars to handle the brakes, give signals, etc., should be upon the ground near by the several cars of the train, watching the cars or patrolling the ground around the cars to prevent children and others from getting on or under them. The jury do not find that the trainmen should have been upon the ground, watching or patrolling the train. No such claim is made. If the train had stopped an unnecessary length of time, and become an obstruction upon the street, as in the *Pennsylvania* case referred to, or if the train, in stopping at the street, violated any city ordinance, any municipal provision, or any statute of the state, negligence could be imputed and a liability based thereon. We repeat what was said in the former opinion: "We do not think any wrong was shown upon the part of the railroad company." Negligence against the company was not established, and therefore no liability was shown. The only alleged negligence found by the jury was that the brakemen or trainmen were not at their proper places. Nothing else was found. If they had been at their usual or proper places on the cars for the operation of the train, they would not, in the performance of their usual or general duties, have been watching or looking out to prevent children or others from climbing on or under the cars, when the train was in motion, or when it momentarily stopped. The *Henigh* Case, (23 Kan. 347,) referred to in the former opinion, differs somewhat from the facts in this case, and we do not base the reversal of the judgment upon that case alone. It was commented upon, but in this case we think no negligence upon the evidence can be imputed to the railroad company, and hence the reversal. The finding of the jury that there was negligence is not conclusive. "If the findings in detail contradict the general finding, we may order the judgment to be rendered in accordance with the findings in detail, and wholly ignore the general findings. For instance, where a question of negligence arises in a case, the jury cannot be allowed to say conclusively, after finding certain special facts, that these facts constitute negligence, when in fact and manifestly they do not constitute negligence." *Railroad Co. v. Plunkett*, 25 Kan. 188. Of course, where any finding is contrary to the evidence, such finding is of no value or importance as establishing negligence, and any of the findings of the jury in this case, not supported by the evidence, cannot be used to support a verdict or sustain a judgment. The jury expressly relieved the railroad

company from any willful negligence or intentional violence or injury. Therefore, from the findings of the jury, it is clearly established that no trainman or other employe of the company willfully or purposely hurt the little boy. He was not seen climbing on the car, and his imprudence was not expected or anticipated. The rehearing will be denied. In 5,665, under the above and foregoing opinion, the rehearing in that case will also be denied.

(47 Kan. 104)

WILLIS et al., Board of County Commissioners, v. WEBB.

(*Supreme Court of Kansas.* Oct. 10, 1891.)

COUNTY BOARD—CONTRACTS.

Where a contract is entered into between two members of the board of county commissioners on the one side and an individual on the other side, outside of their county, and without any previous authority having been given by the board, and such contract has never been ratified by the board, *held*, that it is void.

(*Syllabus by the Court.*)

Error from district court, Hamilton county; A. J. ABBOTT, Judge.

Claim by L. J. Webb against W. N. Willis, L. A. McLaughlin, and F. H. Pomeroy, county commissioners. Judgment for plaintiff. Defendants bring error. Reversed.

George Getty and E. A. Austin, for plaintiffs in error. *Webb & Lindsay*, for defendant in error.

VALENTINE, J. This controversy grows out of a proceeding originally instituted by the defendant in error, L. J. Webb, before the board of county commissioners of Hamilton county. On December 12, 1887, Webb filed with the county clerk and the board of county commissioners of Hamilton county his claim against the county for \$1,000, based upon an alleged contract attached thereto, dated November 6, 1887. This claim was finally rejected by the board, and Webb appealed to the district court, where on February 1, 1889, the case was tried before the court without a jury, and judgment was rendered in favor of the plaintiff, Webb, and against the defendant, the board of county commissioners, for the sum of \$1,070, and costs of suit; and the defendant, as plaintiffs in error, brings the case to this court for review. Many questions are presented to this court, among which is the question of the validity of the contract upon which the plaintiff below, Webb, bases his claim. It purports to be a contract between the board of county commissioners of Hamilton county and Webb, employing him as an attorney and counselor at law to perform legal services in certain cases pending in the supreme court, and agreeing to pay him therefor the sum of \$1,000. It appears, however, conclusively from the evidence in the case that the contract was not made by the board of county commissioners, nor in legal session, nor at the county-seat, nor in Hamilton county, nor by all the members of the board, nor in the presence of the county clerk or county attorney; but it was made by only two members of the board, at the city of Tope-

ka, and these two members made the contract without any previous authority from the board, and the contract has never been ratified, confirmed, or recognized as legal or valid by the board. Such a contract is of course void. *Merrick Co. v. Baty*, 10 Neb. 176, 4 N. W. Rep. 959; *Paola & F. R. Ry. Co. v. Commissioners of Anderson Co.*, 16 Kan. 302; *Commissioners of Anderson Co. v. Paola & F. R. Ry. Co.*, 20 Kan. 534; *Aikman v. School-Dist.*, 27 Kan. 129; *Mincer v. School-Dist.*, Id. 253; *Sullivan v. School-Dist.*, 39 Kan. 347, 18 Pac. Rep. 287. As the aforesaid contract was and is void, and as the case was tried by the court below upon the theory that the contract was entirely valid, it follows that the judgment of the court below must be reversed. But it does not follow, however, that the plaintiff below, Webb, is entirely without remedy, or that he cannot recover anything for any of his services. The tendency of the courts and others at the present time is to treat corporations, including municipal corporations, with respect to their business transactions, about the same as the courts and others treat individuals; and where a corporation, municipal or otherwise, has received benefits from others upon contracts *ultra vires* or void because of some irregularity or want of power in their creation, but not void because made in violation of express law or good morals or public policy, and where the corporation retains such benefits, it must pay for them. *City of Ellsworth v. Rossiter*, (decided by this court May 9, 1891,) 26 Pac. Rep. 674, and cases there cited. It would seem from the record in the present case that for some of the services performed by Webb the county cannot possibly be liable, for it would seem that the county had no interest in them, but that they related purely to private matters between individuals. But as to others of such services it would seem otherwise, and that the county might be liable as for benefits received. See, also, *Thacher v. Commissioners*, 13 Kan. 182. All these questions, however, may be considered upon a new trial, where the parties may show just how far the county was interested and how far not, and what benefits the county may have received from the plaintiff's services. The judgment of the court below will be reversed, and cause remanded for a new trial. All the justices concurring.

(47 Kan. 96)

AIKEN v. NOGLE.

(*Supreme Court of Kansas.* Oct. 10, 1891.)

STATUTE OF FRAUDS—AGREEMENT NOT TO BE PERFORMED IN ONE YEAR.

1. An agreement to render services as a servant girl for another for \$100 per year, the services to commence at the date of such agreement, is not within the statute of frauds, (section 6, c. 43, par. 3166, Gen. St. 1889,) as the agreement might have been performed within one year.

2. Where services have been actually rendered to another under a verbal agreement not binding upon the parties on account of the provision of section 6, c. 43, requiring the agreement to be in writing, if not to be performed within one year, the party benefited thereby may be compelled to pay for the same.

(*Syllabus by the Court.*)

Error from district court, Wabaunsee county; R. B. SPILLMAN, Judge.

This was an action commenced by Emma C. Nogle against Mrs. Elmira A. Aiken, formerly Mrs. Elmira A. Giles, to recover \$658.35, and interest thereon, for wages as a servant. The petition alleged that the wages were due upon a verbal contract made between the parties about July 1, 1881; that by the terms of the verbal contract the defendant promised to pay to the plaintiff \$100 per year for each and every year she worked for her as a servant, and that the plaintiff worked for the defendant from about July 1, 1881, to February 6, 1888. The action was tried before the district court with a jury, and the jury returned a verdict in favor of the plaintiff against Mrs. Aiken for \$256.31. The court overruled the motion by the defendant for a new trial, and rendered judgment in favor of the plaintiff below upon the verdict of the jury. After the case was brought here by proceedings in error, Mrs. Aiken died; and the action was revived in this court in the name of her administrator, S. C. Aiken.

G. N. Elliott and John T. Bradley, for plaintiff in error. *George G. Cornell and J. F. Pepper*, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) The principal objections to the judgment are that the contract between Emma Nogle and Mrs. Aiken, formerly Mrs. Giles, was verbal only, and therefore void under the statute of frauds, because it was not to be performed within the space of one year from the making thereof, (section 6, c. 43, relating to frauds and perjuries,) and because the cause of action was barred long before it was commenced. The statute of frauds cannot avail in this case. The evidence shows that the verbal contract was made about July 23, 1881, after Emma Nogle became of age. She entered upon her performance of the contract at once, and therefore the contract for the first year was good, notwithstanding the statute, on the ground that performance was not only possible, but was actually completed, within the year. If the contract could not, by reason of the statute of frauds, extend into the second year, the jury had the right to determine what was the understanding with which the parties entered upon the second and other years of employment. If Mrs. Aiken agreed to pay her servant \$100 a year, commencing July 23, 1881, this was competent evidence from which to infer under what terms the parties continued their relations after that time until Emma ceased to work as a servant. The agreement between Emma Nogle and Mrs. Aiken may be construed as running for one year's service only, although it might have been, and really was, continued for several years upon like terms. In *Sutphen v. Sutphen*, 30 Kan. 510, 2 Pac. Rep. 100, it was decided that "a parol agreement which, fairly and reasonably interpreted, admits of full performance within the year, although not likely to be so performed, will not be adjudged void by reason of the last prohibition in section 6 of the statute of frauds and per-

juries." The established doctrine is that, to bring a case within the section of the statute of frauds referred to, there must be an express and specific agreement not to be performed within the space of one year, or the facts must show the agreement cannot be performed within the year. *Kent v. Kent*, 62 N. Y. 560.

But, again, the contract has been fully executed upon the part of Emma Nogle. She performed her services as a servant, without objection, from the 23d of July, 1881, to February 6, 1888. She was paid from time to time in clothing, and when she finally quit service she received and accepted further payments in dishes, bedding, etc. The balance of the wages found by the jury has never been paid. Where services have been rendered, the party benefited thereby must pay for them. There may be some differences in the form of the action, and perhaps the allegations in the original petition in this case may be subject to some criticism; but the facts developed upon the trial on the part of the plaintiff below fully sustain the verdict of the jury, and the judgment rendered thereon. The statute of frauds cannot and ought not to be construed to permit palpable frauds. When one who need not have done the services, because the promise was verbal, has voluntarily performed the agreement for the actual benefit of the other party, he or she may have an action against the other for the services actually performed. Common honesty requires and compels such a ruling. The statute of limitations has no application, because of the payments made and accepted from time to time in clothing, bedding, dishes, etc. *Carney v. Havens*, 23 Kan. 82; *Waffle v. Short*, 25 Kan. 503. The other errors alleged are unimportant, and in no way prejudicial. The judgment of the district court will be affirmed.

All the justices concurring.

GRIFFIN V. O'NEIL.

(47 Kan. 116)

(*Supreme Court of Kansas. Oct. 10, 1891.*)

BILL OF PARTICULARS — DEMURRER TO EVIDENCE — NEW TRIAL.

1. The bill of particulars in this case sufficiently states a cause of action for the recovery of a balance due on the transaction therein set out.
2. The demurrer to the evidence of the plaintiff was properly overruled. Such evidence held sufficient to support the verdict and judgment therein.
3. Defendant not entitled to new trial on the ground of accident.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Anderson county; A. W. BENSON, Judge.

Action by B. O'Neil against Walter Griffin. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

Johnson & Johnson, for plaintiff in error. *Kirk & Bowman*, for defendant in error.

STRANG, C. This action was begun before a justice of the peace October 1, 1887, and judgment entered for plaintiff October 7, 1887, for \$107 and costs. Appeal

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for any informality or irregularity in its issue, or because no *præcipe* was filed by the party desiring it.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Hamilton county; A. J. ABBOTT, Judge.

Replevin by Sallie H. Carr against A. M. Huffman, sheriff, to recover possession of a piano. Defendant moved to set aside the order of delivery, and from an order granting the motion plaintiff brings error. Reversed.

Milton Brown and Kimball & Osgood, for plaintiff in error. *A. J. Hoskinson*, for defendant in error.

SIMPSON, C. On the 25th day of January, 1888, Mrs. Carr commenced this action in replevin against Huffman, who was the sheriff of Hamilton county, to recover possession of a piano, of the alleged value of \$300, that the sheriff had seized under an execution against the husband of Mrs. Carr. This piano was situated in Kearney county, then attached to Hamilton county for judicial purposes. She gave bond for costs, and an undertaking in replevin, the sureties on which were approved by the clerk of the district court; filed the necessary affidavit; and an order of delivery was issued to the coroner of said county, that was served and duly returned, with a redelivery bond, with sureties in the sum of \$600. After this Huffman filed an answer, consisting—*First*, of a general denial; and, *second*, that, as sheriff as aforesaid, under an execution against Sam H. Carr, he had levied on the piano as the property of Carr. Afterwards the attorney of Huffman filed a motion to set aside and quash the order of delivery and the service thereof. This motion was filed after the answer of the defendant in error had been filed for some months. Before filing the motion to set aside the order of delivery, the sheriff asked leave to withdraw his answer, and this was granted. The motion to set aside the order of delivery was sustained, and the court then permitted the sheriff to file an amended answer. The plaintiff in error asked leave to amend her petition and affidavit for replevin, and certain amendments were made. On the 22d day of October the plaintiff in error caused an *alias* order of delivery to be issued, directed to the sheriff of Kearney county, (that county having been organized,) which was served and returned with another redelivery bond. The defendant in error then filed a motion to set aside the *alias* order of delivery, and this was sustained. The plaintiff in error is here complaining of all these rulings, and as to all but one we cannot review them, as no final disposition of the case has been made. The orders of the court for leave to plead and file motions and to amend we cannot now consider. The one most bitterly complained of is that of quashing and setting aside the first order of delivery, and, as that is a final order that discharges a provisional remedy, we can review it. The motion directed against it enumerated the reasons why it should be set aside.

The first is "that it was prematurely issued, without the plaintiff filing a *præcipe* therefor with the clerk of the court." The Code does not require that a *præcipe* shall be filed, but it is made the imperative duty of the clerk to issue an order of delivery whenever a certain proper affidavit is filed therefor, and a sufficient undertaking entered into, with the approved sureties. Sections 176, 177, Civil Code. It might be that the clerk, to protect himself, when he has doubts either as to the sufficiency of the affidavit or the legal form of the undertaking, can demand a *præcipe*; but, after he issues the writ without such a demand, it is too late to question the regularity of the proceeding. The second cause assigned is "because the officer to whom the same was directed had no jurisdiction to execute the same, the writ showing on its face that the property was outside of his county." And the third, that may be considered in connection with the second, is "because said order is issued for property outside of Hamilton county." The writ was directed to the coroner of Hamilton county, an affidavit being filed that the sheriff was interested, being the defendant in the action. It described the property as being situate at Lakin, in Kearney county, Kan.; and the averment of the petition is that Kearney county, being unorganized, is attached to Hamilton for judicial purposes. The district court of Hamilton county must take judicial notice of the attachment of Kearney to Hamilton county for judicial purposes, as we do, and hence none of the objections urged against the order of delivery were good, and did not authorize the court to set it aside. Besides, the defendant had answered, and it was too late to move against the order of delivery. To withdraw his answer, then interpose his motion to vacate the writ, and then ask and obtain leave to renew his answer, as soon as the motion was disposed of, looks like trifling with the orderly course of judicial proceedings, and all this defendant in error did, and was permitted to do. This suit was commenced on the 25th of January, 1888. The answer of defendant was filed on the 24th day of February, 1888. On the 8th day of August, 1888, the defendant in error filed his motion to vacate the order of delivery. On the 15th day of August, 1888, he asked leave of the court to withdraw his answer and file his motion to vacate, and this was granted; and on the same day the motion to vacate was sustained against the objections of the plaintiff in error, who then and there had her exceptions noted. On the 27th day of August, 1888, by permission of the court, the defendant in error filed what he calls an amended answer, being, in legal effect, the same as his original answer. It will be seen from this statement that the withdrawal of the original answer was a mere pretext to attempt to avoid the decision of this court in the case of Kennedy v. Beck, 15 Kan. 555, wherein the court holds that, in an action of replevin, it is too late to raise any question about the irregularity of the issue of an order of delivery on behalf of the defendant after he has filed his answer. So that the effect of the trial

court permitting these things to be done, if we should affirm them, would be to deprive the plaintiff in error from obtaining a writ of replevin. We regard the struggling efforts of the plaintiff in error, after the defendant in error filed an answer, to procure an *alias* order of delivery, as null and void, and having no bearing on the question of the regularity of the original order of delivery. We recommend that the order of the trial court vacating the original order of delivery be reversed, with instructions to overrule the motion and for further proceedings.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 126)

CONDON v. KEMPER.

(*Supreme Court of Kansas. Oct. 10, 1891.*)

LIQUIDATED DAMAGES—PENALTY.

Kemper and Condon entered into a written contract whereby Condon agreed to build a wall, etc., or else, at his election, to remove a certain house three feet, and put it in as good condition as it was before; and in such contract the parties further stipulated as follows: "It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of five hundred dollars as liquidated and ascertained damages for the breach of this contract." Condon elected not to build the wall, etc., and afterwards failed to remove the house. The cost of removing the house, and putting it in as good condition as it was before, would not have exceeded \$100. *Held*, that when the parties made the contract, and stipulated for damages in case of breach, fixing the amount at \$500, they could not have had in contemplation actual, compensatory damages; and therefore *held*, that the sum of \$500 mentioned in such contract as liquidated and ascertained damages must be treated as a penalty, and not as liquidated damages.

(*Syllabus by the Court.*)

Error from district court, Labette county; GEORGE CHANDLER, Judge.

This was an action brought in the district court of Labette county by L. H. Kemper against C. M. Condon to recover \$500 as liquidated damages for the alleged breach of the following written contract, to-wit: "This agreement between L. H. Kemper and C. M. Condon witnesseth, that whereas, the said Kemper has sold to said Condon lot 7, block 38, in Oswego, Kansas, said Condon, as a part of the consideration therefor, agrees to erect thereon a two-story stone or brick building, not less than 100 feet deep, within six months, and to give use of the north wall thereof to said Kemper; or else remove the house now on lot 6, in said block 38, three feet north of where it now stands, as said Condon shall elect to do, and put said building in as good condition as it is in its present location. It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of five hundred dollars as liquidated and ascertained damages for the breach of this contract. C. M. CONDON, Oswego, Kansas, March 11, 1887." The defendant answered as follows: "Said defendant admits the execution and delivery of the writing marked

'Exhibit A,' attached to and made part of plaintiff's petition, but he alleges the fact to be that said writing was executed and delivered under a misapprehension and a mistake of the facts in reference to the subject-matter of the transaction therein referred to as they actually existed, and that but for such mistake such writing would not have been executed. Defendant alleges that plaintiff was the owner of lots 6 and 7, in block 38, in the city of Oswego, Kansas. That the frame house mentioned in said writing belonged to plaintiff, and was appurtenant to said lot 6. That defendant negotiated for and purchased from plaintiff said lot 7 with a view of erecting thereon a stone or brick building. That at the time of purchasing said lot 7, and of executing and delivering said writing, both plaintiff and defendant understood and believed that said frame house, mentioned in said writing, and which belonged on and was appurtenant to said lot 6, stood on the line between said lots 6 and 7; the main part of it being, as said parties supposed, on lot 6, and about two or three feet in width of it standing on said lot 7. That to permit defendant to build on his said lot 7 would necessitate the removal of said house, as said parties believed, some three feet to the north. That plaintiff sold, and defendant bought, said lot under such belief. That plaintiff, in negotiating for the sale of said lot 7, objected to being put to the expense of removing said house so that it would all stand on his own lot 6, or insisted, if he were put to such expense, he should be compensated therefor; and to this defendant assented, and agreed that he would, at his own expense, remove said frame house so that it should entirely stand on said lot 6, and far enough across the line between said lots 6 and 7 not to interfere with the erection of a wall on said line, and put it in as good condition as it then was, where it then stood; or if he should so elect, instead of removing and repairing said house as aforesaid, he might erect on said lot 7 a brick or stone building not less than 100 feet deep, and give plaintiff the use of the north wall thereof as compensation for his moving and repairing said house as aforesaid. That it was to meet such contingency, and secure such end, that said writing was executed and delivered. That thereafter this defendant elected not to erect said stone or brick building on said lot 7, and not to furnish plaintiff the use of the north wall thereof. That, by agreement between said plaintiff and defendant, said block was afterwards surveyed, and the fact was then ascertained that said frame building did not stand, as both of said parties had supposed it did, across the line between said lots 6 and 7,—a part on 6 and a part on 7,—but that it all then stood on said lot 6, and so far from the line between lots 6 and 7 as not to interfere with the erection of a wall thereon, and therefore a removal of said frame building was unnecessary, and would be of no advantage whatever to plaintiff. Defendant alleges that the only purpose on the part of plaintiff or defendant in the execution and delivery of said writing

was to indemnify plaintiff against cost and expense in the removal and repair of said house as aforesaid, and that, had plaintiff desired its removal after the fact in reference to its true location was ascertained, he could have had it removed three feet north of where it then stood, and put in as good condition as it was, where it then stood, at a cost and expense of not to exceed one hundred dollars. That said house could, at the time of the execution of said writing, or at any time since then, have been removed three feet north of where it then stood and now stands, and put in as good condition as it then was, in its then location, at a cost of not to exceed one hundred dollars. That in no event could plaintiff's damage, had he desired to have had said house removed, exceed one hundred dollars. That to indemnify against such possible damage was the only object in giving said writing. Defendant alleges that plaintiff has not removed said house, and has in no way been to any cost or expense on account of the removal of said house, or for any other purpose referred to in any way in said writing. Defendant denies that plaintiff has suffered any damage on his account, and denies any liability to him in any respect. Wherefore defendant asks that this cause be dismissed, and that he recover his costs herein." The plaintiff replied, denying every allegation of the answer inconsistent with the allegations of his petition. When the case was called for trial, the plaintiff moved for judgment upon the pleadings; and the court sustained the motion, and rendered judgment accordingly in favor of the plaintiff and against the defendant for \$500, with interest and costs; and the defendant excepted, and afterwards, as plaintiff in error, brought the case to this court for review.

Case & Glasse, for plaintiff in error. J. H. Morrison, for defendant in error.

VALENTINE, J., (after stating the facts as above.) The substantial question involved in this controversy is whether the plaintiff below, L. H. Kemper, may recover from the defendant below, C. M. Condon, the sum of \$500 as agreed and liquidated damages, or whether he can recover only the amount of his actual loss or damage resulting from the breach of the contract sued on, which amount, according to the facts of the case as presented to us, cannot exceed \$100. The contract upon which Kemper seeks to recover contains the following among other stipulations: "It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of five hundred dollars as liquidated and ascertained damages for the breach of this contract." It will be seen that the parties themselves have used the words "liquidated and ascertained damages;" but nearly all the authorities agree that neither these words, nor any other words of similar import, are conclusive, but that the amount named, notwithstanding the use of such words, may nevertheless be nothing

more than a penalty. Some of such authorities are the following: *Lampman v. Cochran*, 16 N. Y. 275; *Ayres v. Pease*, 12 Wend. 393; *Hoag v. McGinnis*, 22 Wend. 163; *Beale v. Hayes*, 5 Sandf. 640; *Gray v. Crosby*, 18 Johns. 219; *Jackson v. Baker*, 2 Edw. Ch. 471; *Shreve v. Brereton*, 51 Pa. St. 175; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Fisk v. Gray*, 11 Allen, 132; *Wallis v. Carpenter*, 13 Allen, 19; *Ex parte Pollard*, 2 Low. 411; *Basye v. Ambrose*, 28 Mo. 39; *Carter v. Strom*, 41 Minn. 522, 43 N. W. Rep. 394; *Schrimpf v. Manufacturing Co.*, 86 Tenn. 219, 6 S. W. Rep. 131; *Haldeman v. Jennings*, 14 Ark. 329; *Davis v. Freeman*, 10 Mich. 188; *Hahn v. Horstman*, 12 Bush, 249; *Low v. Nolte*, 16 Ill. 475; *Kemble v. Farren*, 6 Bing. 141; *Davies v. Penton*, 6 Barn. & C. 216; *Horner v. Flintoff*, 9 Mees. & W. 678; *Newman v. Capper*, 4 Ch. Div. 724. Of course, the words of the parties with respect to damages, losses, penalties, forfeitures, or any sum of money to be paid, received, or recovered, must be given due consideration, and, in the absence of anything to the contrary, must be held to have controlling force; but when it may be seen from the entire contract, and the circumstances under which the contract was made, that the parties did not have in contemplation actual damages or actual compensation, and did not attempt to stipulate with reference to the payment or recovery of actual damages or actual compensation, then the amount stipulated to be paid on the one side, or to be received or recovered on the other side, cannot be considered as liquidated damages, but must be considered in the nature of a penalty; and this, even if the parties should name such amount "liquidated damages." The following text-books upon this subject may be examined with much profit: 1 Sedg. Dam. (8th Ed.) c. 12, §§ 389-427; 1 Suth. Dam. pp. 475-530, c. 7, § 6; 13 Amer. & Eng. Enc. Law, pp. 857-868; 1 Pom. Eq. Jur. §§ 440-447; 3 Pars. Cont. pp. 156-163, § 2. The text-books upon this subject unite in saying that the tendency and preference of the law is to regard a stated sum as a penalty, instead of liquidated damages, because actual damages can then be recovered, and the recovery be limited to such damages. 1 Suth. Dam. 490; 13 Amer. & Eng. Enc. Law, pp. 853, 860. The decisions of this court are also in this same line. The only decisions of this court upon the subject of liquidated damages are the following: *Kurtz v. Sponable*, 6 Kan. 395; *Foots v. Sprague*, 13 Kan. 155; *Railway Co. v. Shoemaker*, 27 Kan. 677; *Heatwole v. Gorrell*, 35 Kan. 692, 12 Pac. Rep. 135. We are satisfied with the foregoing decisions of this court, but they do not go to the extent of controlling the decision in the present case. The last case cited is supported by the following additional cases: *Davis v. Gillett*, 52 N. H. 126; *Caswell v. Johnson*, 58 Me. 164; *Borrill v. Daggett*, 77 Me. 545, 1 Atl. Rep. 677.

In 1 Sedgwick on Damages (8th Ed.) the following among other language is used: "From the foregoing we derive the following as a general rule governing the whole subject: Whenever the damages were evidently the subject of calculation

and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages." Section 405. "And here we are brought back by a somewhat circuitous path to the great fundamental principle which underlies our whole system,—that of compensation. The great object of this system is to place the plaintiff in as good a position as he would have had if his contract had not been broken. So long as parties themselves keep this principle in view, they will be allowed to agree upon such a sum as will probably be a fair equivalent of a breach of contract. But when they go beyond this, and undertake to stipulate, not for compensation, but for a sum out of all proportion to the measure of liability which the law regards as compensatory, then the law will not allow the agreement to stand. In all agreements, therefore, fixing upon a sum in advance as the measure or limit of liability, the final question is whether the subject of the contract is such that it violates this fundamental rule of compensation. If it does so, the sum fixed is necessarily a penalty. If it does not do so, the question arises, as in any other contract, as to what agreement the parties have actually made; and here, as in all other cases, their intention, as ascertained from the language employed, is a guide." Section 406. "Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages." Section 410. "Whenever an amount stipulated is to be paid on the non-payment of a less amount, or on default in delivering a thing of less value, the sum will generally be treated as a penalty." Section 411. "Whenever the stipulated sum is to be paid on breach of a contract of such a nature that the loss may be much greater or much less than the sum, it will not be allowed as liquidated damages." Section 412. "A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty." Section 413. "If the contract is one in which the measure of damages for part performance is ascertainable, and a sum is stipulated for breach of it, this sum will not be allowed as liquidated damages, in case of a partial breach." Section 415.

In 1 Pomeroy on Equity Jurisprudence the following language is used: "Where an agreement contains provisions for the performance or non-performance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or all of such provisions, and the sum will be in some instances too large, and in others too small, a compensation for the injury thereby occasioned, that sum is to be treated as a penalty, and not as liquidated damages. This rule has been laid down in a somewhat different form, as follows: Where the agreement contains provisions for the

performance or non-performance of acts which are not measurable by any exact pecuniary standard, and also of one or more other acts in respect of which the damages are easily ascertainable by a jury, and a certain sum is stipulated to be paid upon a violation of any or all of these provisions, such sum must be taken to be a penalty." Section 443. "Whether an agreement provides for the performance or non-performance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect, that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages." Section 444.

In 1 Sutherland on Damages the following among other language is used: "While no one can fail to discover a very great amount of apparent conflict, still it will be found on examination that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case." Page 478. "To be potential and controlling that a stated sum is liquidated damage, that sum must be fixed as the basis of compensation, and substantially limited to it; for just compensation is recognized as the universal measure of damages not punitive. Parties may liquidate the amount by previous agreement. But, when a stipulated sum is evidently not based on that principle, the intention to liquidate damages will either be found not to exist, or will be disregarded, and the stated sum treated as a penalty. Contracts are not made to be broken; and hence, when parties provide for consequences of a breach, they proceed with less caution than if that event was certain, and they were fixing a sum absolutely to be paid. The intention in all such cases is material; but, to prevent a stated sum from being treated as a penalty, the intention should be apparent to liquidate damages in the sense of making just compensation. It is not enough that the parties express the intention that the stated sum shall be paid in case of a violation of the contract. A penalty is not converted into liquidated damages by the intention that it be paid. It is intrinsically a different thing, and the intention that it be paid cannot alter its nature. A bond, literally construed, imports an intention that the penalty shall be paid if there be default in the performance of the condition; and formerly that was the legal effect. Courts of law now, however, administer the same equity to relieve from penalties in other forms of contract as from those in bonds. The evidence of an intention to measure the damage, therefore, is seldom satisfactory when the amount stated varies materially from a just estimate of the actual loss finally sustained." Pages 480, 481. See also, especially, 3 Parsons on Contracts, (16th Ed., p. 156 et seq.)

Many courts hold that the intention of the parties must govern, but say that if the damages stipulated to be paid, re-

ceived, or recovered on the breach of the contract are out of proportion to the actual damages that might be sustained, then the parties could not in fact have intended liquidated damages, but merely a penalty, whatever their language might be. Other courts hold that it makes no difference what the intention of the parties might be; that the nature of the contract itself must govern, and if the amount stipulated to be paid, received, or recovered is out of all proportion to the actual damages that might be sustained, then such amount must be treated as a penalty, whatever may have been the intention of the parties; that in fact, and in the very nature of things, such amount would be a penalty, and could not be anything else; that the parties could not by misnaming the amount, and calling it liquidated damages, make it such. In this connection, the following language of Judge CHRISTIANCY, who delivered the opinion of the court in the case of *Jaquith v. Hudson*, 5 Mich. 123, 136, 137, is instructive: "Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear, the court would enforce the contract according to that intention. To test this, let it be asked whether, in such a case, if it were admitted that the parties actually intended the sum to be considered as stipulated damages, and not as a penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long-explored doctrine which gave the whole penalty of the bond, without reference to the damages actually sustained. They would thus be simply changing the names of things, and enforcing, under the name of stipulated damages, what in its own nature is but a penalty. The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is in fact in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages. It must therefore, we think, be very obvious that the actual intention of the parties in this class of cases, and relating to this point, is wholly immaterial; and, though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not, and cannot be made, the real basis of these decisions. In endeavoring to reconcile their decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say 'that the parties must be considered as not meaning exactly what they say.' *Horner v. Flintoff*, 9 Mees. & W. 678, per PARKE, B. May it not be said, with at least equal propriety, that the courts have sometimes said

what they did not exactly mean?" And in the case of *Myer v. Hart*, 40 Mich. 517, 523, the supreme court of Michigan held as follows: "Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside."

We might quote further from the textbooks and the reported cases, but we think the foregoing is sufficient; and from the foregoing it certainly follows that the plaintiff below, Kemper, cannot "recover" "the sum of \$500 as liquidated and ascertained damages for the breach of this contract," notwithstanding such is the language of the contract. If the defendant, Condon, had removed the building situated on lot 6 three feet north, and have then put the same in as good condition as it was before, he would have so completed his contract that not one cent of damage could be recovered from him; and to so remove such building, and to put it in as good condition as it was before, would not have cost to exceed \$100. But suppose that Condon had removed the building, and then have failed to put the same in as good condition as it was before; he would have committed a breach of the contract, but the actual damages might not have been \$25. Then, should the plaintiff, Kemper, recover the said sum of \$500? Or suppose that Condon had removed the house, and attempted to put it in as good condition as it was before, but have failed to repair a lock, or a small portion of the plastering, or a broken window, which repairing might not have cost \$1; then, should Kemper have the right to recover the said sum of \$500? All this shows that the parties did not have in contemplation the matter of actual compensatory damages when they stipulated that Kemper might recover \$500 from Condon as liquidated and ascertained damages, in case of a breach of the contract, but shows that in fact, though not in words, they fixed the sum of \$500 as a penalty to cover all or any damages which might result from a breach of the contract. The judgment of the court below will be reversed, and cause remanded for further proceedings. All the justices concurring.

(47 Kan. 182)

NEMAHA FAIR ASS'N v. THUMMEL, Chairman of Board of County Commissioners, *et al.*

(*Supreme Court of Kansas*. Oct. 10, 1891.)

STATE BOARD OF AGRICULTURE — APPROPRIATIONS TO AGRICULTURAL SOCIETIES.

In order to entitle a county or district agricultural society to representation in the state board of agriculture, the reports prescribed in section 2 of the act for the encouragement of agriculture (Gen. St. 1889, par. 6250) must have been made; and, unless these reports have been made at the times and in the manner required, such society is not entitled to demand an appropriation of the public moneys of the county, such as is provided for in section 8 of the act mentioned.

(*Syllabus by the Court*.)

Application by the Nemaha Fair Association for a writ of *mandamus* to C. B. Thummel, chairman of the board of county commissioners of Nemaha county, and

the Sabetha District Fair Association. Writ denied.

Emery & Thompson, for plaintiff. *Abijah Wells*, for defendants.

JOHNSTON, J. This is a proceeding in *mandamus*, brought originally in this court by the Nemaha Fair Association, to compel the chairman of the board of county commissioners of Nemaha county to issue and deliver to the plaintiff an order on the treasurer of the county for \$200. The claim is made under the provisions of "An act for the encouragement of agriculture," and particularly under section 8 of that act. Gen. St. 1889, pars. 6249, 6257. In an earlier stage of this litigation the validity of section 8 was challenged and sustained. *Association v. Meyers*, 44 Kan. 132, 24 Pac. Rep. 71. Since that time Thummel was elected chairman of the board of county commissioners to succeed Myers, and he has been substituted in the place of Myers as the defendant. The Sabetha District Fair Association, upon application, was made a defendant herein; and alleged that it was entitled to the \$200 in controversy, by reason of being a district agricultural society, and having held a fair, collected \$500 by voluntary contribution, and having made all necessary reports to the secretary of the state board of agriculture, and performed everything else required by law to be done to entitle it to the sum of \$200 from Nemaha county. The statute having been held to be constitutional, the question remains whether the plaintiff has complied with the requirements of the statute so as to be entitled to demand from the county the statutory allowance. It is alleged in the alternative writ that the plaintiff is a duly-organized agricultural society, formed November 24, 1882, "to encourage agriculture, horticulture, mechanics, and the fine arts, the improvement of the breed of domestic animals, and to hold fairs for the exhibition of skilled industry and enterprise;" that its capital stock is \$7,000, which has been voluntarily contributed by the members, and is fully paid; that the plaintiff has held annual fairs in Nemaha county since its organization, and has paid annually to exhibitors not less than \$1,500 for premiums, and has annually sent a delegate from the society to the meeting of the state board of agriculture, which delegate has been duly recognized by and admitted as a member of that board. The writ further alleges "that the secretary of the plaintiff has made monthly reports to the state board of agriculture on the last Wednesday of each month since its organization of the condition of the crops in its county, and made a list of such noxious insects as were destroying the crops, if any, and stated the extent of their depredations, and reported the condition of stock, giving a description of the symptoms of any disease prevailing among the same, with the means of prevention and remedies employed, so far as ascertained, and such other information as was of interest to the farmers of the state; and did also make out a statement containing a synopsis of the awards at the fair, the cur-

rent year, offered and awarded as premiums for the improvement of stock, tillage, crops, implements, mechanical fabrics, and articles of domestic industry, which exceeds the sum of \$1,500, and an abstract of the treasurer's account, and reported on the condition of agriculture in its said county of Nemaha to the state board, said statement being forwarded by mail to the state board on or before the 15th day of November of each year." The facts which have been agreed upon, however, do not measure up with the allegations of the plaintiff. It is practically conceded by counsel that the Sabetha District Fair Association has not met the requirements of the statute, and is therefore not entitled to demand from the county \$200, or any other sum; and counsel for defendants insist that the Nemaha Fair Association is not entitled to the allowance for three reasons: (1) That it is not such an agricultural society as is contemplated by the act; (2) that it has not made the reports required by the statute; and (3) that it has not raised from its members and paid into its treasury the required sum of money.

The facts satisfactorily show that the first objection is not well taken, as the plaintiff appears to be an agricultural society such as would be entitled to the statutory bounty if it had complied with the requirements of the statute.

The second objection urged against the demand of the plaintiff is good, as it has clearly failed to follow the directions of the statute in respect to the making of reports. The conditions upon which a society can demand an allowance are clearly stated in the act providing for the same, and the making of monthly and annual reports to the state board of agriculture is among the most important. In respect to the monthly reports, it is provided, in section 2 of the act, "that the secretary of each district or county society, or such other person as may be designated by the society, shall make a monthly report to the state board of agriculture, on the last Wednesday of each month, of the condition of crops in his district or county, making a list of such noxious insects as are destroying crops, and state the extent of their depredations, report the condition of stock, giving a description of the symptoms of any disease prevailing among the same, with means of prevention and remedies employed, so far as ascertained, and such other information as will be of interest to the farmers of the state." After the fair has been held, another report is required, containing a synopsis of the awards, as well as other information. The record discloses that no report was made for January or February of the year on which the demand was made, and that the first report made was on March 31, 1888, which is called a quarterly report, and contained most of the information required to be furnished in each monthly report. On May 31, 1888, a postal-card report was made, giving the condition of the crops, including apples and cherries, and also reporting with reference to rainfall and chinch bugs, but no mention was

made of the condition of stock. A postal-card report was made on June 30, 1888, similar to the one of the preceding month, and it contained no reference to the condition of stock, or the diseases prevailing among the same. On July 31, 1888, a report covering substantially the same ground as the last one was made, which was equally incomplete. On August 31, 1888, a report was made upon a postal-card in respect to the area planted in corn, the difference in results between listed corn and that put in with a planter, and the estimated product per acre of the same. No other facts were stated in the report. In September, 1888, a full report was made as to the average yield of the various crops grown in the county, and the average value of the same, as well as the average value of livestock, and of the wages paid for farm laborers during the season. Nothing whatever was said about the condition of the growing crops, or the noxious insects, nor about the condition of stock or the diseases prevailing among stock, as the statute requires. In the same month, the annual report was made, which, although quite full, did not cover all the subjects upon which a report is required. No other reports were made or attempted during the year, and the reason given for the omission is that no others were required by the secretary of the state board. It is agreed that the secretary of the state board, for a long time prior to 1888, had assumed to and did direct, by means of blanks sent out to the various agricultural societies throughout the state, what information should be furnished to the office with respect to crops, stock, insects, etc., and that the plaintiff had filled up all the blanks sent to it, and answered fully all the questions asked by the secretary. It further appears that the secretary wrote to the plaintiff, stating that, on examination of the records of the office, it appeared that the plaintiff had made all the reports required by law entitling it to a delegate to the annual meeting to be held on January 9, 1889. The delegate was elected by the plaintiff, and was recognized and admitted as a member of the state board at its annual meeting. The plaintiff contends that, as it has made all the reports required by the secretary of the state board, and as it was accorded representation in the state board at the annual meeting, no other or further reports were necessary or essential to the payment of the \$200. The will of the legislature, and not that of the secretary, must control. The legislature has specifically provided when the reports shall be made, and what they shall contain, and has further provided that the making of these reports is a prerequisite to an allowance by the county. The society can demand the money from the county only when it "shall have complied fully with the provisions of the second section of the act, so as to be entitled to a representation in the state board of agriculture." Gen. St. 1889, par. 6256. It is not left to the secretary nor to the state board to determine what acts are to be performed and what conditions exist to

entitle a society to representation, or to entitle it to demand an appropriation of public money from the county. These limitations are fixed by the statute, and they can neither be ignored nor modified by the secretary. The fact that the society was given representation on the state board is not the test of its right to the money, but it is whether it was entitled to representation, and the statute provides that it shall not be so entitled unless it has made the monthly and annual reports. One of the principal objects of the state board of agriculture is the collection and dissemination of information of interest to the farmers of the state. To accomplish this beneficial purpose, the monthly reports are required from the county and district societies, which, in a certain sense, form a part of the state board. In order to encourage the local societies in making these reports, and also in making an annual exhibit of the products the county or district, the allowance of \$200 is authorized. If they are not made regularly and promptly, as the statute prescribes, the county is under no obligation to the society, and the chairman of the county board has no right to issue an order upon the county treasurer for \$200 or any other sum. As the Nemaha Fair Association and the Sabetha District Fair Association have both failed to comply with the statutory requirements, neither of them is entitled to the relief demanded. The peremptory writ will therefore be denied. All the justices concurring.

(47 Kan. 201)

STATE V. BUSH.

(Supreme Court of Kansas. Oct. 10, 1891.)

REGISTRATION OF VOTERS—COMPLIANCE WITH LAW.

A slight departure from some directory provision of the act relating to the registration of voters in cities, without any fraudulent intent on the part of the officer, and which in its nature and effect cannot injure any one, or operate to interfere with or defeat the purpose of the act, is not punishable as a felony, or within the penalty described in section 15 of the act.

(Syllabus by the Court.)

On rehearing. For former report, see 25 Pac. Rep. 614.

JOHNSTON, J. Upon the original hearing no argument or appearance in behalf of the defendant was made, but upon this application for a rehearing the defendant appears by his counsel, and insists that the information filed against him is inadequate in its averments, and fatally defective in not charging a culpable intent. It is stated, in substance, that he was the city clerk of El Dorado, and that he unlawfully and feloniously registered J. N. Hanna as a qualified voter, when Hanna did not appear in person, or was not present in the office of the city clerk, giving his name, occupation, and place of residence, as the statute directs. It is stated that, at the hearing of the motion to quash, the county attorney informed the court "that there would be no effort made to show any fraudulent intent on the part of the defendant in the simple act of registering J. N. Hanna, who was at that time a

resident and otherwise a legal and qualified elector in the city of El Dorado, but who did not appear in person before said clerk on the day on which he was registered." It is also stated that the district court held that unless "the defendant by his act intended to commit some wrong, either in registering a person not entitled to vote, or intending to injure or defraud a person with a right to vote out of his vote, or intending to injure or defraud some candidate before the election, the defendant would not be guilty of violating the law;" and, as none of these things were contended for by the prosecution, the motion to quash was sustained.

It is earnestly contended that it was not within the legislative intent to punish as for a felony every omission or failure of the officers to carry out the minute and minor details of the registration act, and that, although the prohibition of the act was general in its terms, it fairly embraced only the mischiefs which the enactment was intended to prevent. It is therefore urged that the information should contain statements showing a culpable intent on the part of the defendant to defeat the obvious purpose of the statute, or allegations of some acts or omissions of the defendant of a substantive character necessarily resulting in the wrong or injury which the legislature intended to suppress. The writer hereof is now inclined to think that the allegations of the information are insufficient; but the majority of the court are of opinion that the language of the charge, stating that the act was unlawfully and feloniously done, characterizes it as a crime, and therefore the information is not so inadequate in statement as to be fatally defective. The court, however, does not decide, as counsel seem to think, that every departure from the letter of the statute comes within its prohibition and penalty, and therefore the hardships which counsel imagine will result from the enforcement of the act do not exist. It is true that the language of section 15 is sweeping in its terms, and, if construed with literary severity, would embrace the slightest departure from any direction or detail which the statute contains, however innocent and harmless the act or omission of the officer might be. It is evident from the provisions and penalty of the act that such was not the purpose of the legislature. The act is a general one, giving specific and minute directions and details as to the preparation for and the regulation of the registration of voters in cities of the first and second classes. Minute directions are given as to the various steps to be taken, and the manner thereof, some of which are very important, while others are of less importance; and at the end of the chapter it is provided that if any officer shall neglect or refuse to perform any act required by the statute, and in the manner required by it, he shall be guilty of a felony, and punished by confinement and hard labor in the penitentiary, as well as to forfeit the office which he then holds. The legislature doubtless intended to impose upon the officers a faithful observance of the provisions of the act, with a view of carrying out its

purposes; but it will hardly be contended that the legislature intended to visit so severe a punishment upon an officer, free from any wrong intent, for some slight departure from an unimportant detail of the law, which does not and cannot operate to defeat its object. We may properly look at the mischief proposed to be remedied, and to some extent the severity of the penalty imposed in determining the true legislative intent in framing the act. It has been held that the purpose of the registration act is to preserve the purity of the ballot-box by ascertaining in advance, by proper proofs, who are entitled to vote at an election; thus securing, 10 days before the election, the full registry of all persons entitled to vote, which registry can be examined and scrutinized by any interested party. *State v. Butts*, 31 Kan. 537, 2 Pac. Rep. 618. Any substantive act or omission of an officer which appears to operate to defeat this purpose comes within the prohibition and penalty of the statute; but a strict compliance with a minor detail that could have no such effect was not intended to be punished as a felony. For instance, the act provides that on January 1st of each year the mayor and council shall procure and open a poll-book for each ward in the city. Would the inadvertent omission to furnish a poll book until the following day subject these officers to imprisonment in the state penitentiary? The statute further provides that the poll-books shall at all times be kept in the office of the city clerk. If the clerk should take one book out for repairs after office hours, and return it in time for the opening of business the next morning, would he be liable to a felon's punishment? Again, the act requires that the books shall be open at all times during the year, except for 10 days preceding the election; but it will not be contended that the clerk must keep them open during the night-time, or be held liable to the rigorous penalties of the act. This is the more apparent, for another section provides for registration during the usual office hours. If the clerk, as a matter of courtesy and accommodation, should remain in his office a short time beyond the usual office hours, and should then register legally qualified voters, would he be held liable to the penalties of the law? He is required to enter the names of the persons registered in alphabetical order; but if he should, by mistake, fail to enter a name in that order, he would hardly be guilty of felony, although the work was not done in the manner provided in the act. It is also provided that no person shall be registered unless he appear in person at the city clerk's office, and apply to be registered; but if a qualified voter who was an invalid was driven in a carriage to the city clerk's office, but was unable to enter there, and should call the city clerk out in the street, or should chance to meet him in the street, and there apply to be registered, and the city clerk, knowing that he was unquestionably a qualified voter, should register him, would this deviation from the strict letter of the statute be within the severe penalties provided in section 15? We think not.

These and many other like acts and omissions are within the letter of the statute; but manifestly the legislature did not contemplate that such acts or omissions should be punished as felonies. A departure from some directory provision, made without fraudulent intent, and which, in its nature and effect, cannot injure any one, or operate to defeat or interfere with the purpose of the act, cannot be regarded to have been in the mind of the legislature in prescribing the penalties of the act. Although such departure appears to be within the strict letter of the act, a consideration of the mischief intended to be prevented, the remedy proposed, and the punishment provided, indicate clearly that such was not the intention of the makers of the statute. It has already been held that, when the intention of the legislature can be discovered, it should be sensibly followed, although such interpretation may seem contrary to the letter of the statute. *Intoxicating Liquor Cases*, 25 Kan. 751, 762. The motion for a rehearing will be denied.

HORTON, C. J., concurs.

VALENTINE, J. I concur in overruling the motion for a rehearing, but I do not wish to express any opinion upon any matter not involved in the consideration of this question. The fundamental question to be considered is whether the defendant's motion in the court below to quash the information should have been sustained or not; and as to when informations may be quashed, and when not, see the case of *State v. Morrison*, 46 Kan. —, 27 Pac. Rep. 133. The only substantial question now presented is whether the information states a public offense as against the defendant or not. Or, in other words, the question is this: Where a criminal information states and charges everything and all things necessary, under the statutes, to constitute a public offense, and states the same substantially, and almost literally, in the language of the statute defining the offense, and charges that the acts of the defendant constituting the offense were committed by him "unlawfully and feloniously," does such an information state a public offense or not? Or perhaps, in still other words, the question is this: May a person unlawfully and feloniously violate a criminal statute without being guilty of any offense? In the case of *Wong v. Astoria*, 13 Or. 538, 11 Pac. Rep. 295, it was held that to allege that an act was done "willfully and unlawfully" was equivalent to alleging that it was done "knowingly." In the case of *Weinzorpfen v. State*, 7 Blackf. 186, 195, it is said, among other things, as follows: "'Feloniously' is substituted for it [the word 'unlawfully'] in this indictment, and is not tantamount to it, but is a word of far more extensive criminal meaning. The act complained of could not have been feloniously, and not unlawfully, done." In the case of *Carder v. State*, 17 Ind. 307, it is said "that the word 'feloniously,' in the connection in which it was used in the indictment, was identical in its import with the word 'purposely.'"

In the case of *Com. v. Adams*, 127 Mass. 15, 17, it is said: "But the allegation that the defendant maliciously and feloniously incited and procured the principal to commit the felony *ex vi termini* imports that she acted with an unlawful intent." In the case of *Allen v. Inhabitants*, 3 Wils. 318, it is said as follows: "Here he [the prosecutor] has alleged in his declaration, and proved at the trial to the satisfaction of the jury, that the same was committed and done feloniously; and that act, which was committed feloniously, was certainly done willfully, unlawfully, and maliciously; for doing an act feloniously is doing it *malo animo*, viz., with malice. Therefore Sergeant Burland concluded that the declaration was perfectly right; and of that opinion was the whole court, and gave judgment for the plaintiff." In Webster's International Dictionary it is said that the word "felonious" means "having the quality of a felony; malignant; malicious; villainous; perfidious; in a legal sense, done with intent to commit a crime." The Encyclopædic Dictionary says that the word "felonious" means, in law, "of the nature of a felony; done with deliberate purpose to commit a crime." And the word "feloniously" means, in law, "in a felonious manner; with deliberate intention to commit a crime." See, also, the Imperial Dictionary and the Century Dictionary, substantially to the same effect.

Under the foregoing authorities, and under the allegations of the information, the defendant did all that was necessary to be done, under the statutes, to constitute his acts a criminal offense; and, as he did the same "unlawfully and feloniously," he did the same "with intent to commit a crime," (Webst. Int. Dict. ;) or "with deliberate intention to commit a crime," (Enc. Dict.) It would therefore seem that the information ought to be held to be sufficient. Can a person violate a criminal statute "with deliberate intention to commit a crime," and still be innocent and blameless? Where a statute prohibits a thing, and makes the doing of the same a criminal offense, but nevertheless a party does such thing, and does it "unlawfully and feloniously," or, in other words, does it "with the intent to commit a crime," is he still innocent and blameless? Will it be claimed that the statute in the present case is a bad law, and that the legislature has no right to pass a bad law, and therefore that the same should be annulled by the courts?

(47 Kan. 191)

CHICAGO, K. & W. R. CO. v. WOODWARD.

(Supreme Court of Kansas. Oct. 10, 1891.)

EMINENT DOMAIN—EVIDENCE—HARMLESS ERROR.

1. The introduction of immaterial evidence, which is not prejudicial to the rights of the defendant, is not sufficient ground to grant a new trial.

2. Upon the trial of an appeal from the award of commissioners appointed to condemn a right of way for a railroad company along a highway, it is not error for the trial court to instruct the jury that they are not to take into consideration any benefits which might accrue to the plaintiff by reason of any change in the location of such public highway.

3. The evidence considered, and found that damages awarded by the jury are not excessive. HORROR, C. J., dissenting, upon the grounds that the erroneous evidence was improper and prejudicial, and that the instruction referred to in the syllabus had no application in this case, and was misleading, upon the facts disclosed upon the trial.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Saline county; S. O. HINDS, Judge.

Condemnation proceedings by the Chicago, Kansas & Western Railroad Company against John E. Woodward, Sr. Verdict and judgment for defendant. Plaintiff brings error. Affirmed.

George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. Moore & Quinby, for defendant in error.

GREEN, C. This was an appeal from an award of condemnation proceedings to the district court of Saline county. One dollar was awarded as damages to the owner of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 5, township 14, range 2 W., in Saline county. A public highway runs through this land, and just north of it the track of the Union Pacific Railway was located. The plaintiff in error built its railroad on this public highway, and condemned the interest of the owner in the public highway. Before the construction of its railroad the company laid out a public highway north of the Union Pacific track, and paid the defendant in error for the laying out of the highway through his land, and concerning this there is no controversy. That part of highway where the railroad was constructed was not vacated. Upon the trial of the case in the district court, the jury returned a verdict in favor of the plaintiff for \$425.60. The plaintiff in error brings the case here, and the first error assigned is in the admission of certain evidence upon the trial below. Complaint is made of the following question: "Now, imagine the railroad built there, with its most injurious consequences,—both railroads, the Santa Fe and the Rock Island,—what, in your judgment and opinion, was the land worth per acre immediately after the building of those roads?" This question was objected to as incompetent, irrelevant, and immaterial, which was overruled and excepted to. The witness answered: "Well, I should think it would make considerable difference in the value of the land,—to me, any way." The answer given by the witness was not responsive to the question, and should have been stricken out, but that was not asked. The question was not, in fact, answered. What the witness did say was immaterial error, and was not sufficiently prejudicial to justify a reversal of the case. No objection or exception was made to the next question and answer, and we cannot consider the assignment of error based upon that evidence.

It is claimed that the court erred in permitting the report of the condemnation proceedings of the Chicago, Kansas & Nebraska Railway Company to be introduced in evidence. The evidence that a

double track was laid on the right of way for both railroads, under the condemnation proceedings of the plaintiff in error, was, we think, competent. The evidence established the fact that the land in question was not embraced in the condemnation proceedings of the former railroad; that whatever was being done there was under the authority and direction of the plaintiff in error. We think the evidence was competent.

It is insisted that the court erred in permitting evidence to be introduced to show why the highway on the south side of the railroad track was not vacated by the board of county commissioners. We fail to see how this evidence could prejudice the plaintiff in error. The evidence may have been immaterial, but did not prejudice the rights of the railroad company.

Our attention is next called to the following instruction: "The constitution of the state of Kansas provides that a railroad company must pay for its right of way over the premises of an individual, irrespective of any benefits that may accrue to the land-owner by reason of the proposed improvements. Therefore you cannot take into consideration any benefits that may accrue to the plaintiff by reason of changing the public highway from the south side to the north side of the Union Pacific Railroad." Section 4 of article 12 of the constitution says: "No right of way shall be appropriated to any corporation until full compensation therefor be first made in money, or secured by a deposit of money to the owner irrespective of any benefit from any improvements proposed by such corporation." This section of the constitution has been frequently construed by this court, commencing as far back as the case of Railroad Co. v. Orr, 8 Kan. 419, and extending down to Railroad Co. v. Ross, 40 Kan. 508, 20 Pac. Rep. 197; and the court has universally held that a railroad company must make full compensation for the right of way appropriated, irrespective of any benefits or supposed benefits from the construction of the road, or any improvement thereby. Tried by this rule, which is supported and sustained by the decisions of other states with similar constitutional provisions, we think the instruction was not misleading or erroneous.

The last contention of the plaintiff in error is that the damages awarded by the jury are excessive. The witnesses fixed the value of the land taken at from \$100 to \$125 per acre. The railroad occupied one and twenty-nine hundredths of an acre, and the jury awarded \$129 as the actual market value of the land taken, without reference to any damages to the remainder of the land. It is argued that, because the highway was not vacated, no compensation should have been awarded for the right of way at all, for, under the statutes of this state, the railroad company had the right to construct and operate its railroad upon the public highway; that one of the uses to which it may be put is the construction and operation of a railroad along and upon the same. We are not prepared to subscribe to this principle. While the ad-

judicated cases are not uniform, the weight of authority is in support of the rule that the construction of a railroad along a highway imposes an additional burden, and constitutes a taking, within the constitution. The following cases hold that a railroad is not one of the legitimate uses of a highway, and for such an occupation there should be additional damages awarded to the adjoining owner: *Railroad Co. v. Reed*, 41 Cal. 256; *Imlay v. Railroad Co.*, 26 Conn. 249; *Railroad Co. v. Steiner*, 44 Ga. 546; *Cox v. Railroad Co.*, 48 Ind. 178; *Stange v. City of Dubuque*, 62 Iowa, 303, 17 N. W. Rep. 518; *Kucheman v. Railroad Co.*, 46 Iowa, 366; *Railroad Co. v. Hartley*, 67 Ill. 439; *Phipps v. Railroad Co.*, 66 Md. 319, 7 Atl. Rep. 556; *Springfield v. Railroad Co.*, 4 Cush. 63; *Railroad Co. v. Helsel*, 47 Mich. 393, 11 N. W. Rep. 212; *Harrington v. Railroad Co.*, 17 Minn. 215, (Gil. 188); *Railroad Co. v. Ingalls*, 15 Neb. 123, 16 N. W. Rep. 762; *Williams v. Railroad Co.*, 16 N. Y. 97; *Fanning v. Osborne*, 34 Hun, 121; *Chamberlain v. Cordage Co.*, 41 N. J. Eq. 43, 2 Atl. Rep. 775; *Railroad Co. v. Williams*, 35 Ohio St. 168; *Mills, Em. Dom.* § 32; *Lewis, Em. Dom.* 111.

The jury allowed \$280 damages to the land,—\$230 to the land south of the railroad, and \$50 damages to the land north of the track of the Union Pacific Railroad. The different elements of damages the jury subdivided as follows: Danger and inconvenience of crossing, \$100; danger to stock from the south side of the track, \$100; and from accidental fire, \$80. While the damages allowed seem large, there was evidence to support the findings of the jury. Each item appears to be a proper element of damages. It is proper, in estimating damages, to take into consideration the exposure of the remaining land to fire from the company's trains or engines, set out by the railroad company, without fault, by reason of the operation of the road through the premises. *Railroad Co. v. Kregel*, 32 Kan. 608, 5 Pac. Rep. 15. It is recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered.

VALENTINE and JOHNSTON, JJ., concur.

HORTON, C. J., (*dissenting*.) Upon the trial of this case in the district court the jury returned a verdict in favor of the land-owner for \$425.60. The court instructed the jury, among other things, as follows: "The constitution of the state of Kansas provides that a railroad company must pay for its right of way over the premises of an individual, irrespective of any benefits that may accrue to the land-owner by reason of the proposed improvements. Therefore you cannot take into consideration any benefits that may accrue to the plaintiff by reason of changing the public highway from the south side to the north side of the Union Pacific Railroad." This instruction had no application in this case, because it was not alleged, claimed, or proved that, in the construction of the

track or railroad, the land-owner derived any benefit. But the instruction was misleading and prejudicial, because it prevented the jury from considering the benefits which the land-owner obtained from the highway upon the north of the Union Pacific. This was not an improvement from the construction and operation of the railroad, but was intended to be an improvement for the special benefit and convenience of the land-owner, and also for the use of others who desired the highway. There was evidence tending to show that the larger tract of land, to which damages are claimed, was north of the Union Pacific Railroad, and one witness testified that it was better to have the highway north of that road than south of it. Even if this road had not been paid for and constructed by the railroad company, the court ought not to have taken from the jury, by an instruction, the consideration of the convenience and benefits of this road, in view of the fact that the highway south of the Union Pacific track was partially occupied by the railroad company, of which complaint was made. Before the land was taken or condemned for the right of way of the Chicago, Kansas & Western Railroad Company, the tract was divided by the Union Pacific Railroad. About 12 acres lay south, and some 20 acres north. The house referred to in the evidence was not upon the tract of land in controversy, but about a quarter of a mile west of the land. This belonged to other parties. The witnesses fixed the value of the land actually taken for railroad purposes by the Chicago, Kansas & Western Railroad Company at from \$100 to \$125 per acre. The company condemned 1.29 of an acre. For this the jury awarded \$129 as the market value of the land. The land taken was upon the highway, just south of the Union Pacific, which was not vacated, and yet the jury allowed nearly full value for the land, the same as if no highway had been established or existed,—as if the land was without any incumbrance, and subject to no easement. These large damages, I think, were the result of the immaterial evidence admitted, against objections, tending to show why the highway on the south side of the railroad track was not vacated by the board of county commissioners, and the misleading instruction referred to. The highway was not vacated, and the evidence concerning the talk about its non-vacation was not only immaterial, but prejudicial. The erroneous evidence and improper instruction were the more harmful because of the great conflict in the evidence. It appears that several witnesses, some six in number, acquainted with the premises appropriated, testified on behalf of the railroad company that the value of the tract of land was the same after as before the construction of the railroad. On account of the error in the admission of evidence, and the giving of an instruction which was misleading and prejudicial, I believe the judgment of the district court should be reversed, and the cause remanded for a new trial.

(47 Kan. 155)

STATE V. EBERLINE.

(Supreme Court of Kansas. Oct. 10, 1891.)

CRIMINAL LAW—EVIDENCE—CHARACTER OF WITNESS.

1. The evidence examined, and found that no error was committed in excluding certain testimony.

2. While evidence of a witness' bad character for veracity is admissible, such inquiry must be confined to the character of such witness for truth and veracity.

3. Instructions given and refused considered, and found that no error was committed.

(Syllabus by Green, C.)

Commissioners' decision. Appeal from district court, Johnson county; JOHN T. BURRIS, Judge.

Prosecution against George Eberline for carnally knowing a female child under the age of 18 years. Verdict of guilty, and judgment thereon. Defendant appeals. Affirmed.

John T. Little and I. O. Pickering, for appellant. J. N. Ives, Atty. Gen., S. D. Scott, and F. R. Ogg, for the State.

GREEN, C. This was a criminal prosecution under section 31 of the crimes act. The defendant was charged with carnally knowing Sallie Eberline, *alias* Sallie Fahner, a female child under the age of 18 years. He was convicted in the district court of Johnson county at the January term, 1891, and sentenced to the penitentiary for a term of six years. He appeals from that judgment and sentence to this court, and the following errors are assigned: *First*. It is claimed by the appellant that there was a conspiracy formed to send him to the penitentiary, and that this fact could have been established to the satisfaction of the jury had the court below permitted the evidence to go to the jury. *Second*. That it was competent for the defendant to show the general reputation of the prosecutrix for virtue and chastity, but that the court refused to permit such evidence to go to the jury, even for the purpose of affecting the weight of her evidence. *Third*. That the court erred in refusing the fourth, fifth, and sixth instructions requested by the appellant. These errors we shall consider in their order.

1. There was no evidence upon the part of the state tending to show any conspiracy. Upon cross-examination of the prosecutrix, she was asked if she had not talked with a man by the name of Snell about this case, and the state interposed an objection, which was sustained by the court, and this is assigned as error. This evidence was immaterial. The witness denied that there had been any effort upon the part of her mother, Snell, or herself to injure the defendant; and any conversation she may have had with Snell about the case was irrelevant. Snell was not a witness, and, if the defendant had desired to establish some foundation for a conspiracy, he should have asked more specific questions.

2. It is insisted that it was competent for the defendant to prove the general reputation of the prosecutrix for chastity and virtue, not as a justification or an excuse for the crime, but for the purpose of

affecting her evidence. We do not so understand the rule. While evidence of a witness' bad character for veracity is admissible, the inquiry in such a case as this must be confined to the witness' character for truth and veracity. Taylor v. Clendening, 4 Kan. 525; 3 Amer. & Eng. Enc. Law, 117, and authorities there cited.

3. We have examined the instructions given by the court, and also those refused, and also the observations of counsel concerning them. The fourth instruction asked and refused was covered by the fourth paragraph of the general charge of the court. The fifth instruction requested by the defendant did not state the rule correctly. It was not necessary for the state to prove force, under section 31 of the crimes act, and the fact that the prosecutrix claimed that force was used was wholly immaterial. The refusal of the court to give the sixth instruction asked was no ground for error. The court had told the jury, in the second paragraph of its charge, that carnally and unlawfully knowing a female under the age of 18 years constituted the crime with which the defendant was charged. The prosecutrix had testified that the defendant had had sexual intercourse with her. The language of the court and the statements of the prosecutrix could not have been misunderstood. The words used have a well defined and understood meaning, and there could be no question but that the jury understood what was meant. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 157)

IN RE SWARTZ.

(Supreme Court of Kansas. Oct. 10, 1891.)

ENACTMENT OF STATUTES—PUBLICATION.

1. All laws shall be enacted by bill. Const. art. 2, § 20.

2. Laws of a general nature are not in force until after publication thereof. Const. art. 2, § 19.

3. The publication of an act, omitting the enacting clause, is not a valid publication thereof.

4. Prosecution under an act not yet published is prematurely brought.

(Syllabus by Strang, C.)

Commissioners' decision.

Petition of C. L. Swartz for a writ of *habeas corpus*. Petitioner discharged.

H. L. Strohman, for petitioner. J. N. Ives, Atty. Gen., and E. B. Welch, for respondent.

STRANG, C. At the April, 1891, term of the district court of Shawnee county, the grand jury thereof returned an indictment, containing three counts, against C. L. Swartz, charging him with having in said county published, circulated, and had in his possession the Kansas City Sunday Sun, a newspaper devoted largely to the publication of scandals, lechery, assignation, intrigues between men and women, and immoral conduct of persons. May 8, 1891, warrants were issued on said indictment, upon which the said C. L. Swartz was arrested, taken, and held in custody

of the sheriff of said county. Afterwards, May 16, 1891, the defendant applied to this court for his discharge from said arrest upon *habeas corpus*, alleging, among other reasons for his discharge, the following, to-wit, that the act of the legislature under which said indictment was found was not in force at the time said indictment was found, nor when the offenses therein charged are alleged to have been committed, for the reason that said act had not at such times been published. The indictment was found at April term, 1891, and it charges that the offenses complained of were committed during said month of April. An examination of the subject shows either that a resolution of the legislature prescribing the acts alleged in the indictment in the case against the petitioner was published March 21, 1891, or that an attempt was made to publish an act of the legislature on that day, which publication omitted an essential part of said act, to-wit, the enacting clause. If there was an attempt on the part of the legislature to create a crime, and provide for the punishment thereof, by resolution, such attempt is in violation of section 20, art. 2, of the constitution, which provides that "no law shall be enacted except by bill." If, as we believe, there was simply a mistake in the publication of the act on the 21st day of March, by omitting the proper enacting clause, and the act was not properly and legally published until May 16, 1891, then such act was not in force at the time the said indictment was found against the petitioner, nor when the offenses therein charged are alleged to have been committed. "No law of a general nature shall be in force until the same be published." Const. art. 2, § 19. The publication of an act of the legislature, omitting the enacting clause or any other essential part thereof, is no publication in law. The enacting clause of all laws shall be, "Be it enacted by the legislature of the state of Kansas." Const. art. 2, § 20. The law not being in force when the indictment was found against the petitioner, nor when the acts complained of therein were done, the petitioner could not have been guilty of any crime under its provisions, and is therefore, so far as this indictment is concerned, entitled to his discharge.

There is another indictment mentioned in the return of the sheriff, a copy of which is also attached to the petition in the case. But, so far as we know, no warrant has been issued thereon. Both the warrants attached to the sheriff's return and also to the petition in the case show that they were issued upon the indictment already considered. These second indictment charges a misdemeanor. The charge in each of the warrants attached to the sheriff's return, and under which he says he held the petitioner, is a felony. It not appearing that the petitioner has been arrested or is held upon any warrant under the second indictment, we think he is entitled to his discharge. As the act under which the petitioner was proceeded against in the district court was properly published on May 16, 1891, and other prosecutions may follow under its provisions, we suggest

that the paper, the publication of which is complained of, or so much of it as contains the matter complained of, shall be attached to any new complaint which may be made. We recommend that the application of the petitioner be allowed, and an order for his discharge entered.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 143)

STATE V. McLAUGHLIN.

(Supreme Court of Kansas. Oct. 10, 1891.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—INDICTMENT.

1. A count for maintaining a nuisance, under section 18 of the prohibitory law, may be joined in an information with one or more counts charging illegal sales of intoxicating liquors under section 7 of the same law.

2. Record examined, and held that no substantial error exists therein.

(Syllabus by Strang, C.)

Commissioners' decision. Appeal from district court, Geary county; M. B. NICHOLSON, Judge.

Prosecution against Mary McLaughlin for the unlawful sale of intoxicating liquors, and for keeping a nuisance. Verdict of guilty, and judgment thereon. Defendant moved for a new trial, which being denied, she appeals. Affirmed.

Dever & Starnes, for appellant. J. N. Ives, Atty. Gen., and James V. Humphrey, for the State.

STRANG, C. The information in this case charged Sim Irvine and Mary McLaughlin with the unlawful sale of intoxicating liquors, in three separate counts, and with keeping and maintaining a nuisance, in a fourth count. The defendant Mary McLaughlin demanded a separate trial, which was allowed, and the case is brought here as to her alone. The defendant moved that the fourth count be stricken out of the information. This motion was overruled, and the case went to trial on all four counts of the information. The defendant was acquitted on the first count, and convicted on the other three. She moved for a new trial, which motion was overruled, and she brought the case to this court, and asks that the judgment of the court below be reversed for the following reasons:

First. The defendant alleges that it was error for the court to permit the joinder of the fourth count of the information, which charges the offense of maintaining a nuisance, with the other counts thereof, each of which charges the offense of illegally selling intoxicating liquors. Each of the counts in the information charges a misdemeanor, and each of the misdemeanors charged is of a kindred nature, and grew out of violations of different sections of the same statute, relating to the same subject-matter, and, whether tried jointly or separately, must be tried in the same way, and largely upon the same evidence. We know of no reason, therefore, why they should not be joined, but on the other hand think, because they must largely depend upon the same evidence in the trial thereof, that it is not

only allowable to join them in the same information, but quite proper to do so. The reason assigned by the defense against the joinder of the fourth with the other counts in the information is that the defendant is put at a disadvantage by such joinder, in this: that the evidence introduced is used to convict the defendant of two separate and distinct offenses at the same time. It is true that evidence introduced for the purpose of proving the charges in the counts alleging illegal sales may at the same time be competent to prove, and be relied upon to establish, the allegations contained in the fourth count, which charges the maintenance of a nuisance. But we see no disadvantage in this to the defendant, since, if the counts charging illegal sales and the one charging the maintenance of a nuisance were separated, and the nuisance count was tried by itself, the same evidence used to prove the charges of illegal sales in the trial of the case on the information containing the counts alleging such sales could and would be resorted to for the purpose of sustaining the charge of maintaining a nuisance on the trial of the case on the information containing such charge. The result, therefore, would be two formal trials, when one would secure the same purpose. The defense also insists that there is nothing in the affidavits of witnesses filed with the information to justify a warrant for the arrest of the defendant upon the charge of maintaining a nuisance, and, as the information is sworn to by the county attorney upon information and belief only, there is no foundation for the prosecution of the defendant on the fourth count, and the motion to strike it from the information should have prevailed. The affidavits do not specifically charge the maintenance of a nuisance, but they contain allegations of all the elements necessary to the offense of maintaining a nuisance. They show the keeping and sale of liquor at a certain place in violation of law, and allege that the place is kept by the defendant and Sim Irvine. We think the evidence filed by the county attorney with the information sufficient, together with the oath of the county attorney, to justify the warrant on the charge contained in the fourth count of the information.

The *second* alleged error of the trial court consists in the reception thereby of evidence over the objections of the defendant. We think these objections were based upon an imperfect comprehension of the scope of the evidence filed with the information. This evidence is very broad, and an examination thereof, together with the evidence objected to, satisfies us that there is no substantial error in the ruling of the trial court in relation thereto. The defendant objects to the sixth instruction, and says it is not warranted by the testimony of Scully filed with the information, nor by his evidence on the trial of the case; that it does not appear that he purchased or obtained any liquor from the defendant on the 15th of February, 1891. It is true his statement filed

with the information, and his evidence on the trial, show that he got the liquor of Sim Irvine. But the statements filed with the information show that Sim Irvine and the defendant together kept the place where the liquor was obtained, and the evidence on the trial of the case conclusively shows not only that the business carried on at the place described in each of the counts of the information, and in the evidence filed therewith, was the joint business of the defendant and Sim Irvine, but that they were jointly concerned in the conduct thereof. Sales were made by each in the presence as well as in the absence of the other. It being true, as the evidence conclusively shows, that the defendant owned the place where the business was carried on, and had a joint interest with Sim Irvine in the liquors kept and sold, and personally joined in the sale thereof, she not only approved and ratified all the sales made by Irvine, but was equally responsible under the law with him for the sales made by him. It follows, therefore, that she was responsible for the sales by Irvine to Scully, and the evidence of such sales was properly admitted to establish the charge against her, and the sixth instruction was supported by the evidence, and the defendant was properly convicted on the third count. We do not think there is any substantial error in the eighth instruction. The first clause of the eleventh instruction, as an abstract statement of the law, is incomplete; but, when considered in the light of the evidence in the case, we do not think this part of the instruction contains any material error. The jury could not have been misled to the injury of the defendant, because, as above stated, the evidence conclusively shows that the defendant not only had a joint interest in the liquors sold, but that such liquors were sold indiscriminately by herself and Irvine for the benefit of both, and therefore sales made by Irvine were authorized by her, which rendered her equally responsible with him for such sales. There is no error in the last clause of the eleventh instruction. We do not think the first instruction asked by the defendant properly states the law. We think the same evidence may at the same time, on the same trial, be introduced and considered by the jury, for the purpose of establishing the illegal sales charged in the first, second, and third counts of the information, and also for the purpose of proving the charge contained in the fourth count thereof. We do not think the second instruction asked by the defendant properly states the law, because we believe the proof of continued sales of intoxicating liquor in violation of law by one or more persons on his or their premises, kept by him or them, is sufficient to establish the fact that intoxicating liquors were kept on the premises for unlawful purposes. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 151)

STATE v. WOODRUFF.

(Supreme Court of Kansas. Oct. 10, 1891.)

LARCENY—WHAT CONSTITUTES TAKING—EVIDENCE.

1. Where a person obtains possession of a horse with the consent of the owner, by falsely and fraudulently pretending that he wants to use him a short time for a temporary purpose, and will return him to the owner at a specified time, when in fact he intends to and does wholly deprive the owner of the horse and appropriates him to his own use, there is such a taking and carrying away as to constitute the offense of grand larceny.

2. The admission of improper and immaterial evidence, not prejudicial to the complaining party, is not a ground of reversal.

(Syllabus by the Court.)

Appeal from district court, Johnson county; JOHN T. BURRIS, Judge.

Prosecution against Frank Woodruff for grand larceny. Verdict of guilty, and judgment thereon. Defendant appeals. Affirmed.

F. R. Ogg, for appellant. J. N. Ives, Atty. Gen., and S. D. Scott, for the State.

JOHNSTON, J. Frank Woodruff was convicted of grand larceny. The information was filed in December, 1890, and charged Woodruff with stealing a roan mare, the property of F. F. Murray, on August 9, 1887, and alleged that since about the time the larceny was committed Woodruff had been a fugitive from justice, and absent from the state. At the trial testimony was given that Woodruff came to the house of J. C. Murray in the latter part of July, 1887, and was employed by Murray to work upon his farm. On the morning of August 9, 1887, he was sent into a field to cut corn for J. C. Murray, but, instead of doing so, he went to the home of F. F. Murray, who was a son of J. C. Murray, and told him that he had the toothache, and desired to go to Olathe to have the tooth extracted; and he said that he wanted to hire a horse to ride to Olathe, stating that he would return the animal about noon of that day. Murray consented, and assisted in saddling and bridling the mare, but he never saw the mare afterwards, and never saw the defendant until the fall of 1890, when he was brought from Illinois upon requisition of the governor of the state. When the defendant did not return at noon with the mare, Murray went to Olathe, and, with the aid of the sheriff, made a fruitless search for Woodruff and the mare. He was not seen at Olathe on that day, but was seen by one witness in possession of the mare at the town of Morse, Kan. The mare has never been found or recovered. The defendant insists that, under these facts, there was no such trespass and taking as was necessary to constitute the offense of larceny; and he asked the court to charge the jury that if he obtained the possession of the mare with the consent of the owner, and afterwards appropriated her to his own use, he could not be convicted of larceny. The court instructed the jury as follows: "If you believe from the evidence that defendant obtained possession of the mare charged in the information to have been stolen under the pretense that he wanted

to ride to Olathe, but in reality with intent to convert her to his own use, and to deprive the owner of his property, that would be a sufficient taking, and carrying away to constitute the crime of grand larceny." Further along in the charge the court instructed that, "If you are satisfied from the evidence beyond a reasonable doubt that the owner of the mare alleged to have been stolen intended only to part with the possession of the mare, and not with the ownership, and that the defendant took possession of the mare not for the purpose, as he stated, for riding to Olathe and return, but with the intent to convert the mare to his own use, and to deprive the owner of his property therein, and that in pursuance of such intent he did convert the mare to his own use, then you ought to find the defendant guilty of grand larceny, as charged in the information." The instructions given by the court were warranted by the evidence, and correctly stated the law of the case. To constitute larceny, there must be an intentional taking, without the consent of the owner; an intentional fraud and appropriation of the property to the use of the defendant. If the owner consents to part with the property, there can be no larceny; but the consent must be free and voluntary. Where his consent to surrender possession for some temporary and legitimate purpose is obtained by a trick or a fraud, and the taker intends to deprive the owner of his property, and convert the same to his own use, the consent is a nullity, out of which no legal possession or right of possession against the owner can arise. According to the testimony on which the verdict in this case rests, there was no voluntary surrender of the possession of the property for the purposes intended by the defendant; hence the taking was tortious, and against the will of the owner. The jury were warranted in inferring that the defendant never intended to go to Olathe for the purpose of having a tooth extracted, and never intended to return the mare to the owner, but that his real purpose was to steal the mare, and convert her to his own use. According to the testimony, he never went to Olathe, never returned the mare, and it appears that he fled from Kansas, and took refuge in the state of Illinois, remaining there until he was found and extradited for the commission of this offense. We think that the evidence is sufficient to sustain the verdict, and that the defendant has no cause to complain of the charge of the court. *State v. Williams*, 35 Mo. 229; *State v. Coombs*, 55 Me. 477; *State v. Humphrey*, 32 Vt. 571; *People v. Shaw*, 57 Mich. 403, 24 N. W. Rep. 121; *People v. Smallman*, 55 Cal. 185; *Smith v. People*, 53 N. Y. 111; *Miller v. Conn.*, 78 Ky. 15; *People v. Smith*, 23 Cal. 280; *English v. State*, (Tex. App.) 15 S. W. Rep. 649; *State v. Anderson*, 25 Minn. 66; 12 Amer. & Eng. Enc. Law, 770.

The introduction in evidence of a post-al-card notice given by the sheriff, offering a reward for the stolen mare, giving a description of her, and a description of the defendant, is another ground of complaint. It was offered in connection with

the evidence of the under-sheriff, who testified that at the instance of Murray, and while he had the warrant in his hands, he searched for the defendant and the mare in and about Olathe, and to aid in finding them they had printed a large number of such postal-cards, and distributed them over the states of Kansas and Missouri. It was competent to show the search for the defendant, and that he fled from the state, but a copy of the printed postals which were mailed was hardly competent evidence. The reception of the notice, however, was not prejudicial to the defendant, as the testimony conclusively showed that he obtained the mare upon the representation that he was going to Olathe, that he did not go to Olathe, that he never returned the mare to her owner, and that he fled the state, and became a fugitive from justice. Under such a state of facts, the reception of the printed postal was immaterial and harmless. There are no other objections which require notice, and, finding no error in the record, the judgment of the district court will be affirmed. All the justices concurring.

(47 Kan. 140.)

STATE V. McLAFFERTY.

(*Supreme Court of Kansas.* Oct. 10, 1891.)

SALE OF INTOXICATING LIQUORS—INDICTMENT—
WRITTEN INSTRUCTIONS.

1. *Held*, under the corrected record in this case, that the defendant was properly described in the count of the information upon which he was convicted.

2. Certain instructions considered and *held* not to be misleading or erroneous, when considered with the entire charge to the jury.

3. The mere fact that the court made certain oral statements to the jury in relation to their agreeing upon a verdict after they had retired to consider their verdict and had been returned into court, but did not direct them upon any rule of law involved in the trial, or make any comment upon the testimony, is not such an instruction as is required to be in writing, in accordance with section 236 of the Criminal Code; and while such statements may be subject to criticism, and ought not to have been made to the jury, still they are not considered sufficiently prejudicial to grant a new trial in a case where, from the entire record, the guilt of the defendant clearly appears.

(*Syllabus by Green, C.*)

Commissioners' decision. Appeal from district court, Shawnee county; JOHN GUTHRIE, Judge.

Prosecution against D. C. McLafferty for the unlawful sale of intoxicating liquor. Verdict of guilty, and judgment entered thereon. Defendant appeals. Affirmed.

A. H. Cass, for appellant. J. N. Ives, Atty. Gen., and R. B. Welch, for the State.

GREEN, C. The defendant was tried in the district court of Shawnee county on an information containing three counts, wherein he was charged with the unlawful sale of intoxicating liquors. He was only convicted upon the first count. It is urged that the district court should have sustained a motion for a new trial, for the reason that in the first count of the information the title to the cause was, "The State of Kansas against D. C. McLafferty," while in the body of the information the defendant was described as "D. C. Laf-

ferty." This objection has been removed by the suggestion of a diminution of the record by the county attorney, and a correction of the bill of exceptions, which shows that the defendant's name was the same in the first count in the information as in the title of the action.

The appellant objects to the sixth and eighth instructions, and the claim is made that they are erroneous and misleading. The court instructed the jury that proof of a sale of what is generally and popularly known as brandy, wine, lager-beer, or gin is proof of a sale of intoxicating liquors, within the meaning of the law, and that it was not necessary, in the first instance, for the prosecution to offer evidence of that fact, but that such liquors are presumed to be intoxicating until the contrary is proven. The information charged the sale of all kinds of intoxicants, and, while most of the evidence was to the effect that the defendant sold what was called "hard cider," still it was claimed upon the part of the defendant that the parties drank some kind of a mixture which they had compounded themselves. This instruction did not prejudice the rights of the defendant.

The court further instructed the jury that if they should find from the evidence, beyond a reasonable doubt, that the defendant sold, bartered, or gave away to the persons named in the information whisky, brandy, wine, beer, gin, or hard cider, or mixtures thereof, and that such persons were minors, it was wholly immaterial whether the defendant had or had not a permit as a druggist. It was clearly established that the defendant did not have a permit. While this evidence was not necessary in the first instance, the defendant was not prejudiced by it or the instruction. Upon the question of hard cider being intoxicating, this court has held that "hard cider is cider excessively fermented; and therefore, presumptively, hard cider is not only a fermented liquor, but intoxicating. Whatever is generally and popularly known as intoxicating liquor may be so declared as a matter of law by the courts. Under the statute, all fermented liquor is presumed to be intoxicating; and, if the defendant denies that the fermented liquor sold by him is intoxicating, it devolves upon him to remove the presumption of law by evidence." *State v. Volmer*, 6 Kan. 371; *Intoxicating Liquor Cases*, 25 Kan. 751; *State v. Schaefer*, 44 Kan. 90, 24 Pac. Rep. 92. We think this instruction was not misleading or erroneous, when considered with the charge to the jury as an entirety.

It is next urged that the court erred in making an oral statement to the jury after they had retired to consider their verdict, and had been returned into court. While this oral statement made to the jury may be subject to just criticism, it can hardly be said to be an instruction, in the sense in which that word is used in section 236 of the Criminal Code. "The mere fact that an oral communication has passed from the court to the jury is not of itself proof that the statute has been disregarded. The court may properly make oral statements to the jury in refer-

ence to the form of the verdict, the manner in which the trial has been conducted, the behavior of the jury or counsel or parties, or any other oral statement which is not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, or a comment upon the evidence." *State v. Potter*, 15 Kan. 304.

The record in this case shows conclusively that the defendant was guilty of selling hard cider to three minors, two of whom were under the age of 14 years, and that each one of them became intoxicated from drinking this cider, and does not show such prejudicial error as to entitle the defendant to a new trial. The judgment of conviction should be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(46 Kan. 655)

**MANLEY V. EMLEN, County Treasurer,
et al.**

(Supreme Court of Kansas. June 6, 1891.)

MUNICIPAL CORPORATIONS — DEBTS AND LIABILITIES—TAXATION.

1. In 1880 a city of the second class had the power to contract for water to be furnished to itself and its inhabitants.

2. When a city of the second class becomes a city of the first class, it retains all its vested rights with regard to its property and contracts, and remains responsible with regard to all its existing liabilities and obligations, whether upon contract or otherwise, but its mode of government is changed.

3. When a city of the second class becomes a city of the first class, it is then to be governed by the laws relating to cities of the first class.

4. On August 23, 1886, the mayor and council of a city of the first class, by ordinance properly passed, approved, and published, levied a tax of three mills on the dollar for general revenue purposes, and a tax of two mills on the dollar designated as a "Water-Works Contract Tax." *Held*, that the levy of such water-works contract tax was not invalid.

5. On August 23, 1886, a special tax, denominated a "Macadam Tax," was duly levied by ordinance in a city of the first class, but it was subject to several supposed irregularities, to-wit: *First*, a long delay from the time when the resolution was passed, declaring it necessary to do the work, until the tax was levied; *second*, an irregular estimate by the city engineer; *third*, no money appropriated for the work; *fourth*, letting the contract at an alleged excessive amount; *fifth*, irregularity in the notice given. But *held*, that all the supposed irregularities supposed to affect the levy of the tax in 1886 were cured by the relevy of the tax in 1887, by an ordinance duly passed, approved, and published on August 23, 1887, under section 20 of the act relating to cities of the first class.

6. On August 23, 1886, a special tax, denominated a "Guttering Tax," was duly levied by ordinance by a city of the first class to pay for a certain special guttering improvement, but the levy was subject to some supposed irregularities, as that a certain remonstrance had been interposed, not signed by a majority of the owners of property resident in the city liable to pay taxes for such improvement, for the entire length of the improvement, nor for the length of any single block except one, which remonstrance it is claimed rendered the levy invalid. But *held*, that such remonstrance was not sufficient to render the levy invalid, and that a relevy of the tax on August 23, 1887, cured all previous irregularities to which the prior levy may have been subject.

7. And *further held*, that two special taxes, denominated a "Sidewalk Tax" and a "Sidewalk Repair Tax," levied by ordinance by a city of the first class on August 23, 1886, and relevied by ordinance by such city on August 23, 1887, were valid.

8. Section 20 of the first-class city act, providing for the relevy of certain taxes or assessments, is not unconstitutional or invalid, and all persons are bound to take notice of this statute, and to know that under it all taxes or assessments coming within its provisions, and not void because of some incurable irregularity, may be made valid by a relevy of the same.

(Syllabus by the Court.)

Error from district court, Atchison county, B. F. Hudson, Judge *pro tem*.

Action by George Manley against Thomas J. Emlen as county treasurer of Atchison county, state of Kansas, Charles H. Krebs as county clerk of Atchison county, state of Kansas, the city of Atchison, the Atchison Water Company, of Atchison, Kan., Charles Taylor, Ed. Jewett, Julius Kaaz, John Early, and John M. Lane and John Doe, partners as John M. Lane & Co., and L. Friend, to enjoin the collection of certain taxes. The water-works tax only was adjudged void. Plaintiff brings error. Reversed as to said tax, and otherwise affirmed.

L. F. Bird, for plaintiff in error. *H. C. Solomon, H. M. Jackson, Waggoner, Martin & Orr, Frame & Bland*, and *T. M. Pierce*, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Atchison county on August 20, 1887, by George Manley against Thomas J. Emlen as county treasurer, Charles H. Krebs as county clerk, the city of Atchison, the Atchison Water Company, Charles Taylor, Ed. Jewett, Julius Kaaz, John Early, and John M. Lane and John Doe, partners as John M. Lane & Co., to perpetually enjoin the defendants from collecting or enforcing certain taxes against the property of the plaintiff, levied by the city of Atchison on August 23, 1886, and placed upon the tax-roll of the county for that year for collection, to-wit, a water-works contract tax, a Macadam tax, a guttering tax, a sidewalk tax, and a sidewalk repair tax. The plaintiff alleged that these taxes were all illegal and void. Afterwards L. Friend was made a party defendant in the action. Afterwards a trial was had before a referee, and judgment was finally rendered in the district court adjudging that the water-works contract tax was void, and that all the other taxes in dispute were valid; and the plaintiff, as plaintiff in error, has brought the case to this court for review, making all the defendants defendants in error; and two of such defendants, to-wit, the Atchison Water Company and the city of Atchison, have filed a cross-petition in error.

We shall consider the water-works contract tax first; and the principal facts relating thereto, stated very briefly, are substantially as follows: Prior to 1876, and from that time until in March, 1881, the city of Atchison was a city of the second class, when in March, 1881, it became a city of the first class, and has remained such ever since. On March 5, 1880, a city

ordinance was duly passed, and afterwards approved and published, providing for the erection and maintenance of water-works in the city, and giving to Sylvester Watts, and to his successors and assigns, the right for 25 years to furnish to the city and to its inhabitants, for compensation, good, healthful, and wholesome water, upon certain terms and conditions. Within a few days thereafter an amendatory ordinance was passed, approved, and published. By these ordinances the city was to rent and to pay for a certain number of hydrants. On April 6, 1880, an election was held by which the electors of the city of Atchison approved and ratified these ordinances by a vote of 1,309 to 84. Afterwards these ordinances were accepted by Watts, and he gave bond as required by their terms. Afterwards, and on March 15, 1880, Watts assigned and transferred all his rights and interests under the ordinances to the Atchison Water Company, and that company constructed the water-works, and have ever since maintained them, and furnished water to the city of Atchison and to its inhabitants, in accordance with the provisions of such ordinances. In March, 1881, the city of Atchison became a city of the first class, as aforesaid. On August 23, 1886, the city of Atchison levied all the taxes now in controversy, to-wit, the water-works contract tax, the Macadam tax, the guttering tax, the sidewalk tax, and the sidewalk repair tax. On December 20, 1886, the plaintiff, George Manley, tendered to the county treasurer all taxes due against him or his property in Atchison county except the aforesaid disputed taxes, and has kept the tender good. On August 20, 1887, this action was commenced by the plaintiff, George Manley, against the county treasurer and others as aforesaid, to perpetually enjoin them from collecting or enforcing the aforesaid disputed taxes, the plaintiff claiming that they were void. On August 22 and 23, 1887, the city of Atchison relieved all the foregoing disputed special improvement taxes, but did not relevy the water-works contract tax. Afterwards all the defendants answered. Afterwards, and on March 11, 1889, the case came on for trial, and L. Friend was then made a party defendant, and he duly answered. The case was then tried before Seneca Heath, who had previously been appointed a referee for such case. On April 18, 1889, the referee made his report, making voluminous special findings of fact, and also stating his conclusions of law separately, and to the effect that all the taxes except the water-works contract tax were valid, and that that tax was invalid. At that time and afterwards various motions and objections were presented to the court and heard and acted upon; but the court finally, and on June 15, 1889, approved the report of the referee, and rendered judgment substantially in accordance with the referee's conclusions of law.

Just why the water-works contract tax is not valid, it is difficult to understand. In 1880, when the city of Atchison, which was then a city of the second class, provided by ordinance for giving to Sylvester

Watts and to his successors and assigns the right to furnish water to the city of Atchison and to its inhabitants, for compensation and upon certain terms and conditions, the city certainly had the power to do so, and to make a valid contract with Watts for that purpose. Gen. St. 1889, pars. 787, 817, 1401, 1402, 7185-7190; *Wood v. Water-Works Co.*, 33 Kan. 590, 597, 7 Pac. Rep. 233; *Water-Works Co. v. City of Burlington*, 43 Kan. 725, 728, 23 Pac. Rep. 1068; *Dill. Mun. Corp.* (4th Ed.) §§ 146, 443, and note, 568, last part, and cases cited under all these sections; 15 *Amer. & Eng. Enc. Law*, 1115-1118, and cases there cited. When the city of Atchison, in 1881, became a city of the first class, it retained all its vested rights with regard to its property and its contracts, and remained responsible with regard to all its existing liabilities and obligations, whether upon contract or otherwise, (*First-Class City Act*, §§ 119-121;) but its mode of government was changed. It was then a city of the first class, and was to be governed by the laws relating to cities of the first class, and was no longer to be governed by the laws relating to cities of the second class. In the case of *Simpson v. City of Kansas City*, 26 Pac. Rep. 721, (decided by this court on May 10, 1891,) it was said as follows: "After these enumerated cities were consolidated, and formed Kansas City, Kansas, that city became one of the first class, and is to be governed in all respects by the laws regulating cities of the first class." It therefore follows that the contract between the city of Atchison and Watts for the furnishing of water by Watts and his successors and assigns to the city and to its inhabitants, and the paying therefor, and for the rent of certain hydrants, by the city, was valid in 1880 under the laws relating to cities of the second class; that it remained valid when Atchison became a city of the first class; that it was valid in 1886, when the present water-works contract tax was levied; and that such levy was valid when made, if it was properly made under the laws relating to cities of the first class. Was it so made? The plaintiff claims not. He claims that the water-works contract tax must necessarily be a part of the tax levied "for general revenue purposes," as mentioned in subdivision 1 of section 11 of the first-class city act. But suppose it is, would that make any difference? Under that subdivision the city may levy not to exceed six mills on the dollar in any one year for general revenue purposes, and taking this two mills tax that was levied as a water-works contract tax, and all that was levied that year for general revenue purposes, which was only three mills on the dollar, and the whole of these two taxes in the aggregate would amount to only five mills on the dollar; and all these taxes were levied at one and the same time, to-wit, on August 23, 1886. There is no room, therefore, even to claim that the tax of three mills for general revenue purposes was levied first, and that the mayor and council thereby and at that time so exhausted their power that they could not afterwards levy the water-

works contract tax, if such tax should be called a tax "for general revenue purposes;" for, as before stated, all these taxes were levied at one and the same time. But, even if they had been levied at different times, would that make any difference? Could the mayor and council so exhaust their power by levying at one time a portion of the six mills tax for general revenue purposes that they could not afterwards, if they found it necessary, levy the remainder of such six mills tax for general revenue purposes? It is not necessary, however, to answer this question, as section 35 of the first-class city act gives express authority to the mayor and council of cities of the first class to levy a two mills tax for water-works, and the authority thus given, we think, is conclusive in the present case. The city of Atchison had been a city of the first class for more than five years before this two mills water-works contract tax for the year 1886 was levied, and before any step was taken towards its levy; and hence, of course, the city was not governed by the statutes relating to cities of the second class, but was governed by the statutes relating to cities of the first class. But even if the city had remained a city of the second class, and if the tax had been levied under the laws relating to cities of the second class, it would probably still be a valid tax. We think the water-works contract tax is valid.

As before stated, all the taxes now in dispute were originally levied at the same time, and on August 23, 1886; but the incidental proceedings affecting each tax were respectively different. We shall now proceed to consider the Macadam tax. On December 6, 1883, the mayor and council of the city of Atchison passed a resolution declaring that it was necessary to macadamize Commercial street from the west side of Eighth street to the east side of Thirteenth street. Various proceedings were afterwards had, which delayed the work so that the tax for the payment of the work could not well be levied prior to the time when it was levied. The first estimate of the cost of the work made by the city engineer, for instance, was irregular in not being sworn to, and for that or some other reason the first award of the work to one of the bidders proved abortive. Afterwards the city engineer made another estimate in due form and under oath, and the work was again advertised and let to a responsible bidder, who entered into contract, gave bonds, etc., and performed the work; and to pay for such work the present Macadam tax was afterwards levied. Various objections have been and are now urged against the validity of this Macadam tax: *First*. It is claimed that the long delay from the time of the passage of the resolution declaring it necessary to macadamize Commercial street down to the time when the tax was finally levied, rendered the tax invalid. *Second*. It is claimed that under section 22 of the first-class city act the estimate of the cost of the work is the first thing to be done in taking steps towards the improvement of a street, and that, as the passage of the resolution was

the first thing that was actually done in the present case, and the estimate of the cost of the work was afterwards made, the tax must necessarily be invalid. *Third*. It is also claimed that under said section 22 an appropriation of money must be made, and the money set apart for the payment for the work, before any work is done, which was not done in the present case, and indeed could not well be done in any case like the present. *Fourth*. It is claimed that the contract price at which the work was let was in excess of the estimated cost, which is not shown to be true, and the findings of the referee show otherwise. *Fifth*. It is further claimed that the notice provided for by section 13 of the first-class city act to be given of the special session of the mayor and council to hear complaints as to the appraisements of property was given by the city clerk in the official paper of the city, and not by the mayor in such paper. The notice was in fact ordered by the mayor and council to be given in the official paper, and it was so given, but it was signed only by the city clerk. The statute requires that the notice "shall be given by the mayor in the official paper of the city."

Several objections are also urged against the guttering tax. A remonstrance was filed with the city clerk, under section 14 of the first-class city act, protesting against the improvement. The guttering was to be done on both sides of Commercial street for five blocks in length, to-wit, from the west side of Eighth street to the east side of Thirteenth street. The remonstrance was not signed by a majority of the owners of property, resident in the city, liable to pay taxes for the improvement for the entire length of the improvement, nor for the length of any single block, except the block between Eleventh and Twelfth streets; and with reference to such block the remonstrance was signed by Mrs. M. A. Baldwin, who was the only resident of the city who owned property liable to be taxed between such streets. We would think the improvement was a single and continuous improvement, and therefore that the remonstrance was insufficient to stop the work, or to stop any of the proceedings necessary to its accomplishment. It is also claimed that the estimate of the cost of the work made by the city engineer was not in sufficient detail, but we are inclined to think it was. The same objection, with reference to this tax, is urged against the notice of the special meeting of the mayor and council to hear complaints concerning the appraisement as has been urged with reference to the Macadam tax. Some of the other objections made to the other taxes are also urged against the sidewalk tax and the sidewalk repair tax.

It is perhaps unnecessary for us to decide whether the aforesaid disputed special improvement taxes, as they were first levied, on August 23, 1886, were then or are now, aside from their relevancy in 1887, valid or invalid; for they were all levied on August 22 and 23, 1887. The real question is whether such taxes, under the two levies made in 1886 and 1887, are of suffi-

cient validity that they may now be enforced. It will be noticed that the objections to them are of a purely technical character, and merely for irregularities. The principal objection is the want of a technical notice with regard to the proceedings upon which they are founded. The plaintiff, however, who was a non-resident of Kansas, had at all times, through his son and agent, who resided in Atchison, and who had the actual control and management of all his father's property in Atchison, actual notice of all such proceedings. As to the gutting tax, the son signed the aforesaid protest for his father; and another agent of the plaintiff, who had full notice of all the proceedings, gave notice to the several contractors, respectively, "that the plaintiff would contest any levies and assessments that might be made against his property for payment for work that might be done by them under their several contracts, and that they would do all work under their several contracts at their peril." It does not appear, however, that this agent ever gave any notice to any one of the contractors, or to any one else, before the work on any of the various improvements was completed, of any irregularity in any of the proceedings connected with any of such improvements, or that it was claimed by the plaintiff that any irregularity, fraud, or illegality existed or occurred at any time in connection with any of the proceedings. Besides, proper notices were in fact given in all cases, regular in all respects, except that the notices were signed only by the city clerk, and not by the mayor. The notices, however, were first ordered to be given by the mayor and council; and they were in fact given as ordered, and would have been perfectly regular if they had been signed by the mayor instead of by the city clerk. But were they not "given by the mayor" by fair intendment? But, taking all the irregularities together, they were not sufficient to render the taxes, as relieved in 1887, invalid. The statute authorizing a relevy of taxes in cases like the present is section 20 of the first-class city act as enacted in 1881, (Laws 1881, c. 37, § 20;) and it reads as follows: "Sec. 20. In case the corporate authorities have attempted to levy any taxes or assessments for improvement, or for the payment of any bonds or other evidence of debt, which taxes or assessments may have been informal, for the want of sufficient authority, or other cause, the council of such city, at the time fixed for levying general taxes, shall relevy and reassess any such assessments or taxes in the manner provided in this act." We think such a statute as this is valid and binding. *Newman v. City of Emporia*, 41 Kan. 583, 21 Pac. Rep. 593. See, also, in this connection, the cases of *Newman v. City of Emporia*, 13 Kan. 569; *Mason v. Spencer*, 35 Kan. 512, 11 Pac. Rep. 402. All persons are at all times bound to take notice of a public statute, and what may be done under it. They are bound to take notice of the provisions of said section 20, and to know that under it all taxes or assessments coming within its provisions, and not void

because of some incurable irregularity, may be made valid by a relevy of the same. And further, with regard to notice, the taxes levied in 1886 were levied by an ordinance of the city regularly passed by the city council, approved by the mayor, and published in the official paper of the city, and of this ordinance all persons are bound to take notice; and this is also true with respect to the relevy of the taxes of 1887. This relevy was also consummated by city ordinances regularly passed, approved, and published, all in August, 1887. But, before the taxes as relieved could become a fixed lien or charge upon the plaintiff's property, they would all have to be placed upon the tax-rolls of the county by the county clerk, and the tax-rolls would then have to be placed in the hands of the county treasurer, and the taxes would not even then become a fixed charge or lien upon the plaintiff's property until November 1, 1887. The plaintiff, as well as all others, was required to take notice of these ordinances; and after their taking effect, and before the taxes could affect his property, he had ample time within which to commence an action or other proceeding to defeat or avoid such taxes. A notice given by ordinance is held to be valid and sufficient in the case of *Newman v. City of Emporia*, supra. The only difference necessary to mention between the curative statute cited in the *Newman* Case and the one relied on in the present case is that the curative statute cited in the *Newman* Case was enacted between the time of the first levy and the time of the second levy, while the curative statute in the present case was enacted and in force a long time prior to either levy. This, however, we think, cannot be considered as a substantial difference. Both are general statutes, one applying to all cities of the second class, and the other to all cities of the first class,—both to remain in force for all time unless modified or repealed by subsequent legislation; and neither is in any respect a special or local statute. Indeed, neither could be a special or local statute and be valid under sections 1 and 5 of article 12 of the constitution. Special legislation is not permissible under our constitution with respect to municipal corporations.

The judgment of the court below will be modified as follows: As to the water-works contract tax it will be reversed, and as to all the other taxes it will be affirmed. All the justices concurring.

(1 Colo. A. 84)

MISSOURI, K. & T. RY. CO. *et al.* v. COOK
et al.

(*Supreme Court of Kansas.* May 9, 1891.)

RAILROAD GRANTS—LOCATION OF ROUTE.

By Act Cong. July 26, 1866, the Union Pacific Railway Company, Southern Branch, afterwards the Missouri, Kansas & Texas Railway Company, received a grant of right of way for its road, 200 feet wide, through the reserved and ceded lands of the government. Prior to December 24, 1867, the latter company surveyed its line of road, and filed its map designating its route with the secretary of the interior. October 9, 1869, one Hodges, one of the grantors of the defendant J. B. Cook, purchased of the government the land in dispute. Afterwards, in May

¹Rehearing denied.

and June, 1870, the railway company changed the line of its road, and built it across the land in dispute; the original location not having touched the quarter section to which the land in question belongs. *Held*, that by the survey of its line, and the filing of its map designating the route of its road, the company exercised its right under its grant, and could not reclaim it two years and a half afterwards, on changing its line of road, so as to affect the rights of Hodges or his grantees.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Labette county; GEORGE CHANDLER, Judge.

Action of ejectment by the Missouri, Kansas & Texas Railway Company and the Missouri Pacific Railway Company against J. B. Cook and L. H. Printz. Judgment for defendants. Plaintiffs bring error. Affirmed.

T. N. Sedgwick, for plaintiff in error. Case & Glasse, for defendant in error.

STRANG, C. Action of ejectment to recover possession of the following described real property situated in Labette county, Kan., to-wit: Commencing on the north line of Main street in the city of Chetopa, at a point 50 feet west of the center of the main track of the Missouri, Kansas & Texas Railway; thence north 100 feet on a parallel with the center of the main track of said railway; thence west 50 feet; thence south, on a line parallel with the main line of said railway, 100 feet, to the north line of Main street; thence east along the north line of Main street to the place of beginning, being a portion of the land claimed by the plaintiffs as a right of way in the city of Chetopa. The defendants filed a joint answer denying that the plaintiffs had any legal estate in the land described, or a right to recover the possession thereof. The case was tried by the court without a jury on the following agreed statement of facts: "It is hereby stipulated and agreed that upon the trial of the above-entitled action the following facts shall be admitted: (1) The Missouri, Kansas & Texas Railway Company was on the 25th day of September, 1865, duly organized as a corporation under the name of the Union Pacific Railway Company, Southern Branch, and on the 3d day of February, A. D. 1870, its name was duly changed, and made the Missouri, Kansas & Texas Railway Company; and it is the railway company referred to in the act of congress approved July 26, 1866, entitled 'An act granting lands to the state of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas to Fort Smith, Arkansas.' (2) The acceptance of the terms, conditions, and impositions of said act by the said Union Pacific Railway Company, Southern Branch, was signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained. Which acceptance was made and deposited with the secretary of the interior within one year after the passage of this act. (3) The land in the petition described is a part of the lands known as the 'Osage Ceded Lands,' granted to the United States by

the treaty between the United States of America and the Great and Little Osage Indians, proclaimed January 21, 1867. (4) Prior to the 24th day of December, 1867, a line was surveyed for the route of said railroad by G. M. Walker, then chief engineer of said company, which was the line from which the lands mentioned in stipulation No. 7 herein were withdrawn from the market, but that line did not touch the south-west quarter of section thirty-four, township thirty-four, (34,) range twenty-one, (21,) which includes the land described in plaintiffs' petition in said case; and afterwards, and between May 1, 1870, and June 6, 1870, said company located its road on the line where now operated, and built same in substantial compliance with said act of congress; but the route of said road on its present location has never been approved by the president of the United States, unless such approval is shown by the other facts herein admitted. (5) The premises in plaintiffs' petition demanded lie wholly within one hundred feet of the center line of the main track of the railway so built and constructed as aforesaid; the center line of said main track being the center of the right of way of railway company. (6) On the 1st day of September, 1880, the said Missouri, Kansas & Texas Railway Company leased said railway to said Missouri Pacific Railway Company, which has since possessed and operated the same as such lessee. (7) Upon the completion of said railway through said Osage Ceded Land, the president of the United States issued to said Missouri, Kansas & Texas Railway Company patents under said act of congress approved July 26, 1866, for the alternate sections of land designated by odd numbers to the extent of five alternate sections per mile on each side of said railroad, which are the same patents set aside in the case of *Railway Co. v. U. S.*, reported in 92 U. S. 645. (8) The quarter section including the land in question was entered and purchased by one W. A. Hodges from the government of the United States on October 9, 1869, and a certificate in due form was on that day, by the proper officers, issued to him therefor, and thereafter, and on November 1, 1870, a patent in due form was issued therefor pursuant to the said entry by the government of the United States to said patentee, Hodges, which was duly signed and executed; and a perfect chain of title from said Hodges, patentee, now runs to and terminates in said defendant J. B. Cook, and he is the owner thereof, unless the same is owned by the plaintiffs by virtue of the facts herein admitted, and the law governing the same; except Printz is in possession of the premises in controversy as the tenant of defendant Cook. (9) None of the land in dispute lies within fifty feet of the line of the center of the main track of said railroad, nor does defendant claim any part of the strip of land within fifty feet of either side of the center of said track. The plaintiff, at the time of constructing said road, erected a depot building on its right of way, and the land on which said building stands is adjacent to

the land in dispute, which said depot has been used all the time since its erection for the purpose of receiving freight and passengers for shipment. Nor does defendant claim any ground on which any side tracks of said railroad are now located." On the facts as above set forth the court found for the defendants, and entered judgment accordingly. Motion for new trial was overruled. The plaintiffs demanded, on the journal, another trial. The first judgment was set aside, and another trial was had on the same facts, and a second judgment for the defendants was entered, followed by another motion for new trial, which was overruled.

The claim of the plaintiffs to the land in dispute is based upon a right-of-way grant contained in an act of congress of July 26, 1866. The first section of said act gives the railroad company named therein a right of way through the reserved and ceded lands of the government 200 feet wide, while by the sixth section the road is granted a right of way through the public lands only 100 feet wide. The land in question was a part of the lands reserved for the Osage Indians at the time of the passage of the act under which plaintiffs' claim is made, but were ceded to the government January 21, 1867. The plaintiffs claim that the grant to the company of the right of way was a present grant, and took effect immediately upon passage of the act. We agree with the counsel for the plaintiffs that the grant was a present one, and that, so far as the grant itself is concerned, or the right of the company to locate and have a right of way for its road 200 feet wide through reserved or ceded lands it took effect immediately. But we understand that, until the grantee exercises the right secured by the act by definitely locating its road, the grant is *inchoate*, and, while the grantee has a vested right in the grant to the extent of a right to locate its road, and claim 200 feet for its right of way, through reserved or ceded lands, such right does not attach to any particular tract of land until the road is located, and to that extent and in that sense the grantee has no vested right in any particular piece of land for a right of way until the road is definitely located. The grantee has a vested right,—a fixed and indefeasible right,—from the passage of the act, to a strip of land 200 feet wide through the reserved and ceded lands of the government for a right of way, which shall take effect and attach to the land on the location of its road, but no vested right in any particular piece of land until the location of its road. When, however, the location is made and the grant attaches, it relates back to the inception of the grant, the passage of the act containing it. We also understand that, when the grantee elects to attach his grant to any particular tract of land by the definite location of its road, it has claimed its grant and exhausted its right thereunder, and cannot reclaim it elsewhere. "This case stands thus: The corporations had the power to locate and construct a railroad. They could exercise this right but once without a further grant. To accomplish this object a most impor-

tant attribute of sovereignty was bestowed on them by the legislature,—the extraordinary reserved power of subjecting the property of private individuals to public use. If it was intended that this should be a continuing power,—one that might be exercised, and re-exercised, again and again, as often as might suit the convenience of this company, the legislature should have so declared in express terms. They have not done so." *Moorhead v. Railroad Co.*, 17 Ohio, 351. "This extent of country is not all appropriated to the use of the road, but only so much as may be necessary for a track. Its right to it is simply one of selection, and when it has made its selection its right over all the other territory ceases. This principle is distinctly decided in the case of *Moorhead v. Railroad Co.*" *Railroad Co. v. Naylor*, 2 Ohio St. 238. When did the plaintiffs definitely locate their road, so that their grant of the right of way attached? They claim they located it when they built it where it now is, in 1870, and not before, while the defendants claim the company definitely located its road prior to December 24, 1867, on the Walker survey, which location did not touch the quarter section of land to which the piece in dispute belonged. We are of the opinion that the defendants are right in their contention that the company definitely located the line of its road prior to December 24, 1867, and that by so doing it exhausted its rights under the grant contained in the act of July 26, 1866, at any rate so far as the intervening adverse rights of third parties are concerned; and as the defendant Cook's grantors purchased the land after the 24th of December, 1867, and before May, 1870, to-wit, October 9, 1869, he had rights in the land prior to 1870 that could not be affected by the relocation of the plaintiff's road. The survey of the plaintiff's road by Walker was followed by the company filing a map with the secretary of the interior showing the route of their road, and asking that the lands along its line thus established be withdrawn from the market until the company had selected its lands. This, we think, constituted a definite location of its road by the company, and an exercise of its grant, and when thereafter it changed its route its location was subject to the rights before then obtained by Hodges in the land in dispute. The fourth section of the act of July 26, 1866, among other things, states that "as soon as said company shall file with the secretary of the interior maps of its line, describing the route thereof, it shall be the duty of the secretary to withdraw from the market the land granted by this act." This section confers upon the grantee the right to file with the interior department a map describing the route of its road, and made it the duty of the secretary of said department, when said map was filed, to withdraw from the market the lands granted by the act.

It is said by the plaintiff that the only object in filing the map was to secure the withdrawal of the lands granted by the act, and that filing of the map had nothing to do with the right of way. It is true the withdrawal of the lands granted was

the object to be attained by the filing of the map, but it is also true that that object could not be attained except by filing the map as evidence of the location of the line of road. And the company, having filed it as evidence of the location of their road for that purpose, cannot afterwards, and after it has secured that purpose, say that it is not evidence of the location of their road, for the purpose of enabling it to relocate its right of way. "We are of the opinion that the position of the claimant is the correct one. The route must be considered as definitely fixed when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the secretary of the interior the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of the different lines. But when a route is adopted by the company, and a map designating it is filed by the company with the secretary of the interior and accepted by that officer, the route is established. It is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except on legislative consent. No further action is required of the company to establish the route." *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336. "For we are of the opinion that under this grant, as under many other grants containing the same words, or words to the same purport, the act which fixes the time of the definite location is the act of filing the map or plat of the line in the office of the commissioner of the general land-office. * * * Until then many rights to the lands along which the road finally runs may attach which will be paramount to that of the company building the road. After this no such right can attach, because the right of the company becomes by that act vested. * * * It selects for itself the precise line on which the road is to be built, and it is by law bound to report its action by filing its map with the commissioner, or rather in his office. The line is then fixed. The company cannot alter it so as to affect the rights of any other party." *Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566.

Without looking into the question raised by the statute of limitations, we recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 119)

STATE ex rel. BOARD OF REGENTS OF STATE NORMAL SCHOOL v. STOVER, State Treasurer.

(Supreme Court of Kansas. Oct. 10, 1891.)

PAYMENT OF INTEREST ON NORMAL SCHOOL FUND—NECESSITY OF APPROPRIATION—CONSTITUTIONAL LAW.

1. The case of *Martin v. Francis*, 18 Kan. 220, cited and followed.

2. The statutes of the state require that all moneys derived from the sale of lands of the state normal school, both principal and interest, less the commissions allowed for the sale there-

of, shall be paid into the state treasury, where they constitute the state normal school fund. The interest on this fund is paid to and received by the state treasurer as an officer of the state, and the statute requires him to deposit it in the state treasury. The interest of this fund cannot be drawn from the state treasury by the board of regents of the state normal school, or any officer thereof, except in pursuance of an act of the legislature specifically authorizing the same to be done, passed within two years prior thereto.

(Syllabus by the Court.)

Action of *mandamus* on the relation of the board of regents of the state normal school at Emporia to S. G. Stover, state treasurer, to compel him to pay certain moneys to the treasurer of said board. Writ denied.

J. Jay Buck and *I. E. Lambert*, for plaintiff. *J. N. Ives*, Atty. Gen., for defendant.

HORTON, C. J. This is an action of *mandamus* by the state of Kansas upon the relation of the board of regents of the state normal school at Emporia against Hon. S. G. Stover, the state treasurer, to compel him to pay to the treasurer of the board \$1,700 upon its written order, from interest in his hands on the state normal school fund. The state treasurer refuses to pay the order presented, and also refuses to pay any other order of the board of regents, upon the ground that there has been no appropriation by the legislature of any moneys accruing from the interest on the state normal school fund, as required by the constitution of the state. Section 24 of article 2 of the constitution ordains "that no money shall be drawn from the treasury, excepting in pursuance of a specific appropriation made by law; and no appropriation shall be for a longer term than two years." The sole question in this case is whether the interest of the state normal school fund can be disbursed by the treasurer of the state upon the orders of the board of regents of the state normal school without an appropriation by the legislature. In 1863 the legislature of the state established and permanently located at Emporia a state normal school. At the same time it set apart and reserved as a perpetual endowment for the support and maintenance of the normal school certain lands granted to the state by the fourth subdivision of the third section of the act of congress admitting Kansas into the Union. Sess. Laws 1863, c. 57; paragraphs 6310, 6312, Gen. St. 1869. In 1872 legislature passed an act providing for the sale of the lands belonging to the normal school. Section 4 of that act provided: "All moneys derived from the sales of lands under the provisions of this act, both principal and interest, less the amount of commissions allowed by the board of directors for the sale thereof, shall be paid into the state treasury, where it shall constitute the 'State Normal School Fund,' for said institution." Sess. Laws 1872, c. 189; paragraph 6333, Gen. St. 1889. In 1886 the legislature granted to the normal school a further endowment of 12 sections of land. Sess. Laws 1886, c. 156. In 1879 the legislature enacted the following provision: "All moneys belonging to the * * *

state normal school fund * * * shall be deposited with and paid to the state treasurer, and be subject to the order of the board of school fund commissioners." Sess. Laws 1879, c. 166, § 49; paragraph 6594, Gen. St. 1889. Section 117, c. 166, as amended by Sess. Laws 1883, c. 143, § 1, now reads: "Said board of commissioners shall have the power, and it is hereby made their duty, from time to time to invest any moneys belonging to the * * * state normal school fund * * * in the bonds of the state of Kansas or of the United States, school-district bonds of the several school-districts of the state of Kansas, bridge, court-house bonds, or in county, township, or city refunding bonds of the several counties, townships, and cities of the state of Kansas." Paragraph 6654, Gen. St. 1889. From the provisions of section 4, c. 189, Sess. Laws 1872, and section 49, c. 166, Sess. Laws 1879, we are of the opinion that all moneys derived from the sale of the lands of the normal school, both principal and interest, less the commissions for the sales of the lands, are expressly required to be paid into the state treasury. These sums constitute "the state normal school fund." The interest on this fund, which the board of regents, through its president and secretary, now desire to draw from the possession of the defendant, who is the treasurer of the state, is rightfully in his hands as state treasurer. It is therefore rightfully in the state treasury. If it is in the state treasury, and rightfully there, then it cannot be drawn therefrom except in pursuance of an act of the legislature specifically authorizing the same to be done. *Martin v. Francis*, 13 Kan. 220.

There was no appropriation made at the late session of the legislature for the payment of the class of orders or warrants issued to the state treasurer by the president and secretary of the board of regents. As the interest, as well as the principal, of the state normal school fund is rightfully and legally in the state treasury, the state treasurer has no lawful power under the provisions of the constitution of the state to honor or pay the order drawn upon him. It is contended, however, that the language of section 4, c. 189, Sess. Laws 1872, and of section 3, c. 156, Sess. Laws 1886, which authorizes the interest of the school fund to be subject to the order of the president and secretary of the board of regents, and permits them to use the same as the needs of the school shall require, make the state treasurer the agent of the board of regents, and that the interest derived from the state normal school fund is to be held by the state treasurer as the agent of the board; not otherwise. The statute, however, expressly provides that the interest, as well as the principal, "shall be paid into the state treasury;" not that it shall be paid to the person holding the office of state treasurer, or to the agent of the board of regents. The provision in the statute for the board of regents to use the interest for the support and maintenance of the state normal school must be read in connection with the provisions of the constitution of the state, and the use by the

board is subject to the limitations prescribed in the constitution. Section 24, art. 2, Const.

The contention that the board of regents, under the statute, has the power to use the interest on the state normal school fund without an appropriation by the legislature is disposed of by the decision in *Martin v. Francis*, supra. The legislature, in 1871, by chapter 93, § 17, provided for the creation of an insurance fund out of the fees to be paid to the state superintendent of insurance, and also provided that the fees should be paid into the state treasury by the superintendent of insurance when collected. In another section of the same act it was provided that the expenses of the insurance department should be paid out of the insurance fund upon the order of the superintendent of insurance. This court, in construing this statute, decided that, although it expressly stated that the expenses of the insurance department were to be paid out of the insurance fund upon the order of the superintendent of insurance, it could not be so paid except in pursuance of an act of the legislature specifically authorizing the same to be done. The language referred to in chapter 189, Sess. Laws 1872, and chapter 156, Sess. Laws 1886, as to the use of the interest of the normal school fund by the board of regents, is similar to the language of the statute of 1871 concerning the use of the insurance fund by the superintendent of insurance. The construction given by this court to the statute of 1871, relating to the insurance department, and section 24 of article 2 of the constitution of the state, if followed in this case, forbids the board of regents to use the interest of the normal school fund, rightfully in the state treasury, except in pursuance of an appropriation by the legislature, passed within two years prior thereto. We have no disposition to reconsider or change the decision in *Martin v. Francis*, supra.

Again, it is contended that, as the legislature in 1877 expressly enacted "that no appropriation should be made for the state normal school in the future," and again enacted, in 1886, "that the legislature would not in the future appropriate anything for salaries or incidental expenses for the state normal school," these expressions of the legislature are controlling in favor of the board of regents using the interest on the state normal school fund without any specific appropriation, as in the absence of an appropriation the school cannot be successfully carried on without the use of the interest. These provisions of the legislature are not binding upon any subsequent legislature, and in fact the subsequent legislatures have regarded them "more in the breach than in the observance." In 1879 the legislature appropriated \$25,000 for the purpose of rebuilding the state normal school. In 1885 the legislature appropriated moneys to the school, not only for fuel, water, gas, and repairs, but also for furniture, mathematical and chemical apparatus, for designs for the drawing department, etc. In 1891 the legislature appropriated for the school for the years of 1891, 1892, and 1893, in addition to the money provided for

fuel, water, gas, and permanent improvements, over \$2,000 for incidental expenses. But even if the legislature had said, or had intended to say, that the board of regents could use the interest of the state normal school fund, which, under the statute, was rightfully in the treasury of the state, without any specific appropriation, such an act would be in violation of the constitution and void. We have fully considered the practice which has prevailed so many years between the board of directors or regents of the normal school and the state treasury department in allowing orders to be drawn and paid out of the state treasury without any special appropriation, but the practice of the school and state officials cannot be sustained if contrary to the provisions of the constitution. That is the paramount law. Section 24 of article 2 of the constitution is clear and emphatic in its terms. It has already been construed by this court.

Finally, it is suggested, not very strongly, however, that on account of the provisions of the several acts of the legislature referred to there is a contract executed between the state and state normal school whereby the endowment of the lands, together with the proceeds thereof, are in the nature of an absolute donation or grant, which cannot be repealed, changed, or impaired; that neither the state nor the legislature has any control whatever over the endowment fund, whether it be principal or interest; and that the officials of the state normal school have the exclusive authority to use for its support and maintenance all the funds of the institution. The complete reply to this suggestion is that the state normal school is not a corporation *de jure* or *de facto*. It has never organized, or attempted to organize, under the statutes relating to corporations. The legislature has no authority to pass any special act conferring corporate powers, and has not attempted to do so, so far as the state normal school is concerned. The governing board is appointed by the governor and confirmed by the senate. No action affecting the normal school, its property or its endowment, can be prosecuted in the name of the normal school, but such actions are to be prosecuted in the name of the state. Sess. Laws 1877, c. 179; paragraphs 6358-6361, Gen. St. 1889. The state normal school is under the control of the legislature, and is not a separate or independent corporation. It is a part of the great public school system of the state, and as a part of that beneficial system is entitled to the generous support and liberal maintenance of the people. It is unfortunate that the attention of the late legislature was not expressly called to the necessity of a special appropriation, so that the interest on the state normal school fund could be used as the wants and needs of the institution demand. This seems to have been overlooked, and has been overlooked by the state and school authorities for many years. The provisions of the state constitution, however, are now invoked by the attorney general and state treasurer, both state officials, having responsible duties and powers, against the further payment of any order

of the board of regents, until an appropriation is passed. We are called upon to say whether the provisions of the constitution, which is the paramount law, forbid further payments. We think they do, and must therefore hold that the interest on this school fund cannot be disbursed by the state treasurer without an appropriation by the legislature. We regret the unfortunate condition in which this decision may temporarily leave the normal school, which has been so successful in its operations and so beneficial in its influences; but, whatever the present consequences may be, we perform a single and unmixed duty in declaring our views upon the matters submitted. We cannot do otherwise. The constitution is the supreme law, and the acts of the state and school officials must be in obedience to its provisions. The writ prayed for will be denied. All the justices concurring.

(47 Kan. 147)

STATE *ex rel.* IVES, Attorney General, v. MARTINDALE *et al.*, Directors and Warden of Kansas State Penitentiary.

(Supreme Court of Kansas. Oct. 10, 1891.)

EIGHT-HOUR LAW—LABOR IN STATE INSTITUTIONS
—PENITENTIARY OFFICIALS.

The officers and employees mentioned in section 20, c. 152, Sess. Laws 1891, are not embraced in the provisions of chapter 114, Sess. Laws 1891, making it unlawful for laborers, workmen, mechanics, or other persons, employed by the state of Kansas, to work more than eight hours a day.

(Syllabus by the Court.)

Application by John S. Ives, attorney general, for a writ of *mandamus* to William Martindale, John S. Gilmore, and W. M. Rice, directors of the state penitentiary, and George H. Case, warden thereof, to compel them to comply with the eight-hour law. Writ denied.

J. N. Ives, Atty. Gen., and John Martin, for plaintiff. L. B. Kellogg, for defendant.

HORTON, C. J. This is an original proceeding in this court brought by the state upon the relation of the attorney general against the directors and warden of the state penitentiary, praying that they be compelled to comply with the provisions of chapter 114 of the Session Laws of 1891, commonly called "The Eight-Hour Law," in the employment and control of officers and employees working in the state penitentiary. It appears from the stipulation of the parties that several of the officers and other employees in the penitentiary are required and permitted to work more than eight hours per day. On the part of the plaintiff it is alleged that this is in violation of the provisions of said chapter 114. Section 1 of the chapter reads: "That eight hours shall constitute a day's work for all laborers, workmen, mechanics, or other persons now employed, or who may hereafter be employed, by or on behalf of the state of Kansas, or by or on behalf of any county, city, township, or other municipality of said state, except in cases of extraordinary emergency which may arise in time of war, or in cases where it may be necessary to work more than eight hours per calendar day for the

superintendent of insurance for the state that in 1883 the total amount of resources for class No. 2 was \$2,488.68, and that the expenditures for said class No. 2 for that year were \$1,699.76. The persons having insurance in class No. 2, in 1883, had no other notes, funds, or resources to look to for the collection of their claims than the \$2,488.68, unless other notes were executed, or other funds collected, or some other thing done after that date. The condition of class No. 1, in 1883, was much better. The amount of premium notes in force in that class on December 31, 1883, was \$65,838.23. But, of course, the insurers in class No. 2, under the statute, had no right to expect that the \$65,838.23 of premium notes given by insurers in class No. 1, and expressly devoted by the statute to pay the losses and expenses of class No. 1, could be assessed, used, or levied upon to pay the risks in class No. 2. The statute prohibits this. On the 27th of December, 1883, a fire occurred, destroying a part of the property insured by Mrs. Amick. On the 28th of December, 1884, she brought her action upon the policy of insurance of the date of the 7th of November, 1883, and attached to her petition a copy of the policy, which showed upon its face that it was issued under the provisions of chapter 111, as "Class No. 2." Subsequently, judgment was rendered in favor of Mrs. Amick, and against the insurance company, and other proceedings were thereafter had, as stated in the opinions already filed. 37 Kan. 73, 14 Pac. Rep. 454; 45 Kan. 74, 25 Pac. Rep. 211; 46 Kan. —, 26 Pac. Rep. 944.

In overruling the motion for a further hearing, it is only necessary to repeat some of the things already stated in the opinion of June 6, 1891. In the first place, Mrs. Amick accepted her policy of insurance with full knowledge of the provisions of chapter 111, Sess. Laws 1875, and she cannot now be heard to say that she did not understand the terms of her policy, or the conditions under which it was issued. She had her property insured in the second, not the first, class. The statute expressly prescribes that "the goods, wares," etc., "contained in buildings used for merchandise, must be insured in the second, not the first, class." Mrs. Amick knew at the time of accepting her policy that the business of each class was conducted separately and independently of the other. She paid her money for her insurance, but she knew at the time of making the payment that the premium notes given by the company for insurance of the first class could not be assessed or used to pay the losses in the second class. All that we decided in the opinion handed down was that "under the provisions of chapter 111, Sess. Laws 1875, (chapter 50a, Comp. Laws 1879,) the business of each class of a mutual fire insurance company must be conducted separately and independently of the other, and in no case shall an assessment be made by the company or association upon the premium notes of one class to pay the losses and expenses of the other. A general judgment, rendered upon a policy of insurance on property of the second class only, issued on November 7,

1883, by a mutual fire insurance company, under the provisions of chapter 111, Sess. Laws 1875, (chapter 50a, Comp. Laws 1879,) cannot be collected from the property expressly devoted by the statute to the payment of losses by the company on property of the first class." We held then, as we hold now, that the general judgment may be and can be enforced against any and all of the property of the insurance company which is not expressly exempt by statute. We never held, and never intended to hold, that the execution could not be levied upon the general property of the insurance company, subject to any execution. If the insurance company has money in its treasury, has office furniture, books, papers, real estate, or other property subject to execution, the general judgment may be enforced against it. The property, we said, that could not be levied upon to pay the judgment, in this case was premium notes or other like funds expressly devoted by the statute for the protection of the insurers in the first class. As the statute expressly forbids any assessment to be made upon the premium notes of one class to pay the losses of the other class, we held before, and now hold, that the premium notes of the first class are exempted by the statute from being used, levied upon, or sold to pay the losses or expenses of the second class. If the insurance company could not assess the premium notes of the first class to pay the losses or expenses of the second class, it could not use or sell said notes for such an unlawful purpose. In brief, it could not divert the premium notes of the first-class insurers, or the proceeds thereof, or any moneys in the treasury therefrom, for the losses or expenses of the second-class insurers. If it could not do so directly, on account of the prohibition of the statute, it could not evade the law by indirectly doing the same thing through a judgment against it upon a default, or by any insufficient answer, where the petition in the court shows the judgment was obtained upon a policy issued by the insurance company in the second class only. The courts are not eager to assist insurance companies in violating the provisions of the statute under which they are authorized to transact business. We never intimated, in the slightest manner, that the original judgment was to be modified, changed, or vacated, or that it could not be enforced against property subject to execution.

When the learned district judge of Franklin county on the 13th day of August, 1888, appointed D. W. Naill as receiver in this case, he fully recognized the principle announced in the opinion of June 6, 1891, and reiterated here, that the premium notes of the first class could not be assessed or used to pay a loss in the second class. The order appointing the receiver recites, among other things, that, "if said defendant has not sufficient cash to satisfy said judgment, with interest and costs, then it is ordered that said defendant deliver to said sheriff any notes, bonds, bills, or assets (other than premium notes) sufficient to satisfy said judgment, interest, and costs," etc. We affirmed the appoint-

ment of the receiver, but extended the order of the district judge so as to protect, not only the premium notes, but any other like funds (if there be any such) of the insurers expressly devoted by the statute to pay the losses of the first class. If a general judgment is rendered against a debtor, his exempt property cannot be taken or sold upon an execution issued on such a judgment, whether he answered the original petition or not. *Sprout v. Bank*, 22 Kan. 336; *In re Jones*, 2 Dill. 343; *Reed v. Umbarger*, 11 Kan. 206; *Robinson v. Wilson*, 15 Kan. 595; *Rasure v. Hart*, 18 Kan. 340. If property is specifically appropriated by the statute for the use or payment of a certain class of claims or judgments only, it cannot be used, against the objection of the debtor, for the payment of every judgment. Such property is exempt, excepting for the purposes expressly prescribed by the statute.

A homestead may be sold upon a judgment for the purchase money thereof, or for the erection of improvements thereon; but a general judgment, obtained even upon default, cannot be enforced against a homestead if the debtor object. Certain personal property owned by the head of the family is exempt under the statute against a general judgment, but not against a judgment rendered for the wages of a clerk, mechanic, or servant. If a judgment is rendered in the district court of Franklin county, and executions thereon are issued from that court to the sheriff of Dickinson county, the sheriff of the last-mentioned county cannot lawfully levy and sell the exempt property of the debtor in Dickinson county, whether it be exempt under the statute of the state or under the federal statute as a homestead, or as money due or to become due to the debtor, as a pensioner; and while a sheriff cannot, in any case upon an execution in his hands, allow any new defense or modify any judgment, he cannot sell any property of the debtor which is exempt by the state or federal statutes. If the sheriff of Dickinson county, on an execution issued upon a valid judgment in Franklin county, attempts to sell property exempted to the debtor under the state or federal statutes, the debtor residing in Dickinson county may apply to the district court of his own county, where the property is situated, to prevent the unlawful sale. He is not compelled to commence such litigation in Franklin county, or in a court beyond the limits of his own county. Therefore, while "a judgment is the final determination of the rights of the parties in an action," the judgment never can be, and never was intended to be, enforced against property of the debtor which the state or federal statute forbids being applied to the payment of the claim or judgment. The legislature has the same power to exempt the property of a corporation from levy under a judgment that it has to exempt the personal or real property of an individual, and a judgment cannot be enforced in the one case against the exempted property any more than it can be enforced in the other case. Whether the provisions of chapter 111, Sess. Laws 1876, are wise or

not, we are not called upon to say. If the legislature has said that the premium notes of an insurance company given by persons belonging to the first class, and similar funds, shall not be used to pay the losses of the second class, the letter of the statute must control, and we cannot wipe out the exemption by judicial construction. If it be true, as asserted by counsel for Mrs. Amick, that the insurance company is not doing any business of the first class, or if it has any property, real, personal, or mixed, not expressly devoted by the statute to the payment of losses of the first class only, then, of course, the original judgment may be enforced against all such property. Of course, all property not exempt is subject to levy and sale. We repeat what we said upon the former hearing: "If any property, assets, or funds belonging to the second class at the date of the policy issued to Lydia A. Amick, or at the date of the fire, or at any other time, have been improperly or wrongfully transferred by the officers of the insurance company from the second class to the first class, to evade the payment of any judgment, debt, or other claim, such transfer will not prevent the collection of the judgment from such property, assets, or funds. Again, if the officers of the insurance company have concealed or secreted any of the property, assets, or funds of the second class in the business of the first class, such property will also be subject to the payment of this judgment. Further, if the officers of the insurance company have covered up, by reorganization or any change of name, any of the property, assets, or funds which belong, or ought to belong, to the second class, or which in any possible way can be used, under the provisions of the statute, to pay the losses of the second class, such property is also subject to the payment of the general judgment." In case No. 5,491 we affirmed the appointment of the receiver, but directed that he should not take possession or control of the premium notes given by persons insured in the first class only, or any other notes or funds expressly devoted by the statute to the payment of the losses in the first class. It might be beneficial for the receiver to ascertain what has become of the premium notes of the second class in force on December 31, 1883. If in January, 1884, the insurance company ceased to do second-class business, still the premium notes in force in that class on December 31, 1883, until legally exhausted, could be used to pay the loss of Mrs. Amick; and the company could not, to the prejudice of her rights, or in violation of the statute, return to other insurers, or give to any other company, these notes, or the proceeds thereof, or in any way divert them, or any part of them, from the payment of the loss of Mrs. Amick. In case No. 7,017 the injunction was continued, excepting it was ordered to have no application to property not exempt from levy and sale. The motion for a further hearing will be overruled.

HORTON, C. J., and JOHNSTON, J., concurring.

VALENTINE, J., (*dissenting*.) This case has been in this court at different times from 1887 up to the present time: Insurance Co. v. Amick, 87 Kan. 73, 14 Pac. Rep. 454; 45 Kan. 74, 25 Pac. Rep. 211; 46 Kan. —, 26 Pac. Rep. 944. The last decision rendered by this court, on June 6, 1891, in the above case of Naill and Mrs. Amick against the Kansas Farmers' Fire Insurance Company, was against Mrs. Amick and in favor of the insurance company; and this was the first decision rendered by this court against Mrs. Amick, and she, with her co-defendant, Naill, now moves for a rehearing. In addition to the facts already stated in the former opinions delivered in the above cases by myself, I would state the following. The insurance policy was an ordinary full-paid policy executed by the insurance company, as a company, to Mrs. Amick on August 22, 1883. It was an absolute contract of indemnity, whereby the company, in its entirety and as a single corporate entity, agreed to pay for all loss or damage to the insured property occasioned by fire up to the amount of \$2,000, within 60 days after notice and proof of loss; or to repair, rebuild, or replace the property lost or damaged; and this agreement to pay, or to repair, rebuild, or replace, was without any reference whatever to classes of business or members of the association or assessments. It was an absolute and unconditional contract of indemnity as is ordinarily made by stock insurance companies. No premium note was given or executed by Mrs. Amick, or by any one else, in payment for the insurance, but the price of the insurance was wholly paid in cash. Hence Mrs. Amick was not further liable to the insurance company, or to any one else, with reference to the insurance; or, in other words, she did not procure the insurance "upon the mutual plan" of premium notes, assessments, etc., but purchased the insurance absolutely from the insurance company, just as any person might purchase insurance from an ordinary stock insurance company not doing business "upon the mutual plan" at all. Sections 5, 8, c. 111, Laws 1875, which were then in force, read as follows: "Sec. 5. The members of any company or association formed under this act shall be liable to such company, or to any other person, only to an additional amount equal to the principal and interest of the premium note given when effecting insurance." "Sec. 8. All persons insuring upon the mutual plan, in any company organized in accordance with the provisions of this act, shall constitute its members and stockholders," etc. There was nothing in the policy in the present case showing that Mrs. Amick became or was a member of the insurance company; and nothing anywhere else that would make her such, unless the aforesaid statutes would; and nothing showing anything with reference to the class of business in which the policy was issued, further than has already been stated in my former opinion reported in 46 Kan. —, 26 Pac. Rep. 946. But, with the opinion that I entertain, all this is immaterial, for the reason that the judgment rendered in the

original case was a general judgment, authorizing a general execution against all the property of the insurance company subject to execution; and such judgment has never been modified in any particular by any court or person having any authority to modify it. Judgments may be modified or vacated in the same court in which they were rendered, under section 568 et seq. of the Civil Code; and they may also be modified or vacated by the supreme court under section 542 et seq. of the Civil Code; and see, also, section 77 of the Civil Code. But the present judgment has never been vacated or modified in any manner recognized by any law; and really the only question now involved in the case is whether a sheriff holding a general execution, issued in pursuance of a general judgment and following the judgment, may so modify the judgment or the execution that he may levy it only upon particular kinds of the property belonging to the judgment debtor subject to execution; and whether he is liable, in a different forum from the one from which the execution was issued, to be compelled to so modify the same if he should fail or refuse to do so. It is claimed that the execution should be levied upon only property belonging to the insurance company as property of its second-class business, but it is shown that the insurance company has no such property; that it had ceased to do a second-class business on January 25, 1884, long before any execution in this case was issued, long before the judgment in this case was rendered, and long before the time when the action in which such judgment was rendered was commenced. Such action was commenced on December 23, 1884; the judgment was rendered on October 17, 1885; and the question is now whether such judgment may be enforced or not by the levy of an execution upon the general property of the insurance company subject to execution. Since January 25, 1884, the company has been doing only a single class of business, or, perhaps, rather a single business without reference to classes; and why should a sheriff holding a general execution against all its property subject to execution, issued a great many years after January 25, 1884, and issued upon a general judgment rendered against the company on October 17, 1885, know that the execution should not have force or effect as a general execution, but only as a special execution against a particular class of property, belonging to a particular class of business, which the company had not for a great many years, nor for more than one and a half years before the judgment was rendered, carried on? How could the sheriff know that the company had ever carried on such a business, and modify the terms of the execution accordingly? Why should a sheriff be compelled to modify the terms of an execution, and then attempt to enforce it against a class of business which had not been in existence since January, 1884, more than a year and a half before the judgment was rendered, and more than seven years ago? "A judgment is the final determination of the rights of the parties in an action," (Civil

Code, § 895;) and it imports absolute verity. "No principle of law is more firmly settled than that the judgment of a court of competent jurisdiction, so long as it stands in full force and unrevoked, cannot be impeached in any collateral proceeding on account of mere errors or irregularities, not going to the jurisdiction." 1 Black, Judgm. § 261. "A final judgment cannot be collaterally impeached because the opinion of the court shows that a different judgment should have been entered." Id. § 262. "It is a general rule that a valid judgment for the plaintiff definitely and finally negatives every defense that might and should have been raised against the action; and this is true, not only with respect to further or supplementary proceedings in the same cause, but for the purposes of every subsequent suit between the same parties, whether founded upon the same or a different cause of action. A party cannot relitigate matters which he might have interposed, but failed to do so, in a prior action between the same parties or their privies in reference to the same subject-matter. And if one of the parties failed to introduce matters for the consideration of the court that he might have done, he will be presumed to have waived his right to do so. If a party fails to plead a fact he might have pleaded, or makes a mistake in the progress of an action, or fails to prove a fact he might have proved, the law can afford him no relief. When a party passes by his opportunity, the law will not aid him." 2 Black, Judgm. § 754. "No defense can be set up against a judgment which might with proper diligence have been interposed in the action in which the judgment was rendered." *Snow v. Mitchell*, 37 Kan. 636, 15 Pac. Rep. 224, and 16 Pac. Rep. 737. See, also, *Boyd v. Huffaker*, 40 Kan. 634, 636, 20 Pac. Rep. 459, and authorities there cited. "A party may have a good defense to an action, but, if he fail to make such defense when the case is called for trial, he will not be permitted to come in weeks afterwards, and say that the judgment was wrong, and ought to be set aside, simply because he had a good defense." *Iliff v. Arnott*, 31 Kan. 674, 3 Pac. Rep. 525. See, also, *Larimer v. Knoyle*, 43 Kan. 351, 23 Pac. Rep. 487.

Now may a party, a corporation, which supposes it has a particular kind of defense in an action brought against it, fail to interpose the defense until the final judgment has been rendered in the case, and then, after several years have elapsed, and when an execution has been issued to enforce the judgment, appear before the sheriff, and interpose its defense before him, and ask him to grant the defense, and, if he refuses, then go into a forum other than the one which rendered the judgment and issued the execution, and procure an order in that forum compelling the sheriff to recognize and sustain such defense? The original judgment was rendered in the district court of Franklin county, and the executions were issued from that court to the sheriff of Dickinson county, and it was the sheriff and the district court of the last-mentioned county that were asked to modify the executions or prevent their

enforcement. Now, suppose the sheriff, when he was asked to modify these executions, or not to enforce them, for the reason that they should be enforced only against property belonging to the second-class business, of which there was none at that time, had answered, "I have examined that matter, and find that at the time when the original judgment was rendered, and even prior to the time when the action in which it was rendered was commenced, and more than seven years ago, and ever since, your insurance company has been doing only one kind of business, and the judgment was rendered accordingly, and against the company in its entirety, and against all its property subject to execution,"—then should the sheriff allow the company's defense, and modify the judgment and the executions accordingly? One of the things which the insurance company wishes to protect in the present case is its guaranty fund of \$50,000, which was created in the early part of the year 1885, and before the judgment was rendered. The last execution issued on this judgment, and the one now sought to be modified or annulled, was issued on May 29, 1889; and on June 6, 1889, the superintendent of insurance reported concerning the aforesaid guaranty fund as follows: "The fund of the Abilene Company consists of the stock of the Bonebrake Hardware Company and the Abilene Water and Electric Light Company." Supt. Ins. Rep. 1889, pp. 11, 12. It is not probable that any person would ever desire to attempt to levy an execution upon such a fund, and he could not do so until after all other resources had been exhausted. Laws 1885, c. 130, § 2. As to how actions may be brought and judgments rendered against mutual insurance companies doing business even upon the assessment plan, see 16 Amer. & Eng. Enc. Law, 88-90, and 2 May, Ins. (3d Ed.) §§ 563a and 564. In the first authority cited it is stated, among other things, as follows: "When the insurance company refuse to make an assessment, it violates its contract, and becomes liable to the beneficiary for damages caused by such violation. Such damages, like all damages for breaches of contract, can be recovered by an action at law. The recovery should be for the maximum amount insured, unless the defendant shows, by pleadings and proof, that such sum should be reduced." See, also, *May, Ins.*, supra, to the same effect.

It is further claimed by counsel for Mrs. Amick that the insurance company has not only not done business in classes since January 25, 1884, but that the business which it has done it has done as one single business, including all kinds of fire insurance business; that since that time it has insured all kinds of insurable property. Under the statutes as they now exist, the insurance company would certainly have a right to do so. Gen. St. 1889, par. 3418. Therefore, in all probability, the insurance company has at the present time no property that belongs to any particular class of business, but simply has property, office furniture, and the like belonging to itself as an entirety; and may

not such property be levied upon under a general execution against the company, issued upon a general judgment against the company? Or must Mrs. Amick and the sheriff still hunt for property belonging to the company's second-class business, which was extinguished more than seven years ago, and for property which no longer has any existence?

Ex parte HAYMOND. (No. 20,885.)

(Supreme Court of California. Oct. 15, 1891.)

GRAND JURY—IMPANELING.

Where the superior court of San Francisco, having legal authority to impanel a grand jury, impaneled and swore a competent number of persons as such jury, and charged it with the duties of a grand jury, it was a grand jury *de facto*, and one summoned to testify before it cannot refuse to testify on the ground that the jury was not impaneled according to law.

In bank.

Habeas corpus by Edgar D. Haymond. Writ discharged, and prisoner remanded.

Creed Haymond, for petitioner. *Edgar B. Haymond*, *in pro. per.* *Atty. Gen. Hurt*, *Wm. S. Barnes*, and *A. L. Rhodes*, for respondent.

PER CURIAM. The petitioner was subpoenaed as a witness before the grand jury of San Francisco. He refused to appear, and testify, upon the ground that, in his opinion, the grand jury was not a lawful body. For this refusal he was convicted of a contempt of the superior court, and sentenced to fine and imprisonment. Thereupon he sued out this writ, under which he prays to be discharged from custody. It is not controverted that he must be remanded, and the writ discharged, unless he can show that the superior court exceeded its jurisdiction in the contempt proceeding. In order to do this, petitioner offered in evidence the record of the proceedings of the superior court in ordering, selecting, summoning, and impaneling the alleged grand jury, from which he contends that it appears the superior court was guilty of such grave irregularities and violations of plain statutory provisions that the body of men by it sworn and impaneled is not even a *de facto* grand jury. Without passing upon the question whether the grand jury, before whom the petitioner was summoned to appear, was impaneled in accordance with the provisions of the law relating to that subject, it is sufficient for us to say that such body has certainly a *de facto* existence, and, this being so, the witness was clearly guilty of contempt in refusing to testify. When a court, having legal authority to impanel a grand jury, has sworn and impaneled a competent number of persons as such, and, itself recognizing the body so formed as a lawful grand jury, charges it with the duties of a grand jury, and it is engaged in the performance of such duties, a person summoned to testify before it cannot raise the question of its competency to act. His duty is to testify as required, leaving the question of the legality of the grand jury to be tested in the modes provided by law by those who may have an interest in the

question. The petitioner, on his own showing, has been regularly and properly convicted, and must be remanded. Writ discharged, and prisoner remanded.

91 Cal. 530

COVELL v. WASHBURN. (No. 14,811.)

(Supreme Court of California. Oct. 28, 1891.)

SET-OFF—COSTS AND ATTORNEY'S FEES.

In an action to recover the value of materials furnished and labor performed on defendant's house it appeared that liens against the house for materials furnished plaintiff to be used therein had been paid by defendant after judgment in a suit against both plaintiff and defendant. *Held*, that defendant was entitled to set off all that he had been compelled to pay to relieve his property from the liens, including the attorney's fees and costs in the suits to enforce the liens.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; *JOHN W. ARMSTRONG*, Judge.

Action by Covell against Washburn to recover the value of materials furnished and labor performed by plaintiff in building defendant's house. From a judgment for part of his claim, plaintiff appeals, claiming an additional sum. Affirmed.

Chauncey H. Dunn and *Taylor & Holl*, for appellant. *Johnson, Johnson & Johnson*, for respondent.

In bank.

BEATTY, C. J. Justice GAROUTTE is, for the purpose of a decision herein, assigned to department 2.

VANCLIEF, C. The action is to recover the reasonable value of labor done and materials furnished by plaintiff, at defendant's request, in the building of a house for defendant, alleged to be \$2,500, of which \$560 are admitted to have been paid; and judgment is demanded for the balance, \$1,940. The plaintiff recovered judgment for the sum of \$423.15, with costs, but appeals from the judgment, on the judgment roll, and claims that upon the facts found by the court he is entitled to judgment for an additional sum of \$187.15. The findings show that there was a written contract between the parties for the building of the house by the plaintiff for the price of \$3,250; but that the contract did not comply with sections 1183 and 1184 of the Code of Civil Procedure, and was never filed in the office of the county recorder; that plaintiff began the erection of the building and the furnishing of the materials therefor according to the terms of the void written contract, with the knowledge and consent, and at the request, of defendant, and continued the work during a period of about four and a half months, and then ceased to work before the building was completed, and thereafter did no more work and furnished no more materials; that the labor performed and materials furnished by plaintiff were reasonably worth \$2,193.50, of which \$560 had been paid; that two persons, from whom plaintiff had purchased lumber and materials on credit, filed liens on the building for the price of such lumber and materials, amounting to about \$1,070, and thereafter commenced actions against plaintiff and defendant herein to foreclose

their liens. A decree of foreclosure was rendered for the full sums for which the liens had been filed, and in addition thereto for \$175 allowed by the court for attorney's fees in the foreclosure suits, and \$12.15 costs. To discharge his house from the liens the defendant herein paid all these sums, and the court allowed them as offsets against plaintiff's demand in this action. The plaintiff herein having been a party to the suit in which the liens were foreclosed, the validity of the foreclosure decree is not questioned, nor is it questioned that the defendant herein was entitled to set off the amount of the principal and interest adjudged to be due the lienholders in the foreclosure suits, which he had paid, but it is contended that he was not entitled to set off the attorney's fees and costs allowed in the foreclosure suits, not because they were improperly allowed in those suits, but because he should have paid the debts, to secure which the liens had been filed, without suit, and thus have saved the expenses and costs of those suits. In his brief counsel for appellant state the question thus: "Had defendant the right to litigate, as between himself and the lienholders, the validity of their liens, and, if defeated, to offset against the benefit conferred on him by plaintiff the costs and expenses of such litigation?" It should not be overlooked that defendant herein was not personally liable for the debts of plaintiff to the lienholders for the materials furnished by them to plaintiff, and that he cannot be presumed to have known whether or not the plaintiff herein had any valid defense to the foreclosure suits. Had the defendant herein paid the demands on which the materialmen had filed liens, without suit, and without the request of the plaintiff, he would have done so at his peril of being adjudged to have paid them as a mere volunteer to the extent to which the demands paid may not have proved to be valid liens upon his property, and to this extent he would have had no recourse upon the plaintiff for indemnity. Besides, he would have imposed upon himself the burden of proving that the demands paid by him were valid debts of the plaintiff, secured by valid liens upon defendant's property, or that he had paid thereon at plaintiff's request. He was never under any obligation to plaintiff to pay plaintiff's debts to the materialmen. His only obligation to plaintiff was to pay him so much as the labor he had performed, and the materials he had furnished and used on defendant's house, were reasonably worth. Against this obligation he was entitled to set off plaintiff's obligation to indemnify him for all that he had been compelled to pay to relieve his property from the liens thereon to secure plaintiff's debts, including the attorney's fees and costs in the suits to enforce those liens. I think the judgment should be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

CLARK *et al.* v. TAYLOR. (No. 14,081.)

(Supreme Court of California. Oct. 20, 1891.)

MECHANIC'S LIEN—FORECLOSURE—COSTS—ATTORNEY'S FEE—CROSS-COMPLAINT—REVIEW ON APPEAL.

1. Error in sustaining a demurrer cannot be considered on appeal, where it does not appear from the record that any such demurrer was interposed or sustained.

2. In an action to foreclose a lien for material contracted for on December 7, 1888, and furnished between that day and January 1, 1889, a cross-complaint alleging that defendant, "to avoid threatened litigation," paid plaintiffs on November 30, 1888, a sum of money in excess of what was then due them for materials before that time furnished, and asking judgment for such excess, is not authorized, under Code Civil Proc. Cal. § 442, providing that, whenever the defendant seeks affirmative relief against any party "relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates," he may, in addition to his answer, file a cross-complaint.

3. Under Code Civil Proc. Cal. § 1195, providing that, in actions to enforce mechanics' liens, the court must allow as part of the costs reasonable attorney's fees in the superior and supreme courts to each claimant whose lien is established, an attorney's fee will be allowed in the supreme court on the affirmance of a judgment foreclosing a lien.

Commissioners' decision. Department

1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by G. A. Clark and others against W. A. Taylor to foreclose a mechanic's lien. Judgment for plaintiffs, and defendant appeals. Affirmed.

Thomas J. Curran, for appellant. Wells, Guthrie & Lee, for respondents.

BELCHER, C. This is an action to foreclose a lien for materials, alleged to be of the value of \$149.35, and to have been furnished for and used in the construction of a house for defendant. The plaintiffs had judgment as prayed for, and the defendant appeals on the judgment roll. Only two grounds are urged for a reversal of the judgment: *First*, it is contended that the court erred in sustaining a demurrer to defendant's amended answer and counterclaim; and, *second*, that the court erred in sustaining a demurrer to defendant's cross-complaint.

1. It is not shown by the record that any demurrer was interposed or sustained to the amended answer and counterclaim. This point cannot, therefore, be considered.

2. We think the demurrer to the cross-complaint was properly sustained. The action was a proceeding in equity to foreclose a lien for materials alleged and found to have been contracted for on the 7th day of December, 1888, and to have been furnished between that day and the 1st day of January, 1889. The cross-complaint alleged that defendant, "to avoid threatened litigation," paid to plaintiffs on the 30th day of November, 1888, a sum of money in excess of what was then due them for materials before that time furnished, and it asked judgment for such excess. The cause of action set up in the cross-complaint did not relate to or depend upon the contract or transaction upon which the plaintiffs'

action was brought, nor did it affect the property to which the plaintiffs' action related. The cross-complaint was therefore not authorized by section 442 of the Code of Civil Procedure. Besides, the same matters were set up in the counter-claim, and under that pleading were properly cognizable. Respondents ask, in case the judgment is affirmed, that they be allowed a reasonable attorney's fee in this court, citing section 1195 of the Code of Civil Procedure, which provides that in cases of this kind the court must allow "reasonable attorney's fees in the superior and supreme courts." The respondents were allowed an attorney's fee in the court below, and they seem, under this section, to be entitled to one here. We therefore advise that the judgment be affirmed, and that respondents be allowed a reasonable sum as an attorney's fee in this court.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed, and the court below is directed, upon the filing of the *remittitur* therein, to allow the plaintiffs, as a part of their costs on this appeal, a reasonable fee for the services of their attorney in this court.

91 Cal. 194

FOSS v. HINKEL. (No. 14,014.)

(Supreme Court of California. Oct. 12, 1891.)

SUPREME COURT DECISIONS—INTERPRETATION.

Where an appeal, though taken from the judgment and order denying a new trial, was heard and determined on the findings alone, and the cause was remanded, with directions that the court below find on the testimony already introduced and such further testimony as may be introduced, whether the land in suit was within the exterior boundaries of a certain rancho granted by the Mexican government, the language of the court on such appeal, that "what the exterior limits of such granted rancho were, must be determined by the *expediente* of the grant issued by the Mexican government, including petition, *diseño*, and grant, the boundaries in which may be identified by parol evidence," must be taken as words of definition, rather than of enumeration, limiting the testimony on which the court below was to make its finding.

On rehearing. For former opinion, see 27 Pac. Rep. 644.

PER CURIAM. The former opinion is modified by striking out the words, "The former appeal was taken upon the judgment roll alone," and inserting in lieu thereof the words, "The former appeal, although taken from the judgment and order denying a new trial, was heard and determined upon the findings alone."

91 Cal. 158

GRANT v. OLIVER. (No. 13,104.)

(Supreme Court of California. Oct. 12, 1891.)

EJECTMENT—REVERSAL OF JUDGMENT—ORDER FOR RESTITUTION.

On reversal of a judgment for plaintiff for possession of land, defendant's motion for a

restitution of the premises, and the order therefor, should be made, not in the supreme court, but in the superior court, on filing *remittitur*.

On rehearing. For former opinion, see 27 Pac. Rep. 596.

PER CURIAM. The appellant's motion to modify the judgment is denied. Upon filing *remittitur* in the court below, the appellant will be entitled to receive from the clerk the money he deposited with him, and also to restitution of the premises, but the motion and order therefor should be made in the superior court.

64 Cal. 92

WILSON v. WILSON.¹

(Supreme Court of California. Aug. 28, 1883.)

RECORD ON APPEAL—OPINION OF COURT BELOW.

The opinion of the trial court is no part of the judgment roll, and will not be considered on appeal, unless preserved in the record by a bill of exceptions.

Department 1. Appeal from superior court, Sacramento county.

William T. Wilson sued Ellen M. Wilson. Judgment for defendant. Plaintiff appeals. Affirmed.

Grove L. Johnson, Henry Edgerton, and Robert T. Devlin, for appellant. Freeman & Bates and A. L. Hart, for respondent.

McKEE, J. In this case the only issue presented to the court for trial and determination was whether a transaction which took place between the parties on the 26th of November, 1875, was intended as a mortgage or a conditional sale. By its finding, filed pursuant to sections 632, 633, Code Civil Proc., the court decided that the transaction was a conditional sale, and gave judgment for the defendant. The finding was made upon conflicting evidence, but the evidence was sufficient to sustain the finding, and the finding was sufficient to sustain the judgment. It is contended, however, that the facts found did not warrant the conclusion drawn from them, and that the judgment entered thereon is erroneous. This contention is not founded upon the record of the case; for while the notice of motion for a new trial designated, as ground upon which the motion would be made, that "the decision is against the law," the specification of error is that "the court erred in rendering judgment for defendant, because the opinion of the court shows conclusively that the judgment should have been in favor of plaintiff." This specification concedes the facts as found by the court; and as the court found that the deed and agreement in writing, executed by the parties on the 26th of November, 1875, (which the plaintiff alleged were intended and understood as a mortgage to secure an indebtedness due by him to the defendant,) "were not intended or understood by the parties thereto,

¹ This case, filed August 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

either of them, to be or to constitute a mortgage to secure any sum whatever, and the same did not constitute a mortgage," it necessarily followed, as a conclusion of law, that the defendant was entitled to judgment, and the plaintiff was not. Judgment was therefore properly entered for the defendant, upon a conclusion of law legitimately drawn from the facts found. Where a conclusion of law is not legitimately drawn from a finding of facts, it may be reviewed without a bill of exceptions. *Thompson v. Hancock*, 51 Cal. 110. Such an error, if it exists, is apparent upon the judgment roll. But, if the conclusion be legitimately drawn from the facts as found, there is not, in that regard, any error apparent on the judgment roll; and if anything has occurred, on the trial and determination of a cause, which shows that the decision by the court was erroneous, and is not made by law part of the judgment roll, it must be brought into the record of the case by a bill of exceptions. If it is not made part of the record by a bill of exceptions, or by some other mode sanctioned by law, it is not reviewable by the appellate court. Here the matter or thing to which the appellant objects is an opinion delivered by the court below, in rendering judgment, which, it is contended, shows that the court reached its conclusion by the erroneous application of a principle of law to the evidence in the case. But the appellant did not except to the opinion, nor did he move, upon any grounds of law or fact, for a decision by the court upon what he considered the principle of law applicable to the case; nor did he resort to any other mode known to the law for making the opinion part of the record. In *Touchard v. Crow*, 20 Cal. 163, the court said: "If counsel, when a case is tried by the court without a jury, desire to present for consideration certain points of law as applicable to the facts established, or sought to be established, upon which the court might be called to charge a jury, were there a jury in the case, the proper course is to present them in the form of propositions, preceding them with a statement that counsel makes the following points, or counsel contends as follows." And in *Griswold v. Sharpe*, 2 Cal. 24, it is said: "In all cases where the judge below tries the facts of a case, the proper mode of reserving the questions of law arising upon the facts is to ask the court to decide the law as counsel may desire; and, upon a refusal, to have it noted in the bill of exceptions." Neither that course, nor any other known to the law, was taken to make the opinion, or the alleged principle upon which it was based, part of the record in the case. The opinion has therefore no place in the record, and cannot be considered. *McClory v. McClory*, 38 Cal. 675; *Hidden v. Jordan*, 28 Cal. 305; *Houston v. Williams*, 13 Cal. 24; *People v. Reynolds*, 11 Pac. Coast Law J. 570. Judgment and order affirmed.

ROSS and MCKINSTRY, JJ., concurred.

Hearing in bank denied.

PEOPLE v. MITCHELL.¹

(*Supreme Court of California*. Aug. 17, 1883.)

DEPOSITIONS IN CRIMINAL CASES.

Under Pen. Code Cal. §§ 882, 869, providing that in criminal cases the deposition of a witness on behalf of the people may be taken when it appears from the oath of the witness himself or some other person that he is unable to give sureties for his appearance at the trial, and that it must be read over to and signed by the witness, and certified to by the officer before whom it is taken, a deposition is inadmissible when it does not show that the witness or some other person made oath that he could not give sureties, nor that it was read over to the witness, nor that it was certified to by the officer before whom it was taken.

In bank. Appeal from superior court, city and county of San Francisco.

Criminal prosecution against Thomas Mitchell. Defendant was convicted, and appeals. Reversed.

John D. Whaley, for appellant. *Atty. Gen. Marshall*, for the People.

MCKEE, J. On the trial of this case the court below permitted the district attorney, over the exception of the defendant's counsel, to read in evidence against the defendant a deposition of James Morris, the complaining witness in the case; and the ruling of the court in that regard is the principal assignment of error. The deposition purported to have been taken under section 882 of the Penal Code. According to the provisions of that section, the right to take the deposition of a witness on behalf of the people, in a criminal case, arises out of the fact that the witness is unable to procure sureties for his appearance on the trial; and that fact must be satisfactorily established by the examination on oath of the witness himself, or of some other person. When the fact has been judicially ascertained, the right to take the deposition of the witness may be put in motion. But the examination of the witness must be had in the presence of the defendant, or after due notice to him, and "must be conducted in the same manner as the examination of a witness before a committing magistrate is required by the Penal Code to be conducted." That is to say, the deposition must contain the name of the witness, his place of residence, and his business, the questions put to him, and his answers, together with the objections, if any, made, and the grounds of the objections to any of the questions or answers, and the rulings thereon; and, when the examination is concluded, it must be signed by the witness, or his reasons for refusing to sign stated, and the presiding judge before whom it has been taken must sign and certify to it, if it has been reduced to writing by him or under his direction, unless the examination has been taken down by a phonographic reporter, by order of the judge, in which case the reporter's transcript, when written out in long-hand and certified by him as being a correct statement of the testimony and pro-

¹ This case, filed August 17, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

ceedings, shall be received as *prima facie* correct. Section 869, Pen. Code. But the testimony of the witness is only taken conditionally, (sections 686, 869, Pen. Code,) and cannot be read against the defendant until it has been "satisfactorily shown to the court" that the witness is dead or insane, or cannot with due diligence be found within the state, (section 686, Pen. Code.) In taking the deposition, the officers, so far as it appears on the face of the deposition, wholly failed to observe the requirements of section 882, *supra*, in putting the right in motion, and of section 869, in the manner of conducting the examination. The fact that the witness was unable to procure sureties for his appearance at the trial did not appear by examination on oath of the witness, or of any other person. The deposition contained the recital that "it appears from the statement of William Fitzmaurice that the witness, James Morris, was detained in jail, and was unable to procure sureties." Nowhere does it appear that the statement was made on oath. It may have been a mere verbal statement, upon which no action could have been taken. Besides, the deposition does not show that it was read over to the witness, or that he signed it after acknowledging it to be correct, or that the presiding judge or magistrate before whom it was taken certified to it, as he was required to do under the Code, to entitle it to be read in evidence against the defendant. For the informalities and irregularities apparent on its face, the deposition was therefore inadmissible. Taking the testimony of a witness on behalf of the people in a criminal case by deposition is an exception to the rule which entitles the defendant in a criminal action to be confronted with the witnesses against him in the presence of the court, and every substantial requirement of the law which authorizes it must be observed. Any real departure from the course prescribed for the taking of the deposition renders the deposition itself objectionable. *People v. Morine*, 54 Cal. 575; *Williams v. Chadbourne*, 6 Cal. 559; *People v. Chung Ah Chue*, 567 Cal. 567. Judgment reversed, and cause remanded for a new trial.

SHARPSTEIN, ROSS, MCKINSTRY, MYRICK, and THORNTON, JJ., concurred.

64 Cal. 85

MEREDITH V. CHRISTY.¹

(*Supreme Court of California*. Aug. 28, 1883.)

CONTESTED ELECTION—ILLEGAL REGISTRATION.

That the successful candidate aided and abetted the registering officer in the illegal registry of a voter is no ground for contesting the election, under Code Civil Proc. Cal. § 1111, and Pen. Code Cal. tit. 4, pt. 1, providing on what grounds an election may be contested.

Department 1. Appeal from superior court, Sacramento county.

James S. Meredith sued Edmond Christy to contest his election to the office of su-

pervisor of Sacramento county. Plaintiff offered to show that defendant aided and abetted the deputy county clerk in making a false return of an affidavit upon which a voter was registered. The evidence was excluded. Judgment for defendant. Plaintiff appeals. Affirmed.

J. H. McKune, Matt F. Johnson, and A. C. Hinkson, for appellant. *A. P. Catlin and C. T. Jones*, for respondent.

PER CURIAM. The offense on the part of the respondent offered to be proven by the appellant does not come within any of the provisions of title 4, pt. 1, Pen. Code, and does not, therefore, constitute ground for the contest in question. Code Civil Proc. § 1111. Judgment affirmed.

64 Cal. 184

MCCORD et al. v. OAKLAND QUICKSILVER MIN. CO.²

(*Supreme Court of California*. Aug. 31, 1883.)

MINING—WASTE BY TENANT IN COMMON—INJUNCTION—ACCOUNTING.

1. The extraction of ore from a mine, and the cutting of timber on the claim to be used in the operation, by a tenant in common, is not waste, within Code Civil Proc. Cal. § 732, providing that, if a tenant in common of real property commit waste thereon, any person aggrieved by the waste may bring an action against him for treble the damages.

2. In the absence of willful injury, or of unnecessary injury or destruction, caused by negligence or unskillfulness, a tenant in common will not, at the instance of his co-tenants, be enjoined from prosecuting the business of mining on their common claim.

3. If an accounting of the profits should be allowed where one tenant in common of a mining claim, which had never been developed, and never afforded rent or profit, develops it with his own means, and without any agreement with the others, he should be allowed a rebate for expenditures necessarily incurred in protecting the common possession and in buying in an outstanding paramount title.

Appeal from ninth district court.

Action by James H. McCord and others against the Oakland Quicksilver Mining Company for injunction and damages. Judgment for defendant, and plaintiffs appeal. Affirmed.

Estee & Boalt, for appellants. *Garber, Thornton & Bishop*, for respondent.

MCKINSTRY, J. The complaint alleges that plaintiffs are and have been owners and tenants in common of the Lost Ledge mining claim, the plaintiff McCord owning two hundred three-thousandth parts thereof; the plaintiff Griffith, three hundred and sixty three-thousandth parts thereof; the plaintiff Gibbs, one hundred and thirty-three and one-third three-thousandth parts thereof; the plaintiff Pond, sixty-six and two-thirds three-thousandth parts thereof; and the defendant, twenty-two hundred and forty three-thousandth parts thereof. That the defendant, "without authority or permission of the plaintiffs, or either of them," has been and is in the exclusive possession and occupancy of the entire premises, and during such occupa-

¹ This case, filed August 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports

² This case, filed August 31, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

ey "defendant has ever refused, and still does refuse, to admit the plaintiffs, or either of them, to the possession or occupancy of said premises, as tenants in common with defendant or otherwise; and has and still does exclude the plaintiffs, and each of them, from any possession or occupancy of said premises, or any part thereof." That during the time defendant has been in possession as aforesaid it has been, and still is, without the consent or permission of either of plaintiffs, actively engaged and employed in mining in and upon said premises, and, with a large number of men and machinery employed for that purpose, has been, and still is, excavating in and upon the premises, and constructing tunnels and shafts therein, and excavating large quantities of cinnabar therefrom, and cutting down and consuming and destroying growing trees and timber upon said premises, and thereby irreparably injuring and damaging said premises. That the cinnabar so taken from said premises is of the value of \$100,000 and upwards. That a large quantity of the cinnabar so taken from said ground by defendant has been by it reduced and converted into quicksilver, and the quicksilver by it sold and disposed of, and the proceeds converted by the defendant. That the defendant has hitherto refused, and still refuses, to deliver to plaintiffs, or either of them, any part of said cinnabar or quicksilver; or to pay over to them, or either of them, any portion of the proceeds of said sales. That defendant has been, and still is, engaged in cutting down and destroying the growing trees upon said premises, and converting the same into wood and timber, "which said defendant has been, and still is, using for purposes of fuel, and in the construction of shaft, tunnels, machinery, and other structures in and about, carrying on its said business of mining in and upon, said premises." That the value of said trees, wood, and timber, so converted by defendant, is about \$5,000; and that defendant has refused, and still refuses, to pay to the plaintiffs, or either of them, "any part or portion of such value." That defendant has refused, and still refuses, to give plaintiffs, or either of them, any statement or information in detail "of the quantity or value of the cinnabar so taken from said ground, or of the quicksilver produced therefrom, or of the amount realized from the aforesaid sales of the same, or of the quantity or value of the trees, wood, and timber so taken and converted as aforesaid." That defendant threatens and intends to continue to prosecute, for its own use and benefit, the business of mining in and upon the premises, and its excavations and diggings of cinnabar, and its reduction of the same into quicksilver, and the sale and conversion of the same, etc., and will so continue unless enjoined. That defendant has no other property, etc. That by reason of the premises plaintiffs have sustained great damage, to-wit, in the sum of \$105,000 or thereabouts. The prayer is for an injunction, restraining and forever enjoining defendant from prosecuting "the business of mining" in or upon the premises, or from digging, ex-

cavating, or constructing shafts or tunnels in or upon the same, or from extracting cinnabar or other minerals therefrom, or from cutting down, injuring, or destroying any trees or timber upon said premises, or committing waste thereon in any manner; that plaintiffs, and each of them, be admitted to the occupation and possession of said premises as tenants in common with said defendant; that they recover of said defendant "the said sum of one hundred and five thousand dollars" for their damages; and that said damages "be trebled, in pursuance of section 732 of the Code of Civil Procedure;" and for such other and further relief as the nature of the case may require, etc. The court below found that the defendant had never claimed the entire mine, and had never excluded the plaintiffs from the common possession, and that plaintiffs had never entered, nor ever intended or desired to enter, into the actual occupation. As the testimony was substantially conflicting, we would not be justified in setting aside these or the other findings. The material questions presented are: Does the excavation and removal of cinnabar from a quicksilver mine, or the cutting of timber trees used in working the mine, by one tenant, constitute waste for which his co-tenants may recover treble damages, under section 732 of the Code of Civil Procedure? Does such excavation and cutting and conversion constitute waste which should be enjoined? Are the plaintiffs entitled to an accounting?

1. Section 732 reads: "If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be a judgment for treble the damages." In *Elwell v. Buraside*, 44 Barb. 447, it was said: "By the common law, one tenant in common could not be guilty of committing waste; that is, the same acts which if committed by a tenant for life or years would constitute waste would not be waste when committed by a tenant in common. He was not liable to his co-tenant in an action for waste for the injury done to their common estate. As he is now, however, liable by statute [referring to a statute similar to the section of the Code above recited] to respond to his co-tenant in this form of action, for those acts which constituted waste when committed by a tenant for life or years, we must resort to the common law to ascertain whether the acts complained of in this case would be waste, had they been committed by a tenant for life or years." In the case now before us the quicksilver mine had already been opened when plaintiffs and defendant became tenants in common. If, therefore, it be conceded that, under the provision of our Code, a tenant in common is subject to the action in like circumstances as is a tenant for life or years, the plaintiffs cannot recover damages as for waste. "As to all tenants for life, the rule has always been that the working of open mines is not waste." And a tenant for life may open new pits or galleries without committing waste.

Neel v. Neel, 19 Pa. St. 328. A tenant for years is not guilty of waste in taking ore from the mine, the sole subject of the demise, during his term. That is what he pays rent for.

It may be urged that, as between lessor and lessee for years, their contract contemplates the extraction of mineral, and, in case of a life-estate, the grantor or donor must intend that his grantee or donee shall receive some benefit from his estate. But is it not also true, from the very nature of mining property in this state, valuable only because of the mineral it is supposed to contain, that each of the co-tenants may use it in the only way it can be used? The co-tenants out of possession may at any time enter into an equal enjoyment of their possession; their neglect to do so may be regarded as an assent to the sole occupation of the other. This is but another application of the principle announced in *Pico v. Columbet*, 12 Cal. 414. True, the co-tenants will not be held to assent to the commission of waste by the sole occupant, but the question returns, what acts done by him are waste? It cannot be doubted that on the part of a mere trespasser it is a wrong in the nature of waste to remove any ore from a mine. The cases cited by appellants fully sustain this proposition. But it is not a just inference that, as between tenants in common, the rule is the same. Section 732 of the Code of Civil Procedure does not relate to trespasses committed by those who have no interest in the property; nor does it define "waste," or declare what acts committed by a guardian, tenant for life or years, or joint tenant, or tenant in common, as the case may be, shall be waste. For the appropriate meaning of the word, as applicable to acts done by these several classes of persons, we are relegated to the principles of the common law, and to various considerations of policy arising out of different conditions which the common law recognizes and approves. The word "waste" is not an arbitrary term, to be applied inflexibly without regard to the quantity or quality of the estate, the nature and species of the property, or the relation to it of the person charged to have committed the wrong. As was said by ROANE, J., in *Fludlay v. Smith*, 6 Munf. 134: "In considering what is waste in this country, it is to be remarked that the common law by which it is regulated adapts itself in this, as in other cases, to the varied situations and circumstances of the country."

* * * The law on this subject must be applied with reasonable regard to circumstances." In the mining regions of this state, where title to a lode can be acquired from a United States government only after work of certain value has been done upon it, can it be that, if one of several locators or owners shall assume the sole risk of developing the mine, he shall become liable to those who have taken no chance of possible loss, not only for an accounting as to net profits,—supposing him to be fortunate enough to secure any,—but also as a tort-feasor, for three times the value of the whole, or for a proportionate share of the ore taken out?

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It will be observed, upon the facts herein, no question arises as to unnecessary damage done to the mine or its works by reason of reckless or unskillful management of the business by the tenant conducting it. There may be cases in which the courts will impose damages for an abuse of his right by a co-tenant in occupation, or interpose to prevent such abuse. But here the theory of plaintiffs is that defendant could not extract ore from the mine without committing waste, because such extraction is a destruction of the very substance of the estate,—an irreparable injury to the inheritance. In view of the character of the property, and of plaintiffs' implied assent to its sole occupation by defendant for mining purposes, we regard the right of the latter to the proceeds of its operations as partaking of the nature of a usufruct; the appropriation of the net returns as a legitimate participation of the profits; and its acts of mining as not impairing or consuming the estate to any greater extent than must be presumed to have been intended to be allowable by each of the parties in interest. *Murray v. Haverty*, 70 Ill. 820, supposing it to have been correctly decided, does not entirely sustain the view of counsel for appellants. That decision was based upon a statute which authorized a tenant to bring trespass or trover against his co-tenant who should "take away, destroy, lessen in value, or otherwise injure" the common property. The section of our Code does not declare that a co-tenant who "shall take away," etc., shall be guilty of waste. The question waste or no waste is left to the courts. Besides, in *Murray v. Haverty* the court had already decided the case by holding certain evidence, as to license, inadmissible under the defendant's plea. Counsel quote from Freeman on Co-Tenancy: "In all cases where a co-tenant practically destroys the estate, or some part thereof, trespass may be sustained by the injured co-tenant." Section 302. But this is to be taken with other portions of the same work where the distinction is pointed out between an appropriation of the proceeds, rents, profits, or income, and the destruction of the estate itself. See, also, *Wat. Tresp.* 947. The tenant in common of a mine may occupy it for the purpose contemplated by all, even though a portion of the soil or ore be removed. Each tenant has the right to use the mine, and, as was intimated by the supreme court of Pennsylvania, so long as an estate is used according to its nature, "it is no valid objection that the use is consumption, and it is no fault of the tenant that it is not more endurable." *Irwin v. Covode*, 24 Pa. St. 162. The taking of ore from the mine is rather the use than the destruction of the estate, within the meaning of the general rule. The results of the tenant's labor and capital are in the nature of proceeds or profits, the partial exhaustion being but the incidental consequence of the use.

It is not necessary to examine in detail the many cases cited by appellants, as in none are the facts like those of the case at bar. We shall refer to a few of them. *Delaney v. Root*, 99 Mass. 546, was an action

of trover for the conversion of personal property. *Stetson v. Day*, 51 Me. 434, simply decides that, under a statute of Maine, a tenant for life, who neglected to pay taxes assessed upon the estate during his tenancy, and thereby subjected the estate to a sale, was liable to an action by the reversioner, either of waste, or of case in the nature of waste. *Maddox v. Goddard*, 15 Me. 219, and *Symonds v. Harris*, 51 Me. 14, were actions of trespass *quare clausum* for the destruction of a mill, and for the dismemberance and removal of machinery from a mill; *Blanchard v. Baker*, 8 Me. 253, trespass on the case for a similar injury to common property; *McDonald v. Trafton*, 15 Me. 225, has no bearing upon any question involved in the case before us; and *Hubbard v. Hubbard*, Id. 198, was a statutory action of trespass "for strip and waste" of timber. As to the destruction of trees charged in the complaint herein, it has been expressly decided in California that, in the enjoyment of his legal rights in the common property, each co-tenant may cut timber, and use or dispose of it, at least to an extent corresponding to his share of the estate. *Hihn v. Peck*, 18 Cal. 640. In the case before us there is neither averment nor finding that defendant has cut or consumed more than its share. Besides, the use of the trees was merely incidental to the mining operations of defendant. In Pennsylvania it is held that the cutting of timber, to be used in a mine by the tenant for life, whose mining is not waste, is not itself waste. *Neel v. Neel*, 19 Pa. St. 328. Nowhere is it held to be waste for a tenant in common of a farm to cut wood necessary to the use of the farm. It was indeed held in New York by the supreme court that the cutting down of timber trees by one of several co-tenants, upon land whose principal value consisted of the growing timber, was waste, for which the other co-tenants could recover damages under a clause of the Revised Statutes of that state. *Elwell v. Burnside*, 44 Barb. 447. But, aside from the rule to the contrary laid down in *Hihn v. Peck*, 18 Cal. 640, plaintiffs have no averment that the quicksilver mine is "principally valuable" because of the trees growing from its surface. And here it may be added, applying the rule of *Hihn v. Peck*, it would seem each tenant in common of a mine is at least entitled to take out his share of the ore. That neither of the tenants can "look into the ground" may be a reason why a court of equity should order an account to be taken, but ought not to operate a prohibition upon the working of the mine by anybody.

2. Ought the court below to have enjoined defendant from proceeding with its mining? "In case of joint tenants and tenants in common, with respect to whose acts of waste the common law has provided no remedy, courts of equity will interfere when it appears that waste has been committed or threatened by one tenant in common who has become possessed of the whole premises." *Tayl. Landl. & Ten.* 694. This general proposition may be conceded to be correctly stated, but the very question here is, has waste been

committed? At the common law the tenant had no redress for acts of admitted waste committed by his co-tenant. But the latter might be restrained in equity from felling ornamental trees, or from doing other things amounting to wanton and destructive waste, which were called "equitable waste," because allowable at law. By our statute, however, a tenant may recover damages of his co-tenant in every case of waste. Holding, as we do, that the acts of defendant were not, under the circumstances, wanton or destructive, or any waste, it follows plaintiffs were not entitled to an injunction. Counsel rely upon the opinion of the court of chancery of Upper Canada in *Dougall v. Foster*, 4 Grant, (U. C.) 319, where it was held (ESTEN, V. C., dissenting,) that one tenant in common would be restrained at the suit of his co-tenant from digging earth for bricks on the joint property. There the bill alleged that the portion of the lot from which the clay was being excavated and carried away was very valuable for building purposes, and that (with reference to such purposes) the lot had greatly deteriorated in value by reason of the acts of defendant. In his opposing affidavit defendant did not deny the first of these alleged facts at all, and did not expressly deny the last. The chancellor said: "It is quite true that this court refuses to restrict a tenant in common from the legitimate enjoyment of the estate, because an undivided occupation is of the very essence of that sort of title, (Co. Litt. 180.) and to interfere with the legitimate exercise of that right would be to deny an essential quality of the title." The court held that the legitimate enjoyment of a building lot, "within the limits of the town of Belville," was to build upon it, or improve or occupy it as town property is usually improved and occupied; and that to dig holes in it, or degrade it below the surrounding level, was not such legitimate enjoyment. To repeat the language of *ROANE, J.*, (*Findlay v. Smith*, supra:) "The law on this subject must be applied with reasonable regard to circumstances." If it had appeared in *Dougall v. Foster* that the common property was valuable only as a brick-yard, and was acquired by the co-tenants for that purpose, the case would have approximated more closely to the one at bar. By the laws of the United States the mining lands are disposed of under laws differing from those through which agricultural lands may be acquired. As a condition to their acquisition by individuals, it is requisite that the locators shall have done mining work of a certain value. They are disposed of and acquired for the purpose of mining, and the application of them to that purpose by one tenant in common is not waste of which the others can complain. *Hawley v. Clowes*, 2 Johns. Ch. 122, was a bill for partition, and for cutting down and carrying away timber, not wanted for the necessary use of the farm. The injunction was granted, in view of the special character of the case, and the insolvency of defendant, and on the ground that the excessive cutting of timber was destructive,

"and not within the usual and legitimate exercise of enjoyment." Chancellor KENT added: "The remedy is peculiarly appropriate and proper pending a partition of the very land." In *Hole v. Thomas*, 7 Ves. 589, Lord ELDON, after saying, "I never knew of an instance of an application to stay waste by one tenant in common against another, one tenant in common having the right to enjoy as he pleases," granted an injunction against cutting "saplings or any timber trees or underwood at unseasonable times," that being destructive. As was said by ESTEN, V. C., in *Dougall v. Foster*, it was malicious waste. *Twort v Twort*, 16 Ves. 128, was a case where one tenant in common was an "occupying tenant" to another. In *Baker v. Whiting* the tenant in common was the agent of his co-tenants, and the case does not assist the present investigation. 3 Sum. 485. It is said by EDEN (2 Waterman's Eden, Inj., 3d Ed., 210) the instances in which injunctions have been granted between tenants in common against committing waste are few. The application has always been refused, unless attended with peculiar circumstances. In *Smallman v. Onions*, 3 Brown Ch. 621, an injunction was granted against the cutting of timber, on the ground that the parties were only equitable tenants in common, the legal title being in a trustee; that, therefore, the person who was committing the waste had no title to the possession, and cutting the timber was a trespass upon the trustee; also that the trespasser was insolvent. And in *Goodwyn v. Spray*, 2 Dick. 667, the lord chancellor denied an injunction prayed for by one tenant against his co-tenant cutting timber, saying the only remedy the plaintiff had was to get a partition. In the absence of allegations, proofs, or findings of wilful injury, or of unnecessary injury or destruction caused by the negligence or unskillfulness of defendant, the plaintiffs were not entitled to an injunction.

3. Is this an action for an accounting? It is established in this state that, in ordinary cases, an action at law cannot be maintained by a tenant in common against a co-tenant in sole possession of the premises, to recover a share of the profits derived from the state by means of the labor and money expended by the party in occupation. The occupation by one tenant, so long as he does not exclude his co-tenant, is but the exercise of a legal right. The money he invests at his own risk. If his transactions result in a loss he cannot call upon his co-tenant for contribution, and if they result in a profit his co-tenant is not entitled to share in such profit. *Pico v. Columbet*, 12 Cal. 414. The demand of the plaintiffs is not for a sum due by way of rent from defendant as the tenant of their interest, nor is it for a proportionable share of an amount received by defendant for the use and occupation of the premises by third persons, nor is an account sought as an incident to a claim for partition. It is not for their part of moneys received by defendant which belong to all the tenants in common, nor is it based upon an allegation of any of the exceptional facts mentioned in *Pico v. Columbet*, 12 Cal. 414;

in *Goodenow v. Ewer*, 16 Cal. 461; and in *Abel v. Love*, 17 Cal. 233. See, also, *Howard v. Throckmorton*, 59 Cal. 89.

Nor is the present an action brought to recover a portion of the profits acquired by the expenditure of defendant's money, treating it as the agent of plaintiffs in developing the common property. There is no pretense of an averment of any actual contract between plaintiffs and defendant whereby the latter was authorized to act for the former. On the contrary, it is expressly alleged in the complaint that the acts of defendant were against the will of plaintiffs, and without their consent. Again, the tenant in occupation is not made the bailiff of plaintiffs, in the absence of a contract of agency, by any statute of this state. The statute of Anne (4, 5, 16) has never been adopted here, and, if it had been adopted, that statute would seem only to have applied to cases where one tenant in common had received from a third person money, or other thing of value, to which both tenants were entitled by reason of their co-tenancy, and retained more than his just share according to the proportion of his interest. *Pico v. Columbet*, supra; *Henderson v. Eason*, 9 Eng. Law & Eq. 337. If the appropriation by defendant of the net proceeds of its enterprise be considered as merely the legitimate perception of the profits, the action cannot be maintained as an action for an account. *Izard v. Bodine*, 11 N. J. Eq. 403, cited by counsel for appellants, does not sustain their view. There the bill was for partition and account. The supreme court of New Jersey held: (1) If one tenant in common oust his co-tenant, the latter must first establish his right at law, and thus recover the mesne profits, "for one tenant is bound to account to another only as his bailiff appointed by contract, express or implied." (2) Where one tenant in common "actually receives" the rents, issues, and profits, then he may be compelled to account for such profits actually received, (from third persons;) but this by statute, both in England and this state, and not by the common law. 4 Anne, c. 16; New Jersey Act of 1794; *Sargent v. Parsons*, 12 Mass. 149. (3) Where one tenant actually occupies the whole estate, without claim on the part of his co-tenants to be admitted into possession, he is under no obligations to account, "for he has a right to such occupancy." *Citing Co. Litt. 200b*; *Sargent v. Parsons*, 12 Mass. 149; *Meredith v. Andres*, 7 Ired. 5; *Colburn v. Mason*, 25 Me. 434.

Appellants also refer to *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. 139. But in that case the court, after saying that a statute of Virginia which, like the English statute, authorized "actions of account in favor of one joint tenant or tenant in common against another, as his bailiff, for receiving more than his just share," was in force in Kentucky, held that the statute did not apply when the estate, at the commencement of the tenancy in common, yielded no rent or profits, and one of the tenants entered, and by improving the estate rendered it productive; the other co-tenant having expended neither money nor labor. In *Shiels v. Stark*, 14 Ga. 436,

the court adjudged that, under the statute of Anne in force in Georgia, a tenant in exclusive occupation was liable to his co-tenant for a proportionate share of the value of the use and occupation; admitting that it had been held in Massachusetts (*Sargent v. Parsons*, 12 Mass. 149) that, under the statute of Anne, it is necessary to charge the defendant with having received rents and profits "otherwise than by his occupancy." We do not find the language attributed to Dane by the learned court of Georgia (1 Dane, Abr. p. 170, c. 8, art. 3) in our edition of the work referred to. *Shiels v. Stark* was a bill in equity for a partition and an account.

If it be conceded that the peculiar nature of mining property of itself constitutes such an equity as that the tenants, who could at any time have entered into the joint possession, but who have never expended labor or money upon the common property, or become liable for any portion of the loss which might have followed upon the enterprise of their co-tenant, ought to be entitled to demand an accounting from the latter, and to recover a portion of the net profit gained exclusively by its efforts and capital, the present is not an action for such an accounting. The defendant is charged with having irreparably injured the premises by taking therefrom cinnabar of the value of \$100,000, and cutting thereon growing trees of the value of \$5,000. The plaintiffs aver they have been damaged in the sum of \$105,000, and pray, among other things, that they may have a judgment for three times that sum. It is alleged that defendant has converted the cinnabar, and the proceeds of sales of it, and the trees, and "has refused to deliver to the plaintiffs any part of the cinnabar taken from said ground, or the quicksilver so produced therefrom, or to pay over to them any portion of the proceeds of said sales, and denies to the plaintiffs, and each of them, any share or interest in the same." But neither this nor any other averment found in the complaint makes the action one for an account, legal or equitable. The averments in the complaint, except in so far as they constitute a declaration in ejectment, (and, as we have seen, the court below found that defendant had never dispossessed or ousted the plaintiffs,) are of facts alleged by plaintiffs to establish waste committed by defendant upon the common property, for which treble damages are asked.

Nevertheless, since the property is described in the complaint, and the exclusive occupation and working of the mine by defendant averred therein, and inasmuch as the court below did in fact take an account, we have looked into the findings and evidence with respect thereto. We have said that the net proceeds from the working of the mine were rather in the nature of profits from the use than the result of the destruction of the inheritance. But it may be conceded, for the purposes of this decision, that the relation of the tenants in common, under the circumstances disclosed, is *suil generis*, and their rights peculiar; that while the extraction of ore from the mine by one tenant, who does not exclude his co-tenants, is not waste,

and the neglect of the latter to enter should be held an assent on their part to the exclusive occupation by the former, yet, because the effect of the exclusive working by one may be to exhaust the mineral, and the uncertainty of the prospective value of the property may render it impossible to make a just partition of it, a court of equity should order an accounting; holding that, while it must have been contemplated by the parties that the tenant in occupation should not be held for waste, or prohibited from proceeding with his work by the co-tenants who do not seek to enter, yet it must also have been contemplated that the tenant in occupation should not appropriate to himself the entire profits. If this be so, however, the co-tenants, not in actual occupation, applying for such account, should at least be required to do equity,—to allow to the defendant all sums actually expended for the protection of the common property. The court below found "that defendant has taken from said mine, since the 18th day of March, 1876, a great number of tons of ore, and has taken therefrom a large sum of money, and that all thereof has been expended in the proper, economical, and necessary development and working of said mine for said ore, and in the proper, economical, and necessary reduction of the said ore, and in properly, economically, and necessarily defending at law the common title to said property, and in proper payment for an outstanding title thereto." The parties here are not mining partners, between whom an accounting is sought. If they can properly be termed partners "in the profits," (see the *dictum* in *Abel v. Love*, supra,) they have not, by the averments of their complaint, declared themselves partners in any broader sense. By filing their complaint they did not make themselves liable to the defendant, or to creditors of defendant, in case the account of defendant's transactions should show such transactions had resulted in a loss. They did not make the defendant their agent as to debts by it created beyond the proceeds from its mining, nor did they subject their interest in the mine to any debts of its creation. In their complaint they impliedly, if not expressly, disavow any such purpose. If the plaintiffs here are entitled to an account, their claim to it is based upon special equities; their appeal to the court of equity is on the ground that defendant ought, under the peculiar circumstances, to pay them a share of the profits. It would seem plain that an equity is in turn imposed upon them to allow a rebate for expenditures necessarily incurred in protecting the common possession and in buying in an outstanding title paramount to that of the co-tenants, or such as a prudent man would deem it proper to purchase to avoid expensive and dangerous litigation.

4. Conceding, for the sake of the argument, such an action might have been maintained, the present is not an action to recover rent of defendant as successor to the tenants previously in occupation. Judgment and order affirmed.

ROSS and McKEE, JJ., concurred

ESMERALDA COUNTY V. STATE. (No. 1,342.)*(Supreme Court of Nevada. Oct. 23, 1891.)***CLAIMS AGAINST COUNTIES — PRESENTATION — REIMBURSEMENT BY STATE.**

The legislature of Nevada made an appropriation to reimburse the counties for the expenses of a special election to vote on constitutional amendments. A portion of the fund was paid to the county of Esmeralda, and it afterwards sued the state to recover a further sum to meet other alleged expenses. Gen. St. Nev. §§ 1950, 1951, provide that no demand against a county, requiring action by the board of county commissioners, shall be paid until submitted to the county auditor, and section 1964 provides that no suit can be maintained upon a demand against the county unless such demand is first submitted to such board and the auditor. The county had not paid the claims for which it sought to recover, nor had they been submitted to the auditor for allowance. *Held*, that the county could not recover.

Appeal from district court, Ormsby county; RICHARD RISING, Judge.

Action by the county of Esmeralda against the state of Nevada to recover for expenses incurred in holding a special election. Judgment for plaintiff. Defendant appeals. Reversed.

Trenmore Coffin and J. D. Torreyson, Atty. Gen., for the State. *P. M. Bowler, Jr.*, Dist. Atty., for respondent.

BELKNAP, C. J. The legislature appropriated the sum of \$19,687.15 "for the purpose of paying the expenses of the various counties" in holding the special election of February 11, 1889, at which certain proposed amendments to the constitution of the state were submitted. St. 1889, pp. 21, 94. The counties were primarily liable for these expenses, but the legislature, for the purpose of reimbursing them, appropriated, in the first instance, the sum of \$15,000. This appropriation was made before the election was held. After the election, it was found that the sum of \$15,000 was insufficient, and the further sum of \$4,687.15 was appropriated. From the fund created by these appropriations the plaintiff was allowed by the board of examiners and received the sum of \$1,351.15, and has brought this action to recover the further sum of \$592.40, which amount was disallowed by the board.

We deem it unnecessary to consider whether the several claims constituting the demand were allowed for the amounts fixed by the statutes regulating compensation for public services. The record affirmatively shows that the claims were not submitted to the auditor of the county for allowance. The failure to so submit them is, by the terms of the statutes relating to the allowance of claims against counties, an insuperable obstacle to recovery in this action. These statutes provide that no demand against a county requiring action by the board of county commissioners shall be paid until submitted to the county auditor, (sections 1950, 1951, Gen. St.,) and that no suit may be maintained against a county upon a claim unless such claim shall have been presented to the board of county commissioners and county auditor for allowance, (section 1964.) Thus it appears that the steps required by the statutes to be taken

in the allowance of claims were not pursued. The claims were not submitted to the auditor, and were not, therefore, liquidated claims. Not having been so submitted, their payment by the county was, by the express terms of the statute, forbidden, and no suit against the county could be maintained upon them. Upon these facts the county was not liable for their payment, and, it may be added, has not paid them. The statute under which the claims are sought to be made a charge against the state was, as before said, adopted for the purpose of reimbursing the counties their expenses at the special election. But since the county has neither paid these claims, nor allowed them so as to make them a legal charge against it, it is clear that no expense has been incurred by the county concerning them, and it cannot, therefore, recover. Judgment reversed, and cause remanded.

PACIFIC CABLE CONST. CO. V. McNATT.*(Supreme Court of Washington. March 12, 1891.)***ACTION FOR MATERIAL SOLD — JOINT LIABILITY — EVIDENCE — ESTOPPEL.**

1. In an action against two construction companies to recover for material furnished by plaintiff at the request of J. and T., it appeared that J. was superintendent of each company, and T. was manager of each company. The statement on appeal showed that plaintiff made a contract with J. and T. to furnish them the material; that plaintiff testified that he "supposed" he was furnishing it to P., one of the construction companies; that at various interviews between "plaintiff and defendants" there were disputes as to the amount due, but no distinct denial of liability on the part of either of the defendants, but a payment was made on account, and a receipt taken in the name of both defendant companies. *Held* that, it not appearing by what persons defendants were represented at such interviews, nor that such persons had power to bind the companies to a joint liability, and plaintiff having testified that he did not understand that they were jointly liable, there was no evidence of an original joint contract.

2. The fact that defendants failed to deny joint liability at said interviews, and took a joint receipt, does not estop them to deny such liability, where it does not appear that there was any attempt then, or at any time previous, to charge them jointly.

3. Where, under such circumstances, it appears that P., one of the defendants, received none of the material, and derived no benefit therefrom, there is no evidence to render P. individually liable therefor.

DUNBAR, J., dissenting.

Appeal from superior court, King county; T. J. HUMES, Judge.

Action by M. McNatt against the Pacific Cable Construction Company and the Seattle Construction Company to recover for certain piles and cordwood. Judgment for plaintiff. Defendant Pacific Cable Construction Company appeals. Reversed.

Metcalfe, Turner & Burleigh, for appellant. *Dyer & Craven*, for respondent.

SCOTT, J. This action was brought by the appellee against the appellant and the Seattle Construction Company to recover pay for certain piles and certain cordwood furnished by one Nickum at the request of one Jackson and one Thompson.

Jackson was then superintendent of each of the defendant corporations, and also of another corporation known as the "Lake Washington Steam Navigation Company," and Thompson was president of appellant, and vice-president of the other defendant, and manager of both companies. The plaintiff recovered a verdict and judgment, which appellant claims there was no evidence to sustain as against it. The evidence was not sent up, but in its stead a statement of what the proof tended to show, from which it appears that Jackson was in the habit of making contracts and purchases for each of the three companies named, without indicating which one he acted for in any particular transaction, and that he allotted the expense to the proper company when it was presented. Nickum knew of the relations of Jackson to the defendant companies. It is very uncertain what the understanding of the parties at the time was. The first clause of the statement is that "in the month of September, 1888, one J. W. Nickum made a contract with Andrew Jackson and J. M. Thompson to furnish them certain cord-wood and certain piling." This, literally construed, would indicate that it was furnished to them individually, and not in any representative capacity, and would be conclusive as against the plaintiff in this action. Passing over it, however, it appears that Nickum testified he understood he was furnishing the chattels to appellant, but it does not appear that this supposition—for it was apparently nothing more—was based upon any action or conduct of the appellant in relation to the transaction. Nickum assigned the claim to McNatt, the plaintiff, but the form of assignment is not shown, nor does it appear whether he therein or otherwise specified any one as owing the amount or chargeable therewith. McNatt first sought to charge the Seattle Construction Company, and so made out his claim, and placed it in the hands of attorneys for collection; but he was advised by them to sue both companies, and he did so. It seems this course was pursued, or thought to be sanctioned, because, as stated, "that at various interviews between Nickum and plaintiff and the defendants, subsequent to the making of the contract, there were disputes as to the amount due thereon, but no distinct denial of liability on the part of either of the defendants, on the ground that the contract had not been made in their behalf. There was also evidence that at one such interview a payment was made on account of said contract, and a receipt taken in the name of both defendant companies." As there is nothing but this in the entire statement that could be claimed as even colorably tending to show any joint liability, this, considered with the other circumstances, furnishes no proof to sustain a claim against the defendants jointly for the balance. As to how the defendants were present at these said interviews, or by whom they were represented, the record is silent, unless it was by Jackson and Thompson, the only parties designated as having acted for them. No mention is made of any other officers, or of any trus-

tees or other agents. If the defendants were represented there by any persons having authority to bind them jointly, the matters spoken of could only operate to bind them in two ways, if at all: First, that the failure to deny such a liability, and the taking of a joint receipt, was evidence of an original joint contract. But this cannot be claimed. Nickum, under whom the plaintiff claims, did not so understand it, as he testified; and there is no claim made and nothing to show that Jackson and Thompson, or either of them, had any authority to bind the defendants jointly. Consequently there was no force therein in this direction. The second and only other ground upon which it could have been relevant was in the way of an estoppel; that by the failure to deny, and the taking of a joint receipt for the sum paid, the defendants led the plaintiff to believe that they had jointly contracted, or were jointly liable, and that they thereby estopped themselves from denying a joint liability by inducing the plaintiff to act differently than he otherwise would have done in the premises. Now, can it be claimed that it did have any such effect? Evidently not, for McNatt did not understand that they were jointly liable, or that they thereby assumed any joint liability, for he thereafter only sought to hold the Seattle Construction Company. So, whatever was there done, it could not have operated as an estoppel. The defendants were not called upon to deny a joint liability, or even a separate liability, unless there was an attempt to so charge them; and there is nothing to show that there was any attempt at any of said meetings, or at any time previously, to charge them jointly, or any attempt there to charge the appellant separately, for that matter. The mere taking of a joint receipt, under the circumstances shown from the plaintiff's own case, amounted to nothing in support of the plaintiff's action.

It is fair to assume from the record, however, that the defendants were represented at these meetings by Jackson and Thompson, the only parties mentioned as having acted for them, or either of them, in the premises; and they could not bind the defendants jointly by any silence or admission or ratification of their own previous acts, if they had no authority to make a joint contract. The only claim is that Jackson had authority to bind the companies severally for the amount of purchases made by him for each, respectively, in consequence of his habit of so buying and his recognized course of dealing. It appears by the statement that the piles furnished were used by the Lake Washington Steam Navigation Company, and the cord-wood was used by the Seattle Construction Company; that no part of either was received or used by appellant; and that it derived no benefit from said purchases. It does not even appear that appellant was in any wise severally liable, for, under the plaintiff's own showing as to the authority of Jackson, the contract was unauthorized, if it purported or attempted to charge appellant for property that was in no wise furnished to

it; and it does not appear that Thompson had any authority in the premises, and under no theory, upon the facts shown, could the defendants be held jointly liable for the whole amount. It is not claimed that Jackson did allot the expense of these purchases to either or both of said defendants, and his habit of allotting expenses generally would cut no figure if he did not in fact allot this particular expense. Most likely the first clause of the statement was correct, that the chattels were really furnished upon the personal responsibility of Jackson and Thompson. Appellant's point that there was no evidence to sustain a recovery as against it, or as against it and the other defendant jointly, was well taken, and should have been sustained. Of course, appellant's individual liability, even if it was so liable, would not avail the plaintiff in the present action. Judgment reversed.

ANDERS, C. J., and HOYT and STILES, JJ., concur.

DUNBAR, J. I dissent. In my opinion the judgment in this case cannot be disturbed without usurping the province of the jury. The jury heard the testimony and saw the witnesses face to face; and the statement of facts shows that there was sufficient testimony, if the jury believed it, to warrant the verdict. It may be uncertain what the understanding of the parties to the contract was; but where there is an uncertainty as to any fact, concerning which evidence is introduced, that is a question for the jury and not the court. Nickum testified that his understanding was that he was furnishing the material sold, to the Pacific Cable Construction Company, and the jury doubtless concluded that the testimony justified his understanding. The testimony shows that at various interviews between Nickum and plaintiff and defendants, in relation to the payment of this claim, subsequent to the making of the contract, there were disputes as to the amount due thereon; but that neither of the defendants distinctly denied their liability, and that at one such interview a payment was made on account of said contract, and a receipt taken in the name of both defendant companies. From this the jury could fairly infer a joint liability. It is urged that the record is silent as to how the defendants were present at these said interviews, or by whom they were represented. The statement of facts as certified by the judge simply shows that those interviews were between Nickum and plaintiff and defendants. The statement is plain, and must be construed against a defendant corporation the same as against a defendant individual. To give any force to the finding at all, it must be presumed that the defendant was there by its accredited agents; otherwise it was not there at all, and there is no sense to the finding.

Appellants cannot object to the judgment being jointly against them and the Seattle Construction Company, and urge the fact that Nickum's testimony would tend to relieve the Seattle Construction Company

of any liability. It is time to review that question when the Seattle Construction Company asks to be relieved from the judgment.

(1 Colo. A. 92)

WEBBER *et al.* v. BRIEGER.

(Court of Appeals of Colorado. Oct. 12, 1891.)

APPEAL FROM INFERIOR COURT—NOTICE.

Under Act Colo. 1885, § 4, (Mills' Ann. St. Colo. § 1088,) providing that in cases of appeal from the county to the district court appellant shall serve notice of appeal within five days after it is taken, unless it is taken on the same day the judgment is rendered, and that, if such notice is not served, appellee may, at his option, have the judgment of the county court affirmed or the appeal dismissed, a notice of appeal must be served, though on the same day the judgment is rendered an appeal is prayed and allowed on condition that appellant file an appeal-bond within 10 days, since the appeal is not taken till the bond is filed.

Appeal from district court, Pitkin county; THOMAS A. RUCKER, Judge.

George Brieger sued Henry Webber and others, and recovered judgment for \$1,029.27. Defendants appeal. Affirmed.

C. R. Bell and T. M. S. Rhett, for appellants. W. W. Cooley, for appellee.

REED, J. This action was commenced in the county court of Pitkin county, and a trial had, resulting in a judgment in favor of appellee against appellants for the sum of \$1,029.27 on the 12th day of July, 1889. On the 18th day of July, within the 10 days allowed by law, a proper bond for appeal to the district court was approved and filed under the provisions of section 2 of the act of 1885, in regard to appeals from county courts to district courts. Mills' Ann. St. § 1086. Section 4 of the act of 1885 (Mills' Ann. St. § 1088) is as follows: "If the appeal be not taken on the same day on which the judgment is rendered, the appellant shall serve the appellee, or his attorney of record, within five days after the appeal is taken, with a notice in writing, stating that an appeal has been taken from the judgment therein specified, which notice shall be served by delivering a copy thereof to such appellee, or his attorney of record. If the appellant fail to give notice of his appeal when such notice is required, the appellee may, at any time before such notice is actually served, and after the time when it should have been served, have the judgment of the county court affirmed or the appeal dismissed, at his option." No notice of appeal, as provided in this section, having been served, on the 31st day of August counsel for appellee filed in the district court a motion to have the judgment of the county court affirmed, and on the 5th day of October, 1889, the motion was sustained by the court, and the judgment of the county court affirmed, and an appeal from such judgment taken to the supreme court. On the 28th day of December, after the appeal to the supreme court was taken, the judge and acting clerk of the county court filed a further and additional transcript of the record in that court, by which it is shown that on the day the judgment was rendered (July 12th) an appeal to the district court was prayed and allowed upon ap-

pellants filing a bond within 10 days. This subsequent transcript in no way aids the case of appellants. The bond was not filed until the 18th, and no notice of the appeal was served upon the appellee. *Straat v. Blanchard*, 14 Colo. 445, 24 Pac. Rep. 561, is decisive of this case. It was there held that no appeal was taken until the approval and filing of the bond. The appeal not having been effected on the day judgment was rendered, notice within five days after the appeal was perfected "that an appeal has been taken from the judgment" is indispensable. *Hunt v. Arkell*, 13 Colo. 543, 22 Pac. Rep. 826. The praying for and allowance of the appeal upon the day judgment is rendered, where time is given to file the bond, does not obviate the necessity of notice. The appeal may or may not be effected. The statute is a harsh one, and penal in its character, but was probably deemed necessary to prevent delay in the administration of justice. By it the court had no discretion. No notice having been served of the appeal, it was the right of the appellee to have the judgment of the county court affirmed or the appeal dismissed, at his option. The judgment of the district court is affirmed.

MITCHELL v. VOAKE.

(Court of Appeals of Colorado. Oct. 12, 1891.)

Appeal from district court, Arapahoe county; GEORGE W. ALLEN, Judge.

Action by Walter S. Voake against L. H. Mitchell. Judgment for plaintiff. Defendant appeals. Affirmed.

Williams & Bachtell, for appellant. *George A. Smith*, for appellee.

BISSELL, J. This action was brought in the county court of Arapahoe county in 1889. After trial and judgment the defendant endeavored to appeal to the district court. The appeal was prayed at the time the judgment was rendered, and allowed on condition that a bond be filed in a specified sum. Nothing else was done on the day that the judgment was entered. Subsequently the bond was filed according to the terms of the order, and every step essential to the perfection of the appeal taken, save that no notice was served on the other side, according to the provisions of section 4 of the act of 1885, relating to appeals from the county court. When the case was brought into the district court the appellee moved to dismiss it because of the neglect to serve this notice according to the statute. Upon this ground the appeal was dismissed, and the action of the court in this particular is the error complained of. It was not error, and the judgment must be affirmed. The construction of the act of 1885 has been settled by several adjudications in the supreme court of the state, and this construction must be accepted as the law governing the case. *Hunt v. Arkell*, 13 Colo. 543, 22 Pac. Rep. 826; *Law v. Nelson*, 14 Colo. 409, 24 Pac. Rep. 2. The decisions upon this question were rendered subsequent to the prosecution of the present appeal, and there is nothing to be done save to follow the law as declared. These

opinions furnish a clear, precise, and definite exposition of the statute, and in accordance with the construction which they establish it must be held that, under the facts appearing in this case, the service of the notice was a condition precedent to the perfection of the appeal. The judgment must be affirmed.

IRELAND v. PEOPLE.

(Court of Appeals of Colorado. Oct. 12, 1891.)

APPEAL IN CRIMINAL CASE—REVIEW.

Where, in a criminal case, the evidence fails to sustain the conviction, and the attorney general files no brief, and does not urge the affirmance of the judgment, it will be reversed on appeal.

Error to district court, Weld county; T. M. ROBINSON, Judge.

W. W. Cooke, for plaintiff in error. *The Attorney General*, for the People.

RICHMOND, P. J. The plaintiff in error, Ireland, was, by the grand jury of the eighth judicial district, charged by indictment with the crime of grand larceny. The cause came on for trial, and resulted in a verdict of guilty. Motion to set aside the verdict and for a new trial was duly interposed, but the court denied the motion, and gave judgment upon the verdict. Numerous errors are assigned, but we deem it unnecessary to consider any of them save and except the second, which is to the effect that the verdict of the jury is not supported by the evidence in this case. We have carefully reviewed all of the testimony, and reached the conclusion that the verdict was unwarranted by the evidence, and that the court erred in refusing to set aside the verdict and grant a new trial. In view of the fact that the attorney general, who represents the people in this case, has filed in this court a statement to the effect that he will file no briefs or argument in the cause, and does not urge an affirmance of the judgment rendered, it would be superfluous for us to extend the opinion by reference to the testimony submitted at the trial. The judgment must be reversed, and the cause remanded.

HOLYOKE BUILDING & LOAN ASS'N v. LEWIS.

(Court of Appeals of Colorado. Oct. 12, 1891.)

BUILDING ASSOCIATIONS — BY-LAWS — IMPAIRING VESTED RIGHTS.

Plaintiff became a member of defendant building association at a time when a by-law thereof provided that "all non-borrowing stockholders wishing to withdraw shall be privileged so to do upon giving notice to the directors of his or her intention, and shall be entitled to receive the amount of installments actually paid in, without interest." Held, that plaintiff's right of withdrawal was a vested right, of which defendant could not deprive him, without his consent, by a subsequent repeal of the by-law.

Error to district court, Phillips county; S. S. DOWNER, Judge.

Action by Jerome Lewis against the Holyoke Building & Loan Association for moneys had and received. Upon a judg-

ment in favor of plaintiff, defendant assigns error.

W. T. Rogers and Bennett & Dempster, for plaintiff in error. *E. M. Sheridan, E. E. Brannon, and Kelso & Schooler*, for defendant in error.

RICHMOND, P. J. This was an action on a money demand, and was originally tried upon an agreed state of facts which, in substance, are that Jerome Lewis, the defendant in error, paid into the Holyoke Building & Loan Association, plaintiff in error, the sum of \$75, thereby becoming a member of the association. At the time of payment there was an article of the by-laws which read as follows: "All non-borrowing stockholders wishing to withdraw shall be privileged so to do, upon giving notice to the directors of his or her intention, and shall be entitled to receive the amount of installments actually paid in, without interest." Defendant in error gave the notice, the association declined to return the money, insisting that since the payment by Lewis the directors of the association had repealed the article of the by-laws referred to, and therefore defendant in error was not entitled to withdraw the money from the association. Judgment was rendered in favor of defendant in error for the amount of his demand. To reverse this judgment this error is prosecuted.

The rule of law is that a corporation has not the right to repeal a by-law so as to impair rights which have been given and become vested by virtue of the by-laws, although the power to alter, amend, or repeal its by-laws is granted by charter. *End. Build. Ass'n's*, § 278; *Insurance Co. v. Connor*, 17 Pa. St. 136; *Revere v. Copper Co.*, 15 Pick. 351; *Ang. & A. Corp.* § 342. When that by-law was adopted it was as much the law of the corporation as if its provisions had been part of the charter. But it is insisted that the corporation could alter, amend, add to, or repeal by-laws before made, and that by virtue of this authority Lewis is precluded or stopped from asserting his right under the article mentioned. The power to make by-laws is to make such as are not inconsistent with the constitution and the law, and the power to alter has the same limit, so that no alteration or repeal could be made which would infringe a right already given and secured by contract with the corporation. No private corporation can repeal a by-law so as to impair rights which have been given and become vested by virtue of a by-law afterwards repealed. All by-laws must be reasonable and consistent with the general principles of the laws of the land, which are to be determined by the court when a case is properly before them. But a by-law that will disturb a vested right is not such. *Kent v. Mining Co.*, 78 N. Y. 159. "By-laws are the corporation's charter, and are subject to the constitution and general laws of the state. They fix the right of stockholders, and are in the nature of a fundamental contract in form between the corporators, and in practical effect between the association and its stockholders,—a contract which, as in all

other cases, neither party is at liberty to violate. Any attempt on the part of the corporation, by by-laws or otherwise, to deprive a member of a right secured to him by the corporate articles, is in excess of its authority." *Bergman v. Association*, 29 Minn. 275, 13 N. W. Rep. 120. The fact that Lewis was a non-borrowing stockholder is not denied. That he gave the notice under the article of the by-laws referred to, and that he had paid in the amount of money which he sought to recover, is admitted. His right, therefore, of withdrawal, was a vested right, which the corporation, without his assent, could not deprive him of. The judgment of the court below must be affirmed.

HUNT *et al.* v. COLORADO MILLING & ELEVATOR CO.

(*Court of Appeals of Colorado*. Oct. 12, 1891.)

PARTNERSHIP—NOTICE OF DISSOLUTION—EVIDENCE.

1. The fact that notice of the dissolution of a partnership, addressed to a company with which the firm previously did business, was mailed to the company in a city where free mail delivery prevailed, without giving on the envelope the street and number of the company's place of business, is not sufficient, with very slight additional proof, to warrant the court in holding as a matter of law that the necessary actual notice of the dissolution was given.

2. In an action against a dissolved partnership to charge the retired partner on the ground that plaintiff had previously done business with the firm, and when he sold the remaining partner goods had no actual notice of the dissolution, the remaining partner testified positively that he notified plaintiff's agent, who sold him the goods, of the dissolution, and the agent merely testified that he did not recollect the conversation. It also appeared that plaintiff rendered bills in the name of the remaining partner only, and received checks on account, signed by him individually, and that plaintiff's agents frequently visited his place of business. *Held*, that the court was not warranted in holding that plaintiff received no actual notice of the dissolution.

Appeal from Arapahoe county court; G. W. MILLER, Judge.

Action by the Colorado Milling & Elevator Company against Brasler Hunt and David W. Dryden, as partners, to recover on an account for goods sold. Judgment for plaintiff. Defendants appeal. Reversed.

STATEMENT BY THE COURT. Prior to the year 1888, and up to September 1st of that year, the appellants, Hunt and Dryden, were trading copartners in the city of Denver. On that date the firm was dissolved by mutual consent. Prior to the dissolution, the firm had done business with the elevator company, and had bought goods from two of their mills,—the Crescent Flour-Mills and the Roller-Mills. It appeared that after the dissolution Hunt continued business at the old stand, and bought goods of the elevator company from the salesmen who represented them. When they dissolved, Hunt and Dryden attempted to give notice to the persons with whom they had had prior dealings. They directed postal-cards to the Crescent Flour-Mills and the Roller-Mills, and mailed them in the Denver office. The only other evidence of actual notice to the appellees was that given

by Mr. Hunt, who testified that he told Mr. Payne, representing the Crescent Mills, and Mr. Knight, who represented the Roller-Mills, that the firm had been dissolved, and that he was doing business by himself. This was in a measure controverted by Mr. King, (the manager of the Crescent Mills,) who denied any knowledge of the dissolution; by Knight, who contradicted the conversation as given by Hunt, and by Payne, who stated that he was without recollection upon the subject. As bearing upon the question of the knowledge of the elevator company of the dissolution, proof was made that subsequent to September 1, 1888, it rendered its bills to B. Hunt, which, as put in evidence, ran, "B. Hunt, in account with the Crescent Flour-Mills," and "B. Hunt, in account with the Roller Flour-Mills." These bills were not controverted, nor was any evidence offered tending to show that the company kept its books and accounts or rendered other bills in a different fashion. There were also introduced in evidence divers checks in partial liquidation of accounts rendered, signed by Brasier Hunt, and indorsed by the managers of the two mills. There was no other evidence of importance introduced on either side with reference to this controversy. It was shown that notice of dissolution was published in the Daily Rocky Mountain News, but there was no evidence that the elevator company either took the paper or saw the notice. It transpired that Mr. Payne sold some of the goods for which the action was brought on orders which he took at Mr. Hunt's store, and that payments on account were made to him by the debtor. Neither Payne's nor Knight's relations to the company were disputed. The defendant David W. Dryden denied the existence of the copartnership at the date of the sale of the goods. The trial was to the court without a jury, and judgment was rendered against both Hunt and Dryden for \$161.94, from which the present appeal was prosecuted.

Willis B. Herr and H. R. Clise, for appellants. *S. D. Walling*, for appellee.

BISSELL, J. The technical liability of the defendant Dryden for the value of the goods sold can only be determined by a proper solution of the inquiry whether it is apparent that the elevator company had notice of the dissolution of the firm prior to the sale of the goods. The responsibility of the outgoing partner to those who have had prior dealings with his firm for all debts that may be thereafter contracted by those with whom he was connected is clearly settled, unless it be shown that those persons were actually notified of the dissolution. That which is ample to relieve him from all liability as to strangers or persons who had no connection whatever with the old firm would not suffice when the suit is brought by those who have had prior dealings with the copartnership. Whether what had been done will amount to that notice which the law requires, is a mixed question of law and of fact, not always easy of solution. It is strenuously urged by

counsel that the sending of notices through the mail, properly addressed, with very slight corroboration, would make satisfactory proof of that actual notice which the law says must be given to prior dealers. There would be much force in the suggestion if the record either necessitated or required an express adjudication of this proposition. It is true that in *Ransom v. Mack*, 2 Hill, 587, the court decided that a notice sent by mail in the town where both parties reside was not proof of notice, even in the case of commercial paper; but, as was said in that case, "the corporate limits of our cities and towns have, I think, less to do with this question than the mail arrangements of the general government and the business relations of our citizens. Whether mail service is good or not does not depend upon the inquiry whether the person to be charged resides within the same legal district, but upon the question whether the notice may be transmitted by mail," etc. It is thus evident even from that case that the point of inquiry always is whether or not actual notice may be given in that fashion. There would hardly seem to be any room for question that dealers might be given notice by mail. It is only a matter of delivery, receipt, and proof. But it is a far different matter to hold that the deposit of a notice in the office, addressed to the individual to be notified, would of itself, and as in cases of notice to the indorser of commercial paper, make proof of that actual notice which the law requires. Under our present system of postal service in towns where a free delivery prevails, it is nearly certain that a letter will reach the person to whom it is addressed if it bear the street and number of his place of business, and it would require but very slight additional proof to so far confirm that presumption as to make it evidence of both the delivery and receipt of the notice. (*Austin v. Holland*, 69 N. Y. 571;) but to give it this force it is essential to show that the notices were addressed, not only with the name of the person, but also with the number and street of his place of business. That did not appear, and without that proof the link is missing which would require the court, upon the proof, to decide as a matter of law that the actual notice had been given which is indispensable to relieve a retiring partner from subsequent transactions, apparently carried on in the partnership name. But there is other evidence of actual notice, which is enough to relieve Dryden from that technical responsibility for a portion of the debt which otherwise the law would cast upon him. All that is necessary is notice in fact. It is wholly immaterial by what means that notice is brought home to the knowledge of the dealers, or in what form it is given, for no particular method or formality need be observed according to the force of all the authorities. *Austin v. Holland*, supra; *Wade*, Notice, § 499; *Young v. Tibbitts*, 32 Wis. 79; *Hier v. Odell*, 18 Hun, 314; *Colly. Partn.* (6th Ed.) § 581; *Reilly v. Smith*, 16 La. Ann. 31; *Mauldin v. Bank*, 2 Ala. 502. It is enough that the information comes to

the dealer either directly or through some of the channels which the law recognizes as legitimate ways of communication. The dealings between the mills and Mr. Hunt were through Payne and Knight, who acted as agents of the company. Payne had repeatedly taken orders for goods, collected money for those sold, and, according to the testimony, sold part of the goods, for the price of which this action was brought. He thus stood with reference to the elevator company and the Crescent Flour Mills as their representative and agent, and an actual notice to him of Dryden's withdrawal would presumably reach his employers, and would most certainly bind them. *Hier v. Odell*, supra; *Page v. Brant*, 18 Ill. 37; *Ingalls v. Morgan*, 10 N. Y. 178; *Davis v. Keyes*, 38 N. Y. 94. It is wholly unnecessary to rely entirely upon the presumption that the principal was fully advised of that which was communicated to the agent. The form of the bills, the signature to the checks, and the frequent visits of the agents to the house, compel the belief that, if the actual managers of the concern were unadvised as to the change of the copartnership, those persons connected with the company who were actually engaged in the transaction of the particular business with Hunt were fully advised as to the situation, and the company would be bound by that knowledge. This conclusion is not at all in conflict with the rule which has been so often declared by the appellate tribunals of this state, that they will not interfere with the verdict of a jury or the finding of the court upon questions of fact simply upon a conflict of testimony, or upon a question of the weight and preponderance of the evidence. It stands substantially uncontradicted in the record that Payne was given actual notice of the dissolution of the firm. The absence of a recollection on his part that such a conversation was had does not tend to shake or weaken the absolute testimony given by Mr. Hunt upon this subject. His direct and positive statement, standing uncontradicted, must be given full credit, unless there be something in the record which tends to overcome or weaken the force of that unimpeached testimony. *Elwood v. Telegraph Co.*, 45 N. Y. 549. To render the judgment entered in this case the court below must have found that the elevator company received no actual notice of the dissolution of the firm. This finding was not a decision upon conflicting testimony, but was a legal conclusion upon the proof that the notice given was wholly insufficient to charge the elevator company. Since this was error, this cause must be reversed and remanded.

BOARD OF COUNTY COMMISSIONERS OF PITKIN COUNTY V. ASPEN MINING & SMELTING CO.

(*Court of Appeals of Colorado*. Oct. 12, 1891.)

APPEAL—JURISDICTIONAL AMOUNT.

An appeal from a judgment for costs only, perfected under the Colorado Act of 1887, which provides that appeals are allowable only when the judgment, exclusive of costs, amounts to \$100, must be dismissed, as the supreme court was

without jurisdiction to entertain the appeal, and it cannot, therefore, be entertained by its successor, the court of appeals.

Appeal from Pitkin county court; D. W. STRICKLAND, Judge.

Action by the board of county commissioners of the county of Pitkin against the Aspen Mining & Smelting Company. Judgment for defendant for costs. Plaintiff appeals. Appeal dismissed.

C. S. Wilson, for appellant. W. W. Cooley, for appellee.

RICHMOND, P. J. By the record in this case it appears that a judgment was rendered for the defendant below, appellee herein, for costs only. From this judgment an appeal was prosecuted, and a transcript was filed September 3, 1889, in the supreme court of Colorado. June 30, 1891, the cause was transferred from the submission docket of the supreme court to that of the court of appeals. Under the act of 1887, appeals to the supreme court were allowable only when the judgment amounted, exclusive of costs, to the sum of \$100, or related to a franchise or freehold. Hence the supreme court was without jurisdiction to entertain the appeal. Repeated decisions have been rendered sustaining this position. "The proceeding, being jurisdictional, cannot be waived or cured by consent of the parties." Code, § 388; *Crane v. Farmer*, 14 Colo. 294, 23 Pac. Rep. 455; *Meyer v. Brophy*, 15 Colo. 572, 25 Pac. Rep. 1090; *Association v. City of Denver*, 15 Colo. 592, 25 Pac. Rep. 1091. If this case had been appealed to this court subsequent to its creation by statute, it may be that it would be our duty to consider it upon its merits; but, inasmuch as the appeal was perfected under the act of 1887, we do not think a transfer of the cause confers upon us any other jurisdiction than that resulting from the appeal which had already been taken under the existing statutes. The appeal is accordingly dismissed.

HOCKADAY V. GOODWIN.

(*Court of Appeals of Colorado*. Oct. 12, 1891.)

REVIEW ON APPEAL.

Where the verdict is clearly against the evidence, and evinces prejudice on the part of the jury, it will be set aside.

Appeal from district court, Chaffee county; JOHN CAMPBELL, Judge.

Richard W. Hockaday replevied two horses and a wagon from William W. Goodwin. Judgment for defendant. Plaintiff appeals. Reversed.

W. D. Wright, for appellant. G. R. Hartenstein, for appellee.

REED, J. This was an action of replevin brought by appellant for the possession of two horses and a wagon. Plaintiff's right to recover was based upon a chattel mortgage executed by one William F. Gardner on the 29th day of November, 1887. Gardner was in possession of the property at the time by virtue of a purchase alleged to have been previously made from one F. Tibbitts. Goodwin, the defendant, gained

possession of the property by an alleged purchase from Tibbitts made on the 13th day of December following. No questions of law are presented. The proceedings of the court were correct and unquestioned, and the instructions to the jury correct. It is claimed that the verdict of the jury was not only unwarranted by the evidence, but in direct conflict with it, and that the instructions of the court were willfully disregarded. Such claims are shown by the record to be well founded. The court erred in not setting the verdict aside. Aside from the general verdict required of the jury, there were some 10 or 12 questions submitted upon which it was to make special findings. The general verdict was not supported or warranted by the evidence, while several of the special findings, notably, 1st, 2d, 7th, 8th, and 11th, directly contravene all the evidence in the case. The court seems to have regarded the verdict as excessive and unwarranted by the proof in the amount of damages awarded, and required \$75 to be remitted from the sum of \$250, which was a very proper requirement, as the amount awarded exceeded the value by that amount as fixed by the owner at the time of the alleged sale. "A verdict of a jury which is clearly against the evidence should be set aside." *Keating v. Pedee*, 2 Colo. 526. The rule of this court, as announced in *Green v. Taney*, 7 Colo. 278, 3 Pac. Rep. 423, is "that this court will only interfere where, upon the whole record, it appears that the jury acted so unreasonably in weighing testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of awarding impartial justice to the contending parties." Examination of the record in this case shows it is clearly within the exception to the rule as announced in that case. A more willful or flagrant disregard of evidence and instructions, and greater exhibition of prejudice, can hardly be found. The judgment will be reversed, and the cause remanded.

(1 Colo. A. 137)

HARASZTHY *et al.* v. SHANDEL.

(Court of Appeals of Colorado. Oct. 12, 1891.)

PLEADINGS AS EVIDENCE—PLEDGE FOR PRE-EXISTING DEBT—RIGHTS OF CREDITORS.

1. A person bought goods on credit, and borrowed money of another to pay the freight, on condition that the goods should be surrendered as a pledge, and that a pre-existing debt should be included in the security. The sellers replevied the goods on the theory that the purchaser was not intending to pay for them. The pledgee intervened, setting up her claim for advances. The sellers alleged a conspiracy to defraud, and obtained judgment, and the pledgeor appealed to the district court. The sellers there offered in evidence the pleadings and judgment against the purchaser in the lower court, as bearing upon their right to rescind. *Held*, that such proof was properly excluded, since the inquiry in the district court was merely as regards the advances and alleged conspiracy, and the pleadings, in so far as they were a part of the case, could have been used for all legitimate purposes without being offered in evidence.

2. A pre-existing debt is a sufficient consideration to support a pledge of goods in the hands

of the pledgee as against the seller, although the latter would have had the right to rescind the sale and recover the goods from the purchaser, had the same remained in his possession.

3. Where the evidence is conflicting, the verdict of the jury is conclusive.

Appeal from district court, Arapahoe county; W. S. DECKER, Judge.

Replevin by Arpad Haraszthy & Co. against Oppenheimer, and Mrs. Bertha Shandel, intervener, for a lot of liquors. Judgment for Mrs. Shandel, the intervener. Plaintiffs appeal. Affirmed.

Joseph N. Baxter, for appellants. H. E. Luthé, for appellee.

BISSELL, J. This controversy grew out of the transactions between one Oppenheimer and Mrs. Shandel, the appellee. Early in 1889, Oppenheimer bought a very considerable quantity of wine and similar goods from the appellants in San Francisco, and settled for them with his acceptances due in 30 days. The goods were shipped to Denver, and held by the railroad company for the freight and transportation charges. In order to get possession of the goods for the purposes of his business, he negotiated a loan with Mrs. Shandel for enough money to pay these charges, and leave himself a small balance. It appeared that prior to the time of this transaction Oppenheimer had become indebted to either Mrs. Shandel or her husband in a little upwards of \$200, of which indebtedness Mrs. Shandel was undoubtedly the legal owner at the time of the latter transaction. The loan was made upon condition that this pre-existing indebtedness be treated as a part of it, and be secured in the same way that the money to be advanced was provided for, to-wit, by a surrender and pledge of the goods to Mrs. Shandel as security for a return of the eight hundred and odd dollars. The loan was made, and the goods were put into Mrs. Shandel's possession, and she was holding them as security for her advances when this suit was brought. After the shipment and pledge of the goods, Haraszthy & Co. became satisfied that Oppenheimer did not intend to pay for them, and that the transaction was of that fraudulent character which gave them a right to rescind the sale. Acting upon this theory, they brought a replevin suit in the county court, and took the goods under the writ. Oppenheimer defended, and Mrs. Shandel intervened, set up her claim for the advances and the pledge of the goods at the time of the loan, and prayed for relief accordingly. Haraszthy & Co. in their reply set up what they alleged to be the fraudulent character of the transaction as between them and Oppenheimer; denied the pledge for the advances, and then pleaded a conspiracy, as between the intervener and Oppenheimer, which, if proven, would have debarred Mrs. Shandel from any right to hold the goods as a security. The trial resulted in a judgment in favor of the appellants, and Mrs. Shandel alone appealed to the district court, where the cause was again tried, and resulted in a judgment in her favor. Haraszthy & Co. appeal, and assign various errors, of which it will only

be profitable to discuss those which are disposed of in the opinion.

During the progress of the trial in the district court the appellants sought to introduce in evidence the pleadings and judgment against Oppenheimer in the county court as bearing upon the question of the right of Haraszthy & Co. to rescind the contract. The proof was properly excluded. Under the issues, the inquiry in the district court was as to the advances made by Mrs. Shandel to Oppenheimer, and the existence or non-existence of a conspiracy between them to defraud Haraszthy & Co. out of their goods. The pleadings and judgment in the county court, as between Haraszthy & Co. and Oppenheimer, would in no manner have tended to throw light upon this conspiracy, but would have brought another issue into the case not made by the pleadings, and would have been prejudicial to the assertion of whatever rights Mrs. Shandel may have had. In so far as those pleadings were a part of the case which was tried in the district court, it was wholly unnecessary to introduce them in evidence, since they could have been used for all legitimate purposes without the offer, and they were not otherwise available for the purposes of proof.

It is insisted that the court erred in refusing some instructions which were asked by the appellants. It is enough to say, generally, that the instruction presented upon the subject of the right of the appellants to rescind the contract was wholly inapplicable to the issue which was being tried, and, though perhaps good as a legal proposition, was properly refused, because it tended to embarrass the jury with an issue which was not before them. Some of the instructions which were asked on the subject of the knowledge which it was asserted Mrs. Shandel had of Oppenheimer's intention to defraud Haraszthy & Co. were too broadly expressed to be an accurate statement of the law applicable to the case, and they were not justified by the evidence which had been introduced. The others on that branch of the case were fully covered by the eminently fair charge of the court to the jury. The other instruction refused, whereon error is assigned, states the law to be that a pre-existing debt is not such a valuable consideration as will uphold the pledge in the hands of the pledgee against a creditor who has a right to rescind the sale and recover the goods from his vendee. Much learning is to be found in the books touching the character of a pre-existing debt as a consideration for the sale of real and personal property when the transfer is unsalable by existing creditors. A revival of the discussion or a defense of the doctrine announced would be entirely superfluous. In this state the question has been set at rest, and it is well settled that a pre-existing debt is a good consideration to support the transfer of property, as against existing creditors, unless the *bona fides* of the transaction can be otherwise impeached. The action of the court below was in harmony with the law laid down by the supreme court of the state. *Knox v. McFarren*, 4 Colo. 586; *McMurtrie v.*

Riddell, 9 Colo. 497, 13 Pac. Rep. 181; *Bank v. McClelland*, 9 Colo. 608, 13 Pac. Rep. 723.

With reference to the other error assigned, that the verdict was unsustainable by the testimony, it need only be said that it was rendered on conflicting testimony, and upon any consideration of the preponderance of evidence the verdict of a jury is entirely conclusive. *Kinney v. Wood*, 10 Colo. 270, 15 Pac. Rep. 402. Perceiving no substantial error in the record, the judgment will be affirmed.

LINDSAY v. LINDSAY.

(Court of Appeals of Colorado. Oct. 12, 1891.)

ACTION TO DECLARE DEED A MORTGAGE—REVIEW ON APPEAL.

Where, in suit by a mother against her son to have an absolute deed from plaintiff to defendant set aside and declared a mortgage, there is evidence to support a decree for plaintiff, and the decree is not manifestly against the entire evidence, it will not be reversed.

Appeal from district court, Arapahoe county; OLIVER B. RIDDELL, Judge.

Catherine Lindsay filed a bill against James Lindsay, her son, to have a deed absolute made by plaintiff to defendant declared a mortgage. Decree for plaintiff. Defendant appeals. Affirmed.

Cranston & Pitkin, for appellant. *John Hipp*, *S. C. Hinsdale*, and *I. E. Barnum*, for appellee.

BISSELL, J. This is one of that very numerous class of actions which have their inception in the unguarded transactions between persons who sustain to each other some confidential relation. In September, 1884, by a deed of absolute conveyance, Mrs. Lindsay transferred to her son, the appellant, sundry property situate in the city of Denver. There were no limitations in the conveyance, nor was there any instrument executed between the parties at the time of the transfer which would serve to determine its purpose or character. Some years after, the son asserted ownership in the property, and denied his mother's interest in it. On this assertion of title, the mother filed the present bill to set aside the conveyance, and to declare it to have been executed by way of a mortgage to secure the son for certain advances which he had made; and she also alleged that he had been instrumental in securing the transfer by divers misrepresentations, which the law would declare fraudulent. The case was tried by the court without the intervention of a jury, on oral testimony, and resulted in a decree for the mother. There was little evidence save that given by the respective parties, though there was some proof made of circumstances which tended, as the respective sides maintain, to support their different contentions. There are divers errors assigned and argued by counsel in support of their claim that the case ought to be reversed, but that based upon the alleged insufficiency of the evidence to support the judgment is the only one which it is essential to consider, and which, under any circumstances, would be sufficient to justify setting the decree aside. As a

basis upon which to rest the discussion of the insufficiency of the proof, counsel accurately state the rule to be that, in order to overcome the effect of any absolute deed, and to change its legal significance from that of a conveyance to that of a mortgage, the testimony upon which the decree must rest should be precise, clear, and unequivocal. That this is the law has been so often decided that a repetition of the rule will, of itself, serve to recall the numerous adjudications in which it has been declared. Without conceding that the evidence offered in support of the bill, together with the circumstances which surrounded the transaction and illustrated its history, did not, as a whole, furnish that unequivocal and clear proof which is essential to the maintenance of such a decree, it must be stated that the rule is not absolutely uniform in its application, nor is the same identical proof required in all cases. Wherever the transaction is between parties whose relations are of a close fiduciary character, the complainant is not held to the same exactitude and strictness of proof, nor is the testimony offered in support of the bill to be viewed with the same scrutiny, as in those cases where the parties deal with each other at arms-length. *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. Rep. 790. Viewed in the light of these two principles, it cannot be said, with such emphasis as to necessitate a reversal of this case, that the testimony does not reach that level of certainty essential to support the judgment. It is contended with great vigor that, even though this be true, the weight of the testimony is against the finding, and for this reason the decree should be canceled. It is impossible not to concede that upon the record, as it is presented to this court, there is considerable basis for this contention; and, if this court had to decide the question as an original proposition upon the printed case, there might be grave doubt as to the decree which should be directed. But the cause is not brought within the rules which have always been laid down in this state as governing appellate courts in passing upon such an error. The record suggests nothing to indicate that the court was influenced by any other considerations than those which ought to control judicial tribunals in the rendition of their judgments. The decree is supported by the evidence offered by the appellee, by the circumstances of the transaction, and by the subsequent conduct of the parties. It is not, therefore, one of those cases where the judgment is so manifestly against the evidence as to justify an appellate court in reversing it. *Kinney v. Wood*, 10 Colo. 270, 15 Pac. Rep. 402; *Green v. Taney*, 7 Colo. 278, 3 Pac. Rep. 423; *Ziegler v. Cole*, 15 Colo. 295, 25 Pac. Rep. 300.

The judgment is affirmed.

MULVANY V. GROSS.

(Court of Appeals of Colorado. Oct. 12, 1891.)

STATUTE OF FRAUDS — AGREEMENT TO PAY DEBT OF ANOTHER — EVIDENCE.

1. Where the purchaser of a crop of oats on which there is a chattel mortgage agrees to pay

the mortgage debt as part of the price, his promise is not within the statute of frauds.

2. The note and mortgage are admissible in evidence in a suit by the mortgagee against the purchaser, to whom the mortgaged crop has been delivered with his consent, for the purpose of showing that they evidenced the debt mentioned in the bill of sale given by the mortgagor to the purchaser, and which the purchaser agreed to pay.

Appeal from district court, Chaffee county; JOHN CAMPBELL, Judge.

Gregory Gross sued Peter Mulvany for \$600. Judgment for plaintiff. Defendant appeals. Affirmed.

G. K. Hartenstein and J. B. McCoy, for appellant.

BISSELL, J. In May, 1888, Robert Holland and Henry Newby were indebted to the appellee, Gross, to the extent of \$600. On the 16th of that month, together with Mrs. Newby, they executed a promissory note to the order of Mr. Gross, promising to pay that sum, with interest, on or before the 15th of October of the same year. Concurrently with the making of the note, the parties executed a chattel mortgage upon a crop of oats then growing upon certain lands in Chaffee county, which belonged to Newby, but were being farmed by Mr. Holland. The mortgage was put upon record, and the note remained unpaid at the time of the subsequent transactions. Some time in the fall of the year, and while they were in stack, Holland and Newby jointly executed a contract of sale of the oats to the appellant, Peter Mulvany. The contract substantially provided for the sale of the entire crop, which it was supposed would amount to about four or five thousand bushels. According to this agreement, Mulvany was to pay a certain price for the oats, in the following manner: \$600 in cash; \$600, with interest, on a note described as the Witcher and Gross note; \$425 on a note to Peter Mulvany, and what might be due him on the account current; and the remainder, if any, to sundry parties named. The Witcher and Gross note was first mentioned in the contract, but the instrument contained no definite provision that it should be first paid out of the purchase price of the grain. The Gross note was the one referred to in the bill of sale as the Witcher and Gross paper. After the execution of this agreement, but before the delivery of the oats, Gross had an interview with Mulvany concerning the payment of his note, and the liquidation of the mortgage debt. It does not appear that the agreement was referred to, but Mulvany said that he was to handle the crop, and he agreed to pay Gross' note out of the proceeds. Subsequently the crop was threshed and delivered. The price of the oats was not distributed according to the evident understanding and arrangement of the parties, not according to the apparent terms of the instrument, but \$600 was paid in cash at the commencement of the delivery, \$100 thereafter, and on the final settlement Holland and Newby's note of \$425 was surrendered to them, some of Mulvany's accounts contracted during the delivery of the grain were charged off, and the balance was

paid by a check, which was turned over to Mr. Gross, and credited upon the note. The only controversy between the parties is as to what obligation Mulvany incurred with reference to the Gross note. It is contended by counsel for the appellant that none resulted from his agreement to pay that paper. The contract is said to be within the statute of frauds, and therefore void. Such an agreement, however, has never been adjudged to be within the purview of these statutes. An agreement by a debtor to pay his creditor's obligation to a third party has never been regarded as a collateral promise, but wherever it is entered into upon a sufficient consideration, and is accepted by the party to whom the money is to be paid, it has always been deemed an original promise, and enforceable by the party who is entitled to its advantages. *Thatcher v. Rockwell*, 4 Colo. 375; *Brown, St. Frauds*, chapter on "Guaranties." There was an ample consideration for Mulvany's agreement. Part of the purchase price of the oats was paid at the time the contract was made, and the oats themselves were subsequently delivered under the bill of sale. The subsequent performance would afford an ample consideration, and the agreement itself might be referred to for the purpose of determining what the convention was, although he never signed it. *Cary v. McIntyre*, 7 Colo. 173, 2 Pac. Rep. 916.

The note and mortgage to Gross were clearly competent testimony, and the objections made to their introduction were untenable. These papers furnished strong corroborative testimony of the truth of Gross' narration of the occurrence between himself and Mulvany. Mulvany contended that he received the oats without knowledge of Gross' claim, and he sought to avoid the force and effect of his own agreement, and the conversation which he had with Gross, by stating that his only agreement was to pay any balance that might be left after paying all the other obligations named in the bill, and that the order of payment, as expressed, was purely an accidental one. The chattel mortgage which was on record in the county covering this identical crop of oats strongly tended to support the plaintiff's contention that he assented to the delivery of the oats to Mulvany only on Mulvany's promise to pay him the amount of the Holland and Newby obligation. It is hardly probable that a creditor holding ample security for the payment of his debt would consent to the sale of the chattels which were his sole security without some promise, which he deemed both equally binding and safe. The identity of the note and the error in description could only be shown by the production of the paper. Clearly, under all the circumstances, the objections to the introduction of these two instruments were not well taken. The contention that the verdict of the jury is unsupported by the testimony cannot prevail in this court. The case was tried and submitted to the jury under instructions which are not complained of. There is evidence enough in the case to support the verdict, and there

is nothing to show that the jury were influenced by passion or prejudice. Under these circumstances, their verdict upon the facts cannot be disturbed. *Kinney v. Wood*, 10 Colo. 270, 15 Pac. Rep. 402; *Green v. Taney*, 7 Colo. 278, 3 Pac. Rep. 423. It is impossible to discover any error in the record that would warrant a reversal of the case, and the judgment of the court below is affirmed.

OLSON v. SCOTT et al.

(Court of Appeals of Colorado. Oct. 12, 1891.)

TRUST-DEEDS — POWER OF TRUSTEES TO RELEASE
—SUBSTITUTION OF SECURITIES.

1. Plaintiff conveyed land to defendants for \$16,000, taking a note for the amount, secured by a trust-deed. The parties at the same time agreed that as fast as lots were sold defendants would turn over the money in liquidation of the trust-deed, which was to be released as to them, and that when enough were sold to pay the plaintiff, defendants would reconvey to him a fourth interest in all that remained. Plaintiff alleged that after the sale of some lots there was still due \$11,441; that defendants fraudulently conveyed the remaining lots for \$12,000, which was less than a third of their value, payment being made in cash and notes due in one and two years, secured by a trust-deed; that these were accepted by plaintiff's trustee in full of defendants' note, and the trust-deed given by them released; and that the release thus obtained was fraudulent, and without the knowledge of plaintiff. A few days prior to the release plaintiff had written the trustee to continue to release the lots under the agreement, and on the date of the transaction itself plaintiff's attorney indorsed the said letter with the request "please release." Held that, even if the trustee acted beyond his powers in accepting notes which delayed the time of payment one and two years, the error was cured by a decree of court requiring that the amount be paid at once.

2. The fact that defendants conveyed the property to one, who shortly afterwards conveyed it to a corporation, in which he and they were the sole stockholders, while colorable and suspicious, was not of itself sufficient to establish fraud, where defendants showed that the price for which it was sold was the utmost that could be obtained for it, and plaintiff failed to show that the price was inadequate.

Appeal from district court, Arapahoe county; L. M. GODDARD, Judge.

Suit by Peter Olson against G. Oskar Scott and others to set aside a conveyance on the ground of fraud and other relief. Decree for defendants. Plaintiff appeals. Affirmed.

STATEMENT BY THE COURT. This suit originated in transactions between the parties concerning a certain tract of land, appellant being the owner of the farm. Scott, McCourt, and Wiswall, appellees, considering it desirable for subdivision as suburban property for residences, purchased it for that purpose, paying no money. The property was conveyed by appellant by warranty deed, a note made for the entire purchase, \$16,000, and a trust-deed given upon the property to secure the payment. A written contract was made and executed by the parties explanatory of the transaction, which is as follows: "Witnesseth, that whereas, the said parties of the first part have this day purchased from the said Peter Olson certain real estate in the south $\frac{1}{2}$ of the south-west

1/4 of section 33, township 4 south, of range 68 west; and the north 1/4 of the north-west 1/4 of section 4, in township 5 south, of range 68 west, more particularly described in the warranty deed of even date herewith, given by said party of the second part to said parties of the first part; and whereas, said parties of the first part have platted said land and laid the same out into lots, blocks, streets, and alleys, as per a map of the same this day filed in the recorder's office of said Arapahoe county; and whereas, said parties of the first part have this day executed to said party of the second part a trust-deed on said property for the sum of sixteen thousand dollars, (\$16,000;) and whereas, said parties of the first part are desirous of paying said \$16,000 as soon and as rapidly as possible, and said parties of the first part are desirous of selling said property so platted as aforesaid, and putting the same on the market for sale; Now, therefore, in consideration of the premises, it is hereby agreed by and between the parties hereto that as rapidly as any of said property shall be sold by the parties of the first part said party of the second part shall cause to be made and executed by his trustee a release deed of trust for each and every parcel of said property so sold by said parties of the first part, releasing said property so sold as aforesaid from the effect of said trust-deed of said parties of the first part, made and executed as aforesaid, to said party of the second part, bearing even date herewith; and immediately on the sale of any of said property by said parties of the first part the selling price of the same shall be deposited to the credit of said party of the second part in the German National Bank of the city of Denver, until the amount received and deposited as aforesaid shall reach the sum of \$16,000; and the sums so deposited as aforesaid in said bank shall be applied to the payment of the promissory note of even date herewith, for the sum of \$16,000, made and delivered by said parties of the first part to said party of the second part, and secured as aforesaid by said deed of trust; and when said sum of \$16,000 shall have been deposited in said bank as aforesaid, said party of the second part shall cause to be made by his trustee, and delivered to said parties of the first part, a release deed of trust of said property from said deed of trust given as aforesaid, and shall cancel and return to said parties of the first part said promissory note for \$16,000. And it is further agreed by and between the parties hereto that when said \$16,000 shall have been paid in full as aforesaid by said parties of the first part to said party of the second part, and a release deed of trust shall have been executed by said trustee of the party of the second part to said parties of the first part, releasing said lands from said trust-deed, and said party of the second part shall return to said parties of the first part said promissory note so canceled and returned as aforesaid, then said parties of the first part shall make and execute to said party of the second part a good and sufficient warranty deed for an undivided 1/4 interest in and to all of said real estate so platted as

aforesaid remaining unsold at that time. And it is further agreed by and between the parties hereto that no part or parcel of said real estate shall be sold by said parties of the first part except the proceeds of such sale be deposited as aforesaid to the order and credit of the party of the second part in said German National Bank of the city of Denver, state of Colorado, to be applied as aforesaid to the payment of the said promissory note."

It is alleged in the complaint that soon after the date of the conveyance the land was subdivided into 880 lots, a park, called "Olson Park," of 40 acres, streets, alleys, etc.; that the town or subdivision was called "Sheridan," and a plat of the same recorded; that between the date of the contract and the 27th day of February appellees sold 115 lots for \$4,558.75, leaving unsold 665 lots and the park; that the lots remaining unsold were of equal average value with those sold, and of the aggregate value of \$28,535, and that the park was worth \$9,000; that the 115 lots sold were at the time of their respective sales released by the trustee by an agreement with appellant from the operation of the trust-deed; that the consideration for the lots sold (cash, and notes secured by trust-deed) was turned over to and accepted by appellant to be applied upon the note of appellees, that on the 27th day of February, 1889, there was a balance due appellant of \$11,441, and that on that date Scott, McCourt, and Wiswall fraudulently conveyed all the property remaining unsold to appellee, Leves, for the sum of \$12,000, (\$3,000 cash and two notes of \$4,500 each,) due, respectively, in one and two years, secured by a deed of trust upon the property; that the cash, notes, and trust-deed were turned over to Hon. J. A. Cooper, trustee, and accepted by him in full payment of the balance due appellant, and the deed of trust released; that such release was obtained from the trustee by fraud, without compensation, and without the knowledge or consent of appellant; that on the 30th day of March, 1889, Leves conveyed the entire property by him purchased to a corporation called the "Denver Suburban Improvement Company," of which the appellees, Wiswall, Scott, and Leves were the only incorporators, and that the conveyance was made to cheat and defraud appellant out of his interest in the property as reserved to him in the written contract, praying that the release executed by Cooper as trustee be canceled; that the deed from Wiswall, Scott, McCourt, and Leves be canceled; that appellees and the Denver Suburban Improvement Company be enjoined from disposing of or conveying any of the property; and for a judgment of \$12,000 for the balance remaining unpaid from appellees, etc. Defendants answered, denying all the material allegations of fraud, conspiracy, etc., and aver that prior to the 27th day of February, 1889, they spent large sums of money in laying out, improving, and advertising the property, and in efforts to sell the same. That the 115 lots were all they succeeded in selling; admit that there was still due and owing to the appellant \$11,441.25, which would

be due and payable March 1st; aver that the sale to Leves was made in good faith, and for the largest amount obtainable, and that they were obliged to sell to protect themselves against sale under the trust-deed; aver that the appellant had full knowledge of the sale to Leves, and that the trustee was authorized to accept the notes and security and release the trust-deed. That by an agreement made between the parties the following order was executed to the trustee: "Denver, Colo., Feb. 18, 1889. Hon. J. A. Cooper—Dear Sir: You will please continue to release land in Sheridan subdivision as fast as the lots are sold, and receive cash and notes in payment for same, in accordance with agreements on deposit in German Bank. PETER OLSON. Please release S. E. Browne. February 27, 1889." That through such sale to Leves appellees' note was fully paid, and the further sum of \$558.75. A replication was filed, putting in issue the averments in the answer. On March 1, 1890, a decree was entered, the court finding all the issues in favor of the appellees, but requiring them to pay to appellant the sum of \$8,441.25, being the balance due him on the note for the purchase of the property, within 10 days, such payment to take the place of the Leves note, and requiring the trustee to release the property from the Leves trust-deed. The only errors assigned are the following: "First. The court erred in excluding pertinent and legal testimony in behalf of the appellant; second, the court erred in admitting incompetent and irrelevant testimony in behalf of the appellees; third, the finding and judgment and decree of the said court is contrary to law; fourth, the evidence clearly shows that the last release made by the said trustee was void because beyond his power to make, in this: that the time of payment on the note of the appellees to the appellant, to the extent of \$9,000, was extended for one and two years, without the knowledge or consent of the appellant, and without any consideration to him."

Alvin Marsh and Browne & Putnam, for appellant. *Stevens & Ward*, for appellees.

REED, J. The first and second of the supposed errors assigned may be disregarded. No serious error was committed by the court in omitting or rejecting evidence. It is true, the evidence was allowed a wide range, but it seemed necessary for a full and proper understanding of the case. There was considerable conflict in the testimony, but the preponderance appears to have been clearly with appellees, and is corroborated by circumstances and former course of dealing. It is affirmatively alleged in the complaint that the sale to Leves was collusive, fraudulent, and made with the intention to defraud and injure appellant, but the evidence signally fails to sustain the allegation. "It is equally a rule in courts of law and courts of equity that fraud is not to be presumed, but it must be established by proofs." *University of Oxford Case*, 10 Coke, 56; *Story, Eq. Jur.* § 190. Circumstances of mere suspicion, leading to cer-

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tain results, will not in either of these courts be deemed sufficient ground to establish fraud. *Trenchard v. Wanley*, 2 P. Wms. 166; *Townsend v. Lowfield*, 1 Ves. Sr. 35; *Walker v. Symonds*, 3 Swanst. 61. Courts of equity do not require positive proof of fraud. It may be inferred from or established by inferences from facts and circumstances. In this case the conveyance to Leves and by him to a corporation, of which he and others of appellees were the sole incorporators and stockholders, might upon its face be looked upon as colorable, collusive, and suspicious; but this was insufficient. Had the fact been shown that the property was conveyed for an inadequate price, far below its value, that fact, in connection with the colorable transfers, would have gone far to establish fraud. Appellant failed to make such proof, while the evidence of appellees shows it was the utmost they could secure by strenuous efforts. Whether or not appellant was cognizant of and fully informed in regard to the substitution of the Leves notes having one and two years to run after the maturity of the other note in place of the balance remaining due on that, is a question upon which there is quite a conflict of testimony, but the testimony of appellees appears to be sustained not only by the former course of dealing, but by the written order of February 18, 1889, under which was written: "Please release S. E. Browne. February 27, 1889." Gen. Browne having been at that time the attorney of appellant, and the date being that on which the substitution and release was made, the conviction is very strong that the matter was fully understood, and the allegation that the release was obtained from the trustee by the fraud of appellees is not sustained by the evidence, which would go far towards showing that if there was an error the trustee was misled by the request of counsel written under the order of appellant. If the substitution was unwarranted, and worked a wrong by postponing the time of payment one and two years, it was cured by the judgment and decree of the court, requiring the balance due to be paid in 10 days. We think the findings and decree of the court were warranted by the evidence, and that the judgment should be affirmed.

BLAKESLEE v. DYE.

(Court of Appeals of Colorado. Oct. 12, 1891.)

DEPOSITION—NECESSITY OF SEAL.

Under Code Colo. 1887, § 349, providing that the deposition of a witness residing out of the state must be taken on a commission issued by the clerk under the seal of the court, a commission issued without a seal by the judge of the county court acting as his own clerk is a nullity, and the deposition taken under it is inadmissible.

Error to Otero county court; C. W. BOMGARDNER, Judge.

James H. Dye sued Wilmot Blakeslee for commissions for selling defendant's property. Judgment for plaintiff. Defendant appeals. Reversed.

James Hoffnir, for plaintiff in error. *A. F. Thompson*, for defendant in error.

BISSELL, J. Dye brought this action against Blakeslee before a justice in Otero county to recover \$125, which he claimed as a commission upon the sale of certain property belonging to Blakeslee. After a trial before the justice an appeal was taken to the county court, where the action was tried by a jury, which found a verdict of \$50 in favor of the plaintiff, on which the judgment was entered whereon error is assigned. During the progress of the litigation in the county court the plaintiff, Dye, sued out a *dedimus* to take testimony of one Desent in Fayette county, Iowa. Divers errors are insisted upon and argued by counsel in their briefs, but the only one important to consider is that predicated upon the form of the *dedimus* under which the testimony was taken. The writ appears in the record, and was apparently issued by the judge of the county court acting as his own clerk. It is without a seal or any other form of authentication. A motion was made prior to the trial to suppress the deposition because of this irregularity. The error is well assigned. The statute requires (Code 1887, § 349) that the deposition of a witness residing out of the state must be taken upon a commission to be issued by the clerk under the seal of the court. This statute is but declaratory of the law as it existed prior to this enactment. The seal of the court was always a necessary and essential part of every writ issued at the common law. In no other manner did a court of record authenticate its process. It is clear under the authorities that a *dedimus* is a writ, and that it is a process requiring a seal. *Freeman v. Lewis*, 5 Fred. 91; *Ford v. Williams*, 24 N. Y. 359; *Tracy v. Suydam*, 30 Barb. 110; *Churchill v. Carter*, 15 Hun, 385; *Byington v. Moore*, 62 Iowa, 470, 17 N. W. Rep. 644. The statutory provision is in harmony with the general law upon the subject. It must, therefore, be true that the specific requirement of the statute upon the subject must be observed in order to render the process available as an authority to an officer to take the testimony, and that without it the writ would be a nullity, and a deposition taken under it would be inadmissible as evidence. The motion to suppress the deposition should have been sustained, and for the error of the court in this particular the cause must be reversed and remanded.

BABCOCK V. MERRITT *et al.*

(Court of Appeals of Colorado. Oct. 12, 1891.)

REAL-ESTATE AGENTS—COMMISSIONS.

A real-estate agent who is authorized to sell a piece of property for \$7,500, or for \$7,000 net, clear of all commissions, cannot recover commissions from the owner, who herself sells the property for \$7,000 to a purchaser who was introduced to her by the agent, but to whom the agent was unable to make a sale, and who made the agent no offer whatever.

Appeal from superior court of Denver; **MERRICK A. ROGERS, Judge.**

Action by Elmer W. Merritt and another against Mollie E. Babcock for commissions for the sale of defendant's property.

Judgment for plaintiffs. Defendant appeals. Reversed.

Patterson & Thomas, for appellant. *Doud & Fowler*, for appellees.

REED, J. This was an action brought by appellees, Merritt & Grommon, against Mollie E. Babcock to recover commissions as real-estate brokers upon an alleged sale of property of appellant in the city of Denver. Trial to a jury. Verdict and judgment for plaintiffs (appellees) for \$237.50. There is no important conflict in the testimony. At the close of plaintiffs' evidence motion for a nonsuit was made on behalf of the defendant, which was disallowed by the court. The right to recover was based upon the testimony of plaintiffs, which was not seriously controverted by the defense.

The first important question to be determined is one of law,—whether, upon the testimony of the plaintiffs, uncontradicted, they were shown to have earned and to have been entitled to a commission. The following facts were established by the evidence: In the fall of 1885, Mr. Merritt met appellant, who said she was quite anxious to sell the property; that the price was \$7,500, but, if an offer of less was made, it might be submitted to her through her agent. He says: "I told her that I had a party at that time who had been figuring on the property, that I had already shown the property to, and that I hoped to complete a sale," etc. Another interview was had two or three weeks later. "Mrs. Babcock asked me if I had yet completed the sale to this party I had been figuring with before. I told her that I had not yet succeeded in completing the sale, but that I still had the party in tow, and was trying to sell to them." On the 1st of January, 1886, witness formed a partnership with Mr. Grommon, and at some subsequent time again saw appellant, and informed her of the partnership; told her "that we were endeavoring to sell her property; had been advertising it, and were trying to complete a purchase or sale, and that we should use every means in our power;" that he personally never had any further conversation with her. The party referred to by the witness as being the one to whom he supposed he could sell the property was a Mr. J. M. Tompkins, a resident of Cheyenne. The last interview between Merritt and appellant seems to have been in the latter part of February, 1886. On the 29th day of April following, by an arrangement and trade made between Mr. Tompkins and appellant, Mr. Tompkins became the owner of the property. Mr. Merritt had shown the property to Mr. and Mrs. Tompkins with a view of renting it to him. This was in the latter part of February or early part of March. It appears that while looking through the house for the purpose of renting there was some talk of the possibility of his purchasing it at some subsequent time. He wanted to know if plaintiff thought the owners would take in exchange some property which he owned in Cheyenne. He was told that he thought not; that the owner wanted the money,

etc.; that he tried to get an offer or proposition from Tompkins to trade for or purchase the property, but none was made; that Tompkins said that he would rent it for a month, and perhaps he would make a proposition to purchase; that was the last and only conversation he had regarding the sale. On cross-examination, plaintiff said that he tried to get an offer, but did not succeed. There is no evidence to show either that the appellees were ever authorized to trade the property, or sell for anything but cash. It is established by the evidence, and uncontradicted, that the price of the property was \$7,500, and that the lowest offer that would be entertained was \$7,000 net, or clear of all commissions of agents. It is also shown that no talk or conversation had between appellees and Tompkins in regard to the probability of a trade of property was communicated by plaintiffs to the defendant. It is also shown that the offer of \$7,000 cash net for the property would not be entertained, unless the sale was made and the transaction closed before appellant left Denver for Omaha, which was to occur, and did, a day or two after the last interview. It appears that some time during the month of March or early part of April the agent of appellant applied to Mr. Grommon to learn the name of the party who had talked of trading for the property, and was informed that it was Mr. Tompkins, who was renting the property, and who had an office in Cheyenne. This appears to have been the only participation of appellees in the transaction subsequent to the facts stated above. It is shown by the testimony of Mr. Merritt that neither he nor his partner further participated in nor had any knowledge of the dealings between appellant and Mr. Tompkins until some time subsequent to the transfer of the property, when he learned the fact of the sale from the county records. After learning the fact, he addressed the following letter to appellant: "Denver, Colo., May 19, 1896. Mrs. M. E. Babcock, Omaha, Neb.—Dear Madam: We are pleased to see by the records of Arapahoe county that you have sold your property at No. 277 Broadway to Mr. J. M. Tompkins, whom we had the pleasure of interesting in the purchase, first through his wife, in November of last year, soon after you were pleased to place it in my hands for rent and sale, and afterwards Mr. Tompkins himself. We see by the records that the price which you received for the place was \$7,000, and we are glad we succeeded in securing a good customer. Our commission is regular board rates, viz., 5% on first \$2,500, and 2½% on excess, making amount due us of \$237.50, which please remit us at once, and oblige yours, truly, MERRITT & GROMMON. By MERRITT." In the purchase made by Mr. Tompkins he assumed incumbrance on the property of \$4,000; gave his note for \$1,000; put in one house and lot in Cheyenne at an estimated value of \$2,000,—making, as supposed, the consideration \$7,000.

There are a great many reported cases of suits by real-estate brokers to recover commissions. The decisions of the different courts are not all in harmony, but

there are some well-settled rules and legal principles that seem to be well founded in reason that are almost universally conceded as controlling. Two of them only need be invoked in the determination of this case: *First*. Before the broker can be said to have earned his commission, he must produce a purchaser who is ready, willing, and able to purchase the property upon the terms and at a price designated by the principal. *Hungerford v. Hicks*, 39 Conn. 259; *Tombs v. Alexander*, 101 Mass. 255; *Barnard v. Monnot*, 42 N. Y. 203; *Satterthwaite v. Vreeland*, 3 Hun, 152; *Rees v. Spruance*, 45 Ill. 308; *McArthur v. Slauson*, 53 Wis. 41; ¹ *Wylie v. Rank*, 61 N. Y. 415. *Second*. The broker must be the efficient agent or procuring cause of the sale. The means employed by him and his efforts must result in the sale. He must find the purchaser, and the sale must proceed from his efforts acting as broker. *McClave v. Paine*, 49 N. Y. 561; *Lloyd v. Matthews*, 51 N. Y. 124; *Lyon v. Mitchell*, 36 N. Y. 235; *Briggs v. Rowe*, 43 N. Y. 424; *Murray v. Currie*, 7 Car. & P. 584; *Wilkinson v. Martin*, 8 Car. & P. 5. Tested by these general principles, it at once becomes apparent that no commission was earned. The employment was to make a cash sale for \$7,500, or within a short, definite, and limited time at \$7,000 net. These were the terms. No purchaser was found by the brokers who made any proposition to purchase for cash, or any definite proposition to trade property that was or could be communicated by the brokers to their principal. With the renting of the property to the subsequent purchaser, all efforts to sell seemed to have been discontinued, and no knowledge of the transaction with the principal was obtained by the brokers until the fact of the transfer of the property was learned from the county records. In the contemplated sale for cash, commissions were contingent upon selling for \$7,500, or a sum above \$7,000 sufficient to cover them. That having been the contract proved, and the only one made, it is hard to find a legal basis on which to rest the claim for commission. Had the purchaser made, through the broker, a definite proposition to exchange property, which he did not, and the offer had been accepted, commission under the contract proved could not be recovered unless the price obtained exceeded the last net limit given; and, when it is shown that no proposition to exchange was made, communicated to, and acted upon by the owner, it is at once obvious that the means employed by the brokers, and their efforts, did not result in a sale. They found no purchaser, and the sale was not made through their efforts as brokers. The owner herself subsequently sold the property to the tenant. It is true that the brokers gave to the owner the name of the tenant who had previously made an indefinite statement of his possible willingness to exchange properties. But this of itself creates no legal liability to pay commissions. It, at most, would only create a moral obligation to pay for the information received, if the same was beneficial.

¹ 9 N. W. Rep. 784.

They had failed to find and produce a purchaser under the terms of their employment, and the owner was under no obligation to wait longer or indefinitely; and they having failed to negotiate a sale or exchange with Mr. Tompkins, or even get an offer from him, the fact that the owner subsequently sold to the same party to whom they had ineffectually attempted to sell has no legal significance. The law allowing compensations to this class of agents for supposed intervention in real-estate transactions has by many courts been strained to its utmost tension. But I can find no well-considered case sufficiently broad to allow the appellees to recover under the facts in this case. I certainly do not feel like extending it. The law should be so defined and construed as to afford the owner of property some protection against the persistent claims of brokers who seek a recovery on purely technical grounds, and at the same time assure to the broker compensation for services honestly and actually rendered. I cannot indorse the proposition that the placing by the owner in the hands of brokers, perhaps two or three different firms, property for sale for an indefinite time, creates a lien on the property in favor of the broker for commissions in case the owner sells himself at some subsequent time. In the case of *Chandler v. Sutton*, 5 Daly, 117, a case very similar and almost parallel with the one under consideration, I find the conclusion of the opinion by the eminent judge so pertinent, and my own ideas so much better expressed than I can express them myself, that I may be pardoned for quoting it: "The preposterous proposition of Burnett is that because he was employed to sell the defendant's house, and undertook to sell it to a particular person, and could not, no sale of it could be made to that person thereafter, no matter how changed the facts may have been, without paying him a commission; that he has only to lodge his caveat to prevent the owner from selling thereafter to any one to whom he, as broker, tried in vain to sell, unless at the peril of paying to him his full commission." There are several other errors assigned, notably the instructions to the jury. I may be permitted to say that the instructions are in some parts particularly faulty in submitting to the jury questions of fact not warranted by the evidence. If I did not find the judgment of the court erroneous in refusing a nonsuit, I should be compelled to reverse the case upon the instructions; but, having found that no commission was earned, a review of the instructions is unnecessary. The judgment should be reversed, and cause remanded.

(1 Colo. App. 101)

COOPER v. WOOD *et al.*

(Court of Appeals of Colorado. Oct. 12, 1891.)

COMPETENCY OF WITNESS—AMENDMENT OF PLEADING—EVIDENCE OF PARTNERSHIP—ADMISSIONS.

1. Where, in a suit against one member of a firm and the estate of a deceased member, the partnership is denied by defendant estate, the surviving partner is not a competent witness to prove the partnership, under Mills' Ann. St. Colo. c. 182, § 4814, prohibiting a party directly

interested in the event of the suit from testifying when the adverse party sues or defends as administrator of any deceased person.

2. Where, in a suit against one member of a firm and the estate of a deceased member, the defense pleaded is that the firm was dissolved before the debt was contracted, and that plaintiffs accepted the individual liability of the surviving member, and settled with him individually, and this member testifies that he gave plaintiffs a chattel mortgage as security, it is an abuse of discretion for the trial court to refuse to allow the answer to be amended so as to set up the giving and receipt of the chattel mortgage in satisfaction of the debt.

3. In such case, evidence of all the transactions between plaintiffs and the surviving partner are admissible.

4. In a suit against a surviving partner and the estate of his deceased copartner, the admissions of the survivor are not competent to show that the debt sued on was a firm debt, especially where there is evidence that prior to the death of the deceased partner the survivor had assumed the debt as his individual liability, and had given his individual note and security for it.

Error to Lake county court; WILLIAM R. HALL, Judge.

H. D. Wood and others sued Isaac Cooper and C. H. Tibbetts as partners for a firm debt. Pending the suit, Cooper died, and his wife, Sarah F. Cooper, as administratrix, was substituted. Judgment for plaintiffs. Sarah N. Cooper appeals. Reversed.

J. E. Havens and *Bennett & Bennett*, for plaintiff in error. *C. S. Libby*, for defendants in error.

REED, J. If this were not a case affecting the estate of a deceased person, requiring a speedy termination, to enable a settlement of the estate at as early a date as practicable, we should be obliged to dismiss the suit, under the rules of the court, for want of a proper abstract. What purports to be an abstract contains nothing but a copy of the pleadings, and what counsel call a summary of the assignment of errors. Nearly every supposed error arose upon the admission and rejection of evidence, yet the abstract contains no evidence whatever upon the admission and rejection of which errors are assigned, and no reference to the folios or pages of the record where it can be found; but, under the circumstances of this particular case, the rule will be waived, hoping such irregularities will not again occur. The suit was brought by defendants in error (partners) against Isaac Cooper and C. H. Tibbetts, as partners, to recover the balance due upon goods alleged to have been sold to the defendants. Service was had upon Isaac Cooper, but none upon Tibbetts. The complaint is in the ordinary form, alleging a balance of \$558 and interest to be due, and asking judgment. The answer of the defendant Cooper, after denying every allegation of the complaint generally, specifically denies the existence of the partnership of the defendants, and avers that in June, 1880, and before the debt sued for was contracted, he, the defendant, notified the plaintiffs that no partnership existed, and forbade any sale of goods to Tibbetts on his responsibility. It is also further averred in the answer that plaintiffs afterwards set

tled with Tibbetts individually for the amount due, including the claim in this suit, and took the individual note of Tibbetts and a trust-deed upon real estate to secure the payment of the note; that the plaintiffs accepted and received the same in satisfaction of the original indebtedness of Tibbetts. In reply, plaintiffs reassert the partnership of defendants, admit the settlement made with Tibbetts, and the taking of his note and the deed of trust as security, but aver it to have been as collateral security only, and allege the non-payment of the note, and a failure to realize anything upon the security. Previous to the trial, defendant Cooper died, and plaintiff in error, as administratrix, was substituted. It also appears from the record that during the trial counsel of defendants moved the court for leave to amend the answer by alleging that the individual note of Tibbetts was further secured by a chattel mortgage upon personal property, and leave to amend was denied by the court. Trial was had to the court without a jury, resulting—as near as it can be understood—in a judgment against the supposed firm of Cooper & Tibbetts for the sum of \$1,008.50, and judgment for like amount against the estate of Cooper, deceased. The existence of the partnership between the defendants having been directly and specifically put in issue, plaintiffs, in order to recover against the estate of Cooper, were obliged to establish it affirmatively. An attempt was made to establish it by secondary evidence, such as general reputation, circumstances, etc., but this class of loose, indefinite testimony of circumstances, common report and reputation "is not admissible, except in corroboration of previous testimony, unless it be to prove the fact that the partnership otherwise shown to exist was known to the plaintiff." 2 Greenl. Ev. § 483. Numerous other authorities might be cited, but the proposition is so elementary and well understood it is unnecessary.

Tibbetts, the supposed partner, was put upon the stand as a witness for the plaintiffs, and testified: "I lived in Bowman, Gunnison county, Colorado, in 1880 and 1881, and was engaged in merchandising. Had a partner in the business,—Isaac Cooper, now deceased." This was the only direct testimony to establish the partnership which was found by the court. This was error. The supposed partner was not competent as a witness to establish the partnership. Section 4816, c. 132, Mills' Ann. St., is as follows: "That no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein, of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of an idiot, lunatic, or distracted person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, unless when called as a witness by such adverse party so suing or defending." This is a copy of the statute of the state of Illinois. I can find no case in

our own Reports where the exact question has been determined, but it has been adjudicated and construed in that state, and directly held that a surviving partner was incompetent, by reason of his interest. See *Langley v. Dodsworth*, 81 Ill. 86; *Hurlbut v. Meeker's Ex'r*, 104 Ill. 541. The latter case is directly in point. It is said in the opinion, after quoting the statute: "Under this statute we are satisfied that neither J. D. Hurlbut nor D. N. Hurlbut was a competent witness for the plaintiff. They were not made defendants in the action, but were directly interested in the event of the suit. They were members of the firm of Hurlbut Bros. & Co. at the time the note was executed, and were makers of the note in suit, and hence had a direct interest in the result of the pending action." In the course of the examination of the witness Tibbetts the following occurred: "Question. State whether or not, of your own knowledge, the account sued upon in this action has been paid. Answer. Well, in my judgment, it has been paid. I gave the plaintiffs a promissory note, and also a chattel mortgage, to satisfy that account. It was my individual note. Have never received the note in return. Plaintiffs received payment of that note. They did not receive any money. I do say the plaintiffs realized the goods in the house which I gave them, in a chattel mortgage upon the goods in the Tibbetts House, to pay this account." At this stage of the proceedings leave was asked to amend the answer as above stated, and denied. The refusal to allow the amendment was an abuse of the discretion of the court, and may have worked great injustice to the defendant. Either the pleadings should have been allowed to have been amended, or, in proof of payment, all the transactions between Tibbetts and plaintiffs, and all facts of dealings in the way of payment or satisfaction, should have been elicited. This becomes more apparent in the subsequent testimony of Tibbetts, when called by defendant, and in the refusal of the court to allow the witness to testify to certain facts offered in proof, which, if established, would of necessity have shown, if not full, at least partial, payment by the witness. He stated that in payment of his individual note at its maturity he turned over to plaintiffs the personal property covered by the chattel mortgage; that plaintiffs took possession and charge of it; no portion was ever returned to him; and that it was used by plaintiffs in the Tibbetts House, at Aspen. He was then asked the value of the property. Objection was made and sustained. Defendants also attempted to prove by the witness that the witness was misled by one of the plaintiffs at the time the real property was sold under the trust-deed; that plaintiff informed him that he would protect his interests, and that it was unnecessary for him to attend the sale; that he remained away, and the property was bid in for a nominal sum, far below its value, etc.; but was not allowed to make the proof. How far the defendant might have been successful in establishing the facts contained in his offers of proof of

course cannot be known, but the opportunity should have been allowed him. It is unnecessary to follow this subject further. The whole matter should have been investigated.

In defending suits of this character estates are at great disadvantage, and, to a great extent, at the mercy of claimants. The actor in the transactions, who did the business, and knew all the facts and details, being dead, the representative of the estate, having no knowledge only that subsequently gained, cannot, in the first instance, in all cases interpose all necessary defense, and courts should, in the interest of justice, and for the protection of widows and children, afford every reasonable facility for the full investigation of every asserted claim. Such facilities were not given, nor such protection, to the estate upon the trial of this cause.

Another important question, which, as far as I can ascertain, has not been determined in this court, is presented in this case, viz., whether, under any circumstances, after the dissolution of the partnership, the admissions or acknowledgments of a former partner are admissible to establish a cause of action against a former partner. In England, the rule for years was well settled that such admissions are competent, not only to take the case out of the statute of limitations, but to establish or create a firm indebtedness. It was based upon the opinion of Lord Mansfield in *Whitecomb v. Whiting*, 2 Doug. 652, and what Judge Story (*Story, Partn.* § 323) did not hesitate to call "an unreasoned decision." The case has been severely criticised in the English courts. See opinion of Lord Kenyon in *Clarke v. Bradshaw*, 3 Esp. 155; of Lord Ellenborough in *Brandram v. Wharton*, 1 Barn. & Ald. 463; and Lord Tenterden in *Atkins v. Tredgold*, 2 Barn. & C. 23; and the doctrine has been limited and partially overturned by late acts of parliament. In the United States, considerable diversity of opinion is expressed in the different courts, some few states adhering to and following the old English decisions; but in federal courts the English doctrine has been overruled, and the admissions held inadmissible, first in the case of *Clementson v. Williams*, 8 Cranch, 72, followed by Judge Story in *Bell v. Morrison*, 1 Pet. 373. In *Bispham v. Patterson*, 2 McLean, 87, the learned judge, after reviewing the authorities, expressed his conviction in favor of the English rule, but yielded to American precedents, and decided the case in harmony with them. The American rule, overruling early English decisions, has since been followed in those courts. See *Thompson v. Bowman*, 6 Wall. 316. In a great majority of state courts the English doctrine has been overruled; first, in the state of New York, and followed by at least 20 other state courts. In New York the English rule was repudiated as early as *Walden v. Sherburne*, 15 Johns. 409, which has been since followed in *Van Keuren v. Parmelee*, 2 N. Y. 523, in which the decisions of the different states are carefully and ably reviewed in the court of appeals, resulting again in overruling the English doctrine. The princi-

pal authorities on the subject will be found collected in 3 Kent, Comm. 49-51. The power of an individual partner to bind the firm during its existence arises only from the fact that each is the agent of the firm, and "it seems difficult upon principle to perceive how they can be any more than the declarations or acts or acknowledgments of any other agent of the partnership would be after his agency has ceased." *Story, Partn.* § 323; and see *Ellicott v. Nichols*, 7 Gill, 85; *Thompson v. Bowman*, 6 Wall. 316. There is certainly great authority, as well as reason, for adopting the American rule. In this case, not only was the partnership dissolved, but the party to be charged was dead; "but, however the doctrine may be after a dissolution in cases where all the partners are living, it is very clear that no acknowledgment by the surviving partners after the death of one of them will revive the debt against the estate of the deceased partner." (*Story, Partn.* § 324a;) and this seems also to be the English as well as American rule. See *Atkins v. Tredgold*, 2 Barn. & C. 23; *Slater v. Lawson*, 1 Barn. & Adol. 396; *Crallan v. Oulton*, 3 Beav. 1; *Way v. Bassett*, 5 Hare, 67. In this case, not only was the party whose estate is sought to be charged dead, but the claim in suit, prior to his death, had been assumed as the individual debt of Tibbetts and his individual note and security taken in supposed extinguishment of any partnership liability; yet the witness was allowed to testify not only that the debt was originally a firm debt, but that it remained so notwithstanding the fact that previous to the death of Cooper it had apparently been regarded by all concerned as the debt of Tibbetts alone. Certainly, if in any case a rule of law will close the mouth of a surviving partner, it should be applied in this, where not only the direct interest of the witness, but the rule of law, relieves the estate from the effects of such directly interested testimony. We have no hesitancy in saying that the admissions and statements of Tibbetts, calculated to charge the estate, were incompetent, and should have been excluded. The judgment should be reversed, and the cause remanded for a new trial.

CASE V. DANIELS.

(Court of Appeals of Colorado. Oct. 12, 1891.)

LIABILITY OF SURETY ON APPEAL-BOND.

The omission of the name of the surety from the face of an appeal-bond and from its recitals does not release him from liability if he signs the bond and justifies as surety.

Appeal from El Paso county court; JAMES B. SEVERY, Judge.

O. L. Daniels sued E. W. Case as surety on an appeal-bond. Judgment for plaintiff. Defendant appeals. Affirmed.

Fred Betts, for appellant. Walter M. Hatch, for appellee.

BISSELL, J. In June, 1888, the appellee, Daniels, brought an action against S. Y. Case, before a justice of the peace in El Paso county, and recovered a judgment

against him, amounting to about \$132. The judgment debtor prayed an appeal to the county court, which was subsequently dismissed, for reasons which it is unnecessary to state, and a *procedendo* issued. The present action was brought upon the bond given on the appeal taken to the county court, and resulted in a judgment against the appellant, E. W. Case, from which the present appeal was prosecuted. In its general provisions the bond was executed according to the form prescribed by the statute. There was no material variance from the general statutory requirements, and it would be held sufficient in form to render the appellant liable according to its terms, unless the omission hereafter considered would operate to discharge him. It is not essential, in order to bind the obligors, that the bond be in the specific form expressed in the statute, but it is enough that the instrument substantially conforms to its provisions. This has always been held adequate to make a binding obligation. *Crane v. Andrews*, 10 Colo. 265, 15 Pac. Rep. 331; *Schill v. Reisdorf*, 88 Ill. 411. The bond was incomplete in one particular, which, it is insisted, rendered it so absolutely defective as to entirely preclude a recovery. The instrument as introduced in evidence recites that "we, S. Y. Case, etc., are held, etc.: Now, therefore, if the said S. Y. Case shall, etc., the obligation to be void; otherwise to remain in full force." It is thus evident that upon the face of the instrument and in its recitals the name of the appellant and surety was not inserted. But it appears that E. W. Case signed the bond, and he deposed in the form provided for this class of obligations that he was a householder and freeholder, resided in Colorado Springs, and was worth double the amount of the penalty of the bond; and he likewise acknowledged that the instrument was subscribed by him as his free act and deed, for the uses and purposes therein set forth. The judgment was stayed upon the bond, and the appeal was prosecuted until it was dismissed by the county court, to which the appeal had been taken. No good reason can be given for releasing the surety, Case, from the obligation which he assumed. According to the course of all the authorities, this would be a good common-law instrument, binding upon all persons who had signed and sealed it according to its terms and conditions. That this is a statutory instrument ought not, in the law, to absolve the surety from the contract into which he entered, unless there be found within the enactment some mandatory provision from which there is no escape. There is nothing in the statute which necessitates this conclusion. According to its terms it is only necessary that the bond be in substantial conformity to the prescribed form. The technical objection should not avail to discharge a contract into which a party has voluntarily entered. In a well-considered case in Illinois, (*Nell v. Morgan*, 28 Ill. 524,) under a statute similar to the one which prevails in Colorado, it was expressly adjudicated that neither the omission of a name nor a mistake in it would operate

to relieve a bondsman from liability when it appeared that he was the individual who had affixed his name to the obligation. The decision is in harmony with antecedent adjudications upon similar questions, and results in the enforcement of no obligation except that into which a party has voluntarily entered, and it must meet with the approval of the courts. Finding no error in the record, the judgment must be affirmed.

CUMMINS v. PEOPLE.

(*Supreme Court of Colorado. Oct. 5, 1891.*)

FALSE PRETENSES.

One who obtains money by false pretenses is liable to punishment, though the person from whom it was obtained parted with it in furtherance of an illegal purpose to obtain by fraud valuable land from the United States.

Petition by John Cummins for a writ of *habeas corpus*. Writ denied, and prisoner remanded.

STATEMENT BY THE COURT. In June, 1891, petitioner was examined before a justice of the peace in and for Las Animas county under four separate and distinct charges of obtaining money under false pretenses. As a result of such examinations he was required in each case to give bond for his appearance at the next succeeding term of the district court to be held in Las Animas county to answer such charges, or, upon a failure so to do, to be committed to the common jail of the county to await the action of the grand jury. The petitioner failing to furnish bond, warrants of commitment were issued, upon which he was incarcerated in the county jail. Thereupon he made application to the Honorable J. C. GUNTER, judge of the third judicial district, to be discharged upon a writ of *habeas corpus*. After a full hearing upon such application the prisoner was remanded to custody. It appeared, however, from the complaint, as well as by the evidence, that the money which he had obtained by the alleged false pretenses was paid in each instance by the prosecuting witnesses, respectively, in the furtherance of an illegal purpose to obtain by fraud valuable coal lands from the United States. The application is now renewed in this court.

Dixon & Dixon, for petitioner. *Joseph H. Maupin*, Atty. Gen., for the People.

HAYT, J. If two persons conspire together to accomplish an unlawful purpose, and one, by false pretenses, obtains money from the other, which the latter parts with in furtherance of the illegal purpose, will a prosecution lie against the former for obtaining the money under false pretenses? This is the substantial question presented upon the record. Counsel for petitioner contend that it will not, while the affirmative is assumed by the attorney general. The authorities bearing upon the question cannot be reconciled. In the leading cases of *Com. v. Henry*, 22 Pa. St. 253, and *McCord v. People*, 46 N. Y. 470, exactly opposite conclusions were reached upon facts that are quite similar. In the former case it was

alleged in the indictment that the defendant, intending to defraud the prosecutor, falsely asserted to him, and also to another person, who communicated it to him, that he had a legal warrant for the arrest of the daughter of the prosecutor for an offense punishable by a fine and imprisonment, and that he threatened to arrest her, by means of which representation he obtained from the prosecutor property of the value of \$100. The trial court having quashed the indictment, its judgment was reversed by the supreme court and the indictment declared sufficient. In the case of *McCord v. People*, supra, the indictment charged the defendant with having falsely and fraudulently represented that he had a warrant for one Miller, and that Miller, believing said false representations, was induced to and did deliver to the defendant a gold watch and diamond ring. In this case it was held that, as the property had been voluntarily surrendered as an inducement to the officer to violate the law and disregard his official duties, the indictment could not be sustained; the court declaring that the statute against obtaining money by false pretenses was designed to protect only those who for an honest purpose are induced by false or fraudulent representation to give credit, or part with their property, and not to protect those who do this for an unworthy or illegal purpose. The opinion of the court in this case is quite brief, while *PECKHAM, J.*, filed an able and exhaustive dissenting opinion. In support of the majority opinion two cases are cited by the court, viz., *People v. Williams*, 4 Hill, 9; *Same v. Stetson*, 4 Barb. 151. An examination of the former case shows it to be no authority upon the question presented here; the decision being simply to the effect that a false representation, to be within the statute, must be such as is calculated to mislead persons of ordinary prudence and caution,—a conclusion not generally accepted elsewhere. 2 Bish. Crim. Law, § 433. In *People v. Stetson*, supra, it seems, however, to have been determined that, if the owner in parting with his property, etc., was himself guilty of a crime, the indictment, under the statute, could not be sustained; and a similar conclusion was reached in *State v. Crowley*, 41 Wis. 271, in which case the information charged a conspiracy on the part of several defendants to defraud the prosecutor of his money, and, the proof showing that the conspiracy charged was in connection with an unlawful enterprise, in which the prosecutor and the defendants were *particeps criminis*, it was held that a conviction was not warranted. It appeared, also, that, had the prosecutor exercised common prudence and caution, he could not have been misled by the false pretenses by which he was induced to part with his money. In opposition to this doctrine, and in line with the Pennsylvania decision, we find *Com. v. Morrill*, 8 Cush. 571. Mr. Bishop, reviewing the different conclusions, says: "Another doctrine sustained in New York is that where, if the false pretenses were true, the person parting with his goods would be guilty of a crime therein, or

where he actually commits an offense in parting with them, the indictment for the cheat cannot be maintained. On the other hand, the Massachusetts court appears to have directly discarded this doctrine. The point decided was that a defendant cannot set up, in answer to an indictment of this nature, any wrongful representation of the person injured concerning the goods charged to have been obtained through the false pretense. 'Supposing,' said *DEWEY, J.*, 'it should appear that [the individual defrauded] had also violated the statute, that would not justify the defendants. If the other party had also subjected himself to a prosecution for a like offense, he also may be punished. This would be much better than that both should escape punishment because each deserved it equally.' And this view accords with the general spirit of the criminal law, wherein the fault of one man is not received in excuse for that of another; while the New York doctrine would introduce a well-known principle of civil jurisdiction into a system of laws to which it is alien." 2 Bish. Crim. Law, (7th Ed.) § 469. Finding this conflict in the authorities, we are left free to decide the question propounded solely upon principle. In our opinion, the conclusion reached by Mr. Bishop is supported by the better reasons. The primary object of punishment is the suppression of crime; and, where both the prosecutor and defendant have violated the law, it is better that both be punished than the crime of one should be used to shield the other. When the plaintiff in a civil action is shown to have been guilty of a wrong in the particular matter about which he complains, he cannot ordinarily recover. But there is little chance to apply this rule to criminal prosecutions conducted by the state; the person defrauded being at most a prosecuting witness in the case, and not a party to the proceeding. The language of our statute is plain. "false pretenses charged in this case are embraced within its express terms, and we are not in favor of sanctioning a rule that will permit offenders to escape by showing that another should also be punished. The petitioner's application to be discharged will therefore be denied, and the prisoner remanded.

TANEY V. O'CONNELL.¹

(Supreme Court of Colorado. July 3, 1891.)

EXECUTION—PROPERTY SUBJECT TO LEVY—EQUITABLE INTEREST ON LAND—CREDITORS' BILL.

1. Plaintiff alleged that he was a judgment creditor of defendant; that the latter had bought land, taking the deeds in his wife's name, and had no property out of which plaintiff's judgment could be satisfied. The bill prayed that defendant's wife be declared a trustee as to the lands, and that she convey them to her husband and that they be sold to satisfy the judgment. The court found that the purchase money was accumulated by the joint exertions of husband and wife, and that they were equal owners. The decree was for the conveyance of an undivided half. Held that, although plaintiff might have had an execution against the undetermined in-

¹ Rehearing denied, October 19, 1891.

terest of defendant, under Gen. St. Colo. § 1883, making every legal or equitable interest subject to levy, he was not obliged to proceed in that way, but was entitled to have the said interest determined in advance.

2. An allegation that the defendant was insolvent at the time the legal title was vested in his wife was unnecessary, for the reason that the action was not to set aside the conveyances on the ground of fraud, but to uphold them, and decree the wife as trustee to convey the interest of the husband, so that the same might be subject to the payment of debts.

Appeal from superior court of Denver; MERRICK A. ROGERS, Judge.

Action by Patrick Taney against Katherine O'Connell, impleaded with John O'Connell, to subject an undivided interest in land to the payment of a judgment. There was judgment for plaintiff, and defendant appeals. Affirmed.

Steele & Malone, for appellant. *L. C. Rockwell*, for appellee.

HAYT, J. As the amended complaint was filed by leave of court, it superseded the original, and need only be considered. In this pleading Patrick Taney, appellee, as plaintiff, made John O'Connell, Katherine O'Connell, John Sheehan, William C. Graves, and J. F. Conroy defendants. It alleges that on the 30th day of June, 1885, plaintiff recovered a judgment in the superior court of the city of Denver against said defendant John O'Connell for the sum of \$2,262.30 and costs of suit; that afterwards a transcript of said judgment was filed in the office of the clerk and recorder of Arapahoe county; that in March, A. D. 1885, execution was duly issued by the clerk of the court rendering said judgment, and delivered to the sheriff of Arapahoe county for execution; that said sheriff returned the same in April, 1886, *nulla bona*. It is also averred that the said John O'Connell has no property interests, either real or personal, in the state of Colorado, out of which said judgment, or any portion of it, could be made; that the action wherein said judgment was rendered in favor of the plaintiff was based upon a certain appeal-bond signed by said John O'Connell as surety for one Michael Green; under date of June 27, A. D. 1881, and immediately prior to said day and date, said John O'Connell had been working upon the Denver & Rio Grande Railroad in various capacities; while so engaged in said business he had made a large sum of money, to-wit, not less than \$8,000; that in October, 1881, he bought certain lots in the city of Denver with the money so earned, but had the deed for said property made to his wife; that in November he bought certain other lots, taking the deed in the same way; that in February, 1882, he purchased certain additional lots, causing these lots to be transferred to his wife. Plaintiff avers that Katherine O'Connell gave no consideration whatsoever for any part or portion of said premises so purchased, but that the whole consideration paid therefor was paid by her husband out of his own money and property. The remaining portion of the complaint is taken up with reference to certain real estate situated in the state of Kansas, for which certain Denver property, not enu-

merated above, had been traded. There are allegations in this pleading charging the defendants Sheehan, Graves, and Conroy with conspiracy with the O'Connells to cover up the property in Kansas so as to hinder and delay the plaintiff in collecting his judgment; but, as the court below held that it had no jurisdiction over the property in Kansas, it is unnecessary to further consider the allegations in this respect. Plaintiff demands judgment—*First*, that the said Katherine O'Connell be declared to be a trustee for said John O'Connell as to the lands described in the complaint; *second*, that she be required to convey said lands to her said husband, and that the same be sold to pay plaintiff's said judgment. The defendants Katherine O'Connell and John O'Connell filed separate answers to this amended complaint. These answers contained, *inter alia*, specific denials of each allegation of the complaint. A replication was thereafter filed. The cause was tried to the court on December 10, 1885, without a jury. Upon the conclusion of the trial the case was taken under advisement.

On March 5, 1885, certain findings of fact were made, and a decree entered thereon. By the first of such findings all the equities were determined in favor of plaintiff; also that the judgment was duly entered in favor of plaintiff, as alleged in the complaint. The court further finds that the said defendant John O'Connell was jointly interested with his wife, Katherine O'Connell, in boarding men working on the Rio Grande Railroad, and that they accumulated the sum of \$8,000 in the enterprise, which went into the purchase of the property, the deed to which was taken in the name of the wife; that said John O'Connell had a certain interest in said property, which interest stood in the name of Katherine O'Connell, who was decreed to be a trustee holding said property for John O'Connell to the extent of his interest therein. The court being unable to find the extent of the interest of the said John O'Connell and Katherine O'Connell, respectively, in the premises, there being no evidence as to the amount of money earned and received by said defendants John O'Connell and Katherine O'Connell, respectively, while they were in the employ of the said railroad company as aforesaid, ordered an accounting of these matters, and also of the moneys received by the parties as rents, issues, and profits of the above-described premises, situated in the said city of Denver, Arapahoe county, aforesaid. As a result of such accounting, the court, upon the 2d day of the following month of July, found that John O'Connell and Katherine O'Connell were equal owners in the property, and ordered appellant to pay appellee's claim within 20 days from the date of said decree. In default of such payment, the said defendant Katherine O'Connell was ordered to deed an undivided one-half of said property to John O'Connell in order that the same might be sold under execution to satisfy appellee's claim as aforesaid. By section 1883 of the General Statutes, every interest in land, whether legal or equitable, is made subject to levy and sale under execution. Under

this provision appellee might have caused the execution issued upon the judgment in the case of Taney v. O'Connell to have been levied upon the latter's interest in the very property herein controversy, and the same be sold in satisfaction thereof. Had this course been pursued, the purchaser thereafter could have maintained an action for the purpose of having his interest in the premises determined. The judgment creditor was not, however, compelled to resort to this mode of procedure. The action which he did institute might be pursued with, at least, equal propriety. Many reasons might be suggested in favor of the latter course. Until the interests of the judgment debtor in the property should be established by a court of competent jurisdiction, a sale of the undetermined interest would not be likely to result in any substantial diminution of the creditor's claim. Purchasers can rarely be induced to pay more than a nominal sum for an interest in property dependent upon a successful determination of a lawsuit, with its usual uncertainties. In order that the best results may be attained, and the interest not sacrificed, prudence will often dictate the settling of the title in advance of sale, as was attempted in this case.

It is claimed, however, that the decree of the court below cannot be maintained, for the reason that it is not alleged in the complaint that John O'Connell was insolvent at the time the legal title to this property was placed in his wife. If this were a suit to set aside the conveyances on the ground of fraud, in the interest of creditors, such an allegation would be necessary. But it is not such a suit; on the contrary, this action proceeds upon the theory that such conveyances were legal and valid. To defeat them for any reason would be to defeat the present action. It proceeds, and can only be successfully maintained, upon the ground that the husband has a resulting trust in the property, the legal title to which is in the wife. Under our law, husband and wife may deal in reference to property the same as though no marital relation existed between them. The husband may deed direct to the wife or the wife to the husband, and, in the absence of fraud, a good title may be conveyed. As in the absence of the marital relation it is well established that where one has acquired title to property which in equity belongs to another, the party holding the legal title will in equity be declared a trustee, and decreed to convey to the party equitably entitled thereto, so in this case the husband might have maintained an action for his interest in the very property in controversy. It is this interest that plaintiff is seeking to subject to the payment of his debts. It is not claimed that this property was settled upon the wife in pursuance of any agreement, ante-nuptial or post-nuptial; or that it was conveyed as a gift from the husband, as in *Thomas v. Mackey*, 3 Colo. 390. And no allegation of insolvency at the time of the conveyance is necessary in order that the husband's interest may be subjected to the payment of his debts. *Bank v. Wheaton*, 8 Me. 373. As the judg-

ment of the court below must be affirmed upon the merits, it is not necessary to determine whether or not the judgment was properly excepted to.

ELLIOTT, J., did not participate in this decision.

UNIVERSAL FIRE INS. CO. v. TABOR *et al.*

(Supreme Court of Colorado. Oct. 5, 1891.)

GARNISHMENT—UNPAID SUBSCRIPTIONS TO CORPORATIONS—ACTION TO ENFORCE.

1. Under Mills' Ann. St. Colo. § 480, which provides that stockholders in corporations are not required to pay on subscriptions to stock until after 20 days' personal notice or 30 days' written or printed notice, an action cannot be maintained against stockholders, as garnishees of the corporation, for unpaid subscriptions of stock, until such notice has been given and the time allowed thereby expired.

2. Where an execution against a fire insurance corporation has been returned, "No property found," and the company has gone out of business, a suit to reach unpaid subscriptions to its stock must be brought under Mills' Ann. St. Colo. § 497, which provides for suits in equity, joining with the corporation each of its stockholders who may be held liable for the amount of their unpaid subscriptions of stock.

Error to district court, Arapahoe county; VICTOR A. ELLIOTT, Judge.

Action by Universal Fire Insurance Company against Horace A. W. Tabor and others to charge them as garnishees of the Tabor Fire Insurance Company for unpaid subscriptions to its stock. Judgment for defendants. Plaintiff brings error. Affirmed.

E. Miles, for plaintiff in error. *R. D. Thompson* and *L. C. Rockwell*, for defendants in error.

HELM, C. J. This cause was tried to the court below on an agreed statement of facts. Plaintiff in error obtained judgment by default for \$500 and interest against the Tabor Fire Insurance Company, a corporation existing under the laws of Colorado. An execution issued, was returned "No property found," and, the corporation having ceased to do business, the debt remains unsatisfied. Defendants in error were subscribers to the capital stock of the Tabor Fire Insurance Company, having, however, paid but about 25 per cent. of the par value of the stock taken by them. The present proceeding is under the statute relating to garnishments after judgment. Defendants in error, as garnishees, answered, denying liability to the defendant company. Issue being taken upon this answer, the question was tried, resulting in a judgment in favor of the garnishees. To review this judgment the present writ of error was sued out.

Several questions are presented by the assignments of error and arguments of counsel. But, since a determination of one of these questions will be decisive of the present review, we deem it unnecessary to notice the others. By statute, in this state, a stockholder is not required to pay any installment upon the unpaid balance of his subscription until "twenty days after personal demand therefor, or, in cases where personal demand is not

made, within thirty days after a written or printed demand has been deposited in the post-office. * * * "Mills' Ann. St. § 480. The stockholder's unpaid balance upon his subscription is not, in and of itself, a legal debt due the corporation. And until demand is made, as above provided, and the period mentioned has expired, no cause of action accrues in favor of the corporation, and no action can be maintained in its name. Mor. Priv. Corp. §§ 143, 823. Since, in the absence of fraud between defendant and a garnishee, the latter cannot, by virtue of garnishment proceedings, be placed in a worse position than he would occupy if defendant's claim against him were enforced by defendant himself, it is held that, in cases like the present, where the assessment or demand has not been made in accordance with law, the garnishee is not liable. Mor. Priv. Corp. § 143, *supra*; Wap. Attachm. p. 202; Drake, Attachm. § 458; McKelvey v. Crockett, 18 Nev. 238, 2 Pac. Rep. 386; Simpson v. Reynolds, 71 Mo. 594.

But judgment creditors of corporations are not remediless. By proper proceedings in equity, as well before as after dissolution in cases of insolvency or of failure or refusal to levy the requisite assessments, the unpaid balance of the stockholders' subscription may be reached and applied to the discharge of their judgments. Lane's Appeal, 105 Pa. St. 49; 2 Mor. Priv. Corp. § 821; Hatch v. Dana, 101 U. S. 205; Tayl. Priv. Corp. §§ 661, 703.

Counsel for appellant urges that in this state, since forms of action have been abolished, the foregoing rules and authorities are inapplicable. He contends that, however it may be under the common-law procedure, it is not now necessary here to resort to a suit in equity or to await the corporation's demand for installments upon unpaid subscriptions; and that the proceeding by garnishment is maintainable, though but for the adoption of the Civil Code it would not be. Such a view has, we believe, been taken in one or more of the states where the reformed procedure has superseded the procedure at common law. We shall not determine whether, under like circumstances, this view would be accepted here. The action of the legislature, in our judgment, forbids the maintenance of the present proceeding. In the chapter on corporations, already referred to, it is provided that "if any corporation, or its authorized agent, shall do any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record for a payment of money, after demand made by the officer, to be returned, 'No property found,' or to remain unsatisfied for ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way for the debts of the corporation, by joining the corporation in such suit, and each stockholder may be required to pay such debts or liabilities to the extent of the unpaid portion of his stock. * * * "Mills' Ann. St. § 497 This section expressly recognizes and preserves, in substance, the eq-

uitable remedy existing where the common-law procedure prevails for cases wherein no proper assessment has been made in accordance with the statute. We are of the opinion that this remedy should be given the same exclusive force as pertains to the similar suit in common-law jurisdictions which it supplanted. Plaintiff in error should have proceeded under section 497 aforesaid, instead of attempting to avail himself of the garnishment provisions. The judgment of the court below is affirmed.

ELLIOTT, J., not sitting.

SPEER v. CRAIG *et al.*

(Supreme Court of Colorado. Oct. 5, 1891.)

AUTHORITY OF REAL-ESTATE AGENT—PLEADING—
WAIVER OF DEFECTS—VERIFICATION.

1. A letter authorizing agents to sell land for \$2,200 "provided that the party could pay \$700 down and the balance in one, two, and three years," did not authorize them to sell for \$1,000 down and the balance in one and two years.

2. After filing replication to the answer, allowing the case to be set for trial, and waiving a jury, it is too late for plaintiff to object to the verification of defendant's answer.

3. Where an answer requiring verification is filed without it plaintiff should move to strike it from the files, and for judgment as *per* default.

Appeal from district court, Arapahoe county; PLATT ROGERS, Judge.

Action by Kate A. Speer against Nellie Barton Craig and another for the specific performance of a land contract. From a decree dismissing the complaint plaintiff appeals. Affirmed.

R. D. Thompson, for appellant. C. H. Burton and C. G. Richardson, for appellee.

HELM, C. J. The firm of Hicks & Bailey, real-estate agents in Denver, on behalf of appellee Nellie Barton Craig, executed and delivered a written contract for the sale of certain property then appearing on the records of Arapahoe county as belonging to Nellie Barton. Mrs. Barton's marriage was unknown to Hicks & Bailey, and the contract is in the name appearing upon the records. The correspondence leading up to this contract was entirely between N. H. Barton, Mrs. Craig's son, and Hicks & Bailey. The sum of \$100 in cash was paid upon this written contract, and the provisions thereof were in all respects sufficient to justify a decree for appellant, provided the property belonged to Mrs. Craig and Hicks & Bailey were clothed with sufficient authority in the premises. Mrs. Craig refused to execute a deed, and the present suit is by appellant, as purchaser, to compel the specific performance of the contract. Mrs. Craig, by answer, denied her ownership of the property when the contract was made, asserting that she conveyed the same by deed to her son, N. H. Barton, the other defendant and appellee. This deed purported to have been executed several years previous to the negotiations with Hicks & Bailey, and was unrecorded at the time of such negotiations. The agency of Hicks & Bailey to sell the

property was also denied. Theson pleaded his incapacity, by virtue of infancy, to legally authorize a sale, and likewise his disaffirmance. The mother, besides denying ownership, denied any agency of the son to act or contract in her behalf. Appellees did not reside, at the time of the correspondence mentioned, in the city of Denver; neither Hicks nor Bailey nor any one connected with the firm was acquainted with appellees or either of them; nor had the firm, or any member thereof, ever previously acted for them, or either of them, in any capacity. Hicks & Bailey supposed, until an abstract of title was obtained, that the property was in the name of N. H. Barton, and when advised by the record that it was in the name of Nellie Barton they concluded that N. H. Barton and Nellie Barton were one person, the middle letter being omitted in the deed to her. The business was transacted between the parties entirely by correspondence, and related solely to the particular premises in controversy. If, therefore, an agency was created on the part of Hicks & Bailey, it was a special, and not a general, agency. Nearly all of the correspondence appears in the record, and it is apparent that the contract to sell, which, though dated March 21st, was not executed until the 27th or 28th of that month, was predicated upon the authority contained in the following letter: "Montrose, Colo., March 23d, 1887. Hicks & Bailey, Denver, Colo.—Gentlemen: I could take the offer as per your letter of the 21st inst. of \$2,200, provided that the party could pay \$700 down and the balance in one, two, and three years, at eight per cent. Please let me hear from you, and I am, yours, truly, N. H. BARTON. Montrose, Colo. Box 343." The contract entered into with appellant by Hicks & Bailey stipulated for the payment of \$1,000 in cash, and the balance of \$1,200 in one and two years at 8 per cent. interest.

The first question we shall consider, and the one upon which the learned judge below predicated his decision, is: Assuming that Hicks & Bailey were duly directed by the true owner to sell the property, was there such a variance between the terms upon which they were authorized to sell and the terms of the contract actually entered into as to vitiate the latter? It is claimed by appellant that the contract as made was more favorable to appellees than the conditions prescribed in the letter conferring authority upon Hicks & Bailey; therefore, that appellees cannot be heard to complain of the departure from those conditions. True it is that instead of \$700 the sum of \$1,000 was to be paid in cash, thus increasing the cash payment by \$300; also, that instead of the balance being paid in one, two, and three years, as specified in the letter of March 23d, it was all to be paid within two years, thus shortening by a year the maturity of the deferred payments; but can we, as a matter of fact or of law, sustain appellant's contention that better terms were obtained than those authorized? Whether this be a fact or not is a question largely of opinion,

and the owner's opinion is necessarily the principal guide. He might prefer to have all of the purchase money consist of deferred payments at a good rate of interest, rather than to have any portion thereof advanced in cash; and it might be an important consideration with him that deferred payments should run for a long, rather than for a short, period of time, because of the income by way of interest. As a matter of fact, in the present case, appellee Barton testified that "he didn't know but that he would rather have it in that way,"—i. e., as provided in the letter; that he "did not care anything for all the money down at that time." Where suit is brought for the specific performance of a contract for the sale of land entered into by an agent, unless there has been a subsequent ratification, it must appear that the prior authority conferred upon the agent was strictly pursued. *Bissell v. Terry*, 69 Ill. 184. And the plaintiff has the burden of establishing such compliance by the agent when the question is properly in issue under the pleadings. *Dana v. Turlay*, 38 Minn. 106, 35 N. W. Rep. 860. If the agent agree to conditions with a purchaser more favorable in his judgment than the terms he is authorized to make, he and the purchaser take the risk of the principal's refusal to consummate the contract by deed. We must agree with the conclusion reached by the court below that Hicks & Bailey did not execute such a contract as they were authorized to make by the letter of March 23d, and therefore that appellees cannot be held to the specific performance of the same. We must not be understood as asserting that no contract will be specifically enforced where an agent departs from the terms of his authority. If, for instance, he be authorized to sell for \$5,000 cash, but closes a bargain for \$6,000 in cash, the change is so palpably in the interests of his principal that no court of equity would hesitate in enforcing specific performance. Counsel for appellant claims, however, that no question concerning the terms of the contract could be litigated under the pleadings. It is undoubtedly true that the authority of Hicks & Bailey to make any contract whatever is denied and put in issue. But the amended complaint also avers that Barton "consented and requested" Hicks & Bailey to "sell the said property on the terms and for the price in said contract contained." Also, that the said Barton was then representing and acting for his mother. The complaint likewise declares that defendants deny the authority of Hicks & Bailey "to make the said contract." Not only was the first of these averments traversed and the second admitted by the answer, but defendant Craig also, among other things, expressly averred "that it is true that said Hicks & Bailey never had any authority to make the said alleged contract." The foregoing allegations, admissions, and denials, in our opinion, sufficiently present the matter. We do not feel at liberty to disturb the judgment on the ground of want of averment or issue in the pleadings.

Counsel's objection touching the verifi-

ocations of the answers must be overruled. There was an attempt in apparent good faith to comply with the statute in this regard. These verifications conform to most of the statutory requirements. If they were defective, (a question upon which we do not pass,) the objection should have been earlier interposed. Plaintiff filed his replication to the answers without noticing, by demurrer or otherwise, any defect therein, either in form or substance. Subsequently he appeared by counsel, and the cause was set for trial as if the issues were fully made. When the day of trial arrived and the case was called, a jury having been expressly waived, plaintiff preceded the introduction of his witnesses with a motion for judgment upon the pleadings; then for the first time assigning this objection. The statutory provision entitling plaintiff, by verification of his complaint, to a verified answer, may be waived. And courts, as a rule, insist upon the interposition of objections predicated upon this as well as other formal defects in pleadings at the earliest reasonable moment. Without prolonging the present opinion by a reference to cases touching the subject, we shall hold that appellant's application came too late. The suggestion should, perhaps, be made, in support of a logical and consistent practice, that technically the motion for judgment on the pleadings is not strictly accurate. This motion touches the substance, and not the form, of the pleading attacked. It is usually interposed only where one or more of the material averments of fact in the complaint or answer are admitted or left undenied by the answer or replication. *Rice v. Bush*, 16 Colo. —, 27 Pac. Rep. 720. The better practice in cases like the present is to interpose a motion to strike the unverified answer from the files, and for judgment as by default.

In view of the foregoing discussion and conclusions, it is obviously unnecessary to consider the remaining questions raised by the assignments of error and arguments of counsel. Since the letter of March 23d did not authorize Hicks & Bailey to execute the particular contract upon which suit is brought, all other questions of agency involved and discussed become of no material importance. The foregoing observation is also true concerning the issues of ownership and infancy; for, if it be assumed that Mrs. Craig, as Nellie Barton, was the owner, and that her son was authorized to act for her in the negotiations, still, as we have seen, the unauthorized contract cannot be specifically enforced. Likewise, since the evidential objections urged relate to testimony bearing upon the ownership of Mrs. Craig or the agency of Hicks & Bailey, and the authority of Barton, the rulings, even if erroneous, would not warrant a reversal. We regret exceedingly the foregoing conclusion, for, with the learned judge who tried the cause, we must question the good faith of appellees. Had there been no unexpected rise in values after the contract was made by Hicks & Bailey, appellees would undoubtedly have been swift to avail themselves of its provisions. But

it is better that such hardships as might possibly result in cases like the present be suffered than that a precedent be set for more serious invasions of the owner's right to dispose of his property according to the dictates of his own interest and judgment. The decree of the court below is affirmed.

(1 Colo. A. 123)

JENKINS v. TYNON.

(Court of Appeals of Colorado. Oct. 12, 1891.)

FORCIBLE ENTRY AND DETAINER—EVIDENCE—INSTRUCTIONS.

1. In an action of forcible entry and detainer, it appeared that plaintiff was in possession under a deed from a railroad company which had received a grant of the land; but the patent was withheld pending a question as to the rights of the company. Defendant applied for the land under the homestead act, and was refused, but went on a part of the land, and built a house, and both parties were living on the land when action was commenced. *Held*, that plaintiff's possession under color of title entitled him to his action against defendant, who had no title whatever.

2. In an action of forcible entry and detainer, muniments of plaintiff's title may be put in evidence to show the character of his possession.

3. Where a judge refused to give defendant's requests to charge, but gave the substance thereof in his instructions, defendant cannot complain.

Appeal from district court, Arapahoe county; W. S. DECKER, Judge.

Action of forcible entry and detainer by James Tynon against Henry Jenkins. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

N. B. Bachtell, for appellant. Coe & Freeman and Geo. L. Sopris, for appellee.

REED, J. The N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 33, township 40 S., range 67 W., in the county of Arapahoe, was embraced in a grant made by the government to the Union Pacific or Kansas Pacific Railroad Company, but was never conveyed to the company, and the title remained in the government. The railroad company, by virtue of its grant, assuming to be the owner, contracted a sale of it, in connection with the balance of the quarter section, to one James Cozad, who made partial payments, improved and occupied it, and sold his interest to Tynon, (appellee,) and conveyed it by quitclaim deed. Tynon afterwards obtained a warranty deed to the land from the company, and by himself, lessees, and tenants had sole and exclusive possession until the 4th day of March, 1889, when Jenkins (appellant) entered into the possession of the house and premises, claiming a right to occupy the 40-acre tract, and dispossessing appellee. A question having arisen between the government and the corporation in regard to the right of the latter, the conveyance to the corporation was suspended, and the title remained, as above stated, in the government. The government also refused to regard the land as open to settlement under the laws of congress, and refused to allow parties to occupy and take the necessary steps to acquire a title. While the land in question was in this situation, on the 24th of January, 1887, one Dryfus made application to the local land-office to be allowed to claim it under

the homestead act, which application was refused under instructions from the land department of the United States. On September 3, 1887, J. B. Cozad made application under the timber-culture act, which was likewise rejected. On April 3, 1888, appellant applied to file upon and occupy the land under the homestead act, and his application was also rejected. It was upon such proceeding and rejection of his application that he assumed the right to evict the appellee, and enter into possession of the land. This suit was brought originally in the county court; was tried to the court, resulting in favor of appellee on December 11, 1889. An appeal was taken to the district court, a trial had to a jury on March 11, 1890, also resulting in a judgment for appellee, from which this appeal was taken.

Several errors are assigned, but none are found sufficiently important to warrant a reversal. The principal question of fact was as to the possession of appellee. There was uncontradicted evidence of long prior actual possession. Mr. Marvin, a former tenant, testified that he moved out of the house the last part of February, 1889, probably the 20th or 22d of the month. When he left, the house was locked, the windows nailed down, gates shut, and barn-doors fastened. Mr. Pritchard testified that he leased the property on the 4th of March, 1889; paid his rent; moved out on the 6th for the purpose of taking possession and occupying the property; found appellant in possession; on the 7th he surrendered his lease. Mr. Robinson was the next tenant, leasing on March 7th; went out and found appellant in possession of the house, in which he remained some days, until he built another house on the same land, which was about the 13th or 14th of March, when he (Robinson) moved into the house, and retained the possession; was living there at the time the case was tried. Appellant also occupied the small house built by himself. The jury was warranted in finding the possession in appellee. That he was in under color of title has been already shown. In this action (forcible entry and detainer) title could not be tried, but the muniments of title put in evidence by appellee have always been held admissible to show the character of the possession. It was not error to admit the title-papers for that purpose. A right to disturb and dispossess a party legally in possession could not be predicated upon a refusal of the departmental officers to allow him the occupation and possession. His claim to the right is not based upon a consent, but upon a refusal of the government to grant a consent. Having shown no right whatever to the possession of it, the taking of it was a wanton and unwarranted invasion of the rights of another, as shown by the evidence. Admitting, as claimed by appellant, that the land was a part of the public domain, yet, it being in the actual possession of appellee, such possession was entitled to legal protection.

Appellant insisted that, as there was no one in actual, immediate possession at the time of the entry, the possession had

been abandoned. This was not sustained, but contradicted, by the evidence. Abandonment is always a question of intention,—the fact, when relied upon, must be proved like any other material fact. The case of *McCartney v. McMullen*, 38 Ill. 237, and others, relied upon by counsel for appellant, fail to sustain his contention in regard to the character of the possession necessary to maintain this action. In *McCartney v. McMullen* the possession was not actual, only constructive,—such as a party has simply by virtue of ownership. There were no buildings upon the land, nor improvements of any kind, and the only acts of possession proved were occasional entries for cutting and removing firewood, etc. The forcible entry and detainer act of Kentucky is the same as that of Illinois, and ours that of the latter state, and in the discussion contained in the opinion in *McCartney v. McMullen* the learned judge cites and approves *Brumfield v. Reynolds*, 4 Bibb, 388; *Stewart v. Wilson*, 1 A. K. Marsh. 255; and *Chiles v. Stephens*, 3 A. K. Marsh. 347,—as cases where the action could be maintained, although neither the owner nor tenant were in the actual, personal occupancy at the time of the entry. The parallelism of those cases with the one under consideration will at once be apparent upon examination; notably, that of *Chiles v. Stephens*. The proof of payment of taxes was unnecessary, and should not have been allowed. It did not tend to prove possession, nor define the right by which possession was held; but, as all the facts were before the jury, it could not have been misled by the proof under the instructions of the court.

The contention that the court erred in refusing the instructions prayed by appellant cannot be sustained. The first and third were proper, but they, in substance and effect, were given in the instructions of the court. The second and fourth were very properly refused. Error is also assigned upon the instruction given by the court. On a careful examination of it as a whole, we do not think it erroneous, but a fair, clear statement of the law of the case. The judgment of the district court should be affirmed.

HAYES v. JAMES.

(Court of Appeals of Colorado. Oct. 12, 1891.)

APPEAL FROM COUNTY COURT — AFFIRMANCE OF JUDGMENT—WAIVER OF RIGHT.

The record of the district court showed that a cause which had been appealed thereto from the county court had been docketed and called on the first day of the term; that the counsel for both parties had announced the cause "at issue" and for "jury trial," which had been noted on the docket by the letters "I" and "J," but that no formal record thereof had been made, nor any entry showing that the cause had been set for trial. The record failed to show any admission on the part of the counsel for the appellee indicating an intention to appear generally. At the next term notice was served of the appellee's intention to ask for an affirmance of judgment, on the ground that the appellant had failed to take his appeal on the day on which judgment was rendered, or to give notice in writing, as required by Sess. Laws Colo. 1885, p. 159. Coun-

sel for appellant consented to a continuance that the motion might be argued, and afterwards appeared for that purpose. *Held*, that there had been no such general appearance of the appellee as to waive his right to insist on the affirmance of the judgment. *Coby v. Halthusen*, (Colo. Sup.) 26 Pac. Rep. 148, and *Robertson v. O'Reilly*, 14 Colo. 441, 24 Pac. Rep. 560, distinguished.

Appeal from district court, Las Animas county; JULIUS C. GUNTER, Judge.

This was an action by S. B. James against J. W. Hayes. From a judgment of the district court affirming a judgment of the county court in pursuance of Sess. Laws Colo. 1885, p. 159, defendant appeals. Affirmed.

Caldwell Yeaman and Bo. Sweeney, for appellant. *Wm. E. Beck and C. W. Lester*, for appellee.

RICHMOND, P. J. This appeal is prosecuted for the purpose of reversing the action of the court below in affirming a judgment of the county court appealed to the district court. The appeal from the county to the district court was not taken during the day in which the judgment was rendered, nor was a notice in writing served within five days after the appeal was perfected. The action of the district court in affirming the judgment was in pursuance of the statute, Section 4, p. 159, Sess. Laws, 1885. The statutory right in question—having the appeal dismissed or the judgment affirmed—is a personal privilege, which may be waived; unless waived, the judgment must be sustained. The contention of appellant is that the appellee, prior to his motion of affirmance of the judgment, waived the privilege by a general appearance, and in support of his contention he calls our attention to the following portion of the record, to-wit: "Be it remembered that heretofore, at the regular September term, 1889, of the district court, within and for the county of Las Animas, aforesaid, and subsequent to this cause being placed upon the docket of the said court on appeal from the county court, and on the first day of said term, said cause was called on the first call of the docket, and it was then announced by the attorneys of record for the respective parties herein, Dunbar & Lester for plaintiff, and Caldwell Yeaman and Bo. Sweeney for defendant, that said cause was at issue, and that it was a case for jury trial, which facts were noted by the judge upon his docket by entering thereon the letters 'I' and 'J,' meaning 'at issue' and 'jury trial,' but no formal record thereof was made upon the records of said court, and said cause was not at said time, or any other time, set down for trial." The contention of appellant is that this was such a general appearance as should preclude the plaintiff from insisting upon an affirmance of the judgment, and in support of this contention he cites the cases of *Coby v. Halthusen*, (Colo. Sup.) 26 Pac. Rep. 148, (Feb. 27, 1891,) and *Robertson v. O'Reilly*, 14 Colo. 441, 24 Pac. Rep. 560. We cannot concur in this view. The cause was appealed, and the appeal perfected from the county to the district court at the succeeding September term of that court. The appeal being perfected, it was

the duty of the clerk of the district court to place the same upon the trial docket. On the first day of that term, as is customary in *nisi prius* courts of this state, the docket was called, and the cause marked as at issue and for jury trial. It is true that the attorneys for the respective parties were present, yet the record in this case fails to show, by affidavits or otherwise, that the attorneys representing the appellee indicated, by word or sign, his purpose to try the cause, and waive his right to ask the court for an affirmance of the judgment. Certain it is that at the succeeding term, which was a special term of that court for the trial of criminal causes, notice was served of the intention of appellee to ask the court for an affirmance of the judgment. It is equally certain that the attorneys for the appellant appeared and consented that the cause should be continued for argument on motion, until the succeeding regular term of court, and that at that term the attorneys for both parties appeared and argued the motion based upon the statute; and not until the court below had determined and passed upon the question was it ever suggested that the appellee had waived, by general appearance, his right. We cannot declare that, without some evidence or some record, a general appearance was ever entered in this case by appellee. He had a right to appear for the purpose of asking for an affirmance of the judgment or a dismissal of the appeal. In the case of *Robertson v. O'Reilly*, supra, the circumstances were radically different from those recited in the record here, and so, too, it may be said of the case of *Coby v. Halthusen*, supra. In the one an appearance was entered and a continuance asked; in the other, an appearance was entered, and the cause was continued from term to term for a period of three terms, and affidavits were submitted to the effect that the notice provided for by the statute was waived verbally between the attorneys. In this particular case now under consideration the record of the court below discloses no admission on the part of the attorney for appellee indicating that he appeared generally for the trial of the cause, nor is there any affidavit filed showing that he had by word or act so appeared. We do not think that the circumstances in this case warrant us in reversing the judgment. The judgment of the court below must be affirmed.

HIGLEY *et al.* v. POLLOCK. (No. 1,341.)

(Supreme Court of Nevada. Oct. 24, 1891.)

REVIEW ON APPEAL—MATTERS NOT APPARENT OF RECORD.

1. Defendant moved to quash the summons on the ground that the copy served on him failed to show on its face that it was a copy of the original summons. On appeal from an order denying the motion the copy complained of was not contained in the record. *Held*, that its sufficiency could not be considered.

2. Where the sheriff's return on the original summons showed that a true copy thereof had been served on defendant, the mere statement of the defendant's attorney that no copy was served cannot impeach the return of the sheriff.

3. Gen. St. Nev. § 3048, provides that in actions arising on contract for money the summons shall contain a notice that on failure to answer judgment will be taken against defendant for a sum specified. The summons served on defendant stated that the action was to recover \$1,800 for services, and for certain property sold to him, which would more fully appear in the complaint on file, a copy of which would be served with the summons; and that, if he failed to answer, judgment would be taken in accordance with the prayer in the complaint; but did not state what amount judgment would be taken for. A certified copy of the complaint was served with the summons, and prayed for judgment for \$1,800, with interest at 7 per cent., besides the costs. *Held*, that the notice to defendant was sufficient.

4. Though the summonses were defective, yet where the substantial rights of defendant were not affected, the case came within Gen. St. Nev. § 3093, which provides that the court shall disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties.

5. Under the statutes of Nevada, which provide that, if defendants fail to answer, the clerk of the court may, on request, enter default, and, if the demand is for money, may enter judgment, defendants' notice of motion to quash was insufficient to stay entry of judgment on default.

Appeal from district court, Lander county; A. E. CHENEY, Judge.

Action by Charles R. Higley and Mary Jane Higley against William Pollock to recover for services and for horses sold. Judgment for plaintiffs on default. Motion by defendant to vacate and set aside the judgment being denied, he appeals. *Affirmed*.

David S. Truman, for appellant. Henry Mayenbaum, for respondents.

MURPHY, J. This action was brought by the plaintiffs to recover the sum of \$1,800, alleged to be due from the defendant for work, labor, and services as housekeeper, rendered by Mary Jane Higley, and for two horses sold and delivered by the said Mary Jane Higley to the defendant. Summons was issued and served with a certified copy of the complaint, on the defendant, by the sheriff of Lander county, in said county, on the 23d day of June, 1890. On the 2d day of July, 1890, the defendant, by his attorney, appeared, and filed the following notice of motion: "Now comes the defendant above named and moves this honorable court to quash the summons and service thereof on the defendant (and appears for this purpose only) on the grounds: *First*. That the copy of the summons, if such it is, fails to show that it is a copy of the original summons herein issued, and that said copy of summons which is served on this defendant does not appear on its face to be a copy of the said original summons issued in this cause by any proper authentication. That said summons issued in this cause fails to give this defendant any legal or proper notice required according to law." We cannot consider the first objection raised, because the copy of the summons complained of is not embodied in the transcript; and the certificate of the sheriff's return indorsed upon the original summons, which is set out in full in the record, sets forth the facts that the sheriff did serve the defendant "by delivering to said defendant a true copy of the sum-

mons, attached to a certified copy of the complaint in this action." The mere statement of an attorney will not be taken to contradict such a return.

The second objection, in our opinion, is not well taken. It is argued by the attorney for the appellant that the summons is defective, in that it does not conform to the first subdivision of section 3048, Gen. St. Nev., which reads as follows: "*First*. In actions arising on contract for the recovery only of money or damages, that the plaintiff will take judgment for a sum specified therein if the defendant fails to answer the complaint." The summons in this case gives correctly the title of the court, the names of the parties to the action, and notifies the defendant of the time and place in which he was to appear and answer; or, if he failed to appear within the time specified in said summons, judgment by default would be taken against him according to the prayer or the complaint. The cause of action is stated in the summons as follows: "The said action is brought to recover judgment against you, [the defendant,] for the sum of eighteen hundred dollars, alleged to be due from you, [said defendant,] to said plaintiff, as follows, to-wit: \$1,500 for labor and services and \$300, the value of two horses sold and delivered to you at your special instance and request,—all of which will more fully and at large appear in the complaint on file herein, a certified copy of which will be served on you with this summons. And you are hereby notified that, if you fail to appear and answer the said complaint as above required, the said plaintiff will take default and judgment against you *in accordance with the prayer of said complaint, and for costs of this suit.*" The contention of the attorney for the appellant is that by the failure to specify the amount for which judgment would be taken after the word "you" and before the italicized words, the summons is defective, and should have been quashed, because it did not give the defendant legal or proper notice, as required by law. A proceeding for the price of goods or chattels and the price or value of labor is a proceeding to enforce a contract, either express or implied, by which the defendant is bound to pay for the goods or labor a sum certain by the agreement, or capable of being reduced to certainty by mere calculation from the elements which the agreements contain. This action is, therefore, on contract, and brought for its performance by the payment of a sum of money, which, by its terms, is required of the defendant, and is such a case as falls within the first subdivision of the statute in relation to what the summons shall contain. The section of the statute under consideration is a copy of the New York and California statutes. In New York, civil actions were commenced by the service of summons. A copy of the complaint was not required to be served with the summons; and the courts in that state have held that when the summons was served before a copy of the complaint it was essential for the pleader to be particularly careful to state in his summons the nature of the relief

that he should demand of the court; or, in other words, the pleader would not be permitted to state in his summons that he would apply to the court for the relief granted under the second subdivision of section 129 of the New York statute, and when the defendant would examine the complaint he would find that the prayer thereof asked for the relief granted under the first subdivision of said section. Under such circumstances, the pleader was required to amend the prayer of his complaint to conform to the summons, or amend the summons to conform to the complaint. But we fail to find any well-considered case where the summons and complaint were served at the same time, and the prayer of the complaint asked for the relief granted under the proper subdivision of the statute, and the summons set forth that upon the failure of the defendant to answer the plaintiff would take judgment in accordance with the prayer of the complaint, holding such summons to be insufficient.

In the case of *Brown v. Eaton*, (before the supreme court of New York,) 37 How. Pr. 325, MORGAN, J., speaking for the court, said: "When the summons is served before the complaint, and contains a notice under the first subdivision of section 129, and the complaint sets out a cause of action under the second subdivision, it is held by several authorities to be such an irregularity as to require the court to set aside the complaint on motion of the defendant; and it seems to be pretty well established that such an irregularity is not cured or waived by a general appearance in the action. It has been doubted, however, whether the same rule will be applied when the notice in the summons is under the second subdivision, and the cause of action in the complaint authorizes judgment, without such application, under the first subdivision. * * * The decisions cited by the counsel are mostly the individual views of judges at special term, and are by no means uniform, or consistent with each other. If the defendant may be prejudiced by the supposed irregularity, I see no reason why he may not appear and move to set aside the complaint. If he cannot be prejudiced by it, there is no reason why he should be heard at all. It is evident that the defendant cannot be misled by the form of notice in the summons when the summons and complaint are served together. The form of the notice in the summons confers no right upon the plaintiff to enter judgment without an application to the court, when such application is necessary by the form of the complaint; and when it is regular to take judgment without such application it is not irregular to apply for and obtain an order for judgment. The most that can be said is that it is unnecessary to apply for judgment in such a case. The defendant is in no way prejudiced by it. But when the summons precedes the complaint, the defendant may be misled to his prejudice. * * * But, as the Code expressly authorizes the summons and complaint to be served together, I do not think the defendant can rightfully claim that he can appear and

say he has been prejudiced, because in contemplation of law the summons precedes the complaint. The principal object of the summons is to bring the defendant into court. If the defendant should appear without service of summons it may be dispensed with altogether. After the defendant has appeared there is an end of the process. It has become *functus officio*. All subsequent proceedings are based upon the complaint, and when they are served together it is a mere fiction to suppose that the summons precedes the complaint. It is, however, very questionable whether it can be supported as a fiction, for by the very terms of the notice in the summons the plaintiff refers to the complaint. In the case at bar the notice is that the plaintiff will apply to the court for the relief demanded in the complaint; but, without attempting to criticise the decisions which maintain such a fiction, or to deny that it may have some truth to support it, it is quite too harmless to justify the defendant in resorting to a motion for the purpose of annoying the plaintiff and subjecting him to costs. If the correction of the supposed irregularity or variance could be of any benefit to the defendant, or if he had been misled by it to his prejudice, there would be some ground for sustaining a motion to set aside the complaint. In my opinion, no such motion ought to prevail where the summons and complaint are served at the same time, for the reason that in such a case the complaint alone furnishes the cause or ground of action, and is the only foundation upon which the action can proceed. All the subsequent proceedings and pleadings are governed by the form of the action as stated in the complaint, and in no way by the form of notice contained in the summons. To allow the defendant to overlook the complaint and resort to the summons for the cause of action, for no purpose except to make a dilatory and fruitless motion, is to encourage a practice which has already become very troublesome to parties, and very annoying to the courts. Why increase the difficulty by favoring motions to set aside either the summons or complaint, except in case where it is apparent that the defendant has been, or may have been, misled to his prejudice by the form of the summons." The order of the lower court in denying the motion to set aside the complaint was affirmed with \$10 costs.

In the case of *McCoun v. Railroad Co.*, 50 N. Y. 176, there were several hundred actions before the supreme court, wherein the same question was involved, and the decision in the above-entitled case was to control in all the others. In each of the summonses the plaintiffs asked for the relief as granted by the first subdivision of section 129, while the cause of action stated in the complaints was such as required the relief granted by the second subdivision of the said section. ALLEN, J., speaking for the court, said: "It is necessarily wholly immaterial, and cannot, in the nature of things, affect a substantial right of the defendant, whether a summons is under the first or second subdivision of section 129, when a copy of the complaint,

as was in all the cases before us except six, is served with the summons. The office of the summons is to bring the defendant into court, to give the court jurisdiction of the person. * * * This is the effective process to subject the defendant to the jurisdiction of the court. The subsequent section—129—directs the insertion of a notice in the summons, in actions on contract for the recovery of money only, that judgment will be taken for a specified sum on failure of the defendant to answer; and, in other actions, that application will be made to the court for the relief demanded. * * * The purpose of the notice required by section 129 is to inform the defendant of the character of the action and the consequences of a default, that he may understandingly determine whether the protection and preservation of his rights call for an appearance and answer. But, if the complaint is served with the summons, the defendant has more full and perfect knowledge of the cause of action and the consequences of a default than he could get from the summons alone, and, if there is an error or defect in the summons, it carries with it the remedy and correction, and an effectual preventive against error by any one. The objection is that the notice is that the plaintiff will take judgment for a specified sum, instead of notice of an application to the court for the relief demanded, or *vice versa*. It would be trifling with the rights of suitors, sacrificing substance to the merest form, to hold that the denial of a motion to set aside the summons and complaint under such circumstances affected a substantial right of a defendant; and that he was or could be prejudiced by the particular form of the notice. Upon the merits, so far as it can be said to have merits, the motion was frivolous. The service of summons with the notice in the form challenged * * * is no cause for setting aside the summons. The question whether a party in court by the regular service of a summons irregular, it may be, in form, shall litigate in that suit or upon the service of another summons, slightly different in form, when he has not been misled, and does not lose the benefit of any defense he may have had, and when the defenses in the action must be precisely the same, does not affect any substantial right. I am for a dismissal of the appeal. Such a disposal of this appeal disposes of over five hundred appeals by this defendant from orders made refusing applications to set aside the summons and complaint, because the notice inserted in the summons was not under the right subdivision of section 129, the plaintiffs being different, but the attorneys, in many of the cases, the same." To the same effect is the decision in the case of *King v. Blood*, 41 Cal. 316, wherein the court said: "The error or defect claimed to exist in the summons is more technical than real. I am unable to discover that any substantial right of defendants could be affected thereby, or that the judgment should be reversed on account thereof."

In the case of *Kimball v. Castagnio*, 8 Colo. 526, 9 Pac. Rep. 488, it is said: "This court has held that the statute relating to

this subject—sections 35 and 37 of the Civil Code—are mandatory, and that the process issued must comply therewith; but we do not feel justified in declaring that the exact language of these statutes must be used. It is, in our judgment, sufficient if there be a substantial compliance therewith. The purpose of these provisions is to inform the defendant of the nature of the action, the time for answering, the result in case of failure to answer, etc.; and, if all of these material objects are clearly accomplished by the process, although other language be used than that of the statute, it would be unreasonable to say that the defendant might be heard to complain." Dixon, C. J., speaking for the court in the case of *Warren v. Gordon*, 10 Wis. 500, said: "There can be no doubt that the summons was irregular. The action was upon a contract for the recovery of money only. The judgment is also irregular in not having been taken for the penalty. * * * However, as neither of these irregularities affects the substantial rights of the appellants, the judgment of the county court must be affirmed." The errors assigned in the above case were similar to the one under consideration.

Actions are commenced in this state by the filing of a complaint with the clerk of the court, and the issuance of a summons thereon. After the filing of the complaint the defendant may appear and answer, or demur, thereby waiving the service of summons; but, if the summons is served, a certified copy of the complaint must be served with it. From the reading of this section it is clear that the complaint is the foundation upon which the plaintiff bases his cause of action. The summons is served merely for the purpose of notifying the defendant of the time, place, and court in which he is required to appear, answer, or demur, and informs him of the nature of the cause of action. In our opinion, the complaint and summons in this case answered all the requirements of the statute. They contained all the information the defendant could ask for to apprise him of the precise cause of action which he was called upon to defend, and all the facts a clerk of the court would require to enable him to enter the judgment, in case of a default, for the exact amount; and there is no reason given in this case why the court should be annoyed by the mere fact of a special appearance of an attorney asking to have the summons set aside because in the notice of the relief prayed for in the summons the figures \$1,800 were omitted, when the attorney then held in his hands a certified copy of the complaint attached to that summons wherein it was stated: "Wherefore plaintiff demands judgment against said defendant for the sum of eighteen hundred dollars, U. S. gold coin, and interest at the rate of 7 per cent. from date of judgment until paid, and costs of suit." And the summons notified the defendant "that, upon his failure to answer as required by the summons, default and judgment would be taken against him in accordance with the prayer of the complaint." Besides, we cannot see how the case fails to come completely

within section 3093, Gen. St., which reads: "The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." If there was a defect in the summons, as claimed by the appellant, it could not affect a substantial right, and the court must in every stage of proceedings disregard such errors or defects. The defendant could not suffer nor be in any wise injured by the omission of the figures 1,800 in the closing part of the summons. In the body of the summons there was a statement of the cause of action and the amount claimed to be due. The complaint contains a cause of action, and the defendant was informed thereby of every fact necessary for him to know in order to protect himself against an unfounded claim, if it be such. While it is advisable in the issuance of the summons that the statute should be literally complied with, nothing short of a substantial departure therefrom can properly be held to be fatal to a proceeding under it. The provisions of a statute are to be construed with a view to carry into effect its object, and to promote justice, and not to harass and annoy litigants and courts by entertaining frivolous or technical objections, when the same do not in any manner affect the substantial rights of the parties. The recent decisions are to the effect that a substantial compliance with this particular statute is all that is required. *Bewick v. Muir*, (Cal.) 23 Pac. Rep. 389; *Clark v. Gunn*, (Cal.) 27 Pac. Rep. 375; *Bucklin v. Strickler*, (Neb.) 49 N. W. Rep. 371; *McPherson v. Bank*, 12 Neb. 202, 10 N. W. Rep. 707; *Keybers v. McComber*, 67 Cal. 339, 7 Pac. Rep. 838; *Shinn v. Cummins*, 65 Cal. 98, 3 Pac. Rep. 133; *White v. Iltis*, 24 Minn. 46; *Kimball v. Castagnio*, 8 Colo. 525, 9 Pac. Rep. 488; *Warren v. Gordon*, 10 Wis. 499; *Barndollar v. Patton*, 5 Colo. 49.

Since writing the above, the decision in the case of *Behlow v. Shorb*, 27 Pac. Rep. 546, from California, has been received, and is in all respects identical with the question we have passed upon. In that case the court said: "The first point made for reversal is that the court erred in refusing to quash the summons. It is said the notice in the summons was insufficient, because it did not state the amount for which judgment would be taken in case the defendants failed to appear and answer, as required by section 407, subd. 4, of the Code of Civil Procedure. We think the summons in effect complies with the requirements of the statute." The motion to quash the summons is without merit.

On the 2d day of July, 1890, the attorney for the defendant filed a notice of motion to set aside the attachment. It appears that he abandoned the motion, as no action has been taken upon it. On the same day he filed his notice of motion to quash the summons. On the 4th day of October, 1890, the default of the defendant was entered by the clerk of the court. On the 10th day of October, 1890, court was in session in Lander county, and the court

made the following order, as appears from the minutes thereof: "On motion it was ordered that all proceedings in this cause be stayed until the further order of this court." There is a dispute between the attorneys in the case as to who made the motion for a continuance, but from the views we take of the questions involved it is immaterial at whose request the order was made, any further than to say that we think that it would be much more to the credit of the attorneys if they would confine themselves to presenting the merits of the case, and not branch off into side issues. On the 6th day of March, 1891, the defendant, by his attorney, filed a notice of motion to open the default, on the ground and for the reason that the default had been entered while the motion to quash the summons was pending and undisposed of. Upon the hearing of the motion the court refused to open said default, and denied the motion to quash the summons. We think the notice of motion to quash the summons on the ground stated did not stay proceedings or deprive the clerk of the court of the power to enter the default of the defendant when the time for answering had expired. Our statute reads: "If the defendant fails to answer within the time required by the summons, the clerk of the court, upon request of the plaintiff, shall enter his default; and, if it is a money demand, he can enter a judgment for the amount," showing conclusively that the only appearance that can prevent a default from being entered is by demurrer or answer, or by an order of court, or the agreement of parties staying proceedings. In some states the statute reads, "Answer, demurrer, or motion." Such is the Colorado statute. Our statute is copied from the California practice act. In that state the supreme court, in the case of *Shinn v. Cummins*, 65 Cal. 98, 3 Pac. Rep. 133, said: "The pendency of the defendant's motion to dismiss, vacate, and set aside the pretended service of summons and copy of complaint did not extend the time specified in the summons for answering the complaint. When the default was entered there had been no appearance in the case by the defendants." In the case of *McDonald v. Swett*, 76 Cal. 258, 18 Pac. Rep. 324, it is said: "It was not sufficient ground for setting aside the default that it was entered pending the hearing of the motion to dismiss, and we cannot hold that the facts presented to the court below were of such a character as to make the denial of the motion to set it aside an abuse of discretion. The motion to dismiss the action did not extend the time to answer." The action of the judge of which the appellant complains was right. There having been no such appearance as the statute requires on the part of the defendant in the action, his default was properly taken, and he made no showing of merit on the hearing of the motion to vacate and set aside the proceedings. The judgment of the district court is therefore affirmed.

BELKNAP, C. J. I concur.

BIGELOW, J. I concur in the judgment.

METCALF v. HART.

(Supreme Court of Wyoming. Oct. 26, 1891.)

INJUNCTION AND SPECIFIC PERFORMANCE—PARTIES—LACHES—CONTRACTS—JUDGMENT—LICENSE—IMPROVEMENTS—INTEREST—RENT.

1. Where the widow alone has brought ejectment for lands of her deceased husband, the person in possession may, by suit in equity, seek not only the enjoining of the action, but also the specific performance of an agreement to convey the lands, or an allowance for improvements thereon, without making the other heirs parties; he having a right to defend his possession by suit, and no multiplicity of actions being occasioned by seeking other relief in the same suit.

2. Some of the time prior to the bringing of the suit having been occupied with mutual negotiations for settlement, and complainant having all the time been in possession of the land, he cannot be charged with laches in bringing his suit, where it was brought immediately after the commencement of the action of ejectment.

3. Complainant claimed in his pleadings, and endeavored to show by his evidence, that he was entitled to an injunction restraining defendant's action at law on her legal title for possession, and that he was also entitled to conveyance of the property from defendant, or at least to the value of his improvements thereon. Defendant's pleadings and proof were intended to show the contrary of all this, and that she should be dismissed, with her costs, which was the only relief asked for by her. *Held*, that it was error after trial to allow defendant to file a cross-bill, and on this, without any issue being joined or any opportunity given complainant to answer, to include in the decree a finding and judgment in favor of defendant for possession and the value of the rents and profits, to be ascertained by reference.

4. Complainant and others went onto land in the possession of defendant's husband under a desert-land entry, and erected buildings thereon, on his promise, made for the purpose of encouraging the building of a town on the land included in his entry, that on acquiring title he would sell and convey to each resident who should have improvements on the land the portion occupied by such improvements at a nominal price. *Held* that, on account of the elements of uncertainty as to the value of improvements to be made, the exact amount of land to be deeded, and the price to be paid, this could not be specifically enforced as a contract.

5. After the death of defendant's husband she made a contract with the people of the town, which was signed by her individually, but which recited that she, as administratrix of her deceased husband, agreed, on obtaining a patent for the land, to sell to the parties in possession certain lots on terms and conditions therein given. Thereafter a patent was issued in her deceased husband's name, accruing to the benefit of his heirs. *Held* that, even if the condition on which she was to convey was thus satisfied, the contract was made on the mistaken supposition that she would then be able to sell the land as administratrix, and therefore it would not be enforced against her as to land obtained by her on distribution of the estate.

6. The promise of defendant's husband, though too indefinite to be an enforceable contract, became, when acted upon, a license coupled with an interest, so that it could not be revoked without compensating complainant for his improvements.

7. Defendant having offered to deed to complainant for a few dollars all the land he was entitled to, sufficient front to clear the store he had erected, and the depth of a lot back, and he having demanded in addition an adjacent lot, he should be charged with the costs of the suit, and also of the actions of ejectment which he sought by his suit to enjoin.

8. Complainant is not entitled to interest on the value of his improvements.

9. Complainant could not be deprived of his possession without being paid for his improvements, and therefore, though possession was demanded, he cannot be charged with rent. *GROSSBECK, C. J.*, dissenting.

Appeal from district court, Johnson county; M. C. SAUFLEY, Judge.

Suit by Ed. D. Metcalf against Juliet W. Hart to enforce the conveyance of real estate, and to enjoin actions of ejectment therefor. Decree for defendant, and complainant appeals. Reversed.

Charles N. Potter and J. J. Orr, for appellant. *William Ware Peck and Carroll H. Parmelee*, for appellee.

CONAWAY, J. This is a suit for specific performance of certain alleged contracts for the conveyance of realty, and to enjoin the holder of the legal title from prosecuting actions of ejectment at law for the possession of such realty. Defendant and appellee, Juliet W. Hart, holds, and since June 23, 1884, has held, the legal title to the property in question. Complainant and appellant, Ed. D. Metcalf, holds, and since an earlier date has held, possession of the same, claiming an equitable right thereto. The property consists of lots 1, 2, and 3, and the northerly 5 feet of lot 4, in block 1, and lot 11, and the southerly 8 feet of lot 12, and the northerly 6 feet of lot 10, in block 18, in the town of Buffalo, Johnson county, Wyo. All of this property was included in a desert land entry made by Verling K. Hart, June 9, 1879. He died intestate, February 17, 1883, having made final proof and payment under his desert-land entry September 27, 1882; and patent for the land was issued in his name, accruing to the benefit of his heirs, January 19, 1884. The legal title of defendant and appellee she derives as widow and one of the heirs of said Verling K. Hart, deceased, and by virtue of proceedings in the probate court of said county of Johnson for the settlement and distribution of the estate of her deceased husband. The other heirs are three minor children of herself and the deceased. The equitable title of complainant and appellant he derives from an alleged promise or agreement made by Verling K. Hart, for the purpose of encouraging the building of a town upon the land included in his desert entry, that upon acquiring title he would sell and convey to each resident who should have improvements upon said land that portion occupied by such improvements at a nominal or small price. Complainant claims that on account of such promise he occupied the land described as in block 1 in the spring of the year 1882, and then and afterwards made valuable improvements upon it. He also claims that the land described as in block 18 was occupied and improved in the summer of 1882 by one William Burgess on account of said promise of said Verling K. Hart, and with his knowledge, and without any objection by him, and that complainant succeeded to the rights of said Burgess by purchase in 1883, and has ever since held possession of this property. After the death of Verling K. Hart, and before the issue of the patent for the land included in his desert entry, a number of

the citizens of Buffalo made affidavits and protests against the issuing of the patent. This resulted in an instrument in writing in the form of a contract with the people of the town of Buffalo, dated September 20, 1883, and signed by Juliet W. Hart, who is described in the body of the instrument as administratrix of the estate and guardian of the minor children of Verling K. Hart, deceased, stating terms and conditions upon which she would, upon obtaining a patent from the United States for the land upon which the said town is situated, sell to the parties in possession certain lots within said town. It is to be observed that the plat of this town dividing it into lots, establishing streets and alleys, etc., in fact making it a legal, unincorporated town under the laws of the territory of Wyoming, was not filed in the office of the county clerk till July 29, 1884, more than 10 months after the date of this alleged contract for the disposal of lots in the town. One of the conditions upon which Mrs. Hart so agreed to convey lots on the terms in the said instrument specified was that no further delay should be caused nor any expense incurred on account of affidavits or protests which had already been made, or which might thereafter be made, in opposition to the issuing of a patent by the United States for said land. Complainant claims also under this contract.

Before the commencement of this suit defendant had begun two actions of ejectment against complainant for the possession of the realty described as in block 1 and in block 18, respectively. Complainant asks that defendant be enjoined from further prosecuting said suits, and asks for a decree for the specific performance of said alleged contracts for the conveyance to him of said realty, or, if that be denied, that the value of his improvements be ascertained and allowed to him, and made a lien upon the property. The answer of defendant denies that Verling K. Hart ever promised to sell or convey any portion of the land embraced in his desert-land entry upon obtaining patent therefor to settlers making improvements, or to any person or persons for a nominal price, or any price; denies that he ever encouraged or permitted such settlements or improvements to be made on the land; denies that he knew the improvements of complainant or Burgess were made; denies that the instrument of date September 20, 1883, is a contract which may be enforced; denies that the conditions upon which it was to take effect ever came to pass; and asks that she be dismissed, with costs. These, in brief, are substantially the issues made by the pleadings in this suit, and upon which the cause was tried, the evidence taken, and the cause argued and submitted, in the district court.

A preliminary objection to the bill is made by defendant that the other heirs of Verling K. Hart, deceased, should have been made parties defendant; that the claim of complainant is a charge upon the interest of all the heirs in the real estate; and that all should have been joined as defendants, to prevent a multiplicity of

suits. It is sufficient to say upon this point that defendant herein alone is claiming the property, and that she alone brought the actions of ejectment against complainant for its possession. Complainant has a right to defend his possession by proper suits when assailed, and it occasions no multiplicity of actions to seek other relief in the same suit or suits.

It is also urged that complainant is chargeable with laches in not bringing his suit sooner, and therefore should not be allowed to prosecute his suit now. The delay is not claimed to have occurred since the commencement of the actions of ejectment by defendant. Any delay prior to that time is chargeable to her at least equally with complainant. Some of the time was occupied with mutual negotiations for settlement, and, besides, complainant was in possession of the property. If wrongfully so, it was incumbent on defendant to put him out of possession without undue delay, at least to as great an extent as it was upon him to perfect his title.

The court below found in favor of defendant; found that the possession of complainant was wrongful and tortious since June 28, 1884; and dismissed his original and amended bills; and, among other things, gave judgment against him for costs. So far this is just the relief, and all the relief, sought by defendant in her answers to complainant's original and amended bills, and leaves her at liberty to prosecute her actions of ejectment for the possession of the property, and for damages for its detention, if she so desire.—causes of action which might be joined by the law in force at the time these actions were begun and still in force. And this would seem to be an adjudication upon all of the issues made by the pleadings. But the court below did not stop here. In its decree is embodied an order allowing defendant to file a cross-bill. Accordingly we find a cross-bill of defendant indorsed as filed the same day of the rendering of the decree, December 13, 1889. We also find that the motion for leave to file this cross-bill was made only the day before, and taken under advisement by the court. Under the issues in the cause (for no issue was made, or could have been made, under this cross-bill) all the relief asked for by defendant was "to be hence dismissed, together with her reasonable costs and charges in this behalf incurred and sustained." When the two actions of ejectment were begun, and when this suit was begun, the law practice and chancery practice were separate. The defense in this suit, up to the day before the rendering of the decree, was evidently conducted upon the idea that it was best for defendant's interest not to ask any affirmative relief in this suit, but merely to oppose and defeat complainant's application for a conveyance of the property, and for an injunction; and then proceed to assert her legal title, and to prosecute her actions for possession and damages on the law side of the court, unincumbered by equitable considerations or defenses,—a course which would seem to commend itself to any prudent practitioner. Defendant

may have desired a jury trial in those actions, to which either party was entitled, and which would have been specially appropriate in the assessment of damages, rental values, etc. But this cross-bill asks additionally for a judgment and decree against complainant, Ed. D. Metcalf, for the possession of the property, and for \$9,000 for the use, enjoyment, rents, issues, and profits thereof, and for interest on this sum from March 31, 1887; and the decree contains a finding and judgment in favor of the defendant for the possession of the property, and for the value of the use, enjoyment, rents, issues, and profits thereof, from September 5, 1885, and orders a reference to a master to take testimony and ascertain those values. These values had not been ascertained, because they were not in issue.

What induced this very radical change in the views of defendant as to the relief she ought to seek in this particular suit the transcript of the record before us does not disclose. But the brief of her counsel filed herein informs us that the case was heard at the June term, 1889, of the district court, and reserved for consideration, and that in September, 1889, the district judge filed an opinion. This opinion is quoted at length in the brief. No cross-bill had then come to light. The pleadings were the original and amended bills of complainant, considered together as one bill. It seems, without objection, and the answers thereto by defendant, and the replication by complainant. The complainant claimed in his pleadings, and endeavored to show by his evidence, that he was entitled to an injunction restraining the possessory actions at law of defendant upon her legal title, and to a conveyance of the property in controversy to him from defendant, or, if this should be denied, at least to the value of his improvements. The pleadings and proofs on the part of the defendant were intended to show the contrary of all this, and that defendant should be dismissed, with costs, and let at liberty to pursue her actions at law. For this she asked, and for nothing more. The opinion of the learned chancellor who tried this cause in the court below was against the complainant on every branch of his case, and denied him all of the relief sought. It also indicated that a decree should go against him for the possession of the property, and for rent from date of defendant's commencing the suits of ejectment, or from September 7, 1885, whichever was earliest; and that complainant should be allowed nothing for improvements, but should be allowed for taxes actually paid by him. The opinion then proceeds: "The cause having been brought in equity to enjoin the prosecution of an action of ejectment, and to compel a conveyance of the property, it falls within that category of cases where the chancellor, being possessed of the whole case, shall render all the relief to which the parties are entitled." This principle is entirely correct, but it applies just to the "whole case," and nothing else. And the "whole case" is just the case made by the pleadings, and is constituted of the issues formed by the pleadings, and nothing

else; and the relief which the chancellor may render is such, and only such, as the parties show themselves entitled to by their pleadings, and by evidence pertinent to those pleadings; and the prayer for relief is part of the pleadings.

In this case, at the time of the filing of this opinion of the chancellor, there was no prayer for affirmative relief by defendant at all. She had filed no cross-bill; neither any pleading setting up grounds for or claiming affirmative relief. As already stated, she merely asked to be dismissed, with costs, and she made no prayer for general relief. The rule upon this subject, in which all the authorities concur, is well stated by Black in his recent valuable work on Judgments: "According to the settled practice in equity, the rule in regard to decrees is similar to that just stated, as governing judgments at law, viz., that it is error to decree relief not sought in the bill. In other words, if the complainant has prayed for specific relief in the premises, or relief as to a specific subject-matter, no more extensive relief can properly be accorded to him." 1 Black, Judgm. § 141. This language mentions complainants only, but the same rule applies to defendants when they seek affirmative relief. They then become complainants in effect, if not in name. There are some authorities to the effect that relief may be granted which is not asked for in the formal prayer for relief, but such relief must be within the issues, and the bill somewhere must show that the party is entitled to it, even where there is a prayer for general relief. Further, a judgment or decree outside of the issues is without jurisdiction and void. We quote again from Black: "Besides jurisdiction of the person of the defendant and of the general subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which the judgment assumes to decide, or of the particular remedy or relief which it assumes to grant. In other words, a judgment which passes on matters entirely outside the issue raised in the record is so far invalid." Id. § 242. There was no issue joined or tendered in this case as to the right of possession. The issue was as to the conveyance of the bare legal title to one who already had possession, under claim of the equitable right to both title and possession. There was no issue as to rents and profits. All that was said by defendant in her pleadings upon that subject when the case was tried was in the concluding paragraph of her answer to the original bill, in these words: "And defendant further says that complainant has derived great benefit and emolument from the use of said premises, much greater than the value of any improvements by him placed thereon, for which this defendant, nor Verling K. Hart, deceased, ever received the slightest compensation. Wherefore defendant asks to be dismissed with her costs, and reasonable charges in this behalf incurred." Such was the state of the case at the June term, 1889, when the case was tried and submitted. Such was the state of the case in September,

1889, when the opinion of the learned chancellor was filed. How was it on December 13th of that year, when the decree was rendered?

It would appear that defendant, finding relief which she had not sought in the case about to be cast upon her, endeavored to prepare a pleading to sustain the proposed decree. On December 12th she presented her cross-bill, and moved for leave to file it. This motion was taken under advisement. The next day the decree in the cause was rendered, including an order sustaining defendant's motion for leave to file her cross-bill, and granting her all the relief asked for in her cross-bill, except interest. From this decree complainant appeals. The statute in regard to cross-bills, in force when this suit was begun, and under which it must be concluded, is found in the Compiled Laws of 1876, as follows: "Sec. 681. Any defendant may, after filing his answer, exhibit and file his cross-bill, containing his interrogatories to the complaint or complaints, [complainant or complainants is evidently meant,] and call upon him or them to make answer thereto. In such case, the complainants shall be held to answer, plead, demur, or except to such cross-bill in the same manner and under the same penalties that a defendant or defendants are hereinbefore required to answer, plead, demur, or except to an original bill. If the cross-bill is filed in term-time, the complainant or complainants shall answer within such time as the court may order; if filed in vacation, the complainant or complainants shall answer such cross-bill within the time hereinbefore prescribed for defendants to answer original bills; and the issuance, service, and return of subpoenas or publication of notice in case of non-residents shall be the same as hereinbefore provided in the commencement of actions in chancery."

The argument of defendant is that this section by its terms applies only to cross-bills seeking discovery. The interrogatory clause is omitted from defendant's cross-bill. Therefore, it is claimed, this section does not apply, and the common-law rule governs. If this be so, which is not admitted, no common-law rule has been shown denying complainant the opportunity to answer a cross-bill. It is further argued that the relief sought by the cross-bill is only such as results to defendant from her successful denial of complainant's original and amended bills, and such as might have been claimed in her answers to those bills, and therefore her cross-bill admits of no answer. This is a *non sequitur*. Admitting that the claims for the very important affirmative relief demanded by the cross-bill might have been set up in the answer of defendant, they would then have been denied by the replication, and would have been in issue when the cause was tried and submitted. As it is, they have never been in issue at any time.

The doctrine of estoppel is invoked against complainant. It is claimed that, by his pleadings and proofs already in the record, he would be estopped from setting

up any possible defense to the matters alleged in the cross-bill, if allowed the opportunity. After stating in their brief matters which they consider established by complainant's pleadings and proofs, defendant's attorneys say: "He was estopped from denying any of these facts; he could have answered only by denying them." We are not prepared to say, as matter of law, that every possible defense that defendant might make to the new matter of the cross-bill, or any portion of it, is admitted away by his pleadings or proofs upon other issues. Were such a thing possible, even then complainant would have a right to an opportunity to answer the cross-bill. If he could do nothing more than confess a decree, and save additional costs. In other branches of the case defendant's attorneys have shown great industry in citing numerous authorities to support their positions. To sustain their argument that complainant was not entitled to an opportunity to answer defendant's cross-bill, they have not cited one. It is not likely that such an authority can be found in the history of English or American jurisprudence. The statement of the proposition is its own refutation. No argument can make the error plainer. The decree in this case, in awarding to defendant possession of the property in question, and in awarding process to put her in possession, and in awarding to her rent, goes outside of the issues as shown by the record. It is as if a man and his wife should be parties to a suit involving her homestead rights, and evidence should be admitted tending to show incidentally that they were not living happily together, and the court should proceed of its own motion to divorce them. The decree in this case, for error in attempting to adjudicate on matters not in issue, must be reversed.

The decree has also adjudicated the matters properly in issue; that is, the question of the specific performance of the alleged contracts, the question of compensation for complainant's improvements, and the question of enjoining the prosecution of the two actions of ejectment. It is therefore necessary to examine this adjudication, and to determine as to its correctness.

As to the alleged contract of Verling K. Hart to give title, when he should himself obtain title by patent, to occupants of the land who had made improvements thereon. At the time these promises or representations were made Hart had no title, and could give none. It is not alleged that he promised to procure title, or to make any effort to procure title. This consideration, while not conclusive, seems unfavorable to complainant's equities. Neither is there any allegation or proof as to the amount or character of improvement that would be required of the settler to entitle him to the benefit of the alleged promise. Improvements are spoken of, and the building of a burgh. An improvement might be a large business house or a pig-sty; and the building of a burgh might consist, in part, in the erection of one or the other, or both. It would seem that Hart consid-

ered that he had a right to object to the construction of inferior buildings on his land, and in one case intimated that he did not regard such as entitled to consideration. Neither is the quantity of land fixed to which a settler would be entitled on account of improvements of any character. Fischer speaks of a lot. McCray mentions improved lots and adjoining lots as though two lots were intended to accompany each "improvement." Neither is any price fixed. It was to be a small price, or a nominal price. Large latitude is not excluded by these terms. In McCray's testimony he speaks of a nominal figure that would about pay the expense of platting, etc., and says he thought \$10 for improved lots, and \$25 for adjoining lots, too low; that he would fix the figures at \$25 and \$40 or \$50. It may well be doubted whether the settlers generally would consider these prices nominal, or whether they can properly be called nominal; and McCray mentions one amount as a nominal price for improved lots, and a different and larger amount as a nominal price for adjoining lots. These terms "nominal prices" and "small prices" leave much room for controversy. A contract cannot be specifically enforced when it leaves any of its terms open to future treaty, or to be afterwards settled. These elements of incompleteness and uncertainty in the alleged contract are fatal to a claim for specific performance.

This brings us to the written instrument of September 20, 1883. The first clause of this instrument reads as follows: "Know all men by these presents that I, Juliet W. Hart, administratrix of the estate and guardian of the minor children of Verling K. Hart, deceased, do hereby covenant and agree, to and with the people of the town of Buffalo, Wyo., that I will, upon obtaining a patent from the United States for the land upon which the said town is situated, sell to the parties in possession certain lots within said town upon the following terms and conditions." Then follow the terms, and the closing clauses are the following: "All of which is covenanted upon condition that no further delay is caused, or any expense incurred, on account of affidavits or protests which have already been made, or which may hereafter be made, in opposition to the issuing of a patent by the United States for said land. Witness my hand and seal this 20th day of September, A. D. 1883. JULIET W. HART. Witness: H. S. ELLIOTT." This contract is signed simply, "Juliet W. Hart." This suit is brought against Juliet W. Hart. It is thus treated as the individual contract of Juliet W. Hart; as her individual covenant and agreement, upon obtaining a patent from the United States, to sell certain portions, or it may be uncertain portions, of the land. That contingency, upon which this contract was to take effect, if this view be the correct one, has never occurred. Juliet W. Hart never obtained a patent for the land.

It may be said that Mrs. Hart was endeavoring to secure the issue of the patent upon the desert-land entry of her deceased husband, and that the phrase "ob-

taining a patent" in the contract merely means so securing the issue of that patent. There are many things to sustain this view. This is the patent which all the parties interested were discussing. This is the patent the issue of which the citizens were opposing. This is the patent which defendant, Mrs. Hart, sought to free from further opposition. This patent seems to have been regarded by the people as empowering Mrs. Hart, as administratrix, to sell portions of the land. It had not occurred to Mr. Elliott that this was not the case, and he represented the people of Buffalo. If such is the meaning of the phrase "obtaining a patent" in the contract, then the contract is one which it was and is simply impossible to perform according to its terms. The issue of the patent to Verling K. Hart gave Juliet W. Hart no power or authority to sell or convey any of the land. It gave her no such authority, either individually or as guardian, or as administratrix, or as widow and heir, or in all four capacities put together. It may be said that Mrs. Hart, having contracted to sell and convey property to which she had no title at the time, on afterwards acquiring title from any source should be held to sell and convey according to her contract; that the source of the title is not material; that the qualification, "upon obtaining a patent," in the contract, is not a material part of the contract, and may be rejected as immaterial or as surplusage, and the contract enforced without it. This is dangerous ground. Such a course in this case would evidently change the meaning and intent of the contract from what was in the contemplation of the parties at the time it was made and accepted. The parties evidently acted under the impression that, upon the issuing of the patent to Verling K. Hart, Juliet W. Hart, as administratrix of his estate, could convey out of such estate before distribution the portions of the realty belonging thereto which are called for by this alleged contract. This would have reduced the estate to the diminution of the inheritance of all the heirs in proportion to their interest. This is evidently what was intended, and not that the contract should be filled out of the share of one heir after distribution. It could not be known, when the so-called contract was made, which heir would get the property described, or whether any of them would. It might have been necessary to sell it to pay intestate's debts. The time fixed for the performance of the contract, "upon obtaining a patent," sustains this view, and it is consistent with no other. No time is allowed for distribution. No such contingency was provided for, or, it seems, thought of. If the phrase in the contract "obtaining a patent" means the issuing of the patent to Verling K. Hart, then it follows, from the foregoing considerations, that the contract cannot be enforced according to its true intent and meaning. If the phrase has its natural meaning, according to the order and sequence of words in the contract where it occurs, and means the obtaining of a patent by the contracting

party, Juliet W. Hart, in her own right, then that contingency upon which the contract should take effect has never occurred. In either view, the action for specific performance must fail. There are other considerations leading to the same result, but these seem to be controlling and conclusive.

Then the question remains, what is the true relation of this complainant to the property which he has held all these years? Is he a trespasser, or is his possession rightful? He is not in possession by contract. Is he lawfully in, by permission of the party who had a right to give it? This brings us to the questions of license and equitable estoppel.

"License" is defined by Abbott to be, in its general sense, permission; consent that a person may do some act which without such consent he might not lawfully do. An authority to do some one act, or series of acts, on the land of another, without possessing any estate in the land. Bouvier's definitions of the term "license" are substantially the same. These definitions, like most short definitions, are incomplete. A license may be to do some act, without going on the land of another, which will interfere with the owner's possession, enjoyment, or control; and a license may result from approval of acts of the licensee after they are done, as well as from permission previously given. Verling K. Hart, by his desert-land entry of June 9, 1879, acquired the right of possession of a tract of land, including that upon which the town of Buffalo was afterwards built. As he told several parties, he could give them no title under that entry. He could, however, waive his possessory right, if he chose to do so, and give them permission to enter upon his "claim," occupy portions of the land, and build there. The question is, did he do it? and, if so, did such permission inure to the benefit of this complainant, and to what extent? The solution of these questions require an examination of the evidence.

A. J. McCray testifies that he conversed with Hart in March or April, 1881. Said to Hart that he supposed they were building a town on his (Hart's) land, or what would be his land; that a few of them had gone ahead and started a little burgh, not knowing what the future would be, or where a title was to come from. Asked Hart if Snyder was his authorized agent. Hart said Snyder was his authorized agent, and that he would abide by what Snyder did; and that if what few men were there made a little burgh he would do all he could to assist them in improving the property, and that they should have titles at a nominal figure when he was able to convey to them. At this time complainant was not at Buffalo; neither was Burgess. McCray told this to a number of the settlers. He also talked with Hart on the subject in the fall of 1882, and Hart then expressed himself as greatly surprised and pleased at the progress the town had made, and again assured him that the people would have no difficulties in procuring titles as soon as he could convey them. By this time both com-

plainant and Burgess were there, and had erected improvements. John A. Fischer talked with Hart upon the subject repeatedly in 1881 and 1882. Hart told him he would like to see people come to Buffalo and settle, and if he (Fischer) could influence parties or friends on the railroad to come, he would be glad if they would settle there and make a town; that mechanics, blacksmiths, shoemakers, or all good people that would locate there he would give a lot, after the town was laid out properly, for very little expense. In answer to the question whether this was generally known, Fischer says, "Yes, sir; it was known. Most everybody expected the first settlers had their lots for nothing. * * * I think the expenses were attached to recording. The people had to stand that, as I understood from Col. Hart." George W. Munkers, probate judge and treasurer, talked with Hart at Buffalo in the fall of 1882, and asked "the price of ground." Hart declined to give any positive answer, as he had not title, but answered that the "price would be very nominal." Munkers says: "He conveyed the idea to me that the parties first building he was willing to encourage them for a nominal sum for the land." There is no testimony conflicting with this, but other testimony which corroborates it. None of these declarations of Hart's were confidential. They were not personal to the parties to whom they were made. Hart's assurances to McCray were for the men who built a burgh; to Fischer, in favor of mechanics, and all good people who would come and settle there; to Munkers, in favor of those first building. The understanding of Hart with his partner, Snyder, and which was made public, was for the benefit of those who should have buildings in the limits of the town when the survey should be made.

These matters were all made public, and were intended to be made public, and were intended to influence the people generally. They were not confined to people at or near Buffalo at the time. Hart requested Fischer to make them known on the railroad, a great distance away, and influence people to come and settle at Buffalo. E. U. Snyder, sheriff of the county, and partner and agent of Hart, at and before the location of the town of Buffalo, states the situation fairly and fully. He says: "In the years 1879 and 1880 we were strongly opposed to any one building on this claim, but after we were satisfied there would be a town built, and came to the conclusion to survey and plat the same. It was agreed and understood by us that all parties that had buildings on lots at the time of the survey should have the lots at a small price; the amount I don't think was mentioned." He cannot fix the exact time when this was first made public, but it was talked over about a couple of years before Hart's death, (February 17, 1883,) and made public from that time. It was generally understood. He told a number of persons himself. No plainer invitation to occupy ground and to erect buildings thereon prior to the proposed survey could be made. The intention to include as beneficiaries all who should build prior to the

proposed survey could not be made plainer. It was also an approval of the erection of the buildings already there. The declarations of Hart, and the agreement between Hart and his partner and agent, Snyder, in favor of the settlers, were made public, and were intended to reach and influence others besides those to whom the declarations were directly made. The substance of them became known to complainant. He got his information, as he says, from the oldest citizens. He, with them, was content to take his title through Hart, if Hart perfected his title, of which there was some doubt. If he did not, they still had the resource open of proceeding under the town-site law. It became known to complainant that Hart expressed himself as glad to see buildings put up. The public declarations of Hart, and his conduct, were admissions that the settlers were not trespassers; that they were rightfully there with his permission and approval. He did not treat the settlers as trespassers. He made them welcome. He assured them of his good-will, and of his approval of their occupation and improvement of the proposed town-site, and of his assistance in the future. It is not material that he did not talk to each individual personally. His language was general. He talked to a few for all. When he saw the town in the fall of 1882 the improvements of Burgess and part of the improvements of Metcalf were there. Hart did not stop to inquire who the men were who had built the town, but expressed his gratification with what had been done. Such declarations and conduct come under the head of unsolemn admissions, as classified and defined by Greenleaf: "Those which have been acted upon, or have been made to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied without a breach of good faith." 2 Greenl. Ev. § 27. Again: "Admissions, whether of law or fact, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself, or implied from the open and general conduct of the party; for in the latter case the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it. * * * The latter class comprehends not only these declarations, but also that line of conduct, by which the party has induced others to act, or has acquired any advantage to himself." Id. § 207. The conduct of Hart, as well as his language, was an admission that the settlers were rightfully in possession of their improvements, and with his approval and consent. The evidence that the settlers in Buffalo, prior to his death, erected and held possession of their improvements with his knowledge and approval and consent, is abundant and satisfactory. There is no evidence to the contrary. There is nothing to show that he ever revoked this license. A simple license may be revoked by the licensor at any time. It is revoked by his death. It

is also revoked by a sale of the realty involved. But in neither case does its revocation undo what has been done under it, or make that unlawful which was lawful when it was done. The license given by Verling K. Hart to occupy and improve the town-site of Buffalo was revoked by his death, which occurred February 17, 1883. Any holdings taken possession of after that time cannot be protected by that license. But any taken before that time may be, if other facts warrant it, and valuable improvements placed upon portions of the land before that time by virtue of such license were placed there lawfully. So far there can be no question. Then, what was the effect of such occupation and improvement under that license?

The subjects of license and easement have been fruitful sources of litigation. There has been a difficulty recognized in distinguishing between the two. "An easement, says Mr. Angell in his able treatise on Water-Courses, (page 316,) it has appeared, is a liberty, privilege, or advantage in land, without profit, and existing distinct from the ownership of the soil; and it has appeared, also, that claim for an easement must be founded upon a deed or writing, or upon prescription which supposes one. * * * A license, on the other hand, is a bare authority to do a certain act, or series of acts, upon another's land, without possessing any estate therein; and, it being founded in personal confidence, it is not assignable, and it is gone if the owner of the land who gives the license transfers his title to another, or if either party die. This definition of a license, as well as of an easement, is adopted by Chancellor Kent (3 Kent, Comm. 452,) and is expressly recognized by the most approved English and American authorities. Thompson v. Gregory, 4 Johns. 81; Mumford v. Whitney, 15 Wend. 380; Cook v. Stearns, 11 Mass. 533; Miller v. Railroad Co., 6 Hill, 61; Fitch v. Seymour, 9 Metc. (Mass.) 462; Hays v. Richardson, 1 Gill & J. 366; Fentiman v. Smith, 4 East, 109; Hewlins v. Shippam, 5 Barn. & C. 221; Thomas v. Sorrell, Vaughan, 351; Wood v. Leadbitter, 13 Mees. & W. 843. While it has been uniformly held that a parol license, while it remains executory, may be revoked at pleasure, (Cook v. Stearns, 11 Mass. 533; Mumford v. Whitney, 15 Wend. 380; Fentiman v. Smith, 4 East, 109; Ang. Water-Courses, 319, 324,) yet when executed, whether it is revocable, and if so how far and to what extent, has been a question fraught with much difficulty, and respecting which different courts of the highest respectability have held very differently." Hazelton v. Putnam, 3 Pin. 108.

The first part of this definition applies to a mere naked license, without consideration. Such a one has been considered as founded on personal confidence, and not assignable, and revocable at the will of the licensor. But the cases are numerous of licenses founded upon valuable consideration where the motive of personal confidence, if it existed at all, is a very subordinate one. The material question is whether permission to go upon the land

of the licensor, and do any act or series of acts there, was actually given, either expressly or by implication. In this case we have seen that such permission was given, and that the occupation and improvement of the property was ratified by the language and conduct of Hart, the licensor, after considerable expenditures had been made by the licensees, Metcalf and Burgess. As already stated, the general doctrine of the common law has always been, and is now, that a simple parol license is revocable at the will of the licensor, and is revoked, *ipso facto*, by the transfer of the realty by the licensor, or by his death, or by an assignment of the license. The conflict of authority already mentioned is principally among the common-law courts. Courts of chancery have not developed nearly so much conflict. But even the law courts hold with much unanimity that a license by parol, as well as written, when coupled with an interest, becomes irrevocable, except in cases where such irrevocability would conflict with some other rule or principle or policy of the law. In such cases there is a conflict of opinion in courts of the highest respectability as to which rule should give way. The rule under consideration is laid down by the supreme court of the United States, opinion by Chief Justice MARSHALL, in *Hunt v. Rousmanier's Adm'rs*, 8 Wheat., at page 203: "This general rule that a power ceases with the life of the person giving it admits of one exception. If a power be coupled with an interest, it survives the person giving it, and may be executed after his death." And, similarly, a license coupled with an interest is not revocable by a conveyance of the realty to which it relates. This appears from *Hunt v. Rousmanier's Adm'rs*, *supra*, and there is no conflict of authority upon that point, except as stated above, where some other rule or principle intervenes, such as the statute of frauds. It should be remembered that a license is a power. The difference between a simple license and a license coupled with an interest is clearly set forth and illustrated by Chief Justice VAUGHAN in *Thomas v. Sorrell, Vaughan*, 350, in the following language, which has been extensively quoted, and always with approval: "A dispensation, or license, properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which without license had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground and to carry it away the next day after, to his own use,—are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and the tree cut down they are grants." And Baron ALDERSON in *Wood v. Leadbitter*, 13 Mees. & W. 843, says that "a license by A. to hunt in his park was revocable, whether given by deed or parol, and merely renders the act of hunting lawful, which, without the license, would have been unlawful. But if the license, as in the case put by Chief Justice

VAUGHAN, was a license not only to hunt, but to take away the deer, when killed, as the property or to the use of the licensee, then, if the grant of the deer was good, the license would be irrevocable, because the person who gave it would be estopped from defeating his own grant." A common case of this nature in America is that of a parol license to cut and carry away timber. When, in pursuance of the license the timber has been cut, the license cannot be revoked so as to prevent the licensee from carrying it away, or to enable the licensor to maintain trespass against the licensee for going upon his premises for that purpose, or to enable the licensor to maintain trover for the timber; and one who sells goods which are upon his land, or brings the goods of another upon his land, or permits the owner to do so, gives the latter an implied authority to enter for the purpose of taking the goods away, which the licensor cannot recall. The licensee is supported by the interest with which it is coupled. These are all instances of a license to do particular acts upon the realty of another, not involving any permanent occupation of the land, or the exercise of any permanent or continuous control over it, amounting to an easement or an estate in it.

But instead of oral permission to leave goods on the land of another for safe-keeping or other purpose, and to enter upon the land, it may be repeatedly, to take them away, suppose oral permission is given to build a house there, and to enter at will upon the land, and hold it for the purpose of occupying, using, and enjoying the house, without limit as to time. This is the creation of a permanent interest or estate in or upon the land, which, by the common law and the statute of frauds, cannot be created without writing. It is not doubted that such a parol license would be valid, and would be sufficient authority to justify the party acting upon it in building the house and occupying the premises so long as the license remains in force. There is no difference of judicial opinion upon this point. "License" is defined to be a power or authority, and so long as the license is not countermanded, the licensee is acting in the licensor's own right, and in his stead. *Qui facit per alium facit per se*. The point of divergence in the authorities is the question whether such licenses, when executed in whole or in part, and at considerable expense incurred on the faith of the license, are revocable at common law; whether they are revocable at the will of the licensor, notwithstanding the consequent loss of the licensee of expenditures made in good faith, and whether they are, *ipso facto*, revoked by the death of the licensor, or by the transfer of the property by him, or by the transfer by the licensee of his interest.

The early English cases of *Taylor v. Waters*, 7 Taunt. 374, and *Wood v. Lake*, Sayer, 3, held such licenses irrevocable. But these cases were overruled in the later cases of *Hewlins v. Shippam*, 5 Barn. & C. 221, and *Wood v. Leadbitter*, 13 Mees. & W. 837; and since the latter case it has been the doctrine of the English law courts that an oral license to enter upon realty

and make improvements cannot be made to operate as a valid grant of a permanent interest or estate or easement in the realty, although executed, in whole or in part, by the licensee, and even at great expense. This doctrine of the English law courts has been quite extensively adopted in the United States. The case of *Cook v. Stearns*, 11 Mass. 533, decided in 1814, has become a leading case in this country. It is an action of trespass *quare clausum fregit*, and adopts the English rule strictly. Massachusetts having no chancery courts, it might have been expected that there, as in Pennsylvania, the law courts would undertake to administer equitable relief under the common-law forms; but it seems that such was not the case. The case was tried simply as an ordinary action at law, without an intimation, either in the opinion of the court or the briefs of counsel, that any equities could possibly be considered. The case of *Mumford v. Whitney*, 15 Wend. 381, decided in 1836, also strictly follows the common-law rule. It was an action on the case at law, and there seems to be no reason apparent why it should not follow the common-law rule. Other cases sustaining the proposition that a parol license, although executed, cannot operate as a grant of an interest in real estate, are *Ruggles v. Lesure*, 4 Pick. 187; *Stevens v. Stevens*, 11 Metc. (Mass.) 251; *Foot v. Railroad Co.*, 23 Conn. 214; *Bridges v. Purcell*, 1 Dev. & B. 492; *Miller v. Railroad Co.*, 6 Hill, 61; *Carter v. Harlan*, 6 Md. 20; *Carleton v. Redington*, 1 Fost. (N. H.) 291; *Seidensparger v. Spear*, 17 Me. 123; *Thompson v. Gregory*, 4 Johns. 81; *Simpkins v. Rogers*, 15 Ill. 397; *Woodward v. Seely*, 11 Ill. 157; *Kamphouse v. Gaffner*, 73 Ill. 461; *Tanuer v. Volentine*, 75 Ill. 628.

But the decisions of the law courts have not been at all uniform upon this question. Some of them have applied the doctrine of equitable estoppel when necessary to prevent fraud, and have not allowed the license to be revoked. But probably the weight of authority is with *Cook v. Stearns*. But the case at bar is a suit in equity, and the question is not what is the legal doctrine, but what is the equitable doctrine. And every authority in favor of applying the doctrine of equitable estoppel in a law court applies *a fortiori* in a court of equity. But the refusal of a court of law to apply such doctrine is no authority against applying it in equity. In a number of cases at law involving the question under consideration, courts and judges, recognizing the harshness of the established legal rule, have suggested that equity might furnish relief. See *Den v. Baldwin*, 21 N. J. Law, 390; *Foot v. Railroad Co.*, 23 Conn. 214; *Bridges v. Purcell*, 1 Dev. & B. 492; *Prince v. Case*, 10 Conn. 375; *Benedict v. Benedict*, 5 Day, 469; *Foster v. Browning*, 4 R. I. 47. The following note to *Hall v. Chaffee*, 13 Vt. 157, by Judge ISAAC F. REDFIELD, is suggestive. He says: "I have no doubt many cases, both English and American, may be found, and those of high authority, which either directly or indirectly recognize the doctrine that a parol license to enjoy an easement growing out of land, when once ex-

ecuted, becomes irrevocable, and the right thus acquired permanent. [Authorities cited.] But I apprehend the just weight of authority, both English and American, in regard to the rights of the parties at law, is that such license is within the statute of frauds, and, unless in writing, countermandable at will, even when executed so as to make any further enjoyment of the easement a ground of action. If such a license be given by parol and expense incurred upon the faith of it, so that the parties cannot now be placed *in statu quo*, there would seem to be the same reason why a court of equity should grant relief, as in any other case of part performance of a parol contract for the sale of land or any interest therein, *i. e.*, to prevent fraud."

But, as already intimated, the law courts have not, by any means, in all instances, or even very generally, contented themselves with referring parties to the equity tribunals for relief in cases involving a breach of faith on the part of the licensor, and consequent irreparable damage to the licensee. A number of our American law courts have seized upon and adopted the doctrine of equitable estoppel, by which they have been enabled to administer relief indirectly in cases which otherwise would not lie within the scope of their powers. *Ricker v. Kelly*, 1 Me. 117; *Clement v. Durgin*, 5 Me. 9; *Americoggin Bridge v. Bragg*, 11 N. H. 102; *Woodbury v. Parshley*, 7 N. H. 237; *Sheffield v. Collier*, 3 Ga. 82; *Wilson v. Chalfant*, 15 Ohio, 247; *Snowden v. Wilas*, 19 Ind. 10. And, where the law courts have not gone so far as to adopt the doctrine of equitable estoppel in such cases, they have very generally established the doctrine that buildings may, by permission of the owners of the soil, be erected thereon without becoming part of the inheritance; and that the person erecting them, when excluded from their possession and use, should have some remedy, that he should not lose the product of his labor entirely. "The existence of a right of property in a building, apart from the title to the soil, necessarily involves the conclusion that the person in whom it is vested may remove the building if he is obliged to surrender possession of the land. It has consequently been decided that a house or shop erected on the land of another under a license which is subsequently withdrawn may be removed by the person who put it up, (*Doty v. Gorham*, 5 Pick. 487; *Wells v. Banister*, 4 Mass. 514; *Fuller v. Tabor*, 39 Me. 519;) or its value recovered in trover, if the owner of the soil forbids or prevents its removal, (*Russell v. Richards*, 10 Me. 429, 11 Me. 371; *Osgood v. Howard*, 6 Greenl. 452.)"

But the true field for the administration of justice in such cases is in equity. We have already given the *dictum* of Judge REDFIELD upon the subject under consideration, which he put in a note to *Hall v. Chaffee*, *supra*, an action at law. That eminent jurist afterwards had occasion to set forth his views of the equitable doctrine in such case in an opinion where they are not *dicta*. The case of *Pope v. Henry*, 24 Vt. 560, decided in 1852, was a suit in chancery. Judge REDFIELD delivered

the opinion of the court. His remarks upon the interest or title of the defendant Henry explain themselves. They are as follows: "Without saying more in regard to the title of the plaintiff, we proceed to the examination of the title of the several defendants, each of which stands upon peculiar grounds. In regard to that of defendant Henry, it originated in a mere license to take water, by some kind of a duct, sufficient to carry certain machinery, which, in faith of the license, he subsequently erected, and had continued to occupy as his own for more than fifteen years before the bringing of the bill. This we think gives him an equity against all the world to be reimbursed for the value of his whole erections by the person taking them before he could be deprived of them. It is one of the first principles of the Roman civil law in regard to real estate, and valuable erections and 'meliorations,' as they are called, put thereon by the occupier in faith of a title which subsequently failed for any cause, that one thus benefited by the labor of another should make reasonable compensation. And the same principle has been very early incorporated into the English chancery law. This right clearly exists in Henry, without regard to his ultimate title. * * * Possession taken under a license to occupy permanently, either absolutely or under certain conditions, gives, in equity, a title to the premises, according to the terms of the license. And, this contract being partly performed or fully performed on one part by permanent erections of considerable value, a court of equity will decree an assurance of the title stipulated. And the party being in possession under the license is notice to a subsequent purchaser or incumbrancer of whatever title the one in possession may have, whether legal or equitable." So different is the language of equity from that of the law when expressed by the same courts and the same judges.

In the state of New York the case of *Mumford v. Whitney*, supra, speaks the language of her law courts. The following very complete and accurate syllabus of a suit in chancery gives, in brief, the language of her courts of equity. "Bill for specific performance of an agreement to sell or lease land. The appellants had entered upon the land under an assignment of a license given by the respondent to occupy and improve the land. They afterwards surrendered that license to the respondent, who gave them a written memorandum authorizing them to possess the land, and promising to give them the preference to purchase or lease the land. It was proved that at various times the respondent had encouraged the appellants to improve and build on the land, by assurances that no advantage should be taken of their labor, and that when his title was perfected, by a partition of the land, they should have a lease in fee, or a deed at the rate wild lands were selling. The respondent in his answer denied any other agreement than the memorandum, and relied on the statute of frauds. It was held that, the appellants having gone on the land and made improvements, this was a part performance, and took the case out of the statute;

that, although the memorandum was itself uncertain, yet, as a part performance was made the basis of the claim to a specific execution of the agreement, parol evidence might be connected with the memorandum for the purpose of making out the contract; and, there being satisfactory evidence of an agreement, independently of the memorandum, and the conduct of the respondent being a fraud on the appellants, a specific performance was decreed." *Parkhurst v. Van Cortlandt*, 14 Johns. 15.

It is said that the fact that a promise has been made and never performed is not evidence of fraud, but the rule has its exceptions. Judge Cooley says: "If deceit, in order to be actionable, must relate to existing or past facts, it is evident that the fact that a promise made in the course of negotiations is never performed is not, of itself, either a fraud or the evidence of a fraud. Nevertheless, a promise is sometimes the very device resorted to for the purpose of accomplishing the fraud, and the most apt and effectual means to that end. Such is the case already mentioned, of the purchase of goods with the intention not to pay for them. It is the fraudulent promise that accomplished the wrong. So, if one promises to take up incumbrances on the title of another, and by means of the promise throws the promisee off his guard while he secures the title for himself, it would be a singular defense for him to make that he had only failed to perform his promise. The promise was merely his false token, by means of which he effected his cheat. So, if the beneficiary in a will, when the maker thereof is on his death-bed, say to him he need not trouble himself, for he, the beneficiary, will make conveyance according to the wishes expressed, he may be held to this promise as a fraud, if he did not intend to perform it." Cooley, *Torts*, 487. The opinion in the case last cited quotes approvingly from an old but valuable work on frauds some descriptions of fraud which have always been recognized as correct and never better stated by more recent authorities. The quotations are from Roberts on *Frauds*. "The relief," says he, (page 13,) "against the statute [of frauds] in these cases of part performance was originally founded on the fraud and deceit usually characterizing the circumstances. There is no satisfactory foundation for the doctrine of part performance without the intermixture of fraud; (page 132,) and upon this ground, where an owner of lands has encouraged another to go on with his improvements upon the estate under a false expectation of a conveyance or a lease, and this expectation is raised in him by the assurance of such owner, it is agreeable to the general course of equitable relief to disappoint the contrivance by compelling the deceiver to realize the expectation he has created; that is, by compelling him to give such deed or lease. This protecting jurisdiction," he says, "has stretched itself to those cases where the illusory hope has been raised, not only by words and assurances, but simply by looking on in silence, whilst false impressions, which we are able either to correct or verify, are inducing

a fruitless expenditure on improvements. This equity is strong and salutary, and the jealousy of jurisdiction has shut out the statute of frauds where this principle of relief applies." Again, he says, (page 134:) "These instances of encouragement, either tacit or express, to make improvements and incur expenses, etc., are not proper cases of part performance, but of actual fraud, which courts of equity have always been forward to relieve against." The meaning seems clear that the fraud was not in making to appellants the promise to sell them the land or lease it to them, nor in the failure to perform simply. All this might have occurred without fraud if the parties could have been placed *in statu quo*. The fraud consisted in inducing appellants, by means of such promise, to go upon the land, and invest their labor and money there, and then robbing them of the resulting benefits by revoking their license to remain there in the homes they had built there lawfully, and which were their own. Even the law courts in a number of cases recognize the title of the occupants to the improvements in such cases, and their right to remove them or to be paid for them.

We do not overlook the fact that a labored argument has been made in the case at bar against the doctrine that part performance of a parol contract for the sale of real estate takes it out of the operation of the statute of frauds. Especial force is laid upon the words of our statute declaring such contracts void. We had supposed this not to be an open question. We will not attempt to review the authorities upon the question. This has been done too often by our ablest jurists. But in recognition of the elaborate argument of counsel we will give the conclusions arrived at by two of our American commentators, whose works are standard authorities in all our courts. We quote first from Story, Eq. Jur.: "Sec. 759. In the next place, courts of equity will enforce specific performance of a contract where the parol agreement has been partly carried into execution." "Sec. 761. But a more general ground, and that which ought to be the governing rule in cases of this sort, is that nothing is to be considered a part performance which does not put the party in a situation which is a fraud upon him unless the agreement is fully performed. Thus, for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement valid in law or equity. Now, for the purpose of defending himself against a charge as a trespasser and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and, if admissible for such a purpose, there seems to be no reason why it should not be admissible throughout. A case still more cogent might be put where a vendee, upon a parol agreement for a sale of land, should proceed to build a house on the land in the confidence of a due completion of the contract. In such case there would be a manifest fraud upon the party in permit-

ting the vendor to escape from a due and strict fulfillment of such agreement. Such a case is certainly distinguishable from that of a part payment of the purchase money, for the latter may be repaid, and the parties are then just where they were before, especially if the money is repaid with interest. A man who has parted with his money is not in the situation of a man against whom an action may be brought, and who may otherwise suffer an irreparable injury." And from Pom. Eq. Jur.: "Sec. 140. The doctrine was settled at an early day in England, and has been adopted in nearly all the American states, that a verbal contract for the sale and leasing of land, or for a settlement made in consideration of marriage, if part performed by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds. The ground upon which the remedy in such cases rests is that of equitable fraud. It would be a virtual fraud for the defendant, after permitting the acts of performance, to interpose the statute as a bar to the plaintiff's remedial right." And in section 103 we find the following language: "Under the prohibition of the statute of frauds a contract for the sale of land, when not in writing, cannot be enforced in law, even though part performed. It makes no difference whether the statute says, as in England and in some of the states, that no action can be maintained on such an agreement, or says that the agreement is void; the result is practically the same in either form of the statute. The verbal contract is no contract in law, but is simply a nullity. Equity speaks a very different language. It says that such a verbal contract, if part performed in a proper manner, shall be enforced."

It is sufficiently apparent, without rehearsing what has gone before or citing additional authorities, that the ground upon which equity exempts a partly executed parol contract for the sale of realty from the operation of the statute of frauds, and decrees the execution of the contract, is simply fraud. It is said the object of the statute is to prevent fraud, and equity will not allow it to be made the instrument of fraud. When so understood and limited, the rule is a salutary one. Story says, in the case of a vendee of land by parol building a house upon it in faith of the completion of the contract, there would be manifest fraud in permitting the vendor to escape from a due and strict fulfillment of the agreement. Pomeroy says it would be a virtual fraud for the defendant, after permitting the acts of performance, to interpose the statute as a bar to the plaintiff's remedial rights. But suppose the owner of the land, without going so far as to make a complete contract, specific in all its material terms, so as to be capable of definite proof and of enforcement, should stop short of that, but should by other inducements influence persons to invest money and labor on his lands, with a positive assurance that their possession should not be interfered with, and that they should eventually receive titles covering their improve-

ments, and that he should stand by and permit and continue to encourage these investments in execution of the permission he had given them to erect improvements and make their homes upon his land. If he should then revoke their license, bring ejectment to expel them from the homes they had built, and interpose the statute of frauds in bar of all relief to them, would his conduct be less a fraud in this case than in the other? The Pennsylvania courts say it would be the same, and that a mere license for the occupation or use of real estate will entitle the persons who have incurred considerable expense in execution of such license to relief in equity as fairly and fully as part performance of a parol contract for the sale of real estate entitles the vendees to such relief. The case of *Rerick v. Kern*, 14 Serg. & R. 267, decided in 1826, citing and approving the prior case of *Le Fevre v. Le Fevre*, 4 Serg. & R. 241, goes to the full extent of declaring such executed license an agreement on valuable consideration. It should be observed that Pennsylvania had no chancery courts, but administered equitable relief in the common-law actions, and through the common-law forms. *Rerick v. Kern* was an action on the case for diverting water from a stream, thereby injuring plaintiff's mill. The water had been taken from its natural channel, and turned into this stream leading to plaintiff's mill by a structure erected on land of defendant under a license from him. He afterwards removed this structure, so as to allow the water to return to its old channel. Plaintiff had erected a mill on the faith of the authority to so divert and use this water, and the loss of it would render his mill unserviceable during a considerable portion of the year. Plaintiff contended that under these circumstances the license was irrevocable. Defendant contended that a mere license is revocable under all circumstances and at any time. The court says: "But a license may become an agreement on valuable consideration,—as, where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed *in specie*? That a party should be let off from his contract on payment of a compensation in damages is consistent with no system of morals but that of the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior should not be prevented by want of personal independence. Hence the judgment of a court of law operates on the right of a party, and the decree of a court of equity on the person. But the reason of this distinction has long ceased, and equity will execute agreements for the breach of which dam-

ages may be recovered, where an action for damages would be an inadequate remedy. How very inadequate it would be in a case like this is perceived by considering that a license which has been followed by an expenditure of ten thousand dollars as a necessary qualification to the enjoyment of it may be revoked by an obstinate man, not worth as many cents. But, besides the risk of insolvency, the law, in barely compensating the want of performance, subjects the party to risk from the ignorance or dishonesty of those who are to estimate the quantum of the compensation. In the case under consideration no objection to a specific performance can be founded on the intrinsic nature of the agreement, nor, having been partly executed, on the circumstance of its resting in parol; but it is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent. A right under a license, when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself if it should be destroyed, or fall into a state of dilapidation, in which case the parties might, perhaps, be thought to be remitted to their former rights. But, having had in view an unlimited enjoyment of the privilege, the grantee has purchased, by the expenditure of money, a right indefinite in point of duration, which cannot be forfeited by non-user, unless for a period sufficient to raise the presumption of a release. The right to rebuild in case of destruction or dilapidation, and to continue the business on its original footing, may have been in view as necessary to his safety, and may have been an inducement to the particular investment in the first instance. The cost of building a furnace, for instance, would be trivial when weighed with the loss that would be caused by breaking up the business and turning the capital into other channels; and, therefore, a license to use water for a furnace would endure forever. But it is otherwise where the object to be accomplished is temporary. Such, usually, is the object to be accomplished by a saw-mill, the permanency of which is dependent on a variety of circumstances, such as an abundance of timber, on the failure of which the business is necessarily at an end. But till then it constitutes a right for the violation of which redress might be had by action. With this qualification it may safely be affirmed that expending money or labor in consequence of a license to divert a water-course or use a water-power in a particular way has the effect of turning such license into an agreement that will be executed in equity." If this be correct, of course a license for any other purpose extending to the permanent use or occupation of realty, and upon which money had been expended, would have a similar effect, according to the nature and terms of the license.

We have quoted at considerable length from the above case, because it discusses

and decides so many important points so briefly and so clearly, obviating the necessity of a restatement of the points decided or of the doctrine of the case. It is well to observe, however, that the case is not a suit for specific performance, but an action on the case for damages. The license to divert the water on the land of defendant, and to maintain a structure there for the purpose, followed by large expenditure on the faith of such license, is declared to be an agreement on valuable consideration, and to be considered as if there had been a formal conveyance of the right,—i.e., a conveyance by deed. Underlying all is the idea of the important interests involved and depending upon the validity and irrevocability of the license. This is a leading case. It has been followed in Pennsylvania, and, to a considerable extent, in other states. See *Swartz v. Swartz*, 4 Pa. St. 358; *Wheatley v. Chrisman*, 24 Pa. St. 298; *Huff v. McCaulley*, 53 Pa. St. 206; *Dark v. Johnson*, 55 Pa. St. 164; *Thompson v. McElarney*, 82 Pa. St. 174; *Railroad Co. v. McLanahan*, 59 Pa. St. 30. And this last case declares a subsequent ratification by parol equivalent to a precedent authority. The New York doctrine at law is sufficiently indicated in the case of *Mumford v. Whitney*, and in equity by *Parkhurst v. Van Cortlandt*, already referred to. So, in Vermont, by the cases of *Hall v. Chaffee*, and *Pope v. Henry*, *supra*. It seems that Massachusetts has adhered to the doctrine of *Cook v. Stearns*. New Hampshire and Maine seemed inclined to the Pennsylvania view at first. See *Americus v. Bridge v. Bragg*, 11 N. H. 102; *Woodbury v. Parshley*, 7 N. H. 237; *Sheffield v. Collier*, 3 Ga. 82; *Ricker v. Kelly*, 1 Me. 117; *Clement v. Durgin*, 5 Me. 9. But afterwards they both wavered, holding that, while the license might be valid as between the original parties, it would not be as between their vendees or successors in interest. See *Carleton v. Redington*, 1 Post. (N. H.) 291, and *Seldensparger v. Spear*, 17 Me. 123. In discussing the question of parol licenses the supreme court of Ohio uses the following language, after referring to the differing decisions of neighboring states: "But in Ohio we think it can at this day be hardly considered as an open question. Partly performed parol contracts, especially when the non-execution would operate as a fraud on the rights of the vendee, have repeatedly been enforced in equity, and a parol license executed has been held to be irrevocable in numerous instances on the circuit at law." *Wilson v. Chalfant*, 15 Ohio, 248. See, also, *Hornback v. Railroad Co.*, 20 Ohio St. 81. Indiana coincides substantially with Pennsylvania. Her supreme court says: "But though a parol license amounting in terms to an easement is revocable as to future enjoyment at law, and is determined by a conveyance of the estate upon which it was to be enjoyed, this is not the rule in all cases in courts of equity. In these courts the future enjoyment of an executed parol license, granted upon consideration, or upon the faith of which money has been expended, will be enforced at all events where adequate compensation in damages

could not be obtained. This will be done on the two grounds of estoppel on account of fraud, and specific performance of a partly executed contract to prevent fraud. And in those states of the Union where law and equity are administered in the same court, relief is afforded in any given suit where the pleadings present the necessary averments; and grantees as well as the original parties are bound where they purchase with notice; and in a mill and dam the existing condition of things might be notice to them of the equity." *Snowden v. Willas*, 19 Ind. 10, cited and approved in *Lane v. Miller*, 27 Ind. 534, and *Simons v. Morehouse*, 88 Ind. 391. In Iowa the doctrine is well established that an executed parol license for the occupation of real estate cannot be revoked either by the licensor or his grantee with notice; at least not without compensation. *Bush v. Sullivan*, 3 G. Greene, 344; *Beatty v. Gregory*, 17 Iowa, 109; *Anderson v. Simpson*, 21 Iowa, 399; *Harkness v. Burton*, 39 Iowa, 101; *Wickersham v. Orr*, 9 Iowa, 253. In Illinois the decisions are contradictory and unsatisfactory. In *Russell v. Hubbard*, 59 Ill. 335, it was held in the strongest terms that an executed license, where the parties could not be placed *in statu quo*, was irrevocable; that the revocation in such a case would be a fraud, and compensation for damages no adequate redress. This case was decided in September, 1871. It was an action at law, involving an executed parol license to use a party-wall. Three years after, in the case of *Kamphouse v. Gaffner*, the court held that this case must be considered as overruled or limited to cases of party-walls. The court says further: "On mature consideration we are unwilling to announce the doctrine that, notwithstanding the prohibition of our statute of frauds to the contrary, an interest in land which cannot be terminated by revocation may be acquired by parol license, which a court of law will recognize and protect. We still preserve the distinction between law and equity, however; and to what extent a court of equity might enforce specific performance, or grant relief on account of the peculiar hardship resulting from a revocation by a licensor, is another question, and one that we cannot now properly consider. The cases referred to as having been decided by the supreme court of Iowa in some respects are commendable "for the equitable view they take of the question; but when applied to a court in which the distinction between law and equity are preserved, they are contrary to the current of authority, and we do not feel at liberty to follow the rule they indicate." The case is an action at law, but reference is made in the opinion to the case of *Woodward v. Seely*, 11 Ill. 157, a chancery case, which announces the same doctrine. The latter case, however, refers for authority to law cases exclusively. This patent absurdity destroys its weight as an authority in equity.

It is said that equity follows the law, which is true. But equity has a scope of its own for giving relief, especially against actual or constructive fraud, which the law

cannot give; otherwise there would be no such thing as equity jurisdiction distinct from the law. When the law says that a parol contract for the sale of land conveys no estate under the statute of frauds, equity does not deny it; but when, by virtue of such contract, the vendee has been put in possession of the land, induced to make valuable improvements thereon, of which he would be defrauded and robbed by excluding him from the possession, and where a judgment for damages would not afford adequate relief, equity steps in and says the vendor shall not accomplish this fraud by enforcing his legal title at law in ejectment, but that he shall make a deed of the land, conveying an estate in accordance with the terms of the parol contract. When the law says that a parol license cannot give the licensee a permanent interest, easement, or estate in land, equity will not deny it; but when by virtue of such license the licensee has been put in possession, and induced to put valuable improvements on the land, of which he would be defrauded and robbed by a revocation of the license and ejectment by the holder of the legal title, equity will interpose, and either forbid the licensor to revoke the license, or impose such terms as will avoid the fraud, and accomplish what justice and good conscience demand. The supreme court of Wisconsin states the doctrine in this way: "Most of the American courts have been satisfied with determining that a party who has induced the incorporation of the property of another with his own, through the means of a promise not to interfere with its use or enjoyment by the latter, shall not be allowed to commit the fraud of appropriating it to his own purpose, although he may withdraw the right to use it in the manner originally contemplated, and compel the other party to resort for redress to an action." And, again, "In cases, however, where money has been expended, or improvements made and buildings erected on the faith of a parol license, which has been thus executed, courts of equity have generally interposed, at all events, so far as to restrain the licensor from appropriating to his own use and benefit the labor expended and improvements made on the faith of such license, without placing the licensee in the same situation in which he stood before he entered upon its execution." *Hazleton v. Putnam*, 3 Pin. 107. "There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on. The rule does not rest upon the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced another to act in such a manner that he will be seriously prejudiced if he be allowed to fall in carrying out what he has encouraged them to expect." *Faxton v. Faxon*, 28 Mich. 159; *Harkness v. Toulmin*, 25 Mich. 80; *Truesdall v. Ward*, 24 Mich. 117. "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he

cannot afterwards complain." *Leeds v. Amherst*, 2 Phil. Ch. 123, cited in *Faxton v. Faxon*, supra. "The same ideas are enunciated in various forms by many authorities, both English and American; among others see *Gregg v. Von Phil*, 1 Wall. 274; *Swan v. Seamens*, 9 Wall. 254; *Skinner v. Dayton*, 19 Johns. 513-561; *Raw v. Pote*, 2 Vern. 239; *Thompson v. Blanchard*, 4 N. Y. 303; *Parrott v. Palmer*, 3 Mylne & K. 632,"—cited in *Faxton v. Faxon*, supra. In Rhode Island it is held that an executed parol license will not be held irrevocable in a court of law, but that equity will give appropriate relief. *Foster v. Browning*, 4 R. I. 53. Georgia holds that a parol license to enjoy an interest in lands is void at law, but where large investments have been made on the faith of the licensee for the enjoyment of the interest, equity will decree specific performance of the terms of the license as in case of a parol contract for the sale of lands; and where a defendant might, by going into equity, defeat an action at law, he may set up his equitable defense at law. *Cook v. Pridgen*, 45 Ga. 331. But we will not quote further from the cases upon this point. Enough has been given to show that they are not harmonious, but that the conflict is principally in the courts of law. Enough has been given to show also the trend of the different lines of judicial thought and decision upon the questions involved. How can we reconcile the cases? Can they be reconciled? If we adopt the rule that a parol license to permanently occupy, use, and enjoy realty, when executed in whole or in part at considerable expense, becomes irrevocable and transmissible, and say that this rule is supported by a large number of respectable authorities, we are at once met with the indisputable proposition that it is denied by a large number of respectable authorities. It seems that this conflict may result from drawing general rules from particular cases. Two cases may be in direct conflict upon the general proposition, and yet each be right as applied to its own particular facts. A parol license may be irrevocable in one case and revocable in another, according to the varying facts and circumstances of the two cases.

There is one proposition in regard to which there is no conflict. All authorities—case law and text-book law—agree that it is the proper province of equity to give relief in case of fraud, whether the fraud be actual or constructive, intentional or non-intentional. It would be rash to attempt to give a perfect definition of fraud. Many eminent jurists have attempted it. None have succeeded. The best definitions given admit of so many exceptions as to greatly impair their usefulness in judicial discussion. The only safe way seems to be to define, or rather describe, the fraud suspected to exist in any given case, by comparison with similar cases selected from the Reports. Of all the attempted definitions to be found it seems that none are more satisfactory or instructive than merely to say that fraud is unfair dealing; and when, through inducements held out by one person, even only by means of a promise, by which

another person is influenced to change his position so that he cannot be placed *in statu quo*, and will be seriously damaged unless the promise is fulfilled, then the refusal to perform is fraud. Any transaction that outrages our sense of justice or shocks the conscience of an honest man may well be viewed with suspicion, and scrutinized closely. It seems clear in the case of *Parkhurst v. Van Cortlandt*, supra, that the court was right in pronouncing the conduct of the defendant a fraud upon plaintiffs. Defendant had given permission to plaintiffs to go on his wild land,—to “possess” it,—and promised them that as soon as he could perfect his own title he would secure them in the permanent occupation of the land by a sale to them, or a permanent lease. He thus induced them to expend money and labor and make homes there. He afterwards attempted to revoke their license, repudiated his promise, and brought ejectment against them on his legal title. Plaintiffs then brought their bill in chancery for an injunction and for specific performance. The case is very similar to the case at bar. The court was right in exercising its equity powers and taking jurisdiction on the ground of fraud. The defendant had simply enticed plaintiffs onto his ground, and entrapped them there with the tempting bait of a favorable location to build homes on easy terms, and was endeavoring to shear them likeshorn, and drive them off with his writ of ejectment. It was unconscionable that his scheme should be allowed to succeed. It made it no better that he relied upon his legal title, and appealed to the rigid rules of the common law and her courts to aid him. To grant such aid would have been to outrage justice in her temple through the instrumentality of her own chosen ministers. In fact, it was admitted on all hands that it was a proper subject for the interposition of equity. The only contention was whether the relief should be compensation or specific performance. A majority of the court decided in favor of specific performance. *Russell v. Hubbard*, 59 Ill. 335, was a case of a party-wall. One Harman owned the wall, and it was built to the north line of his lot. One Furry was about to build a frame house on the adjoining lot. Harman induced him to build of brick, giving him the use of the north wall of his (Harman's) house as the south wall of his (Furry's) house on condition that he would build a brick building. He did so. The court says: “By virtue of this agreement and the erection of the building equitable rights were acquired. Though the license to use the wall might be revoked prior to its execution, after execution a different question arises, and the possession was constructive notice to the purchaser of the rights which had been acquired. Money had been expended upon the faith of the license, and a different and more expensive building erected. While, ordinarily, it may be true that a parol license of this character is not transmissible, may be revoked at pleasure, and extinguished by the alienation of the land, yet, where money or labor has been expended, the law will interpose to

protect the licensee. The revocation, under such circumstances, would be fraudulent, and compensation in damages would afford no adequate redress. In such case the execution of the parol permission would supply the place of a writing, and take the case out of the statute of frauds. It would be the boldest fraud to allow this permission to be revoked. The grantee of Harman was chargeable with notice of Furry's equity at the time he took the mortgage, and he stands in the place of his grantor. The license has been acted upon, and the parties cannot be restored to their original position.” This case was afterwards overruled or restricted in its application to party-walls, on the ground that the remedy, if there be any, should be sought in equity, and not at law. *Kamphouse v. Gaffner*, supra. But we believe the court was right in saying it would be a fraud to revoke the license in reliance upon which a house had been built, and that, if not at law, at least in equity, there is a remedy for the licensee or his vendee or successors in interest. Cases may arise and have arisen where a license to occupy land has been intended and understood as a mere personal favor to the licensee to give him a place to live, or to occupy for some other beneficial purpose not transmissible, but revocable at will. Then expenditures would naturally be made accordingly. In other cases the granting of the license has been in terms an assurance of permanent possession. It is evident that the same rule cannot apply to both classes of cases. The revocation of the license, even after expenditures made in consequence of it, in the one case is a right, in the other a fraud. No general rule can be made as to the revocability of such licenses after such expenditures. Each case stands upon its own circumstances. The conflict in the authorities has arisen largely from an attempt to make a general rule that all such licenses are revocable on the one hand, or that they are not revocable on the other, when, if the courts had simply decided the cases, and left out the general rule, they might all have been right, and not in conflict. When we have traveled through the mass of decisions, cloudy and conflicting at times, and have arrived at the principle that equity will relieve where there is fraud, actual or constructive, we have arrived at a principle in regard to which there is no conflict. And courts of equity, as quotations already given show, are very generally agreed that the revocation of a parol license to permanently occupy and improve realty after any considerable expense has been incurred, on the faith of such license, under circumstances such that the parties cannot be placed *in statu quo*, is either actual or constructive fraud. Even the courts of law very extensively recognize the fraud, and some of them remedy it by equitable estoppel; but it seems the majority of them acknowledge their inability to furnish the appropriate remedy, while suggesting frequently that equity may do so.

Verling K. Hart perpetrated no fraud. He treated the settlers on his land by his permission as rightfully there. Juliet W.

Hart committed no fraud. She also treated the settlers on the town-site of Buffalo as rightfully there, even to the extent of extending their license to occupy, improve, and hold lots, which expired with Verling K. Hart on February 17, 1883, to the 23d of the following August. A license to hold and enjoy realty may be made as effectual by subsequent ratification as by precedent authority. Her conduct was such as to recognize and acknowledge the rights of the settlers under the license given them by Verling K. Hart, at least to the extent that they were not trespassers, and that their improvements were their own. This was a substantial ratification of their license. Her present attitude of seeking to evade or annul this license, as to complainant, is not voluntarily assumed. It is in a measure forced on her by the complainant's own acts. His conduct is not such as to commend him to the favorable consideration of a court of equity. It cannot be supposed that Verling K. Hart, in assuring the settlers that they should have the land improved by them, could mean more in regard to lots on a business street than one lot to a building, included within the limits of the lot, or sufficient front to clear their buildings where more than one lot was built on, and the depth of the lots back. This is a fair understanding of the terms in which he gave permission to occupy and improve lots. If the terms in this respect and one or two others had been more definite, the parol license to occupy would have been converted into a parol contract of sale. All of this was offered complainant for a small price; but, while not objecting to the price, he wanted more ground. We cannot sustain complainant's claim to the ground, or any portion of it; the contract under which he claims being incomplete in the one case, and impossible of performance in the other. And yet to deprive him of his improvements, made, as they evidently were, in good faith, is no less than a fraud upon him.

The proper measure of relief in such cases is a matter in which there is much diversity of opinion. The Pennsylvania courts go to the extent of holding a parol license, executed in whole or in part, at large expense, an agreement on valuable consideration, and hold it irrevocable, and enforce it according to its scope, meaning, and intent. On the other extreme, a few cases can be found refusing any relief whatever. In this regard, as in others, each case must stand upon its own facts and circumstances. Equity has ample power to mould a decree that will accomplish substantial justice. To determine what substantial justice requires we must take into consideration all the facts and circumstances of this particular case. Cases almost without limit can be found announcing in general terms rules apparently applicable, but when the facts of such cases are examined few can be found that are parallel to the case at bar. As already explained, the terms of the license in this instance were too incomplete in several particulars to constitute a contract capable of specific performance in equity.

But the terms and the true intent of that license, so far as they can be ascertained, are controlling considerations in determining the equities of the parties. The license by Verling K. Hart was given before any survey or platting of the town,—before the location, size, and shape of blocks and lots had been determined. We have already intimated the view that all that settlers are equitably entitled to under that license, on business streets, is sufficient front to clear their buildings, and the depth of a lot back. This is a liberal construction in favor of the settlers. Fischer's understanding of Hart's inducement to settlers, and which he was authorized to make public as far as the railroad, was that mechanics and good people locating and making improvements on the town-site should have each a lot at small expense,—as he understood it, the expense of recording. The size of town lots had not then been determined. A fair construction of this is that it means, as applied to business streets, the front and depth back already indicated. This is defendant's construction. The written instrument of September 20, 1883, would indicate such intent; but that, being a proposition to settle all controversies, is not conclusive. When complainant was building on lot No. 2, as Wood thinks, but at work on lot No. 1, as he thinks himself, and when Wood was making a preliminary survey for defendant, Wood and complainant had a conversation in regard to the matter. Complainant says that Wood was defendant's agent. Wood says he was not, but states that he platted the town-site, and had been assisting Mrs. Hart, defendant, in making sales and in advertising her business generally. He is her brother-in-law. It would seem from all the evidence that the building which Wood speaks of as about lot 2 actually extends over on lot 3. Wood's recollection of this conversation and complainant's do not agree. It is not very material what the conversation was. It is material, however, that then, or soon after, the erection of the building mentioned was going on, and neither then nor afterwards was it objected to by defendant herself, or by Wood for her, although they both lived within 300 or 400 feet of the place, and defendant as well as Wood must have known of the erection of the building. It is also questionable whether, under the circumstances, plaintiff had not a right to rely on Wood's admitted statement to him that Mrs. Hart would not probably interfere with his building unless in the way of platting the town, and to expect that, if she did object, Wood would ascertain the fact, and inform him of it. This much would seem to come within the scope of Wood's employment, as stated by himself. No intimation ever reached complainant to the effect that it was desired he should not proceed. The circumstances would rather seem to corroborate complainant's understanding that defendant would be glad to have such a building erected. He says, at the time of its erection it was the best building in town. At any rate, he was not

treated as a squatter or a trespasser. But this gave him no right to claim more land than necessary for the reasonable use and enjoyment of the buildings he had erected or was then erecting. This amount of land the language and conduct of Verling K. Hart in his life-time shows that he intended settlers putting up fairly good buildings should have. This amount the language and conduct of defendant shows that she intended settlers to have who erected or commenced such buildings on or before August 23, 1883. The main consideration of this inducement was, doubtless, the location and holding there of the principal town of that portion of the country; and this was a very important and valuable consideration. It probably made a few acres more valuable than the entire desert claim would have been without the town upon it. In addition to this, the settlers were to pay what sometimes was called a nominal price, sometimes a small price, probably intended to cover expense of surveying, platting, recording, conveyancing, etc.

When this cause was tried below no question of rents and profits was in issue. At the time the evidence was taken, the cause argued and submitted, and the opinion of the chancellor filed, indicating what the decree would be, there was positively nothing in the pleadings as to any rental values. The answer concluded with a general charge that complainant had derived great benefit and emolument from the use of said premises, etc.,—a statement too indefinite for a ground of judgment, and on which no judgment was asked. The cross-bill attempted to raise the question. It is proper, and probably necessary, that we now give our views upon that question for the guidance of the court below, as it is likely to be considered in the future progress of the case, and is included in the decree. This seems to be simply and clearly a case where the property of complainant has been incorporated with that of defendant with the consent and permission of defendant and her predecessor in interest, and that the property on both sides was real estate, and that of complainant such as usually becomes part of the inheritance; that this was done under a parol license, now executed at large expense by complainant, which license was in the nature of an agreement for the future sale and conveyance to complainant of the land of defendant upon which complainant's part of the property, consisting of valuable buildings, was placed and erected; that this license, although in the nature of such agreement, and now executed on the part of complainant, is incomplete in some of the material terms necessary to constitute a contract, and cannot be specifically enforced as such; that it was not contemplated, either by licensee or licensors, that any rent, either ground-rent or other rent, should ever be charged against the licensee, but rather that he was considered the equitable owner of the land upon which he erected his buildings, and entitled to the legal title as soon as practicable, at a small charge, probably intended merely to cover incidental ex-

penses. Under these circumstances, while we cannot give complainant the legal title to the land, we do not think it equitable that he should pay rent for it.

The case of *King's Heirs v. Thompson*, 9 Pct. 204, decided by the supreme court of the United States in 1835, seems to have stood unchallenged as authority up to the present time. It was not exactly similar in all its facts to the case at bar, but seems precisely analogous in most of the legal and equitable principles involved. The case will be found to be in harmony with a number of those already cited, and it is believed in conflict with very few anywhere. It was a bill in chancery, praying for a decree for the legal title of the realty involved, or, if that could not be decreed, that the property might stand charged with the amount of repairs and improvements expended on it. The complainants, Josiah Thompson and Elizabeth, his wife, were married in 1812. A few days after the marriage, George King, Elizabeth Thompson's father, being then in good circumstances, proposed to Josiah Thompson to give him a house and lot, then much out of repair, if he would repair it so as to make it a comfortable residence, stating at the same time that he intended the property for his daughter, complainant's wife. Complainant accepted the property, and expended upon it over \$4,000. On April 17, 1816, King wrote to complainant that in order to remove any suspense in regard to the property on which complainant then lived he held himself bound to give a deed to a trustee, who shall hold it in trust for the complainant and wife during their lives, etc. Complainant answered April 26th, declining the proposition, and suggested (1) that the property be valued at the time he received it, and he would pay the amount over to King, etc; (2) that the improvements be estimated, and King, on paying the amount, should receive a relinquishment of all his right; (3) that a deed of the property should be executed to complainant's wife. April 29th King replied: "I make no hesitation in complying with your first proposal, for it is just what I first proposed to you; and I will do it another way, giving you your choice, viz.: I will deed the dwelling-house and all above it to you, and about twenty feet below it; and then all below I will deed to Betsy, [complainant's wife,] provided that she will never deed it or dispose of it except by will, which she shall always be at liberty to make when and how she pleases." Afterwards there was some correspondence in regard to rents of the premises after Thompson left them. King acting as his agent in renting and in collecting and forwarding rents to complainant. There was no conveyance made, and in 1820 King died insolvent. The litigation is between his heirs and creditors on one side and Thompson on the other. The court holds that it is impossible to decree a title as prayed for in the bill, because the "evidence fails to establish the specific terms of the contract; but holds, further, that whatever uncertainty may exist as to the terms of the contract, there can be

no question that the complainant acted under it in taking possession of the property and expending a large sum of money in its improvement." And the opinion proceeds: "As the circuit court decreed a conveyance of this property to the complainant, that the decree must be reversed and the cause remanded to that court, with instructions to cause the property to be sold, after due notice, on such terms as they shall deem most advantageous to the estate of George King, and the proceeds of the sale first to be applied to the payment of the money expended by the complainant in making improvements on the property, and the balance, if any, to be paid over to the benefit of the creditors of the estate of George King." No charge was made against complainant for rents received or for the use of the property while he occupied it, nor allowance made for interest on money expended. The litigation being between the creditors of King, as well as the heirs, on one side, and the party who had made the expenditures on the property on the other, makes a stronger case for the recoupment of rents collected, and for a rent charge for the use of the property while Thompson occupied it, than if, as in the case at bar, the litigation were between the original parties or their successors. The true doctrine of such cases is that the party making the improvement cannot be made liable to a rent charge by any notice to quit. He is in possession of his own property, incorporated, it is true, with the property of another, but without fault on his part; and his interests cannot be terminated in that way, either by commencement of suit or anything else that the licensor alone can do. This would be to make the executed license revocable at the will of the licensor, contrary to the prevailing doctrine in equity. The duty of the licensee to surrender possession, or to pay rent, which is equivalent, begins when he is paid for his interest, and not before; and this result can be reached only by a mutual agreement of the parties or by a decree of court, and the sole justification for a court of equity in making such a decree exists in the necessity of the case. In no other way can a separation of the interests of the parties be effected without serious injury to at least one of the parties. To remove improvements consisting of permanent and valuable buildings is, in great measure, to destroy their value. In the case at bar such removal was forbidden by the defendant. The case of *King's Heirs v. Thompson*, like the case at bar, lies near the line which separates a license to occupy from a contract of sale. The case of *Parkhurst v. Van Cortlandt*, *supra*, lies near the line upon the other—the contract—side. The conveyance promised in the latter case was in the alternative,—a deed of title or a permanent lease, at the option of the licensee. The consideration was not fixed, but the contract or license provided the means of fixing it. It was to be the price of wild lands at the time of the conveyance. If a lease was chosen, the rent was to be the usual rental of similar lands in the vicinity. It may well be doubted if all chancellors would decree specific execution

of a contract in these terms. The court was unanimous that the complainants were entitled to equitable relief, but divided on the question whether the relief should be compensation for improvements made or specific performance of the contract. A majority were in favor of specific performance.

The decree of the court below is inconsistent in its findings and conclusions. It declares that complainant since June 28, 1884, has been and is now without right tortiously and unlawfully in possession of the property in controversy; but it gives judgment for rents only from September 5, 1885. This is the date of a notice to quit, which was served on him on September 7, 1885. If his possession was tortious, no such notice was necessary to fix his liability for rents. If such notice were necessary, rent should be computed from date of service. There is error in the decree in the following particulars: (1) In embodying in the decree an order in the nature of an interlocutory order allowing a cross-bill tendering new issues to be filed after the cause had been tried, and the substance of the decree determined. (2) In decreeing relief to defendant upon the new matter set up in her cross-bill, in the same decree in which was contained the order allowing the cross-bill to be filed; thus giving complainant no opportunity to answer such cross-bill, or even to say whether he wished to answer it or not. (3) In attempting to adjudicate matters not in issue in the cause; that is to say, in awarding to defendant the possession of the property in controversy, and process to put her in possession, and judgment in her favor for rents. (4) In denying to complainant compensation for improvements put by him upon the land in controversy. (5) In charging complainant rent for the property in controversy, which is error even if rent were in issue. (6) In dismissing complainant's original and amended bills. (7) In refusing to enjoin defendant's two actions of ejectment. For these errors the decree of the district court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

This cause should be retried upon the theory that both complainant and defendant have a valid interest in the realty in controversy, and that complainant's possession of that portion of the ground occupied by his improvements is and has been rightful, and that he is liable for no rent for the same; but that the ground itself belongs to defendant. The value of the property, including the ground so occupied by complainant's improvements, and the improvements, should be ascertained, and the value of the ground and the improvements separately, and a decree should be made allowing complainant the present value of his improvements, and making it a lien upon the property. Then, unless defendant elect to discharge the lien by paying the amount into court for the use of complainant, the property should be sold as on execution, and the proceeds divided between complainant and defendant in the proportion of the value of their respective interests. De-

fendant having tendered to complainant, before the commencement of the litigation of the interests in controversy, all that he was equitably entitled to, and he having refused the tender, and his conduct in other respects having been arbitrary and reckless of the rights of others, he should pay all costs of this suit and of the two actions of ejectment mentioned in the pleadings herein; and the amount should be made a lien on his interest in the realty involved, and on the money paid into court to his use in lieu thereof, if such payment should be made; and an order of injunction should issue, enjoining defendant's prosecution of her said two actions of ejectment until complainant receives compensation for his improvements, or until the money be paid into court.

MERRELL, J., concurs.

GROESBECK, C. J., (*dissenting.*) While I concur with the majority of the court as to the equities of the case at bar, I dissent from that part of the opinion and judgment which settles the relief to be given to the complainant. The elaborate and learned opinion of my Brother CONAWAY establishes to my mind that the doctrines of license and equitable estoppel must be applied to the determination of this case, and that the complainant is entitled to relief under these well-known equitable doctrines. The rule is clear that, if the owner of an estate stands by and suffers another, who supposes himself to be entitled to certain lands, to go thereon and make improvements and expend money there,—particularly if this is done by the invitation of the owner, under promise of title,—a court of equity will compel such owner, when he afterwards seeks to assert his title, to indemnify the one who made the expenditure, by making pecuniary compensation; and in such case, if the owner resorts to a court of law and brings an action of ejectment, a court of equity, at the suit of the party making the expenditure, will work out the equitable principle by restraining the ejectment suit until compensation is made. 1 Pom. Eq. Jur. § 390, and the cases there cited. By a general and public invitation on the part of Col. Hart, extended to those of his class, the complainant occupied the parcels of land, and erected and maintained valuable improvements thereon. By these acts and those of others, contemporary with him, a town was started, and the desert-land claim of Col. Hart became largely enhanced in value. This occupancy and improvement of the complainant was acquiesced in by Col. Hart, his agent, and his successors in title, until September 7, 1885, when formal demand was made by Mrs. Hart upon complainant for the possession of the premises. Prior to that time she had tendered to the complainant a deed to all the parcels of land, in amount 87 feet, upon which he had made lasting and permanent improvements, and this offer was of the same tenor as that made and accepted by others in the same situation as complainant. The price fixed was only \$42, and the rate fixed for each lot and portion of a lot actually improved by

complainant was the same as that given to the other settlers and occupants under Col. Hart's invitation. It was all that complainant had a right to expect, even under his construction of the general understanding of the early inhabitants and occupants of the town of Buffalo; yet this offer was refused, and the complainant demanded more land. If specific performance had been decreed to him, it is clear from the testimony that complainant would have only obtained the lots and parcels of lots covered by the deeds. Mrs. Hart has therefore acted in good faith, and the evidence discloses that she honestly endeavored to respect every obligation and to redeem every promise made by her deceased husband, although she claimed that such obligation on her part was a moral, rather than a legal, obligation. The complainant does not object as to the price fixed in the deed for the land thereby granted. He is in the position of having forced the defendant into this protracted and expensive litigation. Nay, more, he has boldly attacked the title of his licensor, and that of the successors to the title, by attempting, with others, to have the patent withheld or canceled; thus compelling the outlay of a considerable sum, expended to meet his charges. By assailing the title he has evidently sought to coerce a settlement from the widow and administratrix in his own way and upon his own terms. While this conduct of the complainant may not operate to defeat his right to relief, it does not address itself favorably to a court of conscience. I concur with the majority of the court that he should be mulcted with the costs. Following the reasoning as set forth so ably in the majority opinion, complainant never had any title to the parcels of land claimed by him, and occupied and improved by him, and it cannot be granted to him. His right, then, is solely to be reimbursed for his outlay, to be paid for his improvements. His right to the use and possession of the premises ceased when demand was made upon him for their surrender, and he should not have a farthing for the use and occupation of them since that date. The value of the improvements should be ascertained as at the date of this demand, and interest should be computed thereon to the time of making the computation under the order of the district court. From this amount should be deducted the rents, issues, and profits of the premises since the date of demand, with interest thereon from the time the same were severally paid. The residue should be decreed to be a lien upon the premises, after a reasonable time is given to the defendant to pay the same; and the premises should be sold to satisfy this lien under the direction of the district court. At the time of the taking of the testimony the rents had amounted to more than the value of the improvements, and since that time nearly four years have elapsed. I do not think that this considerable sum should go to the complainant, and that he should be paid the present value of the premises. The computation I have suggested seems to me to be more equitable and just than the one adopted in

the majority opinion, and for these reasons I dissent from the judgment and the opinion rendered in this case.

(3 Wyo. 563)

**SCHOOL-DIST. NO. 2 OF JOHNSON COUNTY
V. HART.**¹

(*Supreme Court of Wyoming.* Oct. 26, 1891.)

**LICENSE — ABANDONMENT — RIGHT TO EQUITABLE
RELIEF.**

Where a school-district, after going onto land and erecting a school-house, under a license and promise of the person in possession that, if it should erect a building and use it for school purposes, he would, on obtaining a patent, deed to the district the lot on which the building was erected, entirely abandons the use of the premises for school purposes, it is entitled to no equitable relief on the revocation of the license, the fact that the title was in dispute and litigation being no excuse for such disuse so long as it was in possession and control, and in no wise prevented from using the premises.

Appeal from district court, Johnson county; M. C. SAUFLEY, Judge.

Suit by school-district No. 2, in the county of Johnson, against Juliet W. Hart, to enforce the conveyance of real estate, and to enjoin an action of ejectment therefor. Decree for defendant, and complainant appeals. Affirmed.

Charles N. Potter and J. J. Orr, for appellant. *William Ware Peck and Carroll H. Parmelee*, for appellee.

CONAWAY, J. The litigation in this cause arises in regard to certain land in the town of Buffalo, Johnson county, Wyo., claimed and held by the complainant, school-district No. 2, under an alleged donation by Verling K. Hart, since deceased. The cause is similar in many of its facts to the case of *Metcalf v. Hart*, 27 Pac. Rep. 900, (decided at the present term.) But, in our view, the controlling considerations are entirely different. It is apparent from the testimony that the alleged donation was a dedication to the public use for school purposes. The ground is uniformly spoken of by the witnesses as a place for a school-house and school. It is also shown by testimony introduced by complainant that the premises have not been used for school purposes since April, 1886. Such being the case, the property reverts to the grantor or his legal representatives. The entire disuse of the premises for school purposes is not excused by the mere fact that the title was unsettled, or even in litigation. Complainant was at all times during such litigation, and still is, in possession and control of the premises, and has not been prevented from using them by any legal process or any other means whatever. Complainant also claims under an alleged written contract of defendant with the people of Buffalo, of date September 20, 1883. For reasons stated in our opinion in the case of *Metcalf v. Hart*, supra, this contention cannot be sustained. The decree of the district court is in favor of defendant, dissolving temporary injunction, dismissing complainant's bill of complaint, and giving judgment against com-

plainant for costs. Said decree is affirmed.

GROESBECK, C. J., and MERRELL, J., concur.

(11 Mont. 222)

**GRANITE MOUNTAIN MIN. CO. V. DURFEE,
Judge.**

(*Supreme Court of Montana.* Oct. 21, 1891.)

CHANGE OF VENUE—DISQUALIFICATION OF JUDGE.

1. Under Code Civil Proc. Mont. § 62, which provides that "the court may, on good cause shown, change the place of trial in the following cases: * * * Fourth, when from any cause the judge is disqualified from acting in the action: provided, that the court shall not change the place of trial for disqualification of the district judge in any case where the judge of another district will appear and try the action,"—a district judge, disqualified to hear a case, will not be ordered by mandate to grant a motion for change of venue where he announces that, on a certain day and hour, a judge of another district would be in attendance to hear the motion and set the case for trial.

2. Const. Mont. art. 8, § 12, provides that, where a district judge is disqualified to hear a case, a judge of another district may sit in his place. Held that, in the absence of other constitutional or statutory provisions, the judge who is disqualified to hear the case is the proper officer to procure the attendance of another judge.

Application by the Granite Mountain Mining Company for mandate to the district judge of the third judicial district of Montana to grant a motion for change of venue. Denied.

STATEMENT BY THE COURT. The petition is for a writ of mandate requiring the judge of the third judicial district to grant a change of venue in an action in which the petitioner is defendant and James E. Durfee is plaintiff. The said James E. Durfee obtained against said Granite Mountain Mining Company a judgment by default. Defendant filed a motion asking to have the default opened. That motion was pending when the matter now in controversy arose, and is still pending. Before said motion was brought to a hearing, the defendant suggested to the court that the plaintiff was a brother of the judge, Hon. DAVID M. DURFEE. This relationship between the party and the judge is a disqualification. The statute says: "A judge shall not act as such when he is related to either party by consanguinity or affinity within the third degree." Code Civil Proc. § 547. The defendant asked the court to have the venue of the cause changed, for this reason. The judge stated that he was a brother of the plaintiff, but that he would make no order in the case, as he had no doubt that he could procure another judge to try the case, and that at the hearing and trial he would call another judge from another district, who would appear and try the action, and all proceedings in the cause. The "hearing" and "all proceedings in the cause," as referred to by the judge, are reasonably taken to refer to the motion to open the default then and still pending. Later, October 3, 1891, appears this order: "This cause coming on regularly to be heard, the court announced that on Saturday, October 24, 1891, at the hour of 10 o'clock on that day, he would have in at-

¹ Rehearing pending.

tendance a judge from another district to pass upon the pending motion, and set this cause for trial." The court refused to pass upon the motion for a change of venue, and announced that he would have a judge from another district, relying upon the statute, Code Civil Proc. § 62, which provides: "The court may, on good cause shown, change the place of trial in the following cases: * * * *Fourth*, when, from any cause, the judge is disqualified from acting in the action: provided, that the court shall not change the place of trial for disqualification of the district judge, in any case where the judge of another district will appear and try the action." The petitioner now seeks to compel the district court to change the venue. The respondent's defense is based upon the statute last cited.

Forbis & Forbis, for petitioner. *Cole & Whitehill*, for respondent.

DE WITT, J. It has been suggested that the district court made an order refusing to grant the motion for a change of the place of trial, and that this order is appealable, (Code Civil Proc. § 444.) and that therefore a writ of mandate will not lie. But we are of opinion that a fair deduction from the record is that the court simply refused to act on the motion, and this is also the view of counsel for the petitioner. They complain of what they call "non-action" by the court, and seek, by this writ, to bring the court into action. The disqualification of the judge "to act as such" in the action is, under the statute, unquestioned. In refusing to act, even upon the motion, the judge below obeyed the mandate of the statute literally and fully, (Code Civil Proc. § 547,) although it has been suggested that the granting of a change of venue is a formal act, which even a disqualified judge may perform. *Cock v. State*, 8 Tex. App. 666, cited in *Littrell v. Wilcox*, 10 Mont. —, 27 Pac. Rep. 394.

We are then brought to the contention of the parties. Petitioner claims that the granting of a change of venue in this case was not a judicial act, but purely ministerial, in which the court had no discretion, but that the motion should have been granted at once and of course. On the other hand, the respondent contends that the venue should not be changed if the judge of another district will appear and try the action. This is unquestionably correct, and the plain direction of the statute, and so far there is no disagreement between the parties. But the controversy arises as to the procuring of the other judge. Petitioner claims that the disqualified judge cannot call in the other judge,—that is to say, he cannot select him; that, if he is disqualified to act, he is disqualified to select his substitute. Petitioner admits that there would be no trouble if the other judge were in Judge DUFFEE's court by means other than the invitation of the resident judge. Petitioner's position reduces itself to about this: It is right for him to try his case before a judge who happens to get into Judge DUFFEE's court, but not before one who arrives

there by the only means by which another judge could ever so arrive. There is no provision of the constitution or the statute, as in some states, by which the governor, or any other officer, could assign a judge to go to Judge DUFFEE's court, for any purpose, in a case of this nature. Such other judge will never voluntarily go to Judge DUFFEE's court, and request the judge upon the bench to vacate his seat for him. Nor is petitioner's case helped if he says that he will wait, and the plaintiff must wait, for a trial, until another judge happens to be in the court upon business other than that in controversy; for the other judge will, even then, be there upon the invitation and selection of the resident judge, and the situation is in no manner altered. When the statute says that the place of trial shall not be changed for disqualification of the judge, when another judge will appear, etc., it must be construed to mean something, if meaning can be extracted from language; and, in our opinion, it does mean that such judge shall appear by the only method by which it is possible for him to appear, viz., by the invitation of the resident judge. When it is argued that to allow this is to allow a disqualified judge to "act as such in the action," the reply is that, under our law, the whole subject has been made statutory, and the same power that disqualifies a judge can make an exception to such disqualification, and such exception is found in the constitution of the courts, which makes Judge DUFFEE the judge of the third district, which clothes him with authority in his own court, and the constitution, (article 8, § 12,) which provides that another judge may sit in his place, and the absence of provision, constitutional or statutory, for any other method by which such other judge can occupy Judge DUFFEE's seat, except upon the call of the judge presiding upon that bench. The application for the writ must be denied, and it is so ordered.

BLAKE, C. J., and HARWOOD, J., concur.

Ex parte HARLAN.

(Supreme Court of Oklahoma. Oct. 31, 1891.)

HABEAS CORPUS—WHEN LIES.

Where the trial court acquired jurisdiction of the subject-matter of an indictment and the person of the accused, the judgment of the court on the question whether the indictment sufficiently charged the crime of perjury can only be reviewed on appeal or writ of error, and *habeas corpus* will not lie.

Petition for *habeas corpus* by James J. Harlan. Denied.

Ledru Guthrie, for petitioner. *Horace Speed*, for the United States.

GREEN, C. J. The petitioner for a writ of *habeas corpus* in this case was convicted of the crime of perjury on the 23d day of April, 1891, in the district court of Oklahoma county, sitting as and exercising the jurisdiction of a district court of the United States, and was sentenced to confinement at hard labor in the penitentiary

at Columbus, Ohio, for a term of two years, and that he pay a fine of one dollar. The indictment against the petitioner, and on which he was convicted, is set out in the petition, and shows that the perjury of which he was convicted was assigned on an affidavit, subscribed and sworn to by the petitioner before a notary public of Oklahoma county, and was in corroboration of a contest affidavit of one Rhoda Summers, which was used in a land contest before the register and receiver of the United States land-office at Oklahoma City, and of which contest the register and receiver had jurisdiction. It is contended in behalf of the petitioner that the indictment does not state facts sufficient to constitute the crime of perjury, or a public offense, under the laws of the United States, and for that reason the court had no jurisdiction, and the judgment is void, and the imprisonment illegal, and that the petitioner should be discharged on *habeas corpus*. In support of this contention it is claimed that there is no law of the United States providing for a corroborating affidavit to a contest affidavit in the local land-office, and that a corroborating affidavit in such case is only made necessary in the initiation of a contest by rules and instructions of the commissioner of the general land-office, which have not the force and effect of law; and, as perjury can only be committed, in proceedings in the local land-office, where an oath is required by a law of the United States, the false swearing on petitioner's corroborating affidavit does not amount to the crime of perjury, and no criminal offense is charged in the indictment, and the proceedings in the trial court were *coram non judge* and void. The law is well settled that in a case like the present, in which the petitioner is in execution upon a conviction, the writ of *habeas corpus* ought not to be awarded if the trial court had jurisdiction of the person and the crime charged, and did no act beyond the powers conferred upon it. And the proceedings of the trial court will be examined, so far as necessary, to determine the question of jurisdiction; and if it appears that the court transcended its powers the writ will be granted, and the prisoner discharged, even after judgment; but, if the trial court had jurisdiction and power to convict and sentence, the writ cannot issue to correct mere errors. *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152; *Ex parte Lange*, 18 Wall. 163; *Ex parte Watkins*, 3 Pet. 203. The district court of Oklahoma county, when sitting as and exercising the powers and jurisdiction of a district court of the United States, has jurisdiction of the crime of perjury, under the laws of the United States, committed in that county. Organic Act, § 9. And, as the petitioner was indicted in that court, and arrested and brought before the court to answer the indictment, and on arraignment entered a plea of not guilty, the court had jurisdiction of the person of the petitioner, and also of the subject-matter of the indictment. But it is urged that the indictment states no criminal offense; that the facts, if true, which are averred in the indictment,

do not constitute the crime of perjury under any law of the United States. As the trial court had jurisdiction of the subject-matter of the indictment and of the person of petitioner, it was a question of law for the court to determine whether or not the facts averred in the indictment constituted the crime of perjury; and, if the trial court erred in its judgment upon that question, such errors can only be corrected by appeal or writ of error in this court, and not by writ of *habeas corpus*. The case of *Ex parte Watkins*, supra, is singularly in point. It was a petition for a writ of *habeas corpus* to bring the body of Watkins before the supreme court for the purpose of inquiring into the legality of his confinement in jail. The petition stated that he was detained in prison by virtue of a judgment of the circuit court of the United States for the county of Washington, in the District of Columbia, rendered in a criminal prosecution carried on against him in that court. A copy of the indictment and judgment was annexed to the petition, and the motion was founded on the allegation that the indictment charged no offense for which the petitioner was punishable in that court, or of which that court could take cognizance; and, consequently, that the proceedings were *coram non judge*, and totally void. Chief Justice MARSHALL, in delivering the opinion of the court denying the writ of *habeas corpus*, and in speaking of the powers and duties of the trial court, said: "To determine whether the offense charged in the indictment be legally punishable or not is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case as in the other, and must remain in full force, unless reversed regularly by a superior court capable of reversing it. * * * Had any offense against the laws of the United States been in fact committed, the circuit court for the District of Columbia could take cognizance of it. The question whether any offense was or was not committed—that is, whether the indictment did or did not show that an offense had been committed—was a question which that court was competent to decide. If its judgment was erroneous,—a point which this court does not determine,—still it is a judgment, and, until reversed, cannot be disregarded." In *Ex parte Parks*, supra, the petitioner was convicted of the crime of forgery in the district court of the United States for the western district of Virginia, and presented his petition to the supreme court for a writ of *habeas corpus*, on the ground that the facts averred in the indictment did not constitute the crime of forgery against the laws of the United States; and the court, in denying the writ, said: "But whether it was or was not a crime within the statute was a question which the district court was competent to decide. It was before that court, and within its jurisdiction. No other court, except the circuit court for the same district, having concurrent jurisdiction, was as competent to decide the ques-

tion as the district court. Whether an act charged in an indictment is or is not a crime by the law which the court administers is a question which has to be met at almost every stage of criminal proceedings, on motion to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court. It would be an assumption of authority for this court, by means of the writ of *habeas corpus*, to review every case in which the defendant attempts to controvert the criminality of the offense charged in the indictment." As the district court of Oklahoma county, sitting as and exercising the jurisdiction of a district court of the United States, had jurisdiction to pronounce the judgment complained of against the petitioner, it follows that the judgment is not void. It is only when the trial court has no jurisdiction, and the judgment is void, that relief from imprisonment can be afforded by writ of *habeas corpus*. *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. Rep. 781; *In re Wilson*, 140 U. S. 575, 11 Sup. Ct. Rep. 870. The question whether or not the facts averred in the indictment constitute the crime of perjury under the laws of the United States can only be considered by this court on appeal or writ of error, and need not now be discussed. The writ of *habeas corpus* is therefore denied. The other judges concur.

ALGER V. HILL *et al.*

(*Supreme Court of Washington*. April 7, 1891.)

PUBLIC LANDS—PRE-EMPTION—POWER OF TERRITORIES TO INCORPORATE CITIES.

1. The grant of a charter to the city of Seattle by Act Wash. T. Dec. 2, 1869, was not within the inhibition of Rev. St. U. S. § 1889, which provides that the legislative assemblies of the several territories shall not grant "private" charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for industrial or commercial pursuits, or for any benevolent or scientific association.

2. Act Cong. March 3, 1877, (19 St. at Large, 392,) § 2, relative to territories, confirmed all entries which had been theretofore allowed upon lands "afterwards ascertained" to have been embraced in the corporate limits of any town, but which entries are or shall be shown to include only unoccupied lands of the United States, not used for municipal purposes. *Held*, that an entryman was not presumed to know the limits of any town incorporated by a territorial legislature, since, otherwise, no land could have been "afterwards ascertained" by him to have been embraced in the corporate limits of any town, and section 2 of the act could have no possible application.

3. The fact that an entryman of land within the limits of a city was the marshal thereof raised no presumption that he knew the corporate limits of the city.

HOYT, J., dissenting.

Appeal from superior court, King county; I. LICHTENBURG, Judge.

Action by Henry S. Alger against Alice S. Hill, executrix of W. C. Hill and others, to have a patentee of lands declared trus-

tee of plaintiff. Demurrer sustained, and action dismissed. Plaintiff appeals. Reversed.

Struve, Haines & McMicken, for appellant. *Junius Rochester*, for respondents.

STILES, J. This was the usual action to have the patentee of lands from the United States held the trustee of one claiming to have had the equitable title to the land under a prior pre-emption, which had been canceled by the department of the interior. The pre-emption declaratory statement was filed June 28, 1874; final proof was made May 4, 1875; and the certificate of entry was issued by the register and receiver on the same day. The entryman was one Minnick, who conveyed the land by deed to the appellant (plaintiff below) a few days later. On the 12th of January, 1877, the commissioner of the general land-office, without any notice to the grantee of Minnick, ordered a cancellation of the entry on the records of the general land-office, and on the 19th day of March, 1879, the secretary of the interior, on appeal, affirmed the decision of the commissioner, and made the cancellation final. The defendants' general demurrer to the complaint was sustained, and the action dismissed. Error is assigned upon the judgment against the plaintiff, he having declined to plead further. The pre-emption entry was canceled because the land was within the boundaries of the city of Seattle, as defined by the act of December 2, 1869, incorporating that city; the secretary of the interior holding that the act of congress of March 3, 1877, did not avail anything to Minnick, who was marshal of the city of Seattle, and by virtue of his office must have known the land in question to be within the city limits. The defendants' decedent, W. C. Hill, and J. Vance Lewis, in 1880 entered the land with Porterfield scrip, and received patent therefor January 9, 1882. The complaint showed all the facts and contained these allegations in paragraph 9: "That after the allowance of said pre-emption entry it was ascertained by said Minnick and by the said commissioner of the general land-office, and by said secretary of the interior, that the same was embraced within the limits of the city of Seattle, as fixed by said legislative assembly by said void and invalid act approved December 2, 1869, which is hereby referred to, and by such reference is made a part of this complaint; and that thereafter, and before the cancellation of said entry by said commissioner and said secretary, it was duly shown to the satisfaction of the said commissioner and said secretary that said entry of said Minnick included only vacant, unoccupied lands of the United States at the date of the said Minnick's said settlement, not settled upon or used for any municipal purposes, nor devoted to any public use of any town, and that said entry was regular in all other respects."

The first point urged by appellant is that the act of 1869 was void because the incorporation of cities and towns was not within the powers conferred upon territorial legislatures, quoting Rev. St. U. S. § 1889, prohibiting the granting of private

charters or special privileges. The act of congress, June 8, 1878, limited the construction of section 1889, and under it the supreme court of the territory, in *Seattle v. Yesler*, 1 Wash. T. 571, held that the city of Seattle was *de jure* a corporation, from the date of the incorporation act in 1869. If, however, the claim of Minnick was carried to entry before the act of 1878, and the territorial act of incorporation was void, the act of congress could have had no effect to carry his land within corporate limits which had theretofore no legal existence, so as to deprive him of rights under the land laws. But we see no reason why the territorial legislature did not have full liberty and power to incorporate cities and towns before 1878. Almost every territorial legislature had assumed that authority, and no one even questioned it successfully, so far as reported. To thus incorporate a town or city was not to grant a "private" charter, but a public charter,—a means of assisting the territory to carry on orderly government, as well as to advance the convenience and interest of a large body of citizens. The separation of the territory into counties, townships, school-districts, and road-districts was an exercise of the same class of powers, which was universal, and was never objected to. The act of congress of March 3, 1877, hereafter referred to, impliedly recognized these corporations by requiring the secretaries of the territories to forward such incorporation acts to the surveyors general.

It remains to consider the effect of the act of March 3, 1877, (19 St. at Large, 392.) Prior to this act the several pre-emption acts of congress authorized public lands to be entered and patented by municipal corporations and incorporated towns, to the extent of not exceeding 2,240 acres, and reserved all lands within the limits of any incorporated town from sale under the pre-emption and homestead laws. Through the action of the states and territories, however, the object of the statute—which was to reserve sufficient land for town-site purposes—was perverted by including areas far beyond the legal limits of town-sites in acts of incorporation. At the same time there was no statutory machinery by which the land-officers could ascertain the lawful areas to which towns were entitled. Consequently settlement was prevented in many instances on land which there was no reason for withholding, except the letter of the statute. The act of 1869 included in the limits of Seattle more than 10,000 acres of land and water, some of which was public land; though, as found by the secretary of the interior in *Lewis v. Seattle*, 8 Copp, Land-Owner, 143, Seattle was wholly located on private land, and was not, therefore, authorized to enter any land. To remedy this state of things, congress in 1877 revised the whole matter, and enlarged the actual area which might be reserved to 2,560 acres. But section 3 of the act defines the duties of the land-officers in such a way that after that time no person who desires to take up public land can be debarred from doing so very long by reason of overliberal corporation acts

where the land is not actually occupied and used for municipal purposes. The municipal authorities can be required, upon 60 days' notice, to elect where they will have the city boundaries under this act, in compact form, and not including more than 2,560 acres, unless lands in excess of that are actually occupied; and if they do not act the commissioner may take steps to determine the proper site, and declare all the remaining lands open to entry under the homestead and pre-emption laws. To aid the commissioner in arriving at the actual area included in corporation limits under territorial laws the secretary of each territory was required to furnish to the surveyor general a certified copy of every legislative act of incorporation. Thus, from March 3, 1877, a proposing settler upon public land within the limits of a town incorporated under territorial statutes, if the boundaries exceeded those allowed by the statute of that date, could cause the machinery of the land-office to be set in motion, and in due time have his land restored to the public domain, and opened to his entry. Congress was not satisfied, however, with providing for the future, but the second section of the act went back and confirmed all entries which had been heretofore allowed upon lands "afterwards ascertained to have been embraced in the corporate limits of any town, but which entries are or shall be shown to the satisfaction of the commissioner of the general land-office to include only vacant, unoccupied lands of the United States, not settled upon or used for municipal purposes, nor devoted to any public use of such town," and which were regular in other respects, and authorized such entries to progress to patent. This curative provision embraced Minnick's entry, unless there was something in the facts which would prevent the act from applying to it. The land-officers found that the fact that the land was within the limits of the city of Seattle, under the territorial act of 1869, was not "ascertained" after the date of the entry, May 4, 1875, and therefore the provision of 1877 could not apply, and canceled the entry in 1879. The complaint alleges that this fact was ascertained by Minnick and the land-officers after the entry; and this makes the vital issue in this case. The land-officers base their findings, not upon proof of the fact that Minnick had knowledge that the city limits included his land, nor upon the presumption that as a citizen of the territory he was presumed to know its public laws, but upon the fact that he was city marshal. The presumption that he would know the law would seem to be the stronger ground, since, although he was the marshal, his duties as a peace officer might never have drawn his attention to the fact that this vacant and unoccupied land was within his jurisdiction. To be elected to an officesometimes has its disadvantages, but we have yet to learn that one of these is to throw the presumption upon the officer of a greater knowledge of the public law than that of any other citizen, especially when the law affects his right to take lands under the pre-emption statutes. Upon the

ground asserted, therefore, the land-officer's decision was erroneous. The territorial statute, on the other hand, included the land in the city of Seattle, and, if the rule that every one is presumed to know the law were to have force in this connection, Minnick knew in 1874 that his land was not subject to entry. But upon such a basis the act of 1877 could have no effect in any case, since every entryman of land within an incorporated town would have had the same presumption against him from the inception of his claim. The "ascertainment" of the status of the land would have dated from the passage of the act of incorporation, so far as the entryman was concerned, and there could be no possible case for the provisions of section 2.

The solution of this difficulty seems reasonably clear. The land laws of the United States do not depend upon or have any connection with the statutes of the states or territories. The land department surveys the public lands, records the surveys upon plats and in field-notes, and prepares the way for the settler to deal with the officers. If at the time of the survey of lands a town is found thereon, it is noted upon the plat, where every one can see and is charged with notice of it. If the town springs up after the plat is filed, and becomes incorporated, at least since the act of 1877, abundant provisions have existed whereby the lawful area of the town can be noted and reserved upon the plat. But the plats on file in the public land-offices, where people resort to find what lands are subject to entry, unless the municipal authorities have acted in the matter, show no town-site reservations; and therefore registers and receivers frequently allowed entries of land within these legislative limits, where the conditions were that the lands were vacant and unoccupied, and there were no adverse claims. Case of *U. S. v. Schurz*, 102 U. S. 378. In 1877, therefore, this state of things existed: Entries had been made; patents in many instances had been issued; in others certificates of entry only had been given; and numerous suits, claims, and contests resulted from the loose condition of the laws. Congress, to mend the matter, first validated all entries where any error of law had theretofore occurred, and then provided a means by which such things could not happen thereafter. This was a plain, common-sense course. The error made in allowing entries within incorporated towns was that of the government itself, through its officers, but it did no real injury to the government, since the price was the same to the individual or to the town, and the entries confirmed were of vacant, unoccupied lands, wherein the entryman had meritorious claims through having otherwise complied with the law. To the entryman no knowledge of the law or the fact was imputed under this act; and, tried by this interpretation, Minnick was entitled to have the benefit of its provision. We hold, therefore, that the complaint on the point in controversy was good, and that the demurrer should have been overruled. Judgment reversed, with

instructions to the court to overrule the demurrer and proceed with the cause.

ANDERS, C. J., and DUNBAR, J., concur.

HOYT, J., (*dissenting*.) I am unable to agree with the conclusions of the majority of the court as to the effect of the act of March 3, 1877, upon Minnick's entry. I think that it appears from the complaint that the secretary of the interior found as a fact that Minnick had actual knowledge that the land in question was within the corporate limits of Seattle at the time he made his entry thereof; and this finding of fact, under the circumstances set up in the complaint, is conclusive upon all parties, and cannot be questioned in the courts. Upon finding this fact of actual knowledge by Minnick,—that the land was not subject to entry,—the secretary of the interior found as a question of law that his entry was not aided by the said act of 1877. I think that this finding of law was correct. It is not reasonable to suppose that congress by said act intended to aid one who willfully and with full knowledge attempted to acquire title to the land that the law had declared he should not obtain. The statute, as construed by the secretary of the interior, is a reasonable one; and, as thus construed, protects every one who had in actual good faith entered land within the limits of any incorporated town. Those who entered in bad faith ought not to be protected. Besides, there is some doubt as to whether or not said curative act applied at all to this entry, for the reason that before it was passed such entry had been ordered canceled by the commissioner of the general land-office. In my opinion the judgment should be affirmed.

MAILLADE V. ORENA. (No. 13,973.)

(*Supreme Court of California*. Oct. 30, 1891.)

GUARDIAN AND WARD — ACCOUNTING — FRAUD OF GUARDIAN — LIMITATION OF ACTIONS.

1. After the settlement of an estate and discharge of the guardian by the probate court a court of equity may compel the guardian to account for property fraudulently concealed from his ward and the court.

2. Money received by a guardian from the sale of both real and personal property constitutes but one fund, and a single action lies for its recovery.

3. Under Code Civil Proc. Cal. § 338, subd. 4, which provides that an action for relief on the ground of fraud or mistake must be commenced within three years, but the cause of action in such case is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake, an action against a guardian for an accounting will lie where it appeared that defendant at all times fraudulently concealed the fact that he had received and appropriated to his own use moneys belonging to plaintiff, if brought within three years from the discovery by plaintiff of his right.

4. In an action for an accounting the complaint showed that plaintiff's father purchased two ranchos, and paid for them with his own funds, but directed conveyances to be made to his wife, plaintiff's mother, who accepted the same for the benefit of her husband; that at the time of his death, in 1849, plaintiff's father also owned a large number of cattle; that for several years prior to 1849 defendant, as decedent's agent, had

the management of the ranchos and cattle, in which he afterwards continued with the consent of plaintiff's mother; that in 1864 defendant married plaintiff's mother, and thereafter, during plaintiff's minority, and until July, 1885, plaintiff was a member of defendant's family, and was treated as his own child; that defendant was the guardian of plaintiff's person and estate; that from time to time, after the death of plaintiff's father, defendant sold all of the cattle owned by plaintiff's father, and in 1868 sold the ranchos, and induced plaintiff's mother to execute deeds thereof to the purchaser; that defendant received all the money paid for the cattle and ranchos, and mingled the same with his own funds, and wrongfully and fraudulently converted the same to his own use, with intent to deprive plaintiff of his lawful share thereof; that defendant knew that the cattle and ranchos were owned by plaintiff's father, and that plaintiff, as heir, was owner of an interest therein, but this fact defendant concealed from plaintiff, and always represented to him that his father died insolvent; that in July, 1885, disputes arose between them, and plaintiff left the household of defendant, and, in interviews with persons who had been servants of plaintiff's father, for the first time ascertained that his father was owner of the cattle and ranchos left in the custody and management of defendant, and plaintiff was then for the first time directed to one J., who then for the first time showed plaintiff, by entries in his books, regularly kept in his business, wherein his daily transactions were entered at the time they took place, that he had acted as agent for plaintiff's father in the purchase of the ranchos; that plaintiff then learned for the first time that his father was the real owner of said ranchos, and the owner of the cattle. *Held*, that the complaint sufficiently shows when the discovery of fraud was made, what it was, how it was made, and why it was not made sooner.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by C. E. Lataillade against Gaspar Orena for an accounting. From a judgment sustaining the demurrer to his third amended complaint plaintiff appeals. Reversed.

R. B. Canfield and John J. Boyce, for appellant. Messrs. Garber, Boalt, Bishop and W. C. Stratton, for respondent.

BEICHER, C. The plaintiff commenced this action to obtain an accounting, and the appeal is from a judgment entered against him after demurrer sustained to his third amended complaint.

The facts stated in the complaint are in substance as follows: On the 12th day of April, 1849, Cesario Lataillade, plaintiff's father, died intestate in the town of Santa Barbara, where he was residing, leaving a widow and three minor children, of whom plaintiff, who was born December 2, 1849, was one. After his marriage to plaintiff's mother the decedent purchased two ranchos, situated in what is now the county of Santa Barbara, and paid for them with his own funds, but at his request the conveyances were executed to his wife as grantee, and were accepted by her for the benefit of her husband, and thereafter the ranchos were owned and possessed as the community property of the two. At the time of his death the decedent was also the owner of a large number of cattle, then grazing upon the ranchos. For several years prior to 1849 defendant had the care and management of the ranchos and cat-

tle as the agent of the decedent, and afterwards, with the consent of plaintiff's mother, he continued to have the same care and management, until the property was sold and disposed of, as hereinafter stated. In 1854 the defendant married the plaintiff's mother, who is still his wife, and thereafter, during his minority, and until July, 1885, plaintiff continuously lived in defendant's family, and was brought up and treated as his own child. In the same year defendant was duly appointed the guardian of plaintiff's person and estate, and continued to act as such until the latter became of age. From time to time after April, 1849, defendant sold all of the said cattle, but for what sum or sums of money plaintiff is not advised; and in 1868 he negotiated a sale of the ranchos for the sum of \$27,000 or thereabouts, and induced the plaintiff's mother to execute deeds thereof to the purchasers, and to permit him to receive the entire purchase money. The defendant received all the money paid for the cattle and ranchos, and mingled the same with his own funds, and wrongfully and fraudulently converted the same to his own use, with the intent to deprive plaintiff of his lawful share thereof. At all the times mentioned defendant knew that the cattle and ranchos were owned by the plaintiff's father at the time of his death, and that plaintiff became the owner of an interest therein as his heir; but he always concealed this fact from the plaintiff, and wrongfully and fraudulently represented to him that his father died insolvent, and that he had no interest in the cattle or ranchos. When defendant was appointed guardian of plaintiff he filed in court an inventory purporting to show all the estate of his ward, but he did not, in that inventory, or in any inventory, or otherwise, at any time, include any of the aforesaid property; and when he applied for and obtained a final discharge from his trust he falsely stated in his petition and represented to the court that he had returned a full and true inventory of all the estate of plaintiff which had come into his hands as guardian, and paid over and delivered the same to the plaintiff. This condition of things continued until July, 1885, the plaintiff all the time during his minority and afterwards relying implicitly on the statements and representations of defendant concerning plaintiff's property rights and the condition of his father's estate, and having no means of ascertaining the falsity of such statements and representations. In the last-named month difficulties and disputes arose between the parties, and the plaintiff then left the household of defendant, and ceased to be a member of his family, or to have friendly or confidential relations with him. "Thereupon this plaintiff, in interviews with persons who had acted in the capacity of servants upon the ranchos belonging to his said father, for the first time ascertained that his father during his lifetime had the interests in said real and personal property as particularly herein above set forth, and that said property was in the custody, care, and management of the defendant at the time of the death of his

said father; and this plaintiff was then for the first time directed to one Augustin Janssens, who carried on business in the said county of Santa Barbara during the married life-time of the said Casario Lataillade, deceased, and at the time of the purchase of the said ranchos, who then for the first time showed this plaintiff by entries in his commercial books, regularly kept in his business, wherein his daily transactions were entered at the time they took place, that he had acted as the agent of the said Casario Lataillade in respect to the payment of the purchase money of said ranchos; and plaintiff avers that said account-books and the statements of said Janssens then and there disclosed to this plaintiff that his father was the owner of said ranchos, and that he was the real purchaser thereof, and the owner of the said cattle thereon." Shortly after these discoveries plaintiff demanded of defendant a full accounting of all his dealings with the property of the deceased, Lataillade, since his death, and the increase thereof; but defendant refused, and still refuses, to render to plaintiff any such account, or any account whatever, in relation to the said property. The proceeds of the cattle and lands disposed of by defendant as aforesaid are still in his hands, and plaintiff is the owner of and entitled to the one-sixth part thereof, together with the increase and profits arising therefrom. The complaint was filed on the 21st day of February, 1887, and the prayer was that defendant be compelled to account for all his dealings and transactions with the said property and the proceeds and increase thereof; that he be charged interest on all sums of money received by him from the sales of the property, compounded annually; and that plaintiff have judgment for such amount as he may be found entitled to. The demurrer was upon the grounds that the court had no jurisdiction of the subject-matter of the action; that several causes of action were improperly united, and not separately stated; that the complaint did not state facts sufficient to constitute a case of action, for the reason that it appeared on the face thereof that the cause of action was barred by the statute of limitations and by the plaintiff's laches; and that the complaint was ambiguous, unintelligible, and uncertain in several particulars. It does not appear upon what ground the demurrer was sustained.

1. The respondent contends that the probate court had exclusive jurisdiction to compel defendant to account as guardian, and that its decree, settling his accounts and discharging him from his trust, was final and conclusive; and in support of this position numerous authorities are cited. This is undoubtedly the general rule applicable to the settlement of the accounts of guardians, executors, and administrators, but we do not think it applicable to a case like this. Here, if the averments of the complaint are true,—and they must be assumed to be so for the purposes of this decision,—none of the matters now in controversy were passed upon in the settlement, for the reason that the guardian intentionally and fraudu-

lently concealed from the court and his ward the fact that the latter had then, or ever had, any interest in the property in question. The cases cited state and apply the general rule, but, so far as we have discovered, no one of them goes to the extent of holding that such a settlement can shield a guardian from afterwards being called upon in a court of equity to account for the property so concealed. The rule applicable to the case is correctly stated in *Griffith v. Godey*, 113 U. S. 89, 5 Sup. Ct. Rep. 383. In that case Mr. Justice FIELD, in delivering the opinion of the court, said: "It is well established that a settlement of an administrator's account by the decree of a probate court does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such case, open its decree, and administer upon the omitted property; and a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity." And see *Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, Id. 473; *In re Cahalan*, 70 Cal. 604, 12 Pac. Rep. 427; *Tobleman v. Hildebrandt*, 72 Cal. 316, 14 Pac. Rep. 20.

2. In support of the second ground of demurrer it is claimed that the transactions in regard to the land and cattle were entirely distinct, and involved different facts, and that they constituted two distinct causes of action, which should have been separately stated; but as we read the complaint it states only one cause of action, namely, for an accounting as to moneys received by defendant and in part held by him in trust for plaintiff. The money received constituted in defendant's hands a single fund, though derived from sales of real and personal property, and received at different times.

3. The third ground of demurrer seems to be the one mainly relied upon as justifying the ruling of the court, and it is very elaborately discussed by counsel. The Code provides that an action for relief on the ground of fraud or mistake must be commenced within three years, but the cause of action in such case is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Section 338, subd. 4, Code Civil Proc. Was the cause of action in this case saved from the bar of the statute by this section? Counsel for respondent earnestly contend that it was not, for several reasons: (a) It is urged that the action was not one for relief on the ground of fraud. It is true, the action was for an accounting, but the grievance complained of was that defendant knowingly received and held moneys in trust for plaintiff, and appropriated the same to his own use, and at all times fraudulently concealed from plaintiff the fact that he had ever received or held any such moneys or any money in which plaintiff had

any interest. It seems to us, therefore, that the averments make a case of the class provided for in the section of the Code above cited. (b) It is urged that the averments respecting the discovery of the fraud are wholly insufficient. It is said that a party seeking to avoid the bar of the statute on account of fraud must show that he used due diligence to detect it, and, if he made any particular discovery, should state when it was made, what it was, how it was made, and why it was not made sooner; and, further, that one will be presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains. The foregoing propositions seem to be well supported by the authorities, (*Wood v. Carpenter*, 101 U. S. 140; *Badger v. Badger*, 2 Wall. 94; *Hecht v. Slaney*, 72 Cal. 367, 14 Pac. Rep. 88;) and the question is whether or not, in view of them, the averments of the complaint are sufficient. It must be observed that the relations of the parties were such as would naturally inspire trust and confidence on the part of the plaintiff in the defendant. The defendant was plaintiff's step-father and guardian, and brought him up in his own family, and as his own son. Plaintiff always, up to the time of the rupture in 1885, placed implicit confidence in whatever defendant told him, and never doubted its truth. He had no knowledge, and no reason to suspect, that a fraud was being practiced upon him. There was nothing, therefore, to put him upon inquiry; and, under such circumstances, we do not see how it can be said that he failed to use due diligence to detect the fraud, or how he can be presumed to have known anything concerning it. The complaint does state, we think, when the discovery was made, and what it was, and how it was made, and why it was not made sooner. It is claimed, however, that the averments as to the discovery were of mere conclusions of law, and not of the facts. It is true that pleadings should state the ultimate facts, and not the probative facts, or conclusions of law; but what are ultimate facts and what conclusions of law are often mixed and uncertain questions. *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. Rep. 161; *Turner v. White*, 73 Cal. 299, 14 Pac. Rep. 794. The same averment may be of a fact or of a conclusion of law according to the context. We think the averments here complained of should be held sufficient as statements of fact. (c) Conceding all that has been said to be true, it is further contended that no cause of action against the defendant respecting the two ranchos or their proceeds is shown. The argument on this point, briefly stated, is as follows: According to the averments of the complaint, plaintiff's father purchased the ranchos with his own funds; but at his request the conveyances thereof were made to his wife, who thereafter held the same as community property. Being community property, the title to the ranchos, under the Mexican law then in force, upon the death of the husband immediately descended to and became vested in the widow and children, without the necessity of any administration. De

La Guerra v. Packard, 17 Cal. 183; *Scott v. Ward*, 13 Cal. 459. The plaintiff and his mother became tenants in common of the property, and were such at the time of the alleged sale thereof. The mother had no power to sell or convey the plaintiff's interest, and there is nothing to show that she attempted to do so; and, if she did, the deeds did not pass or affect his interest in any way. He could afterwards have asserted his right thereto just as well as if no deeds had been made, and possibly could do so now. The purchase money received was therefore the money of the mother, in which the plaintiff had no interest. This argument seems to be sound, and the conclusions reached correct. A similar claim is made in regard to the cattle and their proceeds, but we do not think it can be sustained. The defendant sold all the cattle, and received all of the purchase money, and converted the same to his own use. As to the plaintiff's interest, the sale was a conversion, but he could waive the tort, and sue in *assumpsit* for his share of the purchase money, or, under the circumstances shown here, for an accounting. *Pom. Rem. § 110.*

4. We see nothing in the fourth ground of demurrer calling for special consideration. As we read the complaint, it is not ambiguous, unintelligible, or uncertain in any material respect. We advise that the judgment be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

WE CONCUR: TEMPLE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

(91 Cal. 555)

MARRINER v. DENNISON. (No. 14,154.)¹

(*Supreme Court of California*. Oct. 20, 1891.)

BREACH OF CONTRACT—EXCESSIVE DAMAGES—EVIL
DENCE—GAMBLING VERDICT.

1. Defendant contracted to convey 6 lots to plaintiff, and induced him to accept a contract for other lots in lieu thereof. Plaintiff rescinded the latter contract, and sued for breach of the first contract. To show the value of the first lots, a witness for plaintiff testified that he had bargained for the lots at \$6,500 before the contract with plaintiff, but that he did not think them worth over \$500 each. Plaintiff's testimony showed that lots similar to those in the second contract had been sold for from \$300 to \$1,000 each. *Held*, that a verdict for plaintiff for \$2,500 was unauthorized.

2. Plaintiff offered in evidence deeds of certain land which he was to convey to defendant in exchange for the lots named in the former contract, which deeds he claimed to have tendered to defendant. The deeds contained restrictions as to defendant's right to use the land. Plaintiff's contract with defendant to convey the property was silent as to any restrictions. *Held*, that the deeds were insufficient to show compliance with the contract.

3. Where the jurors placed different amounts upon their ballots, and added them together, and divided the sum by 12, the verdict was not reached by a resort to the determination of chance, and therefore it could not be impeached by affidavits of the jurors. *Hunt v. Elliott*, (Cal.) 20 Pac. Rep. 183, followed.

¹ Opinion modified on rehearing, 37 Pac. Rep. 1091.

Department 1. Commissioners' decision. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Jacob U. Marriner against Gilbert L. Dennison to recover damages for a breach of a contract to convey land. Verdict and judgment for plaintiff. Defendant moved for a new trial, which was denied, and from the order denying the motion he appeals. Reversed.

E. C. Bowers, for appellant. *M. C. Hester and Judson, Hester & Woods*, for respondent.

BELCHER, C. This is the second appeal in this case. The decision on the first appeal is reported in 78 Cal. 202, 20 Pac. Rep. 386. After the case was sent back for a new trial, the pleadings were amended so as to conform to that decision. The case was then tried before a jury, and the result was a verdict and judgment in favor of the plaintiff for \$2,500 damages. The defendant moved for a new trial, which was denied, and has appealed from the order denying his motion. We think a new trial should have been granted.

1. It was held on the former appeal that the plaintiff could not rescind the contract of March 14, 1887, and recover for a breach of the contract of January 13, 1887, even though he was induced to make the change by fraud, unless he was damaged by the change; and it was said: "It was necessary for the plaintiff to allege and prove that the last property contracted for was of less value than the first, or other facts sufficient to show that he was damaged by the making of the last contract." And on the new trial the court instructed the jury that they could not find for the plaintiff, unless he had proved by a preponderance of evidence that he was damaged by the agreement to take the lots last contracted for in lieu of those first contracted for. It is clear, we think, that the plaintiff did not prove by a preponderance of evidence, if at all, that he was damaged by the making of the last contract in the sum of \$2,500, or in any appreciable sum, and if this be so, the damages allowed should at most have been only nominal. To prove the value of the six McGee lots which were to be conveyed to him under the first contract, plaintiff called as a witness one Scott, who testified that on the 9th of March, 1887, defendant executed a written agreement to sell him the Dennison subdivision of the McGee tract in Pasadena, containing 10 acres, and subdivided into 60 lots; that he was to pay for the 6 lots in question in the aggregate \$6,500; that in making the purchase he was acting for other parties who represented the Santa Fe Railroad Company, and that the company wanted the property for railroad purposes. He then went on to testify that he did not think the lots were worth what he agreed to give, and told the parties he was buying for, at the time, that they were wild to give any such price for the property, that it was not worth half of it, that the inside lots were really worth about \$400, and the corner lots about \$450. Plaintiff also called another witness, one Evans, who testified that he was in the real-estate business in

Pasadena in 1887, and knew the lots, and that he considered them worth in March, 1887, \$400 to \$500 per lot. The above was all the testimony introduced by the plaintiff as to the value of the lots. The defendant called two witnesses, Wilson and Phillips, to show the value of the McGee lots. Wilson testified that he was in the real-estate business at Pasadena, and knew the lots, and that they were worth in March, 1887, about \$400 to \$500 each; and Phillips testified that he owned adjoining land, and that in March, 1887, the inside lots were worth \$300, and the corner lots \$450. The respondent claims that the price at which Scott agreed to take the lots is controlling as to their value, but, in view of the other testimony upon the subject, we do not think this can be so. It is true that the price at which a thing is sold may be shown as tending to prove its value, but property is sometimes sold for more and sometimes for less than its market value, and it is the market value—that is, the price at which an equivalent thing might be bought—that is controlling in a case like this. Civil Code, § 3354. The plaintiff wanted the lots to build a residence on for himself, and the evidence shows that he could have purchased as good, if not better, lots for that purpose, in the immediate vicinity, for much less than Scott agreed to pay. As to the value of the lots in the Banta tract, on Fair Oaks avenue, which the plaintiff was to take under the second contract, the decided preponderance of the evidence was that they were in March, 1887, worth much more than the McGee lots. The plaintiff himself testified that he sold some lots on that avenue in July, 1887, for \$800 each, and one for \$1,000. Under the showing made, the verdict seems to have been clearly contrary to the instructions of the court, and should have been set aside for that reason.

2. By the first contract the plaintiff agreed to convey to the defendant, in exchange for the McGee lots, certain real property in California, "and lot No. 52 of building lots in Malden, Mass., bought of E. L. Converse, size of lot 6,440 square feet, viz., 57½ by 115 deep." Plaintiff offered in evidence two deeds of the Malden lot, one to his wife, and the other executed by himself and wife to the defendant, and he proved that he tendered the last-named deed to the defendant under the contract, and the latter refused to receive it. Both the deeds described the lot as bounded on one side on Converse avenue, and then stated that "said lot is sold subject to the following restrictions, to-wit: That no building shall ever be erected within 20 feet of said Converse avenue, and no building shall ever be erected or used as a livery stable, slaughter-house, currier-shop, soap factory, or for any offensive or noxious purpose or use, on any part of said lot and premises." The contract required the plaintiff to convey the lot, and was silent as to any restrictions or limitations in regard to its use. The defendant had a right to a clear deed conveying an unincumbered and unrestricted title. The deed offered to defendant evidently did not convey such title, and

therefore did not meet the requirements of the contract. It does not appear what objections to the deed were made when it was tendered, the only evidence being that on the part of the plaintiff, that defendant refused to accept it. But the burden was upon the plaintiff to show that he had complied with his contract, and this could only be done by proof that he had tendered a proper deed, or of other facts from which it could be seen that defendant waived the objection now urged.

3. One of the grounds on which the defendant asked for a new trial was that more than one of the jurors trying the cause were induced to assent to the verdict by a resort to the determination of chance. At the hearing of the motion the defendant was permitted to read the affidavits of two of the jurors, one of whom was the foreman of the jury. The affidavits stated that after the jury retired to the jury-room a foreman was elected, and "a ballot was then taken to see how the jury stood, which resulted in four for the defendant and eight for the plaintiff. It was then proposed by a member of the jury that another ballot be taken, and for each juror to write on this ballot the amount he was in favor of giving the plaintiff as damages; but before that motion was put to the vote of the jury it was moved to amend that resolution (motion) as follows: That the amounts voted on the ballots be added together, and the aggregate be divided by twelve, and that the result be the verdict of the jury. This motion, as amended, was voted on, and carried by a majority of the jury. The jury took the vote as described by the motion, each voting a ballot with the amount written thereon that he was in favor of giving the plaintiff. Some voted for the defendant, one voted \$1, others, various amounts, and one voted \$10,000. The amounts voted were all added together, and divided by twelve, which made \$2,600. One member of the jury then moved that \$100 be knocked off, making the amount \$2,500, which was carried by a majority of the jury, and they then returned that amount to the court as their verdict." There were no counter-affidavits, and we may assume, therefore, that the affidavits read stated the facts correctly. Under these facts, the verdict was undoubtedly vicious, and ought to be set aside. The method of finding it and the result were determined by a majority of the jurors, and it does not appear that three-fourths of them ever assented to it. Moreover, the complaint asked damages only in the sum of \$3,500, and it appears that one of the jurors put down \$10,000, and that sum was used to increase the average. The only question is, can the affidavits of jurors be used to impeach such a verdict? It seems to be settled law in this state that a verdict found as this one is shown to have been, is not reached "by a resort to the determination of chance," and hence that the affidavits of jurors cannot be received to show the facts. See *Turner v. Tuolumne Co. W. Co.*, 25 Cal. 398; *Boyce v. Stage Co.*, 25 Cal. 475; *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. Rep. 132. These cases we consider controlling, and the

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contention of appellant on this point cannot, therefore, be sustained. We advise that the order appealed from be reversed, and the cause remanded for a new trial.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded for a new trial.

91 Cal. 288

ETCHEPARE V. AGUIRRE. (No. 14,298.)

(*Supreme Court of California*. Oct. 19, 1891.)

Department 1. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

For former report, see 27 Pac. Rep. 668. *M. V. Biscalluz* and *W. I. Foley*, for appellant. *W. J. Williams*, for respondent.

PER CURIAM. A verbal error having, by inadvertence, been made in the judgment heretofore rendered herein, it is ordered that the said judgment be modified by striking therefrom the words, "But the judgment is reversed, and the court below is directed to enter a judgment on the verdict in favor of the plaintiff, in substantial accordance with this opinion," and inserting in lieu thereof the following viz.: "But the court below is directed to set aside its judgment entered in said cause, and to enter judgment upon the verdict therein in favor of the defendant, in substantial accordance with the foregoing opinion."

91 Cal. 549

CITY OF SAN LUIS OBISPO *et al.* v. HASKIN, City Treasurer. (No. 14,755.)

(*Supreme Court of California*. Oct. 20, 1891.)

MUNICIPAL BONDS—ELECTION NOTICE.

Act Cal. March 19, 1889, relative to the issuance of bonds for municipal improvements, provides (section 3) that the board of trustees shall give notice of proposed improvements to the electors, stating "the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of levy to be made for the payment thereof." *Held*, that where the board passed and published ordinances determining that it was necessary to make certain municipal improvements, estimating the exact cost of each, and providing that each should be voted on separately, a notice of a special election, which specified the number and amount of bonds to be issued for each purpose, and the rate of interest, and stated that one-twentieth should be payable each year till all was paid, and that the tax levy for each year would be one-twentieth of the amount that might be voted, was sufficiently definite. *People v. Baker*, (Cal.) 23 Pac. Rep. 364, distinguished.

In bank.

Original petition for writ of mandate by the city of San Luis Obispo and another against Haskin, city treasurer, to compel the issuance of bonds for municipal improvements. Granted.

Wm. Shipsey, for petitioners.

PATERSON, J. It is admitted that the plaintiffs are entitled to the writ prayed for, if the notice required by section 3 of the act of March 19, 1889, and published by order of the board of trustees, suffi-

ciently states the amount of tax levy which is to be made for the payment of the bonds and interest for each year during the existence of the debt. The act provides that the notice shall state "the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of tax levy to be made for the payment thereof." Amend. Codes 1889, p. 400. The board passed and published ordinances determining that it was necessary to make certain municipal improvements, and estimated therein the cost thereof as follows: Bridges, \$14,628.50; grading, filling, etc., of Higuera street, \$16,929.73; widening Chorro street, \$2,500; Pacific street, \$1,500; sewers, \$9,431.77; total, \$45,000; and calling a special election submitting to the qualified voters of the city the question of incurring an indebtedness, and bonding the city for said improvements. The latter ordinance provided that each proposition above stated should be voted on separately. Thereafter a notice was published calling a special election to determine whether an indebtedness should be incurred in the amounts and for the purposes above set forth. The notice specified that the number of bonds to be issued was as follows: For said bridges, 20 bonds, of \$731.43 each; for improving Higuera street, 20 bonds, of \$847 each; improving Chorro street, 20 bonds, of \$125 each; improving Pacific street, 20 bonds, of \$75 each; for sewers, 20 bonds, of \$471.60. It was further stated in the notice that the bonds should be payable as follows: "One-twentieth part of the whole amount of indebtedness shall be paid each year till all is paid, payable on a day and place to be hereafter fixed by the city council, together with interest on all sums unpaid at such date. The rate of interest to be paid on said debt will be five per cent. per annum; and the amount of the tax levy for payment of such bonds and interest for each year during the existence of said debt will be one-twentieth of the amount that may be voted and created as above specified, and sufficient to pay the yearly interest as above set forth." This notice was as definite as it could be made under the circumstances. The trustees could not determine with certainty the amount of tax levy necessary to be made for the payment of the indebtedness until the result of the election on the five separate propositions submitted to the voters was known. The best it could do was to fix the proportion of the indebtedness which should be paid each year. The notice gave to each voter all the information which could be reasonably required under the circumstances. It gave him sufficient data upon which to calculate with certainty the amount of tax levy which would be required each year to pay the indebtedness which he proposed by his vote to incur. The case of *People v. Baker*, 83 Cal. 149, 23 Pac. Rep. 1112, does not support the defendant's contention. In that case it appears that the proposed improvements consisted of bridges, highways, a jail, a poor-house, and a hospital, but the notice failed to specify how much money the supervisors proposed to de-

vote to each improvement. The bonds were held to be invalid for this reason. It is ordered that the writ issue as prayed for.

We concur: BEATTY, C. J.; HARRISON, J.; DE HAVEN, J.; GAROUTTE, J.; SHARPSTEIN J.

91 Cal. 563

PEOPLE v. SCOTT. (No. 20,842.)

(Supreme Court of California. Oct. 29, 1891.)

APPEAL IN CRIMINAL CASES—EXCLUDING EXCEPTIONS FROM RECORD—HARMLESS ERROR.

On a trial for assault with intent to murder, the trial court excluded a question put to the person assaulted, "Did you ever threaten this man's life?" and an exception was taken, but afterwards the court allowed the question, and in preparing the bill of exceptions excluded the exception. *Held*, that defendant's application to the supreme court for leave to prove the exception would be denied, since, though the first ruling and the exception should have been inserted, no real injustice was done to defendant.

In bank. Appeal from superior court, Napa county; E. D. HAM, Judge.

This is an application to the supreme court by J. W. Scott, who was convicted of assault with intent to murder, for leave to prove certain exceptions. Dismissed.

Chas. S. Harker, for appellant. Henry C. Gesford, for the People.

McFARLAND, J. This is an application by appellant to this court for leave to prove certain exceptions alleged to have been taken by him at the trial, and which, it is alleged, the judge of the trial court refused to allow in the bill of exceptions settled by him. The alleged crime for which petitioner was tried was an assault with intent to commit murder upon the person of one Vaughn; and it is averred in the petition, first, that upon cross-examination petitioner's counsel asked Vaughn this question, "Did you ever threaten this man's life?" that counsel for the people objected to the question; that the objection was sustained, and that petitioner excepted to the ruling; and that the court refused to put said exception into the bill, but, on the contrary, settled said bill so as to show that said objection was overruled. It appears, however, by the answer of the judge and the admissions of the parties on the argument of this petition, that the facts about the matter were these: The judge did first sustain said objection, but soon afterwards, becoming satisfied that his ruling was wrong, he reversed it, and ^{also} the question, and others of a substantially similar character, to be asked. The presiding judge would no doubt have been more strictly accurate if he had complied with petitioner's motion, and have put into the bill, first his ruling sustaining the objection, and then his subsequent ruling denying it, (and he would have saved thereby a good deal of trouble;) but, conceding everything petitioner contends for, no real injustice was done to him, and the matter is not of sufficient importance to require further action in the premises. As to the other matters set forth in the petition, it is not averred that the court re-

fused to allow the exceptions mentioned. It merely appears that there are slight differences between the presiding judge and petitioner as to the precise circumstances under which the exceptions were taken, which do not seem to us to be material. The prayer of the petition is denied, and the proceeding dismissed.

We concur: HARRISON, J.; GAROUTTE, J.; DE HAVEN, J.. SHARPSTEIN, J.; PAT-
ERSON, J.

91 Cal. 530

CAVANAUGH v. JACKSON. (No. 14,256.)

(Supreme Court of California. Oct. 31, 1891.)

BOUNDARIES — ESTABLISHMENT BY AGREEMENT —
RATIFICATION.

1. The fact that a purchaser of land, holding and claiming ownership thereof, has not yet paid the consideration therefor, does not invalidate a parol agreement made by him with an adjoining land-owner fixing the boundaries between their land.

2. Where fences were erected by the parties on the dividing line thus determined, and the adjoining land-owner paid taxes on all the land occupied by him, the acquiescence of said purchaser in the boundaries for six years, and his failure to claim title to any of the land held by his neighbor, constitute a ratification of the agreement sufficient to take it out of the statute of frauds.

Department 1. Appeal from superior court, Siskiyou county; EDWIN SHEARER, Judge.

Action by Cavanaugh against Jackson. Judgment for plaintiff. Defendant appeals. Reversed.

John V. Brown and Jas. F. Farragher, for appellant. H. B. Gillis and H. B. Warren, for respondent.

PATERSON, J. The record shows that in December, 1880, and long prior thereto, the plaintiff was in possession of the Coats place, which he now owns, and the defendant, Jackson, was in possession of an adjoining ranch, known as the "Beaughan Place." A dispute having arisen as to the boundary line between the two ranches, a surveyor was employed by plaintiff and defendant to make a survey, and establish the true line. Such survey was made in December, 1880. The plaintiff testified as follows: "Jackson had this land fenced up for a long time prior to the 1st day of September, 1886,—may be four or five years before that date,—along with other lands of his. * * * Jackson and I established a line of fence between the Coats place, which I now own, and the Beaughan place, now owned by Jackson. We had the land surveyed from the center of section 28, west to the road. We established the line on the quarter section line, and when we established the line Jackson moved his fence out to the road, and enclosed this strip in controversy. That strip is narrower at the west end than at the east end. I bought the Coats place from Mr. Orr, but the deed did not include this strip, and Mr. Warren discovered that I had no deed, and that I must have a deed. I have exercised no acts of ownership over this strip of land. * * * I had A. M. Jones survey this tract in about 1872. That strip is one hundred yards wider at

the east end than at the west end. Dan Sullivan assisted Davidson in making the last survey. * * * Jackson and I put up our fences on the line as determined by Mr. Davidson. I did not object to Mr. Jackson putting up fence on line from center of section 28 west to the road, and inclosing this tract in dispute. He fenced it right after the survey made by Mr. Davidson. That line never was inclosed, except a small portion thereof inclosed by appellant, until Mr. Jackson fenced it after the Davidson survey. We built the fences on the lines agreed on. We ran one line west from center of section 28 to the road, and on this line Mr. Jackson was to build his fence, and I was to build as much on the north and south line as he was to build on the east and west line,—we were to and did build equal portions of said fence. Jackson moved out his fence, and inclosed this strip of land. * * * I never asked Mr. Jackson for the land, nor to be let into possession of it." The defendant testified that he had occupied and used the land exclusively since 1880, and paid taxes on it ever since 1878, when he paid his proportion for the Whitmire patent for the N. W. $\frac{1}{4}$ of section 28; that he took all the wood he needed off the land in controversy since the establishment of the boundary line, and had prohibited others from cutting wood there for eight or ten years past. The assessment rolls offered in evidence showed that the land in controversy had been assessed to defendant every year from 1878 to 1887, and that defendant had regularly paid said taxes. The defendant testified that in 1872 a survey was made by one Jones on behalf of Mr. Wholey, Mr. Cavanaugh, and himself, the object being to determine how much Mr. Wholey and defendant were each to pay for the patent for the land granted by the state to Whitmire. In rebuttal, the plaintiff proved by the records of the assessor and tax collector that he had had the lands in controversy assessed to him for the years 1885 and 1887, and had paid the tax for the year 1885.

We think that on this evidence the defendant was entitled to judgment. The parties entered into an express agreement fixing the dividing line between their lands; fences were built upon the line so established; and the parties have ever since acquiesced therein. It is well settled that where the owners of contiguous lots by parol agreement mutually establish a dividing line, and thereafter use and occupy their respective tracts according to it for any period of time, such agreement is not within the statute of frauds, and it cannot afterwards be controverted by the parties or their successors in interest. *White v. Spreckels*, 75 Cal. 610, 17 Pac. Rep. 715; *Helm v. Wilson*, 76 Cal. 485, 18 Pac. Rep. 604; *Blair v. Smith*, 16 Mo. 273; *Orr v. Hadley*, 36 N. H. 575; *Laverty v. Moore*, 32 Barb. 347; *Houston v. Sneed*, 15 Tex. 307. It is the policy of the law to give stability to such an agreement, because it is the most satisfactory way of determining the true boundary, and tends to prevent litigation. *Houston v. Matthews*, 1 Yerg. 118; *Fisher v. Bennehoff*, 121 Ill. 435, 13 N. E. Rep. 150.

It is claimed by respondent that, as the payment was made several years prior to the time when he received his deed from Coats for the land in controversy, it is not binding upon him, but the evidence shows that the plaintiff was in possession of the Coats place, and claiming to be the owner up to the line established. The evident meaning of his testimony is that he had paid for the land, but had failed to secure the legal title thereto. It has been held that such an agreement, made by an occupant of public land, was binding upon him after he acquired legal title from the government. *Jordan v. Deaton*, 23 Ark. 704. See, also, *Orr v. Hadley*, supra; *Silvarer v. Hansen*, 77 Cal. 586, 20 Pac. Rep. 136. In many states it is held that, in the absence of any express agreement, where the boundary line has been recognized, and parties have used and occupied according to it for a considerable period, although less than the period which would be a bar under the statute of limitations, they and all claiming under them will be estopped from afterwards claiming a different boundary. *Blair v. Smith*, supra; *Smith v. Hamilton*, 20 Mich. 438.

The agreement establishing a dividing line between the plaintiff and the defendant was made in 1881. Coats conveyed to Cavanaugh, April 30, 1884. From the time the agreement was made until the commencement of this action on April 15, 1887, plaintiff never exercised any acts of ownership over the land in controversy. This long-continued acquiescence by the plaintiff in the line previously established we think is a ratification of the agreement made in 1881. Judgment and order reversed, and cause remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

(31 Cal. 594)

ELTZROTH v. RYAN et al. (No. 14,281.)

(Supreme Court of California. Oct. 31, 1891.)

PRACTICE—SETTING CASE FOR TRIAL—WAIVER OF FINDINGS—CONTINUANCE.

1. A rule of the trial court provides "that on any Monday either party may on motion have, without notice, any case set down for trial, * * * and for such purpose the opposite party is deemed to have received notice that such action would be taken." *Held*, where a case was on the 4th day of the month set for trial on the 13th, and defendant's attorney received notice of such action on the 7th, a new trial will not be granted on the ground that defendant's attorney did not have sufficient notice that the case had been set for trial.

2. Code Civil Proc. Cal. § 634, provides that "findings of fact may be waived by the several parties to an issue of fact (1) by failing to appear at the trial," etc. *Held*, where defendant, by attorney, appeared specially, to move for a continuance of the case, and, on the motion being denied, withdrew from the trial, defendant thereby waived the findings of fact.

3. Under Code Civil Proc. Cal. § 1029, which provides that when for any reason a postponement of a trial is asked the court may, in its discretion, make the payment of costs occasioned by such continuance a condition of granting the same, where defendant refused to pay the costs the denial of the motion for a continuance is not error.

Commissioners' decision. Department: 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action to quiet title by David Eltzroth against Patrick Ryan and J. H. Wythe. From a judgment in favor of plaintiff defendants appeal. Affirmed.

Welles Whitmore and David Stoddart, for appellants. Lamberson & Taylor, for respondent.

BELCHER, C. The plaintiff brought this action against Patrick Ryan and J. H. Wythe to quiet his title to a quarter section of land in Tulare county. The defendants answered separately. The case as against Wythe was tried, and judgment rendered for the plaintiff. From that judgment and an order refusing a new trial an appeal was taken to this court, where the judgment and order were affirmed. 89 Cal. 135, 26 Pac. Rep. 647. The case as against Ryan was, on the 4th day of March, 1889, set down for trial on the 13th day of that month. Ryan resided at Portland, Or., and his attorney at Oakland, in this state. The attorney received notice on the 7th of the month that the case had been set for trial on the 13th, and immediately telegraphed his client to that effect. The defendant started for Oakland, and arrived there on the 10th, which was Sunday. On the next day he saw his attorney, and then for the first time learned that he was too sick to attend the trial at the time set for it. He advised with his attorney as to the best course to pursue, and attempted to procure other counsel in Oakland to go with him to Visalia, and try the case, but was unable to do so. The attorney and his attending physician then made affidavits showing the attorney's sickness and inability to be present at the trial, and that there was not sufficient time to engage other counsel to conduct it, and also that the attorney was familiar with all the facts of the case, and believed that his client had a meritorious defense. These affidavits were given to defendant, and he then started for Visalia, where he arrived on the 12th. Immediately on his arrival he consulted E. O. Larkins, an attorney at law residing there, and engaged him to appear in court the next day and move for a continuance. When the case was called on the 13th Larkins appeared and moved for a continuance on the affidavits which defendant had brought from Oakland. The court asked the attorney if his client was prepared to pay the costs of the continuance, and he answered that he was not. The court then denied the motion, and Larkins withdrew from the case. The trial was thereupon commenced, and, after the introduction of oral and documentary evidence by the plaintiff, the cause was submitted, and judgment rendered in his favor, but no findings were filed. The defendant moved for a new trial upon a bill of exceptions and upon new affidavits, made by himself and his attorney, setting up, among other things, that after defendant arrived in Visalia he had not sufficient time to procure the attendance of his witnesses or familiarize Larkins or any attorney with the facts of the case. The court

denied the motion, and the defendant appeals from the judgment and order. All the points urged for a reversal of the judgment except three were decided against appellant's contention on Wythe's appeal. The three remaining points are: *First*, that defendant's attorney had no sufficient notice that the case had been set for trial; *second*, that the court erred in not making and filing findings of fact and its conclusions of law therefrom; and, *third*, that the court erred in not granting defendant's motion for a continuance.

1. It is claimed that the attorney for defendant was notified that the case had been set out for trial by a letter written by the attorney for plaintiff, and sent by mail from Visalia to Oakland; that, the distance between the two places being 260 miles, he was entitled, under section 1018 of the Code of Civil Procedure, to 21 days' notice, commencing with the time the letter was deposited in the post-office at Visalia, before a legal trial could be had; and that, no such notice having been given, defendant was deprived of a statutory right, and thereby prevented from having a fair trial. We do not think this position can be maintained. It does not appear from the record how or by whom the attorney was notified that the case had been set. He only states in his affidavit that he received the notice on or about March 7, 1889. But, however the notice may have been given, the section of the Code cited has nothing to do with it. No notice of the setting of a case for trial is required by statute. One having a lawsuit pending must, by himself or his attorney, whether they reside in the county where the case is or elsewhere, watch its progress, and he can only be heard to complain that a proceeding is taken against him in his absence when it is taken through his mistake, inadvertence, surprise, or excusable neglect. Section 473, Code Civil Proc. Ordinarily the time when demurrers and motions may be heard and cases set down for trial is regulated by rules of court; and in the court below there seems to have been a rule reading as follows: "It is by the court ordered that on any Monday either party may on motion have, without notice, any case set down for trial, and dispose of any motion on file to settle the pleadings and dispose of a demurrer which has been on file three days previous to such Mondays; and for any of such purposes the opposite party is deemed to have received notice that such action would be taken."

2. It is contended that findings were not waived, and that, as no findings were filed, the judgment should be reversed; but we think the record conclusively shows that findings were waived. The Code (section 634, Code Civil Proc.) provides: "Findings of fact may be waived by the several parties to an issue of fact (1) by failing to appear at the trial." It appears that Larkins appeared only for the special purpose of moving for a short postponement of the trial, and that, when his motion was denied, he withdrew from the case. And the judgment recites that the cause came on regularly for trial, the plaintiff appearing by his

attorney, "and the said defendant, Patrick Ryan, not appearing either in person or by attorney, and thereby waiving findings in said cause." The judgment cannot, therefore, be reversed on this ground.

3. Every attorney is supposed to examine the facts and study up the law of a case before he enters upon the trial of it. And where, as here, an attorney suddenly becomes sick, and is thereby prevented from being present at the time set for trial, a postponement should undoubtedly be granted for such time, at least, as will enable the litigant to procure another attorney, and have him become familiar with the facts and law which he is expected to present. But under our Code, whenever a postponement of a trial is asked on any ground, the court is authorized, in its discretion, to make the payment of costs occasioned by the postponement a condition of granting the same. Section 1029, Code Civil Proc. This condition was imposed by the court below, and not accepted by the defendant. Under these circumstances, we cannot say that the refusal to grant the postponement was a reversible error. It follows, in our opinion, that the judgment and order should be affirmed, and we so advise.

We concur: TEMPLE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(91 Cal. 539)

Ex parte TUTTLE. (No. 20,835.)

(*Supreme Court of California.* Oct. 31, 1891.)

VALIDITY OF ORDINANCE—POOL-SELLING.

Under Const. Cal. art. 11, §§ 7, 11, authorizing the city and county of San Francisco to make and enforce within its limits such police regulations as are not in conflict with general laws, an ordinance prohibiting the sale of pools, etc., on horse races, "except within the inclosure of a race track where such trial or contest is to take place," is valid, since, though its incidental effect may be to confer special privileges on the owners of race tracks, its purpose is to restrain gambling of the character mentioned, which is a proper subject of police regulation.

In bank. Petition for writ of *habeas corpus* on behalf of — Tuttle to the chief of police of San Francisco. Writ discharged, and prisoner remanded.

W. W. Foote, George A. Knight, and Garret W McEnerney, for petitioner. *Davis Louderback*, for respondent.

DE HAVEN, J. The return to the writ issued herein shows that the petitioner was at the date of its service in the custody of the chief of police of the city and county of San Francisco, under arrest upon a charge of violating an ordinance of that city, which prohibits selling pools on horse-races, or holding money or other thing as a stake upon any wager as to the result of such race, "except within the inclosure of a race track where such trial or contest is to take place." The preamble to this ordinance, which gives the reason for its enactment, is as follows: "Whereas, it has become apparent that

the practice of gambling on horse-races has become alarmingly prevalent, and is the cause of debauching many of our boys and young men, rendering them unfit for the honorable occupations of life; and whereas, this discreditable occupation, with all its vicious results, is allowed in all its alluring features to occupy places in the business portion of our city, enticing our youths into habits which ultimately effect their ruin and degradation; and whereas, it is asserted that there is no legislation prohibitory of this nefarious and demoralizing pursuit being conducted and carried on, the present legislature having failed to pass any of the bills introduced for that purpose: Now, therefore, the people of the city and county of San Francisco do ordain," etc. It is claimed by the petitioner that the ordinance is void, for the reason that it in effect gives to the proprietor of the race-course the right to determine who shall enjoy the privilege of indulging in this species of betting, as he has the power to admit and exclude whom he pleases, and only those admitted to the track are permitted to wager upon the result of the race; and, further, that a monopoly is created in favor of such proprietor, as those who desire to engage in the business of pool-selling will necessarily be compelled to pay him for the privilege. We do not think these objections have sufficient force to render the ordinance invalid. Under sections 7 and 11 of article 11 of the constitution of this state the city and county of San Francisco is authorized to make and enforce within its limits such police regulations as are not in conflict with general laws, and the ordinance in question is clearly a police regulation. Any practice or business, the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, is a legitimate subject for regulation or prohibition by the state; and that gambling, in the various modes in which it is practiced, is thus demoralizing in its tendencies, and therefore an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure, is no longer an open question. The measures needful or appropriate to be taken in the exercise of this police power are determined by legislative policy, and for this purpose a wide discretion is committed to the law-making body. Whether it shall entirely prohibit, or only regulate by confining such practices within prescribed limits: whether the law shall apply to every kind of gambling, or only to those games or wagers in which evil effects appear with greatest prominence,—must be determined primarily by the legislative department of the state or of the municipality authorized to exercise this great power, which is conferred for the purpose of securing the public safety and welfare; and unless it clearly appears that a statute or ordinance ostensibly enacted for this purpose has no real or substantial relation to these objects, and that the fundamental rights of the citizen are assailed

under the guise of a police regulation, the action of that department is conclusive. *Mugler v. State*, 123 U. S. 661, 8 Sup. Ct. Rep. 273; *In re Jacobs*, 98 N. Y. 98; *Watertown v. Mayo*, 109 Mass. 315; *Ex parte Keating*, 38 Cal. 702. It is manifest, we think, under this rule, that the ordinance in question cannot be declared invalid. Whatever may be its incidental effect, it is apparent that it is not the object or purpose of the ordinance to confer any special privilege or benefit upon those who own or control race-courses, by giving them the exclusive right to carry on the business, or of selling to others the privilege of pool-selling on horse-races, and therefore we need not stop to consider whether a law or ordinance having only such an effect, or plainly intended to accomplish such an object under the mere pretense of establishing a police regulation, could be upheld. As already stated, a large discretion is vested in the legislative branch of the municipal government, in dealing with questions of this character, in determining not only what games or wagers should be made the subject of legislation, but, if permitted at all, under what regulations they should be allowed to exist. It seems to have been the judgment of that department that the existing evils consequent upon selling pools on horse-races, as declared in the preamble to the ordinance under review, would be sufficiently restrained by confining the business to the inclosure where the race is to be run, and, as the object sought to be accomplished is lawful, and the mode of regulation not clearly inappropriate to effect it, the ordinance is valid. Writ discharged, and prisoner remanded.

We concur: BEATTY, C. J.; GAROUTTE, J.; SHARPSTEIN, J.; HARRISON, J.; PATTERSON, J.

91 Cal. 606

BANBURY V. ARNOLD. (No. 14,163.)

(Supreme Court of California. Nov. 5, 1891.)

WAIVER OF ERROR—CONTRACTS BY MARRIED WOMEN—SPECIFIC PERFORMANCE—ACKNOWLEDGMENT.

1. The fact that appellant's demurrer to the complaint was overruled by consent does not preclude him from attacking its sufficiency in the appellate court.

2. Under Civil Code Cal. § 1093, providing that no estate in the land of a married woman shall pass except by a grant or instrument acknowledged by her, and section 1187, providing that a conveyance by a married woman has no validity until acknowledged, an unacknowledged contract by a married woman for the sale of her land is void, and cannot be enforced by her, and is not one which she can avoid or not, at her option.

3. The vendor's failure to demand the purchase money, and tender a deed, upon the vendee's default of payment, under a contract for the sale of land, does not estop the vendor from enforcing the contract, although time is of the essence thereof. *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. Rep. 629, and *Smith v. Mohn*, 87 Cal. 489, 25 Pac. Rep. 696, followed.

4. The certificate of acknowledgment of a notary public to a conveyance by a married woman is not a part thereof, under Civil Code Cal. § 1188, making the indorsement on the instrument, or attaching thereto a certificate of acknowledgment, a purely ministerial duty, and sections

1098 and 1187, providing that her conveyance, when executed and acknowledged, has the same effect as the deed of an unmarried woman, and is sufficient to pass her estate; and the fact that a married woman's contract for the sale of land, as set out in her complaint, in an action for its enforcement, contains no certificate of acknowledgment, does not make it appear to have been unacknowledged, and control allegations that she "entered into a contract with the defendant," etc., whereby she "agreed to sell to the defendant," etc., and "the said defendant agreed to purchase," etc.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Catherine Banbury against Delos Arnold to enforce a contract for the sale of land. From a judgment for plaintiff, defendant appeals.

Metcalf & McLachlan and *Delos Arnold*, for appellant. *H. C. Carr*, *W. S. Wright*, and *John Haynes*, for respondent.

GAROUTTE, J. This action is brought by respondent, who was the vendor in a contract for the sale of certain real estate, to enforce specific performance of the contract on the part of the appellant, who was the vendee. There is an appeal by defendant from the judgment. A copy of the contract is attached to the complaint, and made part of it. The contract shows that the plaintiff was a married woman and the wife of T. Banbury at the time she entered into it. There is no certificate of acknowledgment attached thereto, and no express allegation in the complaint that it was acknowledged. For grounds of reversal appellant insists that the complaint does not state facts sufficient to constitute a cause of action. The fact that appellant's demurrer was overruled by consent does not preclude him from attacking the judgment in this court upon the ground that it rests upon a complaint inherently defective, and it is upon the sufficiency of that complaint that the merits of this appeal must be determined. Section 1093 of the Civil Code provides: "No estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed by sections 1186 and 1191." Section 1187 of the Civil Code provides that a conveyance by a married woman has no validity until acknowledged according to the requirements of section 1186. In the case of *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. Rep. 695, it was held under these provisions of the Code that specific performance of an unacknowledged executory contract of a married woman to convey her separate real property could not be compelled. In the case at bar, assuming that this contract was not acknowledged, we have a married woman attempting to enforce against the vendee her unacknowledged executory contract for the sale of real estate. As we have seen, the vendee could not have enforced the contract against her, and there is no principle of equity that gives, or should give, her rights under the contract not accorded to the defendant vendee. This principle is clearly declared in *Cooper v. Pena*, 21 Cal. 412;

Cal. Rep. 26-28 P.—46

and in *Vassault v. Edwards*, 43 Cal. 466, the court said: "There is no exception to the rule, at least none now occurs to us, that the contract, though signed by both parties, will not be specifically executed at the instance of one party, unless performance on his part could also be compelled. The proposition that specific performance of the contract would not be decreed when the party asking its enforcement could not be compelled to perform it was decisive of the case, (referring to *Cooper v. Pena*.) and upon it the case was in fact decided; and, in our opinion, the decision is sustained by the overwhelming weight of the authorities." Appellant concedes the rule, but insists that this case is an exception thereto, and similar in principle to those cases which hold that a minor may enforce his contract after arriving at majority, or that a beneficiary may enforce a contract against his trustee although the trustee had no enforceable rights against him. The principles there involved are not analogous. Such contracts for just and proper reasons are made voidable at the option of the infant or beneficiary; but in this state a married woman, in dealing with her separate property, stands upon no such plane, and is hampered in her transactions relating to her property in no such manner. The contract in this case is not one, and certainly should not be construed as one, voidable at plaintiff's option. The consideration actuating the vendee in entering into the contract was her agreement to convey the land to him. Her acknowledgment of the contract was an essential part of the execution of it, (*Joseph v. Dougherty*, 80 Cal. 360.) and, not being acknowledged, it was not executed; and, the consideration actuating the vendee having totally failed, the contract was absolutely void, and became *nudum pactum* for all purposes.

Appellant contends that time was of the essence of the contract, and that plaintiff did not tender a deed and demand the purchase price until some months subsequent to the date fixed by the contract for final payment, and that, therefore, it will not support the action. While the authorities in this state are not as explicit and uniform upon this question as they should be, yet the true rule is laid down in *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. Rep. 629, and *Smith v. Mohn*, 87 Cal. 489, 25 Pac. Rep. 696, and as there found is opposed to appellant's contention in this regard. Respondent insists that it does not appear from the record that the contract was not acknowledged, and, consequently, the judgment must be affirmed. The allegation of the complaint in this regard is: "On the 6th day of May, 1887, the plaintiff entered into a contract with the defendant, whereby the plaintiff agreed to sell to the defendant," etc., "and the said defendant agreed to purchase," etc. In *Kays v. Phelan*, 19 Cal. 128, in construing a similar allegation of a complaint, the court said: "Upon the allegation of the complaint, the deed must be presumed to have been such as passed the estate of the plaintiff in the premises." Appellant concedes this prin-

ciple of law, but says that a copy of the contract is made part of the complaint, and controls the allegations thereof as to its contents, and it appears therefrom that the certificate of acknowledgment was not attached, and that, therefore, it affirmatively appears that the contract was not acknowledged. The proper solution of this question depends upon the fact as to whether or not the certificate of acknowledgment of a notary public to a conveyance of a married woman is a part of the conveyance. If the certificate of acknowledgment is no part of the conveyance, then the absence of such certificate upon the copy of the contract attached to the complaint would in no way affirmatively indicate that the contract was not executed and acknowledged according to law, and the allegation of the complaint heretofore quoted would be quite sufficient to show such to be the fact. Prior to the adoption of the Codes, under a line of authorities cited in *Leonis v. Lazzarovich*, 55 Cal. 52, it would appear that the certificate of acknowledgment of a married woman was an essential part of the execution of her deed, and even in that case, though not necessary to its determination, there is found language supporting such views. In *Wedel v. Hermau*, 69 Cal. 511, this very question was under discussion; and, while the case may not be deemed authority by reason of the remaining justices of the department simply concurring in the judgment, yet the views there expressed by Justice McKee seem to indicate the true rule. He said: "But execution, acknowledgment, and certification of acknowledgment were no longer necessary to the validity of her conveyance. It was sufficient to pass her estate if she executed and acknowledged a conveyance thereof according to the requirements of the Code. Section 1093, Civil Code. When thus executed and acknowledged, her conveyance had the same legal effect as the deed of a *feme sole*. Section 1187, Id. Therefore the certificate of acknowledgment is not an essential part of her conveyance. That, under the Code, is regarded simply as record proof of the fact of acknowledgment. When acknowledgment has been made according to law, before an officer qualified by law to take it, the party making it has done all that the law requires to make the instrument her act and deed. Her deed thus executed and acknowledged may be valid, though defectively certified. The embodiment of the fact of acknowledgment in the form of the certificate prescribed by law devolves upon the officer who has taken the proof of it, and not upon the party making it." Under section 1188 of the Civil Code, the duty of the officer in indorsing upon the instrument or attaching thereto a certificate of acknowledgment in the form required by law is purely ministerial, and it is impossible to comprehend how the ministerial act of such officer can be construed to form a part of the execution of an instrument by a married woman conveying realty. In *Joseph v. Dougherty*, 60 Cal. 360, it was held that when an instrument was signed and acknowledged by a married woman it was

executed; and in *Hutchinson v. Ainsworth*, 73 Cal. 458, 15 Pac. Rep. 82, the court clearly indicates that the notary's certificate is no part of the conveyance, where it is said: "The conveyance, then, having been properly executed and acknowledged, (though not properly certified,) was valid as between the parties to it and all the world, except subsequent *bona fide* purchasers," etc. We therefore conclude that the record before us does not show that the contract involved in this case was not acknowledged by the plaintiff. Let the judgment be affirmed.

We concur. PATERSON, J.; HARRISON, J.

(91 Cal. 600)

FITZGERALD v. NEUSTADT. (No. 14,390.)

(Supreme Court of California. Nov. 5, 1891.)

FRAUDULENT CONVEYANCES—REVIEW OF EVIDENCE—CONTINUANCE—ACTION BY ASSIGNEE OF INSOLVENT.

1. In an action by an assignee to recover goods sold by one G., an insolvent, within 30 days of his insolvency, the complaint alleged "that at the time of the attempted sale, * * * and for a long time prior thereto, the said G. was, and ever since has been, indebted to various persons in large sums of money; and during all said times was, and still is, unable to pay his debts from his own means, as said debts become due, and then was, and still is, an insolvent debtor," etc. Held, that the allegations sufficiently showed G.'s financial condition when the sale was made.

2. As there was a conflict in the evidence as to defendant's knowledge of G.'s financial condition when the goods were purchased, the findings of the trial court will not be disturbed.

3. A trial court may, in its discretion, allow parties to amend their pleadings, and such action will be sustained, unless there is gross abuse of discretion.

4. Insolvent Act Cal. § 18, provides that, "in suits prosecuted by an assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue." Held immaterial that the bond of the assignee was only signed by the sureties.

Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by J. E. Fitzgerald, assignee, etc., against Sarah Neustadt, to recover goods sold by an insolvent contrary to rights of creditors. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Justin Jacobs, for appellant. *Rothschild & Ach* and *Brown & Daggett*, for respondent.

GAROUTTE, J. This is an action of claim and delivery brought by respondent, as assignee in the matter of Joseph Goodman, in insolvency, against appellant, to recover a stock of merchandise of the value of \$3,000. Appellant claims title to the goods by virtue of purchase from Goodman made within 30 days next preceding his adjudication in insolvency. This is an appeal from the judgment and order denying her motion for a new trial.

1. The following allegation of the complaint, which was not denied, is sufficient to establish the insolvent's financial condition at the time of the alleged sale to appellant: "That at the time of the attempted sale of his said stock of goods, wares, merchandise, and fixtures above

described, as hereinafter stated, and for a long time prior thereto, the said Joseph Goodman was, and ever since then he has been, indebted to various persons in large sums of money; and during all said times was, and still is, unable to pay his debts from his own means as said debts became due, and then was, and still is, an insolvent debtor," etc.

2. There is a substantial conflict in the testimony as to the appellant's knowledge of Goodman's insolvency at the date of the transfer to her, and the finding in that regard will not be disturbed. Neither do we think the court was not justified in concluding from all the evidence that such transfer was made in violation of the provisions of section 55 of the insolvent act of 1880.

3. There was no error in denying the motion for judgment upon the pleadings, and allowing the plaintiff to amend his complaint. Such action of the lower court will always be sustained, unless there is a gross abuse of discretion.

4. Appellant contends that it was error to admit the bond of the assignee in evidence as against her objections, such bond not being signed by the assignee, but by the sureties only. Section 18 of the insolvent act of this state is as follows: "In suits prosecuted by an assignee, a certified copy of an assignment made to him shall be conclusive evidence of his authority to sue." In this case the assignment to the plaintiff from the county clerk was introduced in evidence, and under this provision of law it seems its validity cannot be questioned by a collateral attack. There is no reason why the legislature had not the power to make such a rule of evidence, and such rule has been recognized and applied in many cases. *Cone v. Purcell*, 56 N. Y. 649; *Herndon v. Howard*, 9 Wall. 664; *Rogers v. Stevenson*, 16 Minn. 68, (Gil. 56); *Dambmann v. White*, 48 Cal. 439; *Luhrs v. Kelly*, 67 Cal. 291, 7 Pac. Rep. 696. In the case of *Luhrs v. Kelly* the court said: "The creditors and debtors were alone interested in the amount and sufficiency of the bond." We see no error in the record. Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

(31 Cal. 608)

DAVIS v. BROWNING (No. 14,107.)

(Supreme Court of California. Nov. 5, 1891.)

CLAIMS AGAINST DECEDENT'S ESTATE—SUFFICIENCY OF AFFIDAVIT.

Code Civil Proc. Cal. § 1494, provides that a claim against an estate must be "supported by an affidavit of the claimant, or some one in his behalf, that the amount is justly due; that no payments have been made thereon which are not credited; and that there are no offsets to the same to the knowledge of the affiant," etc. *Held*, that an affidavit to a claim made by an executrix, in her representative capacity, which states "that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of said claimant," etc., is sufficient.

Department 1. Appeal from superior court, Colusa county; E. A. BRIDGEFORD, Judge.

Action by Sebila Davis, executrix, etc., against Browning, administrator, etc. From a judgment for plaintiff defendant appeals. Affirmed.

John T. Harrington, for appellant. H. M. Albery, for respondent.

HARRISON, J. The only question involved in this appeal is the sufficiency of an affidavit to a claim against the estate of the defendant's intestate. Plaintiff's testator, prior to his death, had prepared and properly verified a claim against said estate, but, having died before its presentation, the plaintiff herein, after her appointment as executrix of his last will and testament, added to the claim that had been so prepared and verified by him her own verification, in the following words, viz.: "State of California, county of Colusa—ss.: Sebila Davis, being first duly sworn, deposes and says that she is the executrix of the estate of Howell Davis, deceased, whose foregoing claim is herewith presented to the administrator of the estate of R. S. Browning, deceased; and Sebila Davis, being duly sworn, says that the amount thereof, to-wit, the sum of fifteen hundred and four and forty-seven one-hundredths dollars, is justly due to the said Sebila Davis, as executrix of the estate of Howell Davis, deceased; that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of said claimant; that the reason said affiant makes this affidavit is that said Howell Davis is dead, and she is executrix of said estate of Howell Davis, deceased. SEBILA DAVIS. Subscribed and sworn to before me this 25th day of June, A. D., 1888. S. M. BISHOP, County Clerk. By S. S. RUSSELL, Depy." The claim, so verified, was presented by her to the defendant, and by him rejected. Suit was thereupon brought upon the demand, and at the trial the above-named claim with the foregoing verification was admitted in evidence against the objection of the defendant. This ruling of the court is now presented as error. It is contended by the appellant that the affidavit of the plaintiff "that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of said claimant," is not a sufficient compliance with the statute, (Code Civil Proc. § 1494,) which requires that the claim must be "supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due; that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the affiant;" that, inasmuch as it appears from the affidavit that the "claimant" is the estate of Howell Davis, deceased, and as the affidavit is made by the plaintiff, a denial of the existence of any offsets or credits to the knowledge of the "claimant" is insufficient, but that such denial should be according to the knowledge of the "affiant." We think, however, that in this case the "claimant" and the "affiant" are the same person, and that the use of the word "claimant" instead of "affiant" in the clause referred to in the

affidavit is immaterial. It is true that the demand is in behalf of the estate which she represents, and that the moneys that may be received by her will not be her individual property; but she is nevertheless the proper individual to make, and the one who has made, the claim, and to whom the money is to be paid. It would be giving too much attention to mere form and shadow to hold that the affidavit made by her is not a substantial as well as a sufficient compliance with the requirements of the statute. Judgment affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

64 Cal. 95

PEOPLE'S SAV. BANK *et al.* v. HODGDON.¹

(Supreme Court of California. Aug. 28, 1883.)

EJECTMENT—TITLE OBTAINED AFTER ANSWER FILED—RES JUDICATA.

Where defendant in ejectment acquires a good title between the time of filing the answer and the judgment, a judgment for plaintiffs does not estop defendant from setting up this after-acquired title in another suit, it not having been set up in the first suit by supplemental answer.

Department 1. Appeal from superior court, Sacramento county.

Suit by the People's Savings Bank and others against Wadsworth Hodgdon to quiet title. Judgment for defendant. Plaintiffs appeal. Reversed.

A. C. Freeman and Geo. E. Bates, for appellants. M. L. G. O'Brien, Matt. F. Johnson, and T. G. Hodgdon, for respondent.

ROSS, J. Actior to quiet title. It is conceded on both sides that one Gass was the owner in fee of the property in controversy on the 29th day of June, 1855. Being such owner, he, on the 17th day of December, 1858, mortgaged the property to Morse and English, trustees, etc. April 21, 1863, a complaint was filed for the foreclosure of the mortgage, and the proceedings were regularly conducted to judgment, under which the property was duly sold by the sheriff on the 6th of July, 1863, to Morse and English, who received a certificate of purchase, which, in the year 1869, they assigned to Laidley, Hickox, and Dale. After the execution of the mortgage to Morse and English, and on the 22d of November, 1860, Gass conveyed the property by deed to Jane Griffin, who thereupon entered into its possession. In the year 1868 the present defendant Hodgdon commenced an action of ejectment against Jane Griffin and other persons to recover the possession of a block of land, including the land here in question. In that action Jane Griffin, on the 13th of July, 1869, answered, denying that Hodgdon had any right or title to this land, and alleging herself to be the owner in fee thereof. This answer was filed prior to the execution of the sheriff's deed to Laidley, Hickox, and

Dale pursuant to the sale made under the decree of foreclosure of the Gass mortgage. The sheriff's deed was, however, executed subsequently in the same year; that, is to say, in the year 1869. In 1870, Laidley, Hickox, and Dale executed to Jane Griffin a deed conveying the said property to her. In 1872 the ejectment suit of Hodgdon v. Griffin *et al.* was regularly tried upon its merits, and judgment was rendered therein in favor of Hodgdon, and against the said Griffin and others, for the recovery of the land involved therein, including that here in controversy, under which judgment Jane Griffin was dispossessed, and Hodgdon placed in possession. The single question in the present case is whether Jane Griffin and her co-plaintiff, who claims under her, are concluded by the judgment rendered against her in the ejectment suit. When Hodgdon commenced his action of ejectment, and when Jane Griffin filed her answer therein, the legal title to the property in controversy was in Jane Griffin, because of the deed executed to her by Gass. The title was, however, subject to be divested by the culminating step in the foreclosure proceedings, to-wit, by the execution of the sheriff's deed. The title was so divested in the year 1869. When Laidley, Hickox, and Dale received the deed from the sheriff they took the title as of December 17, 1858, the date of the mortgage by virtue of which the foreclosure proceedings were had. *McMillan v. Richards*, 9 Cal. 412. They thus became vested with the legal title to the property as of a date anterior to the deed from Gass to Jane Griffin, and anterior to the ejectment suit of Hodgdon; and, not being parties to that suit, they were, of course, unaffected by it. They could, therefore, undoubtedly have asserted their title against both Hodgdon and Jane Griffin. In 1870 they conveyed their title to Jane Griffin. It is true that that conveyance was made intermediate the filing of her answer in the ejectment suit and the trial of the action, but the title she got by the conveyance was not the same title she had when the suit was commenced, and when her answer was filed for the title she had at those dates was subject to the mortgage, and therefore subject to be, as it was, divested by the execution of the sheriff's deed in pursuance of the sale made by virtue of the decree of foreclosure. The title she got by the deed from Laidley, Hickox, and Dale conveyed to her the absolute fee of the property as of date December 17, 1858, unaffected by any subsequent conveyance or action. This title Jane Griffin did not hold at the time she joined issue in the action brought against her by Hodgdon, but it was acquired by her intermediate that time and the entry of judgment in that case, and was not set up by supplemental answer. It was therefore not involved in that action, and was therefore unaffected by the judgment therein rendered. *Valentine v. Mahoney*, 37 Cal. 396; *Thompson v. McKay*, 41 Cal. 221; *Bagley v. Ward*, 37 Cal. 121. Judgment and order reversed, and cause remanded for a new trial.

McKINSTRY and McKEE, JJ., concurred.

¹ This case, filed August 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

(64 Cal. 87)

PEOPLE *ex rel.* STODDARD v. WILLIAMS.¹
(*Supreme Court of California.* Aug. 22, 1888.)
COUNTIES—CLASSIFICATION BY CENSUS—JUDICIAL NOTICE.

1. The census referred to in Pol. Code Cal. § 4007, providing that "whenever a new census is taken the counties, on the 1st day of July thereafter, are, by operation of law, classified under such census," is the census taken by the United States.

2. A copy of the census returns or any part thereof, certified to by the superintendent of the census, is admissible in evidence to show the results of the census.

3. The courts will take judicial notice of the results of the census, as shown by the returns.

4. An order of the county board of supervisors consolidating county offices, must, under Pol. Code Cal. §§ 4106, 4107, be published by order of the board, and the publication of the proceedings of the board containing the order, in a newspaper, is insufficient.

In bank. Appeal from superior court, Santa Barbara county.

Action by the people at the relation of Henry Stoddard against A. B. Williams for usurping the office of recorder of Santa Barbara county. Judgment for relator. Defendant appeals. Affirmed.

W. C. Stratton, for appellant. Jarrett T. Richards and Atty. Gen. Marshall, for respondent.

THORNTON, J. This is an action for alleged usurpation of the office of recorder of Santa Barbara county by defendant Williams. The relator was elected recorder of Santa Barbara county at the election in 1882, and defendant was elected at the same time county clerk of said county. Defendant claims by virtue of his election as county clerk to be *ex officio* recorder. By section 4006 of the Political Code, the counties of this state, for purposes other than for roads and highways, are classified as follows: (1) Those containing 20,000 inhabitants or over constitute the first class; (2) those containing 8,000 inhabitants and under 20,000 are the second class; and (3) those containing less than 8,000 inhabitants constitute the third class. By section 4007 of same Code, "Whenever a new census is taken, the counties, on the 1st day of July next thereafter, are, by operation of law, classified under such census." Each county must have a board of supervisors, consisting of seven members, in counties of the first class, of five members in those of the second class, and of three in those of the third class. Pol. Code, § 4022. Under the provisions of section 4025 of the Political Code, whenever, under the classification above stated, the number of supervisors of any county is either increased or diminished, the board of supervisors must redistrict the county into supervisors' districts, to correspond with the number of supervisors to which it is, under the new classification, entitled. When the number is increased, at the first general election thereafter supervisors must be elected for such new districts in which no supervisors then acting reside.

¹ This case, filed August 22, 1888, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

The sections of the Code heretofore referred to, as well as those hereinafter referred to, were in force when the events occurred out of which the controversy in this case arose. Prior to the 1st day of July, 1881, the county of Santa Barbara was, by operation of law, a county of the second class; and on the 11th day of August, 1882, the board of supervisors thereof passed an order redistricting the county into supervisors' districts, so as to form five such districts, upon the ground that it had become, by an increase of population, a county of the second class, and thus entitled to have five members in its board of supervisors. In making this order, the board acted upon the census taken in 1880 by the authorities of the United States, under the provisions of the act of congress of March 3, 1879, entitled "An act to provide for taking the tenth and subsequent census." The census (the tenth) was to be taken on or for the date of June 1, 1880. Section 1, 20 St. at Large, p. 473. The enumeration was to be made under the act of congress was to commence on the first Monday of June, 1880, and be made by enumerators appointed under the act, and it was required of each enumerator to complete the enumeration of his district, and to prepare the returns required by the act to be made, and to forward the same to the supervisor of his district on or before the 1st day of July, 1880; and, in any city having over 10,000 inhabitants under the census of 1870, the enumeration of population was to be taken within two weeks from the first Monday of June. Section 10 of Act. The returns of the enumerators were to be sent to the supervisors of the census, who were to scrutinize the same to see whether they were taken in compliance with law, and to forward the completed returns to the superintendent of the census at Washington city. Sections 2, 3, 5. By the census it appeared from a certificate of the superintendent of the census, which was offered in evidence on the trial, the population of Santa Barbara county was on the 1st day of June, 1880, 9,513, sufficient to raise it to a second-class county. It is argued that the census referred to in section 4007 of the Political Code above quoted is not the census of the United States. But in this contention the counsel for appellant has gone astray. We think it clear the reference is to such census. The census of the United States is a census of each particular state as well as of all the states. The enumeration taken under the act will show the inhabitants of each political division of the state. Section 11. In ordinary parlance, when we speak of a census of the inhabitants of a state or any of its political divisions, we mean the United States census; for that is the only census in this state which is regularly and periodically taken. The board of supervisors had the authority to act on this census, and it did act by authority when it redistricted the county in August, 1882.

It is contended that the court erred in admitting in evidence the certificate of the superintendent above mentioned. We do not think so. The records of this cen-

was under the care and in the custody of that officer, and on common-law principles, as the record could not be taken from his custody, a copy of such census, or any part of it, could be proved by a copy certified by him. But, if this is not so, the court below and this court can take judicial notice of the results of such census, (section 1875, Code Civil Proc.,) and resort for information to appropriate documents of reference, (section 1875, Id.) That the census was complete when the board of supervisors acted on the 11th of August, 1882, and long before that period, we have no doubt. The most conclusive proof of it is found in the act of congress passed February 25, 1882, by which an apportionment of the representatives in congress among the several states under the tenth census was made. St. U. S. 1881-82, p. 5. Congress would certainly not have legislated, in so important a matter as the apportionment of representatives among the several states, upon an incomplete census. But it is urged that the relator could not have been legally elected recorder in 1882, for there was no such officer, the office of recorder having been in August, 1880, consolidated with that of county clerk, which consolidation the board of supervisors had authority to make, and defendant had been, at the election in 1882, elected county clerk, by which he became *ex officio* county recorder. Conceding that the board of supervisors had power to consolidate the offices, as contended for, in 1880, still, in order to effect such consolidation, the order passed by the board for such purpose must have been published by order of the board. Sections 4106, 4107, Pol. Code. The publication in a newspaper of the proceedings of the board in which such order appeared was not sufficient. The board made no order for any publication, and therefore the publication above mentioned amounted to nothing, and the consolidation was not effected. Such was the ruling of this court in *People v. Bailhache*, 52 Cal. 310, and we see no reason to doubt its correctness. Judgment affirmed.

MYRICK, ROSS, McKEE, and McKINSTRY, JJ., concurred.

(64 Cal. 99)

BROWN v. BURBANK et al.

(Supreme Court of California. Aug. 28, 1883.)

CANCELLATION OF DEED—FRAUD—UNDUE INFLUENCE.

Where plaintiff, a girl of 19, who has resided with her grandparents as their ward since she was 9, conveyed to her grandmother all of her property, on the representations of her grandmother that the property really belonged to her grandfather, and that she (the grandmother) would devise it to plaintiff, the conveyance will be set aside for fraud and undue influence.

Department 1. Appeal from superior court, Sacramento county.

Suit by Clara L. Brown against P. D. Burbank and others to annul a convey-

ance on the ground of fraud. Judgment for defendants. Plaintiff appeals. Reversed.

W. H. Beatty, for appellant. L. S. Taylor, for respondents.

Ross, J. Action to annul a deed of conveyance. The plaintiff's maiden name was Burbank. Her father, George W. Burbank, who died in August, 1866, when she was but nine years of age, was the son of the defendants. Plaintiff's mother died when she was but three years old. From the time of her father's death until her marriage she resided with her grandparents, the defendants, and was under their care and control. She had no other home, and was treated by them in all respects as their own child, and she regarded them as the only persons to whom she owed filial duty, or from whom she had support and protection. When George W. Burbank died, in August, 1866, he was the owner of a house and lot in the city of Sacramento. The plaintiff was left his sole heir. In October, 1866, the defendant P. D. Burbank obtained letters of administration upon his son's estate, and as such administrator took possession of the house and lot, and, with his wife,—his co-defendant herein,—has ever since occupied a portion of the house as a residence, and received the rents of the remaining portion. In his petition for letters of administration upon his son's estate, in the inventory of the estate filed by him, and in his verified accounts filed in the probate court and confirmed on his petition, P. D. Burbank invariably described the house and lot as the property of the estate of George W. Burbank. He made no claim upon the property, nor pretended that the estate was indebted to him. On the contrary, he charged himself in his accounts with the value of the use of that portion of the premises occupied by him, and with the rents of the remaining portion. On his petition he was allowed the use and rents of the property for the maintenance and education of the plaintiff. The order making this allowance was made in December, 1868, and from that time until May 17, 1877, P. D. Burbank continued to enjoy the same. His administration was never closed. On the day last mentioned the property was worth \$5,000, and its annual rental value was \$750. It constituted the only property of the plaintiff. She was at that time 19 years and 8 months old, but was still residing with the defendants, and under their care and protection. She had never been informed by them, or either of them, of her rights with respect to the property. Such being the situation and relations of the parties, the defendant Irene H. Burbank represented to the plaintiff that the property never really belonged to her deceased father, but was rightfully and in fact the property of P. D. Burbank, and thereupon requested the plaintiff to convey it to her, promising at the same time to make a will devising it to plaintiff, so that it would be hers after the death of the grandmother. The plaintiff, acting solely upon these representations and in obedience to the will and request of her grand-

¹This case, filed August 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

mother, without other information, counsel, or advice, and in ignorance of the real motive of the defendants, executed a deed conveying the property to her grandmother, the defendant Irene. The real motive of the defendants in obtaining the deed the court below found to be this: "The defendants claimed to be the equitable owners of the property, and were afraid that the plaintiff, who was young and giddy-minded, might marry some designing person, who would deprive her and them of the property, and they desired the property conveyed to the defendant Irene, in order to prevent such a misfortune." The court further found that at the time of the execution of the deed the defendant Irene executed a will, by which she devised to the plaintiff all the property of which she might die seised. The facts above stated are established by the findings. They show, as is well said for the appellant, "that the plaintiff, while still an inexperienced girl, still under the care and control of her grandparents, still subject to the influence acquired by them in the double relation of parents and guardians of her person and estate, accustomed to consult their wishes and obey their commands, ignorant of her rights, purposely misled and kept in ignorance by those to whom she naturally looked for the protection of her interests, without the aid of legal advice or time for reflection, made a conveyance of her whole estate without any valuable consideration to one standing *in loco parentis*." That a deed obtained under such circumstances cannot be permitted to stand is one of the clearest of propositions. Story, Eq. Jur. §§ 809, 817, et seq.; Kerr, Fraud & M. pp. 150-153, 177-179; Bigelow, Fraud, pp. 250-253, 263, 264. In view of the testimony of the defendants it is useless to order a new trial. Judgment and order reversed, and cause remanded, with directions to the court below to enter judgment for the plaintiff on the findings.

McKINSTRY and McKEE, JJ., concurred.

Hearing in bank denied.

64 Cal. 11

GORTON v. FERDINANDO.1

(Supreme Court of California. July 20, 1883.)

APPEAL—CASE INVOLVING TITLE TO REAL ESTATE.

Plaintiff brought in justice's court trespass for entry and cutting timber on his land. On defendant's alleging that he was the owner of the land, the cause was transferred to the superior court by an order permitting the filing of an amended complaint. Plaintiff filed an amended complaint alleging ownership and possession of certain land, and that defendant entered thereon at a certain time and cut timber. No answer was filed, and there was judgment by default. Held that, it not appearing that the trespass alleged in the amended complaint was the same as that alleged in the original complaint, or that the same premises were referred to in the two

complaints, an appeal would not lie from an order in the case tried, as being in a case involving title to or possession of real estate.

Department 2. Appeal from superior court, Amador county.

Trespass by Gilman Gorton against L. Ferdinando. From an order recalling an execution for costs plaintiff appeals. Appeal dismissed.

A. C. Brown and John A. Eagon, for appellant. Charles K. Gray, for respondent.

SHARPSTEIN, J. The appellant commenced an action in a justice's court against the respondent for the recovery of \$100 damages, which appellant alleged he had sustained by reason of the respondent's entering upon appellant's land and cutting timber thereon. The respondent in his answer alleged that he was the owner of the premises upon which appellant alleged that said timber was cut, and thereupon the justice made an order transferring the case to the superior court, which permitted appellant to file an amended complaint, in which it was alleged that he was the owner, in the possession, and entitled to the possession, of certain described land, and that respondent entered upon it at a certain date, and without leave of appellant cut down and converted to his own use 100 trees, of the value of \$50, standing on said land, and demanded judgment for \$299.25. To this complaint respondent neither demurred nor answered, and judgment by default was entered against him for \$299.25. Afterwards the court made an order setting aside said judgment, and remanding the case to the justice's court, on condition that appellant should serve and file his cost bill, and respondent should pay the costs within 20 days. Afterwards the defendant made a motion, which the court denied, to have the condition of the order relating to the payment of the costs stricken out. At some time between the 14th day of December, 1881, and the 27th of December, 1882, the clerk of said court issued an execution for said costs, which on motion of the defendant was recalled by an order of the court made and entered on the 6th day of January, 1883; and from that order this appeal is taken; and the first question to be determined is whether an appeal will lie in a case like this. The damages claimed were less than \$300. The case, as stated in the complaint, does not involve the title or possession of real estate any more than an action of trespass *quare clausum* must necessarily involve such title or possession. As before stated, the defendant made no answer to the complaint, and the judgment, exclusive of costs, was for less than \$300. It is by no means certain that the cause of action set out in the complaint filed in the superior court is the same as that set out in the complaint filed in the justice's court. It does not appear that the trespass alleged in the one was the same as that alleged in the other. For anything that appears on the face of said complaints, the premises on which it is alleged a trespass was committed may not be the same. The cause was tried upon the complaint filed in the superior court, which took the place of the original com-

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plaint, which then ceased to perform any further function as a pleading. *Barber v. Reynolds*, 33 Cal. 497. Therefore the case transferred from the justice's to the superior court, on the ground that it involved the title or possession of real property, has never been tried. The case tried involved no such question; and, as the amount in controversy was less than \$300, neither the judgment nor any order made after the judgment can be reviewed on appeal in this court. Appeal dismissed.

MYRICK and THORNTON, JJ., concurred.

Hearing in bank denied.

(64 Cal. 13)

KIRSCH et al. v. SMITH.¹

(*Supreme Court of California.* July 20, 1883.)

EJECTMENT—AMENDMENT OF PLEADING—ABUSE OF DISCRETION.

In ejectment in the superior court an application to amend the answer by setting up a judgment of a county court as a bar is properly denied, such courts having jurisdiction of no action, judgment in which would bar ejectment.

In bank. Appeal from superior court, city and county of San Francisco.

Ejectment by Michael C. Kirsch and others against Josiah Smith. Defendant's application to amend his answer was denied and he appeals. Affirmed.

A. H. Griffiths, for appellant. *George A. Nourse*, for respondents.

PER CURIAM. The questions raised by appellant's counsel, with a single exception, were considered and decided adversely to his views in *Kirsch v. Brigard*, 63 Cal. 319. The question which distinguishes this case from that arises out of the ruling of the court upon an application of the defendant to amend his answer. The application was made more than three years after the filing of the original answer, and within five days of the commencement of the trial. The application was denied, and the ruling excepted to. The provision of the Code applicable to this subject is as follows. "The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding." Code Civil Proc. § 473. When the law gives to a lower court discretion, we will not reverse its order or ruling unless there appears to have been an abuse of discretion. The amendment which the defendant asked leave to file set up a judgment of a county court as a bar to this action. As this was an action of ejectment, and the county court had no jurisdiction of an action of ejectment, nor of any other action in which its judgment would be a bar to an action of ejectment, we do not think there was an abuse of discretion in denying the motion to file the amendment. Judgment affirmed.

¹This case, filed July 20, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

HICKS v. LOVELL.²

(*Supreme Court of California.* July 23, 1883.)

EJECTMENT—VENDÉE IN POSSESSION—EVIDENCE AT FORMER TRIAL.

1. Where a vendee in possession, under a contract of purchase on which he has made part payment, refuses to further comply with the terms and conditions thereof, or to quit and surrender possession, the vendor is not obliged to stand on his contract, and sue for a breach, or seek specific performance, but he may maintain ejectment.

2. Under Code Civil Proc. Cal. § 1870, subd. 8, providing that the testimony of a witness out of the state, given in a former trial between the parties relating to the same matter, may be given in evidence, there is no error in overruling an objection to the official reporter's transcript of testimony given on a former trial, the only grounds of objection raised being that the testimony was not signed by the witness, that it was not his deposition, and that it was secondary evidence.

Department 1. Appeal from superior court, San Diego county.

Ejectment by John J. Hicks against D. J. Lovell. Judgment for plaintiff, and defendant appeals. Affirmed.

M. A. Luce and *Will M. Smith*, for appellant. *Leach & Parker*, for respondent.

McKEE, J. Ejectment to recover several parcels of land in San Diego county. The answer to the complaint in the case contained a general denial, the defense of a former recovery, and of an equitable title to the land, and also a cross-complaint in equity. The statement of the cause of action in the cross-complaint showed that the defendant was in possession of the lands in controversy under two agreements in writing,—one dated September 10, 1879, and the other March 1, 1880,—by which he and one Wheeler had agreed to purchase the lands from the plaintiff, according to the terms and conditions of said agreements. Both vendees entered and occupied, under said agreements, until the fall of 1880, when Wheeler sold and transferred all his right under the agreements to the defendant, who has since occupied the lands solely for himself. Neither of the agreements have been performed; but the defendant averred in his cross-complaint that he was ready, able, and willing to perform the agreement of September 10, 1879, according to its terms and conditions, but had been prevented from performance by the plaintiff; and that, after prevention and before the commencement of the action, he had also offered to pay the plaintiff the purchase money due on the agreements, but the plaintiff refused to accept the same; and that as to the lands referred to and described in the agreement of March 1, 1880, he was also ready and able to perform his agreement whenever he could have a good and sufficient deed of conveyance of said lands; but as the plaintiff had no title to the same he could not comply with the agreement on his part. Therefore the defendant asked, as equitable relief, that the plaintiff's action at law be dismissed; that

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the contract of March 1, 1880, be canceled; and that the contract of September 10, 1879, be specifically performed. In his answer the plaintiff admitted the entry and occupation by the defendant under the agreements as stated in the cross-complaint; but he denied the readiness and ability of the defendant to perform any of the agreements, or that he had offered to perform any of them, or had been prevented from performing by the plaintiff. He also averred that the defendant had absolutely refused to perform, and had failed and refused to pay any portion of the purchase money due for the lands according to the terms and conditions of the agreements, except the sum of about \$116, which he admitted having received on the agreements in the fall of 1880.

Before trial a motion was made for judgment on the pleadings, upon the ground that they admitted the defendant was in possession of the lands under agreements of purchase and part performance. The motion was denied, and the ruling is assigned as error. But as the defendant denied the plaintiff's cause of action at law, and as the plaintiff denied the defendant's cause of action in equity, there were issues raised by the pleadings in both actions to be tried and determined before judgment could be rendered in either; there was therefore no error in denying the motion. It is only where an answer admits, or leaves undenied, the material facts stated in the complaint, that a judgment can be rendered on the pleadings. *Prost v. More*, 40 Cal. 347.

By consent, the issues in the action at law and in the cross-action in equity were tried together. At the trial the plaintiff rested his case upon proof, which established a legal title in himself to the lands in dispute, possession by the defendant at the commencement of the action, and an absolute refusal by the defendant to comply with the terms and conditions of the agreements of purchase under which he was in possession, or to quit and surrender possession to the plaintiff. When the plaintiff rested the defendant moved for a nonsuit, upon the ground that the proofs and the pleadings in the case showed that the defendant was in possession under contracts of purchase which had been in part performed. The motion was denied, and that ruling is also assigned as error. But the ruling was correct, because, the legal title to the lands being in the plaintiff, he was in law entitled to judgment, unless the agreements of purchase under which the defendant entered and was in possession gave him an equitable right to the possession. But, according to the plaintiff's proofs, that right had ceased to exist because the defendant had refused to comply with the terms and conditions of the agreements, and repudiated them. A vendee in possession of land cannot repudiate his contract of purchase and at the same time hold the possession under it and by virtue of it. A repudiated contract is no protection to an intending vendee in possession against the legal title. If the defendant denied repudiation, and relied upon readiness and ability to perform, which was prevented by the plain-

tiff, or an offer to perform, which was rejected, those were matters in defense to the action at law, or for the consideration of the court sitting as a court in equity, in the equitable cross-action. *Clark v. Lockwood*, 21 Cal. 220; *Meador v. Parsons*, 19 Cal. 294; *Lestrade v. Barth*, Id. 666; *Cadiz v. Majors*, 33 Cal. 288; *McCauley v. Fulton*, 44 Cal. 356; *Torney v. True*, 45 Cal. 105; *Kenyon v. Quinn*, 41 Cal. 325.

Upon the trial the court found that defendant had never performed, or in good faith offered to perform, either of the agreements, according to their terms and conditions; that he had not been prevented from performance by any act of the plaintiff; that plaintiff had tendered a deed and demanded performance, but defendant had absolutely refused, and that both he and Wheeler had wholly failed and refused to perform the agreements, or any part thereof, except to deliver to the plaintiff about 136 sacks of wheat, of the average weight of 135 pounds each, which the plaintiff received from them in the fall of 1880; and because of the delivery to the plaintiff of that quantity of wheat, in part performance of the agreements, and of the entry and possession by the defendant under the agreements, it is contended that ejectment is not maintainable by the plaintiff as vendor, against his vendee in possession, who has refused to comply with the terms and conditions of the agreements, or to quit and surrender possession of the lands, and that his only remedy is in equity to foreclose his vendor's lien for the purchase money. *Willis v. Wozencraft*, 23 Cal. 614, and *Bohall v. Diller*, 41 Cal. 532, are cited to sustain the contention. But neither of those cases is analogous to the case in hand, nor does either sustain the contention of the appellant. In *Willis v. Wozencraft* the vendor and vendee had been in possession in common, each "having a 'full right' to an undivided half of the rents and profits." Being thus in possession, the vendee agreed to purchase the undivided interest of his co-tenant, who had the legal title to the entire estate in his name, and took from him a bond for a deed, upon payment of the purchase money, in which it was especially stipulated that the vendee had the right of possession to an undivided one-half of the premises. Against the vendee thus in possession in his own right, and under the contract of purchase, a grantee of the vendor brought ejectment, solely upon the ground that he had acquired the legal title to the land. But before suit she had made no demand to be let into possession of her share with the defendant, and there was no proof in the case of any special facts tending to show either an actual or constructive ouster of the plaintiff, nor was there any evidence tending to show the tender of a deed and demand and refusal to pay the purchase money after it became due, or that the purchase money had not been paid, or that the defendant had abandoned the purchase, or refused to complete it according to the terms of his contract. The defendant had therefore done nothing to forfeit the benefit of his contract; and, being rightfully in possession under his equitable title, he

could not be disturbed. The defendant in *Bohall v. Diller* had also entered into possession of the land in dispute under a contract of purchase. The purchase money had become due and was unpaid at the commencement of the action, and, relying solely upon that fact, the vendor, without having put the vendee in default, brought a peculiar action against the vendee to recover damages for an alleged breach of the contract, possession of the land, and also the purchase money. But the supreme court held that he could not recover damages, because he had not alleged any; nor the purchase money, because, although it had become due before the commencement of the suit, yet, as there was no allegation of tender of a deed and of demand and refusal to pay, the defendant was not in fault; nor could he recover the land, because there was no evidence tending to show that the contract had been rescinded by the parties, therefore the right of possession was in the defendant, and must prevail.

The doctrine deducible from those cases, as well as from others in this state, is that ejectment is not maintainable by a vendor of real property against his vendee in possession under an executory contract of sale, who is not in default in the performance of his contract, or who has performed it and is in a position to demand a deed, or who seasonably and in good faith offers to comply with the terms of his purchase, and continues ready to comply with them. To a vendee in possession under such circumstances, the contract will avail him as an equitable defense to an action of ejectment brought against him by his vendor, or as a cross-action in equity to enforce a trust against his vendor, or to obtain a specific performance of the contract. *Love v. Watkins*, 40 Cal. 548; *Gerdes v. Moody*, 41 Cal. 336; *Talbert v. Singleton*, 42 Cal. 395; *Willis v. Wozencraft*, and *Bohall v. Diller*, supra; *Railroad Co. v. Mudd*, 59 Cal. 585. But if after maturity of the purchase money the vendor tenders a deed, and demands payment, which the vendee refuses to make, or if the vendee has abandoned the purchase, and repudiates the title of his vendor, in such case the vendee forfeits the benefit of the contract, and he cannot avail himself of it as a defense to an action of ejectment by his vendor, (*Pearls v. Covillaud*, 6 Cal. 617; *Whittier v. Stege*, 61 Cal. 239; *Thorne v. Hammond*, 46 Cal. 530); nor by way of a cross-action for specific performance. For it is well settled that a court of equity, in the exercise of its judicial discretion, will not decree specific performance of a contract for the sale of land in favor of a party who, by his own negligence or default, has prevented or unreasonably delayed the full execution of the contract. *Conrad v. Lindley*, 2 Cal. 173; *Brown v. Covillaud*, 6 Cal. 566; *Green v. Covillaud*, 10 Cal. 317; *Willard v. Tayloe*, 8 Wall. 557. That was the position of the defendant on his cross-complaint. By his own showing, he abandoned the purchase of one of the contracts, and disclaimed the title of his vendor; but having entered into possession under the title, and in subordination to it, he was estopped from denying it.

Hoen v. Simmons, 1 Cal. 119; *Salmon v. Hoffman*, 2 Cal. 139; *Walker v. Sedgwick*, 8 Cal. 403. And as to the other contract, he neither averred a tender of the purchase money nor offered to pay it. *Marshall v. Caldwell*, 41 Cal. 611; *Englander v. Rogers*, Id. 420. One who appeals to a court of equity to defend him against the legal title to land, of which he is in possession, must do equity by paying the price which he agreed to pay. The maxim, "he who seeks equity must do equity," applies to him in full force. *Eastman v. Plumer*, 46 N. H. 464. The cross-complaint of the defendant, therefore, lacked the essential element of a complaint in equity. Nor had the defendant any equitable title which would serve as a defense to an action of ejectment. Having abandoned his purchase and repudiated his contracts, he was not a purchaser clothed with right, and his vendor was not bound to resort to a court of equity for relief; he may sue in ejectment. *Keller v. Lewis*, 53 Cal. 118. "The refusal of one party to perform his contract," says the supreme court of New York in *Graves v. White*, 87 N. Y. 465, "amounts on his part to an abandonment of it. The other party, therefore, has a choice of remedies. He may stand upon his contract, refusing assent to his adversary's attempt to rescind it, and sue for a breach, or in a proper case for a specific performance, or he may assent to its abandonment, and so effect dissolution of the contract by the mutual and concurring assent of both parties. In that event he is simply restored to his original position, and can neither sue for a breach nor compel a specific performance, because the contract itself has been dissolved. * * *

An absolute refusal, a deliberate repudiation of the stipulations of the contract, gives to the other party as an alternative remedy the right to assent to such abandonment, and treat the contract as dissolved." In the present case such refusal was proved. The defendant undertook to repudiate the contract, and at the same time held the possession under and by virtue of it. If the plaintiff could have stood upon the contract, and compelled performance or recovered damages for the breach, he was not bound to adopt that remedy, but had the right to bring ejectment to recover back his land. In so doing, and giving the preliminary notice to surrender possession, he, too, gave his assent to the abandonment of the contract; and the parties who made it having thus by mutual assent rescinded it, its validity was gone and it ceased to exist. Neither party thereafter could invoke its terms or protection as against the other, and the plaintiff was at liberty to maintain ejectment to recover the possession of the land to which he had a legal title. *Jackson v. Moncrief*, 5 Wend. 26; *Wright v. Moore*, 21 Wend. 230; *Pierce v. Tuttle*, 53 Barn. 167.

The court found that the former trial and judgment between the parties was not an adjudication of the matters contained in this action. The finding is sustained by the record of that case, which shows on its face that the questions involved in this were not raised, tried, and

determined in that; and also by the evidence which the defendant gave, under his pleadings, as to the facts upon which that decision was based. *Megerle v. Ashe*, 33 Cal. 84. The former adjudication was therefore no bar to the action in hand.

Lastly, it is assigned as error that the court overruled the objections taken by the defendant to the official reporter's transcript of the testimony of a witness given on the former trial and offered in evidence by the plaintiff. No objection was made that the witness was not shown to be beyond the jurisdiction of the court, nor as to the mode of proving his testimony. The only objections were that the testimony itself was not signed by the witness, that it was not his deposition, and that it was secondary evidence. But by subdivision 8, § 1870, Code Civil Proc., it is provided that "the testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter," may be given in evidence. And as it was proved that the witness was out of the state, and no objection was made to the transcript as evidence of his testimony, there was no prejudicial error in the ruling. Judgment and order affirmed.

ROSS and McKINSTRY, JJ., concurred.

Hearing in bank denied.

VAILES v. BROWN.

(Supreme Court of Colorado. Oct. 19, 1891.)

COUNTY ELECTION—CONTESTS—JURISDICTION.

1. Under the act of 1885 the county judge, sitting in term-time in his regular capacity as the county court, is invested with jurisdiction to try and determine contested election cases of county officers. Whether the county judge sitting in vacation may exercise such jurisdiction, not determined.

2. Section 14 of the act is to be construed as a statute of limitations upon a summary proceeding; and when the period for filing the statement under said section has fully elapsed, excluding the day when the votes are canvassed, the time cannot be extended merely on the ground that the last day happens to fall on Sunday.

(Syllabus by the Court.)

Error to La Plata county court; H. GARBANATI, Judge.

William T. Valles and Callahill Brown were opposing candidates for the office of commissioner of La Plata county at the general election in November, 1890. The vote being canvassed, it appeared that the total number of votes cast for said office was 1,223, of which Valles received 614; Brown, 608; scattering, 1. Valles received the certificate of election. This proceeding was instituted in the county court by Brown for the purpose of contesting the election of Valles. The case being tried, the court found in favor of the contestor, Brown, and rendered judgment declaring him to have been duly elected. Valles brings the case to this court by appeal. Reversed.

Decker & O'Donnell, N. C. Miller, W. C. Davidson, and Spickard & Pike, for plain-

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tiff in error. *Russell & McCloskey*, for defendant in error.

ELLIOTT, J., (after stating the facts as above.) This was a contested election case under the act of April 10, 1885, (Sess. Laws, p. 193.) The contestor having filed his statement and served his summons, the contestee appeared, and, first by demurrer and afterwards by answer, challenged the jurisdiction of the court over the proceeding. The grounds of objection to the jurisdiction of the court were: *First*, that the proceeding was tried and determined by the county court instead of by the county judge; *second*, that the written statement of contest was not filed in the office of the clerk of the county court within 10 days after the day when the votes were canvassed.

1. The act of 1885, *supra*, is somewhat ambiguous as to whether the county judge or the county court shall exercise jurisdiction in contested election cases of county officers. Upon careful consideration of its various provisions from section 13 to section 22, inclusive, we are satisfied that the county judge, sitting in term-time, in his regular capacity as the county court, is invested with jurisdiction to try and determine such election contests. Whether the county judge sitting in vacation may or may not exercise such jurisdiction, we need not now determine. The court did not err in overruling the challenge to its jurisdiction on the ground that the proceedings were had before the county court instead of the county judge.

2. From the record it appears that the votes were canvassed on November 6, 1890. The contestor did not file the written statement of his intention to contest the election until November 17, 1890. Section 14 of the statute requires that the statement shall be filed "within ten days after the day when the votes are canvassed." Hence it is contended by appellant that the court below was without jurisdiction over the proceeding. On the other hand, it is claimed by appellees that, as November 16, 1890, fell on Sunday, the contestor was entitled to file his statement on the following Monday. In a recent contested election case under the act of 1885 Mr. Justice HAYT, in delivering the opinion of this court, used the following language: "The proceedings upon an election contest before the county judge, under the statute, are special and summary in their nature, and it is a general rule that a strict observance of the statute, so far as regards the steps necessary to give jurisdiction, must be required in such cases. * * * The act is not only special in character, but it furnishes a complete system of procedure within itself. * * * It provides for a written statement as the basis of the proceedings." See *Schwarz v. County Court*, 14 Colo. 47, 48, 23 Pac. Rep. 84, and authorities there cited. In *McCrary, Elect.* (2d Ed.) § 276, it is said: "A statutory provision requiring notice of contest to be given within a given time from the date of the official count, or from the declaration of the result, or the issuing of the certificate of election, or the like, is peremptory, and the time can-

not be enlarged. * * * And it may be added that there is the strongest reason for enforcing this rule most rigidly in cases of contested elections, because promptness in commencing and prosecuting the proceedings is of the utmost importance, to the end that a decision may be reached before the term has wholly or in great part expired." It has been held that where a rule to plead expires on Sunday the party has the next day in which to plead; but this rule has generally been limited in its application to causes over which the court has already acquired jurisdiction. *Cock v. Bunn*, 6 Johns. 326. So, where administrative or judicial acts are required to be performed within a specified time, if the last day falls upon Sunday, the succeeding Monday becomes the return-day or court-day, unless the same be also a legal holiday. In re *Computation of Time*, 9 Colo. 632, 21 Pac. Rep. 475. So, also, the Civil Code of this state (section 382) provides that "the time within which an act is to be done as provided in this act" shall exclude the last day if it be Sunday; but the rule is expressly limited to matters provided for in the Code. The act of 1885, regulating proceedings in contested election cases, contains no such provision; and it is, as we have seen, "a complete system of procedure within itself." Its provisions, therefore, must be construed by general rules applicable to statutory construction. There is, undoubtedly, some conflict of authority in respect to the rule by which time as applied to statutes is to be computed. The question has sometimes been resolved by considering whether from the nature of the case a rigorous or liberal construction should be given. See opinion by Chief Justice TILGHMAN in *Sims v. Hampton*, 1 Serg. & R. 411. In *Kansas*, for the purpose of allowing a party to redeem his lands from a tax-sale, and in *Pennsylvania*, for the purpose of enabling a party to perfect an appeal, a method of computing time has been adopted which excludes the last day when it falls on Sunday. *English v. Williamson*, 34 Kan. 212, 8 Pac. Rep. 214. In re *Goswiler*, 3 Pen. & W. 200. In *Massachusetts* a similar rule has been declared for the purpose of preventing the forfeiture of life insurance policies. *Hammond v. Insurance Co.*, 10 Gray. 306. But the latter case, like others cited in the brief of counsel for appellee, pertains to the construction of contracts rather than statutes. When the computation of time under statutes becomes necessary, an entirely different rule prevails in *Massachusetts*. See *Cooley v. Cook*, 125 Mass. 408, where Chief Justice GRAY states the rule as follows: "Whenever the time limited by statute for a particular purpose is such as must necessarily include one or more Sundays, Sundays are to be included in the computation, even if the last day of the time limited happens to fall on Sunday, unless they are expressly excluded, or the intention of the legislature to exclude them appears manifest." The case of *Haley v. Young*, 134 Mass. 366, was a bill in equity to redeem land from a mortgage. The last day of the three years fell on Sunday. The court, in its opinion, re-

fering to the life insurance case in 10 Gray, supra, used the following language: "It is said that at common law, when the time for the performance of a contract according to its terms expires on Sunday, a performance on the following Monday is good. But this rule, whatever may be the extent of it, has not been applied to acts which by statute are required to be done within a time therein limited." The *Massachusetts* rule for computing time under statutes is fully sustained by the *New York* cases. The case of *People v. Luther*, 1 Wend. 42, related to the redemption of lands sold under execution. The last day of the 15 months happening on Sunday, an offer to redeem on the next day was held to be too late. So in *Ex parte Dodge*, 7 Cow. 147, where the time fixed by statute within which an appeal might be taken was 10 days, and the last day fell on Sunday, the court said: "Sunday has in no case, we believe, been excluded in the computation of statute time." The case at bar involves the construction of section 14 of the act of 1885, supra, as a statute of limitations upon a summary proceeding. There has been much discussion whether the statutory period for commencing actions or proceedings should be held to include or to exclude the first day; and the decisions upon this subject have generally been arrived at by considering whether the time begins to run from or after an act done, or from or after a particular day. *Wood, Lim. Act*, p. 95 et seq.; *Arnold v. U.S.*, 9 Cranch, 120; in re *Tyson*, 13 Colo. 489, 22 Pac. Rep. 810. From the wording of section 14, supra, it is clear that the first day must be excluded. The statute gives the contestor "ten days after the day when the votes are canvassed" to file his statement. After much consideration we are satisfied, both upon principle and authority, that when the statutory period for filing the statement of an election contest for county officers under the act of 1885 has fully elapsed, excluding the day when the votes are canvassed, the time cannot be extended merely on the ground that the last day happens to fall on Sunday. This is the reasonable, as well as the natural and literal, interpretation of the statute. Any other construction of such an act would be unwarranted. Whenever recourse to the courts becomes necessary to determine the result of an election, public and individual interests alike require that the proceeding should be commenced and prosecuted promptly. *McCrary, Elect. supra*. The statement of contest not having been filed within the time required by the statute, the court below erred in entertaining jurisdiction of the case. The judgment is accordingly reversed, and the cause remanded, with directions to the county court to dismiss the proceeding.

COOPER V. PERRY.

(*Supreme Court of Colorado*. Oct. 19, 1891.)

DOCUMENTARY EVIDENCE—REVIEW ON APPEAL.

1. In an action by an administrator on a note, letters written by defendant to plaintiff's decedent in his life-time are competent evidence

against defendant without accounting for their custody.

2. Where the testimony is conflicting, and it is incumbent on defendant to prove his defense by a preponderance of evidence, a verdict for plaintiff will be sustained.

Appeal from district court, Arapahoe county; DAVID B. GRAHAM, Judge.

Action in *assumpsit* by John Perry, administrator of the estate of J. S. Fretz, deceased, against Thomas J. Cooper. From a judgment for plaintiff defendant appeals. Affirmed.

W. N. McBird, for appellant. Pence & Pence, for appellee.

HAYT, J. Appellee, John Perry, as administrator of the estate of J. S. Fretz, deceased, brought this action against Thomas J. Cooper, appellant. The suit is on a promissory note for \$2,500, given by Cooper, and payable to J. S. Fretz or order. The note is dated July 5, 1882, and bears interest at the rate of 10 per cent. per annum. Appellant's defense is based upon the claim that in 1878 he performed services for which Fretz agreed to pay him \$2,500, the amount to be paid only out of a certain judgment when collected; signing an attachment bond in a suit then pending in one of the courts in this state, and appearing as a witness in said suit upon two trials constituting the services rendered, appellant paying his own expenses from his home in Chicago to Denver, the place of trial, and return, upon both occasions. In explanation of the fact that the note bears a date subsequent to the time at which the judgment rendered in the attachment suit was satisfied, it is claimed that appellant met Fretz on the day of the date of the note, and demanded of him payment of the \$2,500; that Fretz refused payment, alleging as a reason for such refusal that the judgment had not yet been paid; and that appellant, not knowing that the judgment had been paid, borrowed the \$2,500 of Fretz, giving his note therefor, which is the same note here declared upon. The due execution and delivery being admitted at the trial, the defendant, Cooper, introduced evidence tending to prove the above defense. To overthrow this, appellee offered in evidence certain letters written by appellant to Fretz during his life-time. These letters strongly tend to show that the defense was false in fact, and not interposed in good faith. The first error presented for our consideration relates to the admission of the letters in evidence, the objection being that their custody was not sufficiently accounted for. The assignment is entirely without merit. It is shown beyond controversy that the signature of Mr. Cooper was genuine, and that the letters themselves were in his handwriting. Under these circumstances, it was not necessary to account for their custody, although, as a matter of fact, the record shows that even this was attempted in this instance. Without such a showing the letters were properly admissible. No rule of evidence is better settled than that letters, written by a party to the action, containing self-serving admissions, are competent evidence against him. The case below was

tried to a jury. No fault is found with the instructions of the court. It is claimed, however, that the verdict of the jury is contrary to the evidence. The evidence in the case is quite conflicting. The burden of proving the defense interposed rested upon defendant. In addition to his written admissions, as stated, many circumstances appear tending to overthrow his defense. It was the peculiar province of the jury, under the circumstances, to decide upon the conflicting evidence. We see no reason to interfere with the conclusion reached. The judgment is accordingly affirmed.

TELLER et al. v. HARTMAN et al.

(Supreme Court of Colorado. Oct. 19, 1891.)

HARMLESS ERROR—EXCESSIVE VERDICT—EVIDENCE OF PARTNERSHIP—PLEADING.

1. A material allegation of the complaint, not denied in the answer, will be taken as confessed.

2. Upon an appeal by a part of the defendants against whom a judgment is rendered, error in the judgment, affecting only a defendant not appearing, will not be considered.

3. When items are improperly included in a verdict, the error may be cured by remitting the amount prior to judgment.

4. A contract for the sale of goods, which provides that the goods shall be charged for at reasonable prices, and the buyers to have a credit of one-half the profits, does not establish a partnership between the sellers and purchasers.

(Syllabus by the Court.)

Appeal from district court, Summit county; L. M. GODDARD, Judge.

Appellees, John H. Hartman and Martin Hartman, commenced this action in the district court of Summit county. In the complaint it is alleged that the plaintiffs were partners doing business under the firm name of J. H. Hartman & Bro., and that the defendants were partners doing business as the Teller Tie & Timber Company. It is further alleged that the defendants, doing business as aforesaid, are indebted to the appellants in the sum of \$2,261.25 upon an account for goods sold and delivered by the plaintiffs to the defendants between the 8th day of February, 1887, and the 15th day of June, 1887. At the time of filing the complaint, an affidavit of attachment was also made and filed, the grounds thereof being that the claim was upon an overdue book-account. Afterwards a writ of attachment was duly issued and levied upon the property of the Teller Tie & Timber Company. The answer consists of a specific denial of each allegation of the complaint, except the allegation in reference to the partnership of the plaintiffs, which stands undenied. After denying the partnership of the defendants, as alleged in the complaint, it is stated that J. C. Teller and J. C. Allen were the only partners constituting the Teller Tie & Timber Company. The trial to a jury resulted in a verdict for the plaintiffs in the sum of \$2,062.97. Thereupon the plaintiff remitted the sum of \$179.65, this being the amount charged for goods sold after the 1st day of June. Judgment was entered for \$1,883.32. Defendants appeal. Affirmed.

Teller & Orahood, for appellants. *Jones & Riddell*, for appellees.

HAYT J., (after stating the facts as above.) By the first assignment of error argued, it is claimed that the partnership of the plaintiffs is not established by the evidence. No proof of partnership was necessary, the allegation of the complaint being admitted by the failure of the defendants to deny the same in their answer.

The second objection urged has reference to the form of the verdict and judgment. The verdict is a general verdict for the plaintiffs. The judgment is against the defendants as partners. Now, as an issue was made by the pleadings upon Anderson's connection with the firm, and no evidence having been introduced upon the point or to show Anderson's liability, it is claimed that the judgment is erroneous as to him, and must be reversed *in toto*. It does not appear that Anderson was served with process. He neither appeared in person nor by counsel. Under such circumstances, it has been held that the plural term, as used in this judgment, should be considered to refer to those persons only who were properly before the court. See *Hubbard v. Dubois*, 37 Vt. 94; *Gargan v. School-Dist.*, 4 Colo. 53. We think, however, a sufficient answer to the contention of appellants in this case lies in the fact that Anderson himself is not here complaining, and appellants could in no way be prejudiced by any judgment entered against him. The erroneous judgment affects a co-defendant only, who does not join in the appeal. In this respect the case is distinguishable from *Langley v. Grill*, 1 Colo. 71. Appellants cannot be permitted upon their appeal to take advantage of an error which does them no injury. *Ball v. Nichols*, 73 Cal. 193, 14 Pac. Rep. 831; *Freem. Judgm.* § 155.

By the third assignment of error it is claimed that the charges for goods bought during the month of June, 1887, were not due at the time this suit was instituted; the contention being that there is no evidence of the amount of the charges made for the goods so purchased, and hence no basis for ascertaining the amount thereof erroneously included in the verdict. Counsel are evidently mistaken in regard to the evidence on this point. The amounts of the several bills, purchased during the month of June, were stated by Mr. Hartman in his examination, and his testimony in reference thereto is uncontradicted. These amounts make a total of \$179.65. This corresponds with the amount which the court below required to be deducted from the verdict as a condition to the entry of judgment for the remainder. This action was, without doubt, taken for the reason that, in the opinion of the court, the June bills were not properly included in the suit. By this action of the court the error in the verdict was cured in the final judgment.

By the last assignment of error argued it is urged that the evidence shows that the defendants and plaintiffs were partners in the sale of these goods, and are therefore entitled to an accounting before this action could be maintained. The ar-

gument proceeds upon the assumption that the evidence in the case shows that plaintiffs and defendants were to share in the profits of the sale of these goods, and it is contended that this is sufficient to establish a partnership. We do not think the evidence warrants this assumption, although it appears that, according to the terms of the contract, the goods were to be sold at reasonable prices, the profits to be divided between plaintiffs and defendants. It is not claimed that the goods were not, in fact, received, and no complaint is made of the prices charged. The evidence shows that the amount of the profits was ascertained and agreed upon by the parties, and the defendants credited with their proper proportion according to the contract. No error in this regard is claimed, and a further accounting would serve no useful purpose. Aside from this, we are of the opinion that the evidence does not show a partnership in the transaction between the plaintiffs and defendants. The rebate was evidently given in anticipation of large purchases, the language employed being used simply as a mode of fixing the prices at which defendants were to have the goods. No error is assigned upon the instructions. The judgment is amply supported by the evidence, and must be affirmed.

(1 Colo. App. 148)

Savage v. Pelton et al.

(Court of Appeals of Colorado. Oct. 26, 1891.)

AUTHORITY OF AGENT—CUSTOM AS EVIDENCE.

1. The power to bind the principal of a traveling agent selling goods by sample being special, one buying his trunks of samples is bound to know that such sale is within the agent's authority.

2. Where a principal is sought to be held by implied authority of the agent through usage or custom in trade, such custom must be shown to be reasonable, notorious, and uniform in his line of business.

3. When an allegation is not supported by competent evidence it is the duty of the trial judge to withdraw its consideration from the jury.

Appeal from district court, Pueblo county; J. C. GUNTER, Judge.

Action for the possession of personal property or its value by Samuel Pelton and another against Nathan W. Savage, Jr. From a judgment for plaintiffs defendant Appeals. Affirmed.

J. C. Elwell and L. B. Gibson, for appellant. Alvin Marsh, for appellees.

BISSELL, J. The Peltons, as copartners, brought this action against Savage, to recover the possession of a lot of personal property described in the complaint, or its value, which was alleged to be \$600, with damages for the detention. The issues in the case were made by a denial of the complaint, and by a defense based upon averments of the purchase of the property by Savage, Jr., from one Herman, who was said to be the agent of the Peltons, with authority to sell the property in dispute. According to the evidence, Herman was a traveling salesman for Pelton & Bro., employed to travel within a certain designated district, and sell goods for the firm from samples which he carried in

trunks furnished for the purpose. He was supplied with samples of all the various classes of goods handled by the firm, save that as to gloves and stockings and things of that description only one of a pair was used. During one of his trips he sold his three trunks, with their contents, to the appellant, Savage, in Pueblo, for \$290, which was only a little over 60 per cent. of their wholesale value in Denver, according to the verdict of the jury. The goods were not sold by inventory, and scarcely by inspection, but for a lump sum, which he appropriated. The goods in the trunks were marked with the name of the house in Denver. The purchaser made no inquiries as to Herman's authority or his right to sell, either of Herman himself or of the house. It was established by the evidence and by the verdict of the jury that Herman had no authority to make the sale, and that he was simply an agent to solicit orders to be sent to the house to be filled, according to the usage of traveling salesmen in such cases. It is not contended by counsel for the appellant that the agent, Herman, possessed any actual authority to sell the goods which are the subject of the controversy. It is insisted, however, that the power is to be implied from the character of the agency, and from the ordinary methods used in its execution. This cannot be conceded. The law is clear that the limits of an agent's authority are to be found in the instructions of his principal. This general rule is necessarily subject to the modification that the agent is entitled to employ all the necessary and usual means of executing the principal's authority, and that this implied power is frequently modified by his right to use all the ordinary means justified by the usages of the trade in which he is engaged. Neither of these principles is broad enough to confer upon an agent, employed to solicit orders for goods upon the strength of samples furnished him, authority to sell those things which are essentially necessary to the performance of his duties. The absence of original authority to sell the goods being both proven and established by the verdict of the jury, it cannot be declared as a matter of law that the salesman had implied authority to dispose of the property. *Diversy v. Kellogg*, 44 Ill. 114; *Ewell's Exors.*, Ag. *107. The force of these rules was evidently felt upon the trial, since the appellant sought to escape his obligation by offering proof of the existence of a usage or custom in the trade, from which the jury would be warranted in finding that the agent possessed the authority necessary to make the sale. The principal error assigned and argued is based upon the action of the court in withdrawing from the consideration of the jury the evidence introduced upon this subject. There can be no question concerning the admissibility of this sort of evidence. The rule, which permits a usage or custom of a particular business or trade to be taken as a part of the instructions to an agent where the rights of third parties are concerned, seems to be well established by the authorities. To make the proof available for the purposes of establishing the au-

thority, the evidence of the custom must be clear and satisfactory. It must be uniform, notorious, and reasonable, and it must be established by proof of its uniformity in the particular business which it concerns. *Hall v. Storrs*, 7 Wis. 217. The proof of custom in this case in none of its aspects reaches the level required by the authorities. It was neither established by evidence that it was the custom of all traveling salesmen to dispose of their trunks and samples at will, nor was it shown that such a custom prevailed in the particular business in which Herman was employed. The evidence did not even tend to establish such a usage. The only proof offered upon the subject was that of a few particular cases or special transactions in other lines than the trade in which Pelton & Bro. were engaged. There is little hesitancy in reaching this conclusion, since it is apparent from the record that the transaction was of the sort to put on the purchaser the duty of ascertaining the authority of the agent with whom he dealt. In the present case the appellant was dealing with a traveling salesman, who represented a house within easy telegraphic distance of the purchaser's place of business; and it would not be unreasonable to hold him to the duty of inquiry as to the authority of the agent when he was selling in bulk what was evidently his only means of transacting the business of his principal. The court was entirely justified in withdrawing from the jury all the evidence of custom introduced on the trial. Under the law as declared the custom was not established, and had the jury, upon the strength of this testimony, found that the agent possessed the authority to make the sale, the court would have been compelled to set aside the verdict as against the law and contrary to the evidence. Under circumstances like these, it is undoubtedly the rule that the power is vested in the court to determine whether the evidence offered tends to support the allegations of the party in whose behalf it is introduced; and where, as in this case, there is a complete failure of proof on any particular subject, it is not only clearly within the power, but it is also the duty, of the court to withdraw from the jury the consideration of any such matter. *Proff. Jury*, § 351; *Behrens v. Railway Co.*, 5 Colo. 400; *Brasher v. Railway Co.*, 12 Colo. 384, 21 Pac. Rep. 44. We are satisfied upon the record that the judgment should be affirmed.

CUNNINGHAM v. PEOPLE.

(Court of Appeals of Colorado. Oct. 26, 1891.)

INTOXICATING LIQUORS—SUNDAY SALES.

Gen. St. Colo. 1883, subd. 18, § 3312, provides that towns and cities shall have "the exclusive right to license, regulate, or prohibit the selling or giving away of any intoxicating, malt, vinous, mixed, or fermented liquors within the limits of the city or town," etc. *Held*, that where a town takes control of its liquor traffic under this statute, and grants licenses, a licensee cannot be indicted under a general statute of the state prohibiting "keeping open a tippling-house on the Sabbath day."

Appeal from district court, Gunnison county; JOHN C. BELL, Judge.

Indictment of Ed. Cunningham for keeping open a saloon on the Sabbath where intoxicating liquors were sold. Judgment of conviction. Defendant appeals. Reversed.

Gullett & Crump, for appellant. *Jos. H. Maupin*, Atty. Gen., for the People.

RICHMOND, P. J. This case is submitted upon an agreed state of facts. Appellant, Ed. Cunningham, was indicted by the grand jury for keeping open a saloon where intoxicating liquors were sold on the Sabbath, in the town of Crested Butte, Gunnison county. It is admitted that he held a license from the trustees of said town to sell and deal in intoxicating liquors, and that the board of trustees had, prior to the said alleged defense, assumed control of the sale of intoxicating liquors within the limits of said town, and had granted said appellant such license, and that the trustees had passed an ordinance in due form relating to the licensing of such business, and the regulation of the same, which was in full force on the day of such alleged offense, and that there was no ordinance in existence prohibiting or controlling the sale of liquors on Sunday. Upon the agreed state of facts the court found the appellant guilty, and assessed a fine. From this judgment the defendant appeals. It is insisted that subdivision 18, § 3312, Gen. St. 1883, grants to towns and cities the exclusive right to license and regulate the sale of intoxicating liquors within such towns and cities, and that no indictment for a violation of section 839, to-wit, "keeping open a tippling-house on the Sabbath day," can be maintained. Subdivision 18 of said section 3312 provides that towns and cities shall have the exclusive right to license, regulate, or prohibit the selling or giving away of any intoxicating, malt, vinous, mixed, or fermented liquors within the limits of the city or town, or within one mile beyond the outer boundaries thereof, except where the boundaries of the two cities or towns adjoin, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license. We deem it unnecessary to discuss at length the proposition presented by this agreed state of facts. It has repeatedly received the consideration of the supreme court of this state, and we are somewhat surprised, in the light of those decisions, that it was found necessary for the appellant to prosecute this appeal. In the case of *Rogers v. People*, 9 Colo. 450, 12 Pac. Rep. 843, it is expressly declared that "the grant of exclusive power and authority to one jurisdiction to restrain, regulate, or prohibit a

business as to every day in the week is irreconcilable with the existence of a concurrent power to prohibit the exercise of the same vocation upon a single day in the week." In *Hetzer v. People*, 4 Colo. 45, it is announced that "where the legislature vests, either in the city or county authorities, the exclusive right to license vendors of spirituous liquors, a license to a vendor from the authority exclusively authorized to grant it is all that can be required." The foregoing cases are confirmed by the supreme court in the case of *Heinssen v. State*, 14 Colo. 228, 23 Pac. Rep. 995. Such being the conclusion of the supreme court of this state, no alternative is left us but to say that the judgment must be reversed, and the cause remanded for proceedings in conformity with this opinion.

COOK *et al.* v. WALLEY *et al.*

(Court of Appeals of Colorado. Oct. 26, 1891.)
PERFORMING UNAUTHORIZED AUTOPSY—LIABILITY TO HEIRS.

Plaintiffs brought suit for damages for permitting and assisting in an autopsy upon the body of their mother. On trial, the evidence showed that the husband of deceased survived her; that she had been living apart from her husband and children; that her death was sudden, while in a hack; that plaintiffs never made any contract with the defendants for her burial; that another person had her body taken to defendants' place of business, employed them to prepare it for burial, and subsequently paid them for their services; that an ordinance of the city where deceased died required the certificate of a physician as to cause of death; that the autopsy was performed by a physician, assisted by defendants, in a decent and scientific manner. *Held*, that a verdict for the defendants was properly directed.

Error to district court, Arapahoe county; W. S. DECKER, Judge.

Action by Minnie L. Cook and William Thorpe against J. J. Walley and R. P. Rollins. Judgment for defendants. Plaintiffs bring error. Affirmed.

F. W. Robertson and *A. S. Fisher*, for plaintiffs in error. *Keeler & Sales* and *E. W. Waybright*, for defendants in error.

RICHMOND, P. J. The complaint in this case alleges that the defendants Walley & Rollins were doing business as undertakers in the city of Denver, and that the defendant Dr. A. M. Bucknum is a practicing physician in the same place; that on the 10th of January, 1890, Tamar V. Thorpe, a resident of the city of Denver, died, and that her body was taken to the establishment of Walley & Rollins to await preparation for its burial, and that it was placed by plaintiffs under the care, custody, and protection of said Walley & Rollins as undertakers until they could prepare or get ready for the funeral and burial of the remains; that said Walley & Rollins undertook for a valuable consideration to furnish the coffin and hearse, and perform all services incident to and that were usual and customary in their said business as undertakers; that on or about the 11th day of January, 1890, and in the night-time, and while the said body was still under the custody and safe-keep-

ing of said Walley & Rollins, for the said purpose of funeral and burial, the said defendant Dr. A. M. Bucknum, with the knowledge and consent of said Walley & Rollins, and with their aid and assistance, they, the said Walley & Rollins, being unmindful of their obligations to the plaintiffs, and that their said business as undertakers imposed upon them by virtue of their said business as undertakers as aforesaid, dissected, cut open, mutilated, and otherwise abused and maltreated the body of said Tamar V. Thorpe, and indecently and outrageously exposed to the public view the nude body of said deceased; that the said acts were done without the knowledge or consent of plaintiffs, without any right or lawful authority whatever, and against the wishes and desires of plaintiffs, and contrary to the law; that the plaintiff Minnie L. Cook is the daughter, and plaintiff William L. Thorpe is the son, of said Tamar V. Thorpe, and the sole heirs; that by reason of said acts the confidence of the plaintiffs has been betrayed, their rights disregarded, and plaintiffs' feelings cruelly lacerated, and the love, veneration, and respect that the plaintiffs entertained for their mother have been shocked and wounded, and the plaintiffs have suffered therefrom, both in mind and in body, to their damage in the sum of \$25,000. Prayer for judgment. Defendants Walley & Rollins, by a separate answer, deny the allegations in the complaint, and for a second defense state that the body was given into their care and custody by one J. S. Casserleigh, and from him they received authority to have said remains subjected to a *post mortem* examination, as well as also from Minnie L. Cook, the plaintiff, and that a *post mortem* examination was necessary in order to obtain a certificate of burial. For a third defense they allege that the *post mortem* examination was fully authorized by the deceased in her life-time, and that it was conducted in accordance with her request given to Dr. A. M. Bucknum while living. Dr. Bucknum, for a separate answer, denies the allegations in the complaint; and for a second defense alleges the consent of deceased while living to a *post mortem* examination after her death; and for a third defense he alleges that he was her regular attending physician, and after her death was applied to as such physician to issue a certificate of death; that in compliance with the ordinances of the city of Denver, and in pursuance of the statute in such cases made and provided, he made the necessary and proper examination to ascertain the cause of death of the deceased, and thereupon certified and recorded the same as required by the law and the ordinances, and the rules and regulations of the board of health, of the city of Denver. Plaintiffs reply by way of a general denial to the second and third defenses of each of the defendants. The case was tried to a jury, but after hearing the testimony the court directed the jury to return a verdict for defendants. To reverse this judgment this writ of error is prosecuted.

Plaintiffs in error contend that the complaint contains a good cause of action,

and that the court erred in thus instructing the jury. There are 15 errors assigned, directed mostly to error of the court in refusing testimony offered by plaintiffs, and to the instructions of the court, to the refusing of instructions asked by the plaintiffs, as well as to admission of testimony offered by defendants over the objections of plaintiffs. A thorough examination of the abstract in this case discloses the facts to be that Tamar V. Thorpe had, at the time of her decease, surviving her a husband, as well as these two children, and that the plaintiffs in this suit never made any contract, directly or indirectly, with the firm of Walley & Rollins; and that the death of Tamar V. Thorpe was sudden, and occurred in a hack, while in company with J. S. Casserleigh; that she was living separate and apart from her children and her husband; that the *post mortem* examination was conducted in a decent and scientific manner, without any undue exposure of the body, and under circumstances which would seem to warrant a physician ascertaining the cause of death before issuing a certificate. By the pleadings in this case, as appears from the record, we are warranted in saying that plaintiffs did not in their replication deny the existence of an ordinance requiring a physician's certificate before burial.

In this case plaintiffs thought proper to aver an existing contract between the parties themselves and the defendants Walley & Rollins; for they say that the body was placed in the care of these defendants by the plaintiffs, and that the defendants undertook for a valuable consideration to furnish the coffin and hearse, and perform all the services incident to, and that were usual and customary in, their business as undertakers, and that they were unmindful of their obligations to the plaintiffs, and wholly disregarded their obligations, and violated the obligations imposed upon them in permitting a *post mortem* examination. It seems to be a well-recognized rule that, whenever a wrong is founded upon contract, no one not privy to the contract can sue in respect of such wrong. *Moak's Underh. Torts*, rule 8, p. 24. The above principle being true, the action of the court, directing the verdict for defendants, was warranted; but, as appears from the summing up by the judge, other reasons operated to confirm his conclusions that the plaintiffs ought not to recover, one of which was that the proof showed that the plaintiffs were not the sole heirs of the deceased; that she left a husband surviving her, whose duty it was, in my judgment, to attend to the burial of his wife. It can be said that there is some doubt about this question; still the authorities indicate that, at common law, it was the duty of the husband to bury the wife. *Schouler, Husb. & Wife*, § 347. *Wynkoop v. Wynkoop*, 42 Pa. St. 293, a case cited by plaintiffs in error, declares that it is the widow's duty to bury the body of the deceased husband, and this seems to be reiterated in the case of *Snyder v. Snyder*, 60 How. Pr. 368; vide *Secor's Case*, 10 Alb. Law J. 71. Accepting this doctrine as correct, it would seem as

though the husband was the proper party to make the contract with the undertakers. But, leaving the proposition as an unsettled one, still the evidence shows that the individual who was with the deceased at the time of her death caused the body to be conveyed to the undertakers, entered into a contract then and there to pay for the services to be rendered by them, and subsequently did pay. But, if all that has been said before is erroneous or not sufficient to defeat plaintiffs' right of recovery, I still think that the evidence discloses circumstances which would warrant any physician in declining to issue a certificate designating the cause of death, and permitting burial without a *post mortem* examination. It is true that the physician may have had a belief as to the cause of death, but the circumstances under which death occurred warranted him in hesitating to give the certificate required by the ordinance of the city of Denver in this case. This being so, and the proofs conclusively showing that the body was not mutilated, and that the autopsy was performed in a decent and scientific manner, with due regard to the sex of the deceased and the feelings of all parties interested, I cannot conceive what damages could be proven to a jury. The testimony discloses much that might be commented upon in support of my conclusion that the plaintiffs ought not to recover in this case, and that the judgment of the court below must be affirmed, but respect for the dead and the living forbid it. The judgment is affirmed.

MCDANIEL v. MAXWELL, et al.

(Supreme Court of Oregon. Nov. 2, 1891.)

EQUITABLE ASSIGNMENT—LIABILITY AS GARNISHEE.

A contractor with a city gave a bank an order directing the city to deliver to it all warrants on account of the contractor's work. The contractor then gave written orders on the bank to pay certain sums to certain of his creditors. These were presented before the warrants were delivered to it, and placed on file under a parol agreement between the bank, the contractor, and the payees of the orders that the bank, after reimbursing itself for advances to the contractor out of the proceeds of the warrants when collected, should apply the remainder in payment of the orders, in the order in which they were presented, unless restrained by legal proceedings. *Held*, that under the agreement the orders were an equitable assignment *pro tanto* of the fund to be received on the warrants, and therefore the bank could not be charged with such fund as garnishee of the contractor in favor of a mere creditor of his.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

Garnishee proceedings, in the action of T. S. McDaniel against E. J. Maxwell, by McDaniel against the Commercial National Bank, garnishee. Judgment for garnishee, and plaintiff appeals. Affirmed.

STATEMENT BY THE COURT. On February 28, 1890, the defendant E. J. Maxwell, who was a contractor for the improvement of certain streets in Portland, executed and delivered to the garnishee, the Commercial National Bank, an order on the auditor of the city of Portland, directing him to deliver to said bank any

and all warrants drawn in his favor on account of said street improvement, and authorizing the bank to receipt for and indorse the warrants, in his name. Before the bank received any of the warrants from the city of Portland, Maxwell, for a valuable consideration, executed and delivered to the payees named therein the following orders: "Portland, Oregon, June 28, 1890. Mr. R. L. Durham, Cashier of the Com. National Bank, Portland, Or.—Dear Sir: Please pay to Wah Sing Company, on the 10th day of August, 1890, out of any money that may come into your hands for me, the amount shown by his book to be due for work performed during the month of July, under an agreement between said Wah Sing Company and myself. Yours, etc., E. J. MAXWELL." "The time of Chinese furnished by the Wah Sing Company, grading for July, is 391.6 days at \$1 ¼ per day, and 20½ days at \$2 per day, equals \$531.37. E. J. MAXWELL. WILLIAM PETERS, Foreman." "July 5, 1890. Mr. R. L. Durham, Cashier Commercial National Bank.—The full time for June for China labor furnished by Wah Sing Company is 22 days, equal \$22.25, (twenty-two and 25-100 dollars,) which please pay on the 10th to Wah Sing Company, and charge to my account. E. J. MAXWELL." "Portland, Oregon, August 19, 1890. Commercial National Bank, Portland, Oregon—Dear Sirs: Please retake out of the warrants coming into your hands one warrant amounting to not exceeding \$300, which you will please deliver to Mr. R. Weeks, on account of Weeks & Churchill. E. J. MAXWELL." That afterwards, and before the warrants from the city of Portland were received by the garnishee, the orders above mentioned were presented to the garnishee, and by it placed on file, under a parol agreement between the defendant, Maxwell, the payees thereof, and the garnishee, that the garnishee, after reimbursing itself for advances made to Maxwell out of the proceeds of said city warrants when collected, should apply the remainder of the proceeds, in payment and satisfaction of the orders, in the order in which they were presented, unless restrained by legal proceedings. That on October 3, 1890, the auditor of the city of Portland delivered to the garnishee the warrants in Maxwell's favor for \$1,669.59, but, before any application of the proceeds had been made, the garnishee process in the action of McDaniel v. Maxwell was served upon it. The court below held that these orders constitute an assignment and appropriation of so much of the funds as should be collected on the warrants of the city in favor of Maxwell as would be necessary to pay and satisfy the same, and entered a judgment in favor of the garnishee for its costs and disbursements, from which this appeal is taken.

J. J. Johnson, for appellant. Sears & Beach, for respondent.

BEAN, J. The only question necessary for us to consider on this appeal is whether the orders from Maxwell on the garnishee, in favor of Wah Sing Company and R. Weeks, under the facts of this case, operated as an assignment or appropri-

ation *pro tanto* of the funds to be collected by the garnishee on the warrants assigned to it by Maxwell. It is universally recognized that, at law, a part only of an entire demand cannot be assigned so as to enable the assignee to bring an action upon it without the consent of the debtor, for the sufficient reason that it would subject the debtor to a multiplicity of actions at the instance of each assignee of a separate portion of the debt, and thereby subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his contract, and decline to recognize any assignments by which it may be separated into distinct portions. When he undertakes to pay an entire sum to his creditor, it is no part of his contract that he shall pay it in fractions to other parties. His obligation is single, and he should not be harassed with different actions to recover parts of the one demand. In equity, no such consequences could result. If parts of a single demand are assigned to different persons, the rights of all the assignees can be settled in one suit. In a suit by one assignee, not only the debtor and assignor, but all other assignees or claimants to any part of the fund, can be made parties to the suit, so that one decree may determine the duty of the debtor to each claimant, and his rights and interests be fully protected, and hence the reason for the rule at law does not exist in equity. Where one has agreed for a valuable consideration that another shall have part of a debt or demand due him from a third person, and has made a transfer of such part, manifest justice requires that the agreement should be enforced, when it can be done without prejudice to the debtor. While there is some confusion in the books, we think the better rule, as supported by the decided weight of authority, is that an assignment of a part of an entire demand is good in equity, and the debtor is bound, after notice of the assignment, to so apply the fund; and that an order drawn upon a third person for a valuable consideration from the payee, payable out of a designated fund, then due or to become due, operates, when delivered to the payee, as an equitable assignment or appropriation of the fund *pro tanto*, and no acceptance by the drawee is necessary. 3 Pom. Eq. Jur. § 1290; Brill v. Tuttle, 81 N. Y. 454; Bank v. Kimberlands, 16 W. Va. 555; Harris Co. v. Campbell, 68 Tex. 22, 3 S. W. Rep. 248; Hutchinson v. Simon, 57 Miss. 628; James v. City of Newton, 142 Mass. 360, 8 N. E. Rep. 122. By such an assignment the assignee obtains an interest in the property or fund, and not simply a right of action against the drawee. In order, therefore, that there may be an equitable assignment creating an equitable property, there must be a specific fund, sum of money, or debt, actually existing or to become due in the future, and the order must be, in effect, an assignment of that particular fund, or some designated portion thereof. No particular form of words or particular form of instrument is necessary to effect such assignment.

Any binding appropriation of it to a particular use is an assignment, or, what is the same, a transfer of the ownership. Drake, Attachm. § 610. "The sure criterion is," says Mr. Pomeroy, "whether the order or direction to the drawee, if assented to by him, would create an absolute personal indebtedness, payable at all events, or whether it creates an obligation only to make payment out of the particular designated fund." 3 Pom. Eq. Jur. § 1290. Since the assignee obtains, not simply a right of action against the holder of the fund, but an equitable property in the fund itself, it follows that when the assignment is by means of a written order, unless it specifies the particular fund or debt out of which its payment is to be made, it cannot operate as an equitable assignment. Percival v. Dunn, 29 Ch. Div. 128; Phillips v. Stagg, 2 Edw. Ch. 108; Shaver v. Telegraph Co., 57 N. Y. 459. As to what will constitute a sufficient designation of the particular fund out of which the order is to be paid, within the meaning of this rule, the authorities are in the utmost confusion. It is a question of intention, to be gathered from the language of the instrument, construed in the light of surrounding circumstances. The difficulty lies rather in the true construction to be put upon the order than the legal principle applicable in a given case. The difficulty is in determining whether the order is to be paid out of a given fund or not, and the question in all of this class of cases is the same, and must be determined according to the circumstances of each case. "The true test would seem to be," says DWIGHT, C., in Minger v. Shannon, 41 N. Y. 255, "whether the drawee is confined to the particular fund, or whether, though a specified fund is mentioned, he would have the power to charge the bill up to the general account of the drawee, if the designated fund should turn out to be insufficient." It may well be doubted whether the orders from Maxwell to Wah Sing Company and R. Weeks sufficiently specify the particular fund out of which they were to be paid to operate as an assignment, but the subsequent agreement between the garnishee, Maxwell, and the payees named in the orders, at the time the orders were presented and placed on file, by which the garnishee, after reimbursing itself, for advances made to Maxwell, out of the proceeds of the city warrants, when collected, should apply the remainder in payment of these orders, can leave no doubt as to the fund intended. By this agreement the fund out of which these orders were to be paid was particularly designated, and the garnishee herein assumed no personal liability, but only obligated itself to make payment out of this fund, when it should come into its possession, and this arrangement was made with the assent of all the parties. When, as in this case, the debt is not evidenced by a writing, it may, by the assent of the debtor, be assigned, even by a verbal agreement, and, when such assent is given, the assignment is complete. Drake, Attachm. § 611. The fact that the orders in this case are in writing did not prevent the parties from afterwards agreeing up-

on some particular funds out of which they should be paid, and when such fund was designated the orders, together with such subsequent agreement, operated as an equitable assignment or appropriation *pro tanto* of such specified fund. *Moore v. Lowrey*, 25 Iowa, 336; *Bank v. Kimberlands*, 16 W. Va. 555. The orders were but one step in the assignment, and, in order to make it complete, it only remained to designate the particular fund which should be applied to their payment, and this was done by the subsequent parol agreement. We are therefore clearly of the opinion that when the orders were presented to and received by the garnishee, under the agreement of the parties above mentioned, they operated as an equitable assignment or appropriation *pro tanto* of the fund to be received by the garnishee from the city of Portland on the warrants in Maxwell's favor; and that it is bound to so apply the fund, and consequently cannot be charged as garnishee of Maxwell. The judgment of the court below is therefore affirmed.

WILD V. OREGON SHORT LINE & U. N.
RY. CO.¹

(Supreme Court of Oregon. July 8, 1891.)

CONSTRUCTION OF PLEADING—NEGLIGENCE—INJURY
TO EMPLOYE—ASSUMPTION OF RISK—AMEND-
MENT OF PLEADING—FINDINGS.

1. A general introductory statement, or a general conclusion in a pleading, always yields to a specific statement of the facts.

2. An allegation which directly imputes negligence and carelessness to the defendant in causing a locomotive to run against a car upon which the plaintiff was at work, causing it to move, and himself to be thrown down, whereby he was injured, is a charge of negligence made directly upon the defendant itself, and not merely upon its servants. The negligence of a co-servant with the plaintiff, engaged in a common service, cannot be said to be the negligence of the defendant.

3. Where carelessness and negligence in causing and permitting a locomotive to run against the place at which the plaintiff was at work are directly imputed to the defendant, whereby plaintiff was injured, such allegation is broad enough to admit evidence of all kinds and grades of negligence on the part of the defendant, which resulted from causing and permitting the locomotive to run down on the place where the plaintiff was at work, and thereby rendering it unsafe, and causing the injury.

4. This would include the failure to provide such rules, or to adopt such precautionary measures, as were needful to regulate or oversee the running of locomotives upon the tracks and switches of the yard, and as would render the place of employment upon cars upon the tracks reasonably safe.

5. While a servant assumes the risks ordinarily incident to his employment, and all open and visible risks, including the negligence of a fellow-servant, yet he has a right to presume that the master will exercise due care for his safety, by providing, when necessary, all needful rules for the conduct of its business, or such precautionary regulations as will not needlessly expose him to risks not necessarily resulting from his occupation.

6. Where it is not certain from the allegation in what the negligence imputed to the defendant consists, such defect is not fatal to the sufficiency of the complaint after trial, but it is to be cor-

rected by a motion to make the allegation more specific.

7. Whether certain precautions taken were sufficient under the evidence, or whether under it there were ever promulgated or established any precautions designed to meet the exigency and dangers of the situation, as well as the care exercised by the plaintiff at the time of the injury, are questions of fact for the jury to determine under all the circumstances of the case.

8. Where the plaintiff inadvertently omitted to insert an allegation of incorporation, but the existence of the corporation is not the substance or gist of the action, and its name is such as to import a corporation, and the defendant appeared as such, and filed an answer verified by its agent, such allegation being merely formal, the court committed no error, after the evidence for the plaintiff had been submitted, in allowing the plaintiff to amend by inserting such incorporation, nor in refusing at such time to allow the defendant to file a new answer, raising different issues, when there was no claim of surprise, inadvertence, or mistake. Nor was it error to refuse the removal of the cause at such time to the United States court.

9. The giving or refusing to submit special findings to the jury is in the discretion of the court.

(Syllabus by the Court.)

Appeal from circuit court, Wasco county.

Action for personal injuries by George B. Wild against the Oregon Short Line & U. N. Railway Company. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

W. W. Cotton and Gilbert & Snow, for appellant. A. S. Bennett, for respondent.

LORD, J. This is an action to recover damages for personal injuries, alleged to have been sustained by the plaintiff while in the employ of the defendant. The defense was that the injury was caused by the negligence of a co-servant, and contributory negligence. While there are some minor questions to which we shall subsequently advert, the two controlling questions presented by this record are—*First*, that the complaint fails to state a cause of action; and, *second*, that the evidence fails to disclose any negligence for which the defendant is responsible. Both of these objections were taken by instructions, and the latter also by motion for a nonsuit, which was overruled. The complaint shows that the plaintiff was a car-repairer, and that the accident occurred at the car and repair shops, by negligently causing and permitting a locomotive to run against a car which was standing on one of the switches connected with the yard, while the plaintiff was standing upon such car, and assisting to unload it. The locomotive was one that was used upon the switches of the yard for moving cars to be repaired, and for such other purposes as it was needed for. The complaint then proceeds to allege "that while the plaintiff was working upon or about said car, as hereinbefore alleged, the defendant failed to provide, preserve, and secure a safe place for him to work, but negligently and carelessly caused and permitted a locomotive and cars then upon its tracks to run up against the car upon which the plaintiff was working as aforesaid, with great violence, whereby the car upon which the plaintiff was working was caused to

¹ Rehearing denied October 5, 1891.

move, and the plaintiff was thrown down" and injured. The defendant is a railroad corporation, as its name imports, and necessarily conducts its business through agents and servants; so that upon whomsoever it devolved any of its personal duties as master, such as furnishing appliances, selection of competent servants, or of providing reasonable regulations for the safety of those in its service, or at the places in which they work, was an agent or representative of the company, and for any dereliction in the performance of such duties, resulting in injury, the defendant is liable. The complaint charges that the "defendant failed to provide a safe place for the plaintiff to work," and then proceeds to specify the negligent acts which caused the injury, namely, that the "defendant negligently and carelessly caused and permitted a locomotive and cars then upon its tracks to run against the car upon which the plaintiff was working, as aforesaid, with great violence, whereby the car upon which the plaintiff was working was caused to move, and the plaintiff was thrown down," etc., and injured. The general statement that the defendant failed to provide a safe place for the plaintiff to work is not of controlling importance, for the specified statement which follows it is the one which governs. "A general introductory statement or a general conclusion will always yield to a specific statement of the facts." *Railroad Co. v. Johnson*, 102 Ind. 354, 26 N. E. Rep. 200. This specified statement of the facts is the ground upon which negligence is imputed to the defendant, and upon which the plaintiff's right of recovery is based. There is no doubt that the particular acts alleged were intended to touch the place of service, and to show that it was rendered unsafe by reason thereof; but they do not affect the place of employment as the proximate cause of the injury. The place provided for the plaintiff to work was not of itself an unsafe place, and as such could not be the producing cause of the injury. The allegation shows that the negligence which caused the injury was either in the careless running of the locomotive, or the failure to regulate its operation, which rendered a safe place unsafe to work.

As the place itself was not unsafe, upon the facts as alleged, nor the proximate cause of the injury, but only rendered unsafe by extraneous acts or omissions, it can constitute no ground of liability. Whether, then, there is a cause of action stated, depends upon considerations arising from the allegation under immediate mention. This allegation directly imputes negligence and carelessness to the defendant in causing and permitting a locomotive to run against the car upon which the plaintiff was at work, causing it to move, and himself to be thrown down and injured. It is plain that the negligence intended to be charged, and which was the producing cause of the injury, was due to some fault of the master, and not of the servant. It excludes the assumption that the injury was caused by the negligence of a co-servant with the plaintiff, engaged in a common service, for

the charge of negligence is made directly upon the defendant itself, and not merely upon its servants. In short, the negligence of a co-servant with the plaintiff, engaged in the same general undertaking, could not be said to be the negligence of the defendant. But in and by what acts or omissions the negligence imputed to the defendant consisted in causing and permitting the locomotive to run against the car upon which the plaintiff was at work is not disclosed. The facts upon which he predicates his charge of negligence are stated, but it is not certain from the allegation of them in what the alleged carelessness and negligence consisted. If the defendant should knowingly operate its locomotive by the agency of careless or incompetent servants upon the tracks and switches of the yard, and they should negligently run the locomotive against the car or place at which the plaintiff was at work, and injure him, has not the defendant "negligently and carelessly caused and permitted a locomotive to run against a car upon its tracks upon which the plaintiff was at work," etc., or place, and rendered it unsafe to work there, while the defendant permits the locomotive to be operated by such persons? Or, if the defendant should fail to provide such rules and regulations for the management of its engines upon the tracks and switches of the yard as was necessary to insure reasonable safety in the places of service upon or about such cars upon its tracks as were being unloaded or repaired, or to adopt such precautionary measures as were needful to notify or apprise those operating its engines of the proximity of the place of employment, so as to render it safe from collision, has not the defendant "negligently and carelessly caused and permitted its locomotive to run against the car" or place at which the plaintiff was at work, and rendered it an unsafe place to work, without such rules regulating or such precautionary measures guarding the running of its locomotive? In the one case, the negligence of the defendant consists in knowingly operating the engine by the agency of careless or unskillful servants, which rendered the place of service unsafe; but in the other, the negligence of the defendant consists in the omission to prescribe such rules, or to adopt such precautionary regulations, as were necessary to regulate or guard the running of the locomotive upon the switches in the yard, and as would render the place reasonably safe when controlled by careful and competent servants. As the first case is suggested merely, it may be dismissed without further consideration, as there is no evidence to support it. It is upon the other that the plaintiff wholly bases his right of recovery, and to which the evidence is directed. It is upon this aspect of it, then, that the sufficiency of the allegation as stating a cause of action must be tested.

Carelessness and negligence in causing and permitting a locomotive to run against the place at which the plaintiff was at work are directly imputed to the defendant, whereby plaintiff was injured. The language of this allegation is broad enough to admit evidence of all kinds and grades

of negligence on the part of the defendant which resulted from causing or permitting the locomotive to run down upon the place where the plaintiff was at work, and thereby rendering it unsafe, and causing the injury. This would include the failure to provide such rules or to adopt such precautionary regulations as were needful to regulate or oversee the running of the locomotives upon the tracks and switches of the yard, and as would render the place of employment reasonably safe. While a servant assumes the risks ordinarily incident to his employment, and all open and visible risks, including the negligence of a fellow-servant, yet he has a right to presume that the master will exercise due care for his safety by providing, when necessary, all such needful rules for the conduct of its business, or such precautionary measures, as will not needlessly expose him to risks not necessarily resulting from his employment. This being so, we hold the language of the complaint broad enough to cover the negligence imputed to the defendant. Nor does this work any hardship. If it had desired a more specific statement of the negligence imputed to it, that end could have been attained by a motion to make the allegation more specific; but the defect is not fatal to the sufficiency of the complaint as stating a cause of action. "No authority can be found," said PETTIT, J., "where negligence has been directly charged against the defendant, that a demurrer for want of sufficient facts has been sustained." *Hildebrand v. Railroad Co.*, 47 Ind. 399. *Railroad Co. v. Collarn*, 73 Ind. 261.

The sufficiency of the evidence is a matter that needs to be considered but briefly. But in doing it it is well to keep in mind that the ground on which the plaintiff bases his right of recovery was that it was the duty of the defendant to see that due care was used to prevent the running of engines down upon the car-repairers while they were at work in the yard, and upon cars upon its tracks, and to see that the switching and operating were done in such a manner, or so regulated, as to preserve, as far as possible, the safety of the place where the men were at work. It was negligent in this regard, in not performing such duty, and thereby exposing the plaintiff to injuries not necessarily resulting from his occupation at the place of employment, which is imputed to the defendant. It concedes that the plaintiff assumes the risks incident to the service in which he was engaged, and all open and visible risks, as well as the negligence of co-servants; but it asserts the well-established doctrine that he has the right to presume that the master will be vigilant in the use of means and in the adoption of measures adapted to the nature of the business to make the servants reasonably safe in their employment. Briefly, the evidence showed that the yard had a large number of shops and buildings situated upon it, in which a great many men were engaged at work at various occupations, but which was cut up by a number of different tracks and switch tracks, and that among these was the one

upon which the injury occurred; that the car upon which the plaintiff was at work had been brought in and left upon the track, loaded with *débris* from a wreck upon the road, consisting, among other things, of some heavy trucks upon wheels; that when the collision occurred which caused the injury the plaintiff was at work among the wheels and irons, and that he was thrown down by the shock, and run over twice by the heavy wheels, which vibrated back and forth upon the car, etc. The testimony also shows that he was a car-repairer, and that it was not a part of his regular duty to strip the cars upon the track; that he had not generally done that work, except once or twice, as it generally was the work of the iron-men, etc.; that he was put at work upon the car by order of the foreman; and that the injury was caused by an engine with cars attached running down upon the car upon which the plaintiff was at work. There was also evidence tending to show that there had been some kind of custom of the yard to hang out a flag upon the car when the employes were at work upon it; that the flag was sometimes put along the track between it and the next switch; but it does not show whose duty it was, further than that it was sometimes done by the foreman of the car-repairers, but generally by the men engaged on the work themselves, if it was done at all. The plaintiff testified that he did not know of this custom, although he had once or twice seen flags out when the men were at work, and that other men already were engaged at work upon the car at the time he went to work, etc. There was also evidence tending to show that no flag had been placed on the car where the men were at work, or between them and the next switch. There can be no doubt, looking at the whole situation in the light of the evidence, where so many men were employed, some of them, as the plaintiff, upon or about cars upon the tracks of the yard, which was netted with tracks and switch tracks, and almost constantly in use, that it was a requirement of duty to see that the switching and operating of engines about the yard was so regulated and guarded as not to expose its employee to risks in the course of their employment upon the cars upon the tracks which might be avoided by proper diligence. That it was necessary under all the circumstances of the case to require of the defendant to take some precaution in this regard will not be denied. The evidence shows that there was some sort of a custom to hang out a flag, as indicated, to protect the men when so employed upon cars upon the tracks of the yard by some one; but upon whom devolved such duty, or that such custom had the force of a rule, is left in darkness. It is even doubtful whether there was such custom in the sense the term implies, as applied to the requirements of the situation. But, be this as it may, the question still remains whether it was sufficient as a precaution, or whether any precautions were promulgated or established, designed to meet the exigency and dangers of the situation. All this, as well as the care exer-

cised by the plaintiff at the time of the injury, are questions for the jury to determine under all the circumstances of the case, and not for the court.

The view we have taken eliminates much of the mass of instructions asked and refused, and renders their consideration unnecessary. The reason is that the complaint is not based upon any negligence of the servants operating the engine not due to the fault of the defendant. In theory it concedes that the mere work of running an engine appertains to the work of a servant, and excludes the assumption of any liability for negligence occurring in that capacity, or on that account. It charges the negligence by which the plaintiff was injured directly upon the defendant itself, and not merely upon its employees. It covers under its broad allegation any negligence of the defendant which rendered the place unsafe, arising either from carelessness or incompetency of the servants operating the locomotives with notice of such faults, or for the want of proper rules promulgated to regulate and guard, or sufficient precautions to apprise those running the locomotives of the proximity of the place of employment. It was negligent in not exercising proper diligence and care in this last regard, so as to regulate the switching and operating engines upon the yard, and to preserve, as far as possible, the safety of the place where the employees were at work, to which the evidence was directed, and involved no imputation of negligence arising from co-service with the plaintiff. It is true, as a last resort, to fortify himself against the reiterated argument that the negligence imputed was that of a fellow-servant, the plaintiff finally invoked the different department distinctions as declared in the Ohio, Kentucky, and Tennessee decisions, which "departments," Judge DILLON said, "frequently exist only in the imagination of the judges, and not in fact," and that "whoever studies those decisions and the effect of trying to apply them will pause long before adopting them," and "where courts," he thinks, "have constructed a labyrinth in which the judges that made it seem to be able to find no end in wandering mazes lost," 24 Amer. Law Rep. 182, 189. Upon this record we find no error in the other instructions excepted to that would authorize the reversal of the case.

It is also assigned as error that the motion to dismiss the action, and to strike out the evidence for the plaintiff, on the ground that there was but one party to the action, should have been sustained. It seems that the allegation that the defendant was a corporation was inadvertently omitted. After the plaintiff had introduced his testimony and rested, the defendant raised the question suggested by his motion, which the court overruled, except as to there being but one party to the action, but allowed the plaintiff to amend by inserting the allegation of incorporation. As the defendant did not desire to make any issue upon its incorporation, but confessed it openly, at the same time offering to interpose a new answer raising different issues, which the court refused to

grant, it is now claimed that the permission to amend and refusal to permit this defendant to raise new issues was error.

The allegation of the incorporation of the defendant was merely formal, and did not in any way change the cause of action. The existence of the corporation was not involved as the gist or substance of the action. We think the name of the defendant is such as to import an incorporation, and of so distinctive a character as to distinguish it from trading companies or partnerships. While it is best to insert such allegations of incorporation, even when only introductory, as here, it was amendable, and could not work any injury to the defendant. Nor is the defendant in any position to avail itself of this objection. It appeared as a corporation, and filed its answer, verified by its agent. It voluntarily acknowledged in open court that it was a corporation, under the name specified as the defendant in the action. As such there is no question but what it had ample opportunity to make its defense, including such affirmative matter as it might deem best to set up, or that it had omitted anything in its answer through inadvertence or mistake or surprise, or anything of that kind. Nor was there error in refusing to remove the cause to the United States court. The insertion of the allegation, being merely formal, is not within the reason of the cases cited by the appellant in which the defendant's right to remove is preserved. The defendant did know that the "action was brought against it, and not against something else," for it appeared as a corporation, and filed its answer to the merits by its agent. Nor was there any error in refusing to submit to the jury several special findings which were presented in writing. The giving or refusal of them is in the discretion of the court. In *Swift v. Mulkey*, 14 Or. 59, 12 Pac. Rep. 76, the court says, by THAYER, J.: "The refusal of the court to direct special findings as requested by appellant's counsel was wholly discretionary. This court will not undertake to review any such rulings of the circuit court." The defendant was not within the purview of section 240, Hill's Code, involving propositions of fact which it claimed had been established by the evidence. And, even if the defendant had properly brought the question it seeks to have decided, within the ruling in *Knahtla v. Railroad Co.*, 27 Pac. Rep. 91, (at the present term,) the submission of such facts are discretionary with the trial court, and there is no error. Upon the whole, we think there is no error disclosed by the record which authorizes a reversal of the case, and the judgment must be affirmed.

THOMPSON v. MARSHALL.

(Supreme Court of Oregon. Oct. 19, 1891.)

DEED OF TRUST—LIEN—MORTGAGE—FORECLOSURE.

1. A deed of trust designed as security for money advanced, or to be advanced, for the benefit of another, creates a lien on the real property described therein, and is in legal effect a mortgage.

2. By section 414, Hill's Code, "a lien upon real or personal property, other than a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby, by suit." *Held*, that the method of foreclosing prescribed by this section is exclusive and imperative, and an attempt to prescribe a different method in the mortgage or writing, creating a lien upon real property, must be disregarded.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

Action by R. H. Thompson against J. P. Marshall. Judgment for plaintiff. Defendant appeals. Affirmed.

STATEMENT BY THE COURT. On the 5th day of April, 1890, the Portland Cable Railway Company executed and delivered to the appellant the following writing: "Know all men by these presents, that the Portland Cable Railway Company, (a corporation duly organized and incorporated under the laws of the state of Oregon,) in consideration of twenty thousand dollars, (\$20,000,) to it paid by J. P. Marshall, trustee, does hereby grant, bargain, sell, and convey to said J. P. Marshall, trustee, and his assigns, forever, the following described parcel of real estate situate, lying, and being in the county of Multnomah, state of Oregon, to-wit: Lot numbered two, (2,) in block A; lots numbered one, (1,) three, (3,) five, (5,) and seven, (7,) in block B; lots numbered two, (2,) six, (6,) seven, (7,) and nine, (9,) in block D; lots one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) and six, (6,) in block E; and lots three, (3,) eight, (8,) and twelve, (12,) in block F,—all in Smith's addition to the city of Portland, county of Multnomah, and state of Oregon, according to the recorded map and plat of said addition to said city in the county and state aforesaid, and containing twenty-two and forty-two one-hundredths (22 42/100) acres, together with the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and also all of its estate, right, title, and interest, at law or equity, therein or thereto. To have and to hold the same to the said J. P. Marshall, trustee, and his assigns, forever. And the Portland Cable Railway Company does covenant with the said J. P. Marshall, trustee, and his legal representatives, forever, that said real estate is free from all incumbrances, and that it will and its successors shall warrant and defend the same to the said J. P. Marshall, trustee, and his assigns, forever, against the lawful claims and demands of all persons whomsoever. In witness whereof the Portland Cable Railway Company has, by resolution of its board of directors, duly and legally adopted, caused these presents to be signed by its president and secretary, and its corporate seal to be affixed, this 5th day of April, 1890. [Seal.] PORTLAND CABLE RAILWAY COMPANY. By PRES- TON C. SMITH, President. PORTLAND CABLE RAILWAY COMPANY. By IRA B. STURGES, Secretary. Signed in presence of A. E. BORTHWICK, L. H. MAXWELL." This deed was duly acknowledged.

The complaint alleges that the object

and purpose of the execution and delivery of said deed to Marshall was to secure the payment of an indebtedness of said railway company to the Alnsworth National Bank of Portland, Or., under a secret trust that said Marshall should sell and convey said lands at either public or private sale, and out of the proceeds thereof should pay said bank the amount of said indebtedness, rendering the overplus, if any, to said railway company or its assigns. The complaint further alleges that thereafter, and on the 27th day of January, 1891, said railway company was indebted to divers persons, including the respondent, and in various sums of money. That on said day said railway company executed and delivered to said Marshall another conveyance of said real property described in said conveyance dated April 5, 1890, and also by said deed, dated January 27, 1891, conveyed other real property to said Marshall. The following is a copy of said conveyance, dated January 27, 1891, (omitting the acknowledgment, which is in due form,) to-wit: "Know all men by these presents, that the Portland Cable Railway Company, a corporation duly organized and existing under and by virtue of the laws of the state of Oregon, having its principal office and place of business in the city of Portland, in said state, for and in consideration of the sum of one dollar to it in hand paid by J. P. Marshall, of the city of Portland, state of Oregon, and in consideration of other valuable considerations to it moving, has bargained, granted, and sold, and by these presents does grant, bargain, sell, and convey, unto said J. P. Marshall, as trustee, all the following described real estate, situate in the county of Multnomah and state of Oregon, to-wit: Lot two, (2,) in block A; lots one, (1,) three, (3,) five, (5,) and seven, (7,) in block B; lots two, (2,) six, (6,) seven, (7,) and nine, (9,) in block D; all of block E; and lots three, (3,) eight, (8,) and twelve, (12,) in block F,—all in Smith's addition to the city of Portland, in said county and state, according to the recorded map and plat thereof. [The other lands conveyed by this deed are not in controversy in this suit, and therefore are omitted from the description.] To have and to hold the same, together with the appurtenances thereunto belonging, or in any wise appertaining, unto the said J. P. Marshall and his successors in this trust, in trust, nevertheless, and for the security and benefit of all persons holding or owning claims against the said railway company, or holding or owning mortgages upon any of the property of said company not covered by the trust-deed securing the bonds of the company; and when the said indebtedness shall have been fully discharged, and all said claims against said company except said bonds shall have been fully met and paid, then to reconvey the property herein conveyed to said Portland Cable Railway Company, its successors or assigns. It is further agreed and provided that, for the purpose of raising funds to liquidate and pay off said indebtedness intended to be secured hereby, the said J. P. Marshall, as trustee, or his successors in this

trust, shall have power and authority, under and with direction and consent of the board of directors of said Portland Cable Railway Company, to borrow money in the name of said company, and to secure the repayment of the same, with interest, by mortgage upon any or all the property hereby conveyed, or for said purpose, with like direction and assent of said board of directors, to sell said real property, or any part thereof, and to make, execute, and deliver good and sufficient deeds therefor, with or without covenants of warranty and against incumbrances; and the money arising from such loans negotiated, and from such sale or sales of said real estate, shall be by the said J. P. Marshall or his successor in this trust applied to the payment of the indebtedness herein provided for. In witness whereof the said Portland Cable Railway Company has caused these presents to be signed by its president and secretary, and its corporate seal to be hereunto affixed, in pursuance of a resolution of its board of directors duly passed on this 27th day of January, A. D. 1891. [Seal.] PORTLAND CABLE RAILWAY CO. By C. H. WOODWARD, President. PORTLAND CABLE RAILWAY CO. By IRA B. STURGES, Secretary. In presence of CHARLES R. FAY, B. F. CLAYTON." This deed was also duly acknowledged.

It is alleged in the complaint that on the 18th day of April, 1891, the board of directors of said railway company duly passed a resolution directing and assenting that said Marshall, as trustee, should sell certain specified properties described in each of said deeds, and that said resolution directed and assented that said sale should be made at public auction at a place in the city of Portland to be designated by said trustee, and that certain prescribed notice should be given for a specified time, and the property be sold on terms named in said resolution. The complaint further shows that plaintiff is one of the creditors of said cable railway company whose debt was secured by the deed dated January 27, 1891, and that the defendant was about to sell all of said property under said secret trust relating to said deed of April 5, 1890, at the same time he would sell under the deed of January 27, 1891, under the direction and assent of the board of directors of said cable railway company, and make certain disposition of the proceeds of said sale as directed by the said board of directors, and will not foreclose the same by proper proceedings in court. The defendant demurred to the complaint, which was overruled, and, declining to further plead, a final decree was entered enjoining said sale, from which decree this appeal was taken.

Fred. V. Holman, for appellant. *J. V. Beach*, for respondent.

STRAHAN, C. J. The deed dated January 27, 1891, shows upon its face that, so far as money was advanced upon the faith of it, or so far as it became security for any debt of the cable railway company, the same is a mortgage, and all of the incidents of redemption and the right of foreclosure attached to it. 3 *Conn. Eq. Jur.* §

1195. And the deed of April 5, 1890, under the allegations in the complaint which stand admitted by the demurrer, is of the same character. Though its phraseology is somewhat different, its real character must be determined by its object. If its object was to secure a debt, whether theretofore or to be thereafter contracted, either by the cable company on the faith of it, or by Marshall, as trustee for its use and benefit, as between the parties to such transaction, and all persons dealing in relation to the property with notice of the facts, such conveyance is a mortgage. But it is said by the appellant these deeds are deeds of trust, with power of sale superadded, and that in such case the power may be exercised without the intervention of a court of equity. Much of the learning on this subject is collected by Judge DILLON in a very exhaustive article, (2 *Amer. Law Reg.*, N. S., 641;) but the learned author treats the subject upon the theory that, upon the execution of the mortgage or deed of trust, the legal title becomes vested in the mortgagee. Reasoning from this premise, his conclusions are no doubt correct, and are sustained by an overwhelming array of authorities. But it was long ago settled in this state that a mortgage does not convey title, but only creates a lien. *Anderson v. Baxter*, 4 Or. 105; *Sellwood v. Gray*, 11 Or. 534, 5 *Pac. Rep.* 196. In all the states that follow this line of decisions, so far as I have been able to discover, a deed of trust designed as security for money has no other or greater effect than a mortgage. *Webb v. Hoselton*, 4 *Neb.* 303, is a case in point. There the conveyance was absolute, with power of sale in case of default, but the court held the equity of redemption existed, and could not be cut off by an attempted exercise of the power conferred by the deed. And it was observed by the court: "The fact that the mortgage in this instance is in the form of a deed of trust does not change its character from a mere security for the payment of money, nor does it convey the legal title, nor do the restrictions therein contained prevent the plaintiff from availing herself of the safeguards thrown around the debtor to prevent a sacrifice of her property." So it was said in *Lenox v. Reed*, 12 *Kan.* 223: "The mere execution of said trust deed, of course, conveyed no title to E. & B., (although Foreman at the time he executed the same held the entire title to the land,) for a deed of trust, given to secure the payment of money, was at that time merely a mortgage, (*Laws 1859*, p. 571, § 2; *Comp. Laws*, p. 722, § 2;) and a mortgage in this state conveys no estate or title to the land, but only creates a lien thereon." And *Railroad Co. v. Auditor General*, 41 *Mich.* 635, 2 *N. W. Rep.* 835; *Newman v. Samuels*, 17 *Iowa*, 528,—are cases where the question seems to have been much considered. In passing upon the character and effect of the instrument in the latter case, the court said: "In ordinary acceptance, this is called a deed of trust, but in legal effect it is a mortgage, superadded thereto, to be sure, the power of sale, which does not change its essential attributes. *Will. Eq. Jur.* 430; *Story, Eq. Jur.* § 1018; 4 *Kent*,

Comm. 146, marginal; Pow. Mortg. 9, 104. In the case of *Woodruff v. Robb*, 19 Ohio, 212, the supreme court, speaking of a conveyance of land to a trustee as collateral security for the payment of a debt with power to sell on default of payment, says the deed in question contains all the substantial qualities of a mortgage, and nothing more. It was a security for a debt, to be void if the debt were paid. The fact that the conveyance was made to a person other than to the creditor, and that it contained a power to sell, does not change its character as a mortgage. The same general principle was declared in the case of *Sargent v. Howe*, 21 Ill. 148; *Eaton v. Whiting*, 3 Pick. 484; and many other authorities cited in 2 Amer. Law Reg. (N.S.) 643-649. And the same doctrine prevails in Texas, (*Wright v. Henderson*, 12 Tex. 43; *Blackwell v. Barnett*, 52 Tex. 326; *McLane v. Paschal*, 47 Tex. 365; *Walker v. Johnson*, 37 Tex. 127.) I am aware that the cases cited on the subject of foreclosure and sale were largely influenced, and probably controlled, by statutory provision, but substantially the same statutory provision prevails here. Section 414, Hill's Code, provides: "A lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby, by suit." This language is too plain and direct to be misunderstood. Its import cannot admit of discussion. The lien shall be foreclosed by suit. This cuts off every other method of foreclosure. Upon the argument the learned counsel for the appellant referred to this section of the Code, and claimed this language was used simply for the purpose of vesting the court with jurisdiction over the subject of foreclosure. But this construction seems unsatisfactory, for the reason that the use of such language was wholly unnecessary for that purpose. The creation of a court of equity, and vesting in it general equity jurisdiction, would be all that was necessary. It could then take cognizance of every subject of equity jurisdiction that might be brought before it. To give full effect to the language of the Code under consideration, it must be given a wider import; and that is, to render imperative a foreclosure by suit of the liens specified and provided for in the section. What effect later legislation had upon the foreclosure of chattel mortgages it is not now necessary to consider, further than to say that that act may be regarded as a legislative interpretation of this section. After the enactment of the Code, by a subsequent act the legislature directed, in effect, if the mode of foreclosing a chattel mortgage were provided in the mortgage, it should be foreclosed as therein provided, and not otherwise. This last enactment was wholly unnecessary, if the appellant's contention were sound, for the reason that the parties could have provided for a sale of the property in the chattel mortgage, and proceeded to foreclose by sale without the intervention of a court. The general doctrine undoubtedly is that, where

the statute prescribes the method of foreclosure, a power of sale or other agreement in the mortgage that it shall be foreclosed in any other manner than that prescribed by the statute, will be void, and the statute in such cases must be strictly followed. *Wilt. Mortg. Forec.* § 3, and authorities cited. The result would be the same in this case whether we hold a deed of trust made as security is a mortgage or not, for the reason the statute enumerates and includes every lien, (except judgments,) whether created by mortgage or otherwise. The construction we have placed upon section 414, supra, is further strengthened by section 422 of the same chapter of the Code, which provides: "The provisions of this title as to the liens upon personal property are not to be construed so as to exclude a person having such lien from any other remedy or right in regard to such property." Let the decree appealed from be affirmed.

(64 Cal. 23)

FERRIER V. FERRIER.¹

(Supreme Court of California. July 23, 1883.)

DEMURRER TO PART OF ANSWER—APPEAL—HARMLESS ERROR.

1. In an action by a husband against his wife for services in the management of her separate estate, a demurrer to a subdivision of the defense was properly overruled, where the subdivision only stated that plaintiff was the husband of defendant at the time the services were rendered, and was merely preliminary to a further averment that the services were rendered at plaintiff's own instance, in consideration of the benefits derived from his relation to defendant, as the sufficiency of a defense is to be tested by considering it as a whole.

2. The statement of a fact in an assignment of error will not be accepted as true when that fact does not appear in the record.

3. Under Code Civil Proc. Cal. § 475, which provides that the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect, the fact that the record fails to show that the trial court made any disposition of a demurrer to a cross-complaint will not be adjudged prejudicial error when plaintiff, without objection, went to trial on the merits, and no relief was granted defendant on the cross-complaint, nor was any order adverse to plaintiff made by reason thereof.

Department 1. Appeal from superior court, Santa Barbara county.

Action by George Ferrier against Catharine Ferrier for personal services. Judgment for defendant. Plaintiff appeals. Affirmed.

B. F. Thomas, for appellant. Hall & Requa, for respondent.

Ross, J. There is no merit in this appeal. The action is by a husband against his wife for the value of his services alleged to have been rendered, under employment by the wife, in and about the management and cultivation of the wife's separate estate. There was a verdict and a judgment for the defendant. It is contended for the

¹This case, filed July 23, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

appellant that the court below erred in overruling his demurrer to the first subdivision of the second defense set up in the amended answer. But this subdivision only set forth the fact, not alleged in the complaint, that the plaintiff was, at the time stated in the complaint, the husband of defendant, and this only as preliminary to the further averment contained in the second defense set up, to the effect that any and all services rendered by plaintiff for which he sues were rendered at his own instance, without request, solicitation, or employment by the defendant, and in consideration alone of his relation to defendant, and of the benefits received by him by reason of that relation. The sufficiency of the defense is not to be tested by one of its subdivisions, but as a whole; and, considered as a whole, it put in issue the fact of employment, without which it is certain no cause of action was rested in the plaintiff.

It is also contended that the court below erred in refusing to make an order precluding the defendant from giving any evidence in support of the matters set up in and by the third defense contained in the amended answer, because of the defendant's failure to furnish the bill of items demanded. If it be admitted that the court was in error in this respect, no injury to appellant appears to have resulted, for it does not appear that the defendant gave any evidence on the trial in support of the matters set up in the third defense. We observe that it is stated by counsel in their assignment of errors that such was the fact; but, of course, we cannot accept that statement as true. If such was the rule, there would be few, if any, cases in which an assignment of errors appears that would not have to be reversed.

Another point made for appellant is that it does not appear from the record that the plaintiff's demurrer to the cross-complaint filed by the defendant was disposed of by the court. This is true; but it is also true that the defendant went to trial upon the merits of the case without making any objection of this nature in the court below. No relief was awarded the defendant by reason of the cross-complaint, nor does it appear that there was any order or judgment made adverse to the appellant based on or in any manner growing out of that pleading. Moreover, upon looking into the cross-complaint, we do not see that it has any relation whatever to the alleged contract upon which the plaintiff's action was brought, for which reason it was probably abandoned in the court below. At all events, no possible injury could have resulted to appellant by reason of the failure of the court, if failure there was, to rule upon the demurrer; and, that being the case, the judgment should not be reversed. Code Civil Proc. § 475.¹ Judgment affirmed.

McKEE and McKINSTRY, JJ., concurred.

¹ Code Civil Proc. Cal. § 475, provides that the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.

HURD v. SIMPSON et al.

(Supreme Court of Kansas. Nov. 7, 1891.)

HUSBAND AND WIFE—ACTIONS—MISJOINDER.

Where a husband and wife sell and convey jointly and by a joint deed certain real estate to H. for the joint consideration of \$5,650, and afterwards the grantors commence a joint action against H. for the purchase price of the land, and the petition states and shows a joint cause of action for the purchase price of the land, and no question is raised as to a misjoinder of causes of action or of parties by either a demurrer or an answer, but on the trial it appears that each of the plaintiffs owned a separate portion of such real estate, and the trial court rendered a joint judgment in favor of the plaintiffs and against the defendant for the amount of the purchase price still remaining due and unpaid, *held* not error. 26 Pac. Rep. 465, affirmed.

(Syllabus by the Court.)

On rehearing.

Action by R. J. Simpson and Mary H. Simpson against W. H. Hurd. Judgment was rendered for plaintiffs, and defendant brought error. On the former hearing the judgment was affirmed. Motion for rehearing overruled.

VALENTINE, J. This was an action brought by Mary H. Simpson and R. J. Simpson, wife and husband, against W. H. Hurd, to recover the sum of \$5,650, claimed to be due to them as the purchase price of certain real estate sold and conveyed by them to the defendant. The petition stated and showed a joint cause of action in favor of the plaintiffs and against the defendant for the purchase price of the land. It appeared on the trial, however, that although the sale and conveyance was by a single deed, executed by both the plaintiffs jointly, for a joint consideration of \$5,650, yet that each of the plaintiffs owned a separate portion of the real estate conveyed, and it is therefore now claimed that each had a separate cause of action, and that the two together did not have a joint cause of action, and therefore could not maintain this action for the purchase price, nor for any portion thereof. This question, however, was not raised in the court below by either a demurrer or an answer, and hence, in our former decision in this case (46 Kan. —, 26 Pac. Rep. 465) it was held that the question of misjoinder was waived, and that the plaintiffs might, therefore, recover in the action jointly for whatever might still remain due of the purchase price of the land, which the court below found to be, principal and interest, \$2,240.57; and the court below rendered a joint judgment in favor of the plaintiffs and against the defendant for this amount. Of course this court did not intend to hold in our former decision, and would not hold if the question were properly raised, that, where each of two persons has a separate cause of action, such two persons together might maintain a joint action to enforce their separate causes of action. *Hudson v. Commissioners*, 12 Kan. 140; *Swenson v. Plow Co.*, 14 Kan. 387; *Palmer v. Waddell*, 26 Kan. 352; *Dobbs v. Stauffer*, 24 Kan. 127, 128; *Jeffers v. Forbes*, 28 Kan. 174; *McGrath v. City of Newton*, 29 Kan. 365; *City of Ellsworth v. Rossiter*, 46 Kan. —, 26 Pac. Rep. 674. Separate causes of

action in favor of separate individuals cannot, in the nature of things, constitute a single cause of action, or a joint cause of action, or a cause of action in favor of any two or more or all of the several plaintiffs. But such causes of action are nevertheless causes of action in favor of the separate plaintiffs, and are not nullities. Nor would this court hold that a misjoinder of parties or an excess of parties would constitute a defect of parties. *McKee v. Eaton*, 26 Kan. 226. Nor would this court hold that a demurrer would lie in any case for a misjoinder of parties. Civil Code, § 89; *Town Co. v. Maris*, 11 Kan. 147. But this court intended to hold by our former decision in this case, and now holds, that under the facts of this case and the provisions of the Civil Code, the defendant below, plaintiff in error, so waived any question of misjoinder which might possibly be in the case that the court below did not err, as against the defendant, in rendering a joint judgment as it did upon the facts of the case in favor of the plaintiffs and against the defendant for the amount of the purchase price of the land still remaining due; and therefore this court now holds that the motion for a rehearing in this case should be overruled. Under section 35, art. 4, of the Civil Code, "all persons having an interest in the subject-matter of the action and in obtaining the relief demanded may be joined as plaintiffs, except as otherwise provided in this article;" and section 37 of the same article provides as follows: "Sec. 37. Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason being stated in the petition." And under section 83, art. 7, of the Civil Code, "the plaintiffs may unite several causes of action in the same petition;" but, in order that they may do so, these "causes of action" must all belong to one of the several classes of actions mentioned in said section, "and must affect all the parties to the action, except in actions to enforce mortgages or other liens." Now, where each of two plaintiffs has a separate cause of action, the separate cause of action of one of the plaintiffs would certainly not in any manner affect the other plaintiff; hence, under said section 83 of the Civil Code, such two separate "causes of action" could not be united in one and the same action. But if they should be so united then there would be an improper joinder of causes of action, (*Jeffers v. Forbes*, 28 Kan. 174;) and the question whether they could be so united or not might properly be raised by a demurrer to the petition, where the facts showing the same appear upon the face of the petition. Civil Code, § 89, subd. 5; *Jeffers v. Forbes*, 28 Kan. 177; *Barnes v. City of Beloit*, 19 Wis. 93; *Newcomb v. Horton*, 18 Wis. 566. Also, in the same connection, see *Fuller v. Fuller*, 5 Hun, 595; *Fisher v. Hall*, 41 N. Y. 416.

In the opinion of the court in the case of *Jeffers v. Forbes*, supra, delivered by Mr. Justice BREWER, the following, among

other, language is used: "The first ground of demurrer, as heretofore stated, is that several causes of action were improperly joined; and the contention is that the setting aside of each of the six several deeds from the plaintiffs to the defendant, *W. H. Forbes*, was a separate and independent cause of action, in which only the grantor in such deed had any interest. * * * We think the contention of the defendants in error is correct, and that the ruling of the district court must be sustained on this ground. [Such ruling of the district court was that the demurrer should be sustained.] * * * As each grantor is alone interested in obtaining the cancellation of his own deed, and as all the other plaintiffs would be improper parties in an action brought by the one alone to set aside his individual deed, so, where all the parties unite in an action to have set aside six several deeds by separate grantors conveying separate interests, they unite six several causes of action in one suit, and six several causes of action, in each of which only a portion of the plaintiffs is interested. * * * We conclude, then, that upon this ground the ruling of the district court is correct and must be affirmed. We might stop here, but inasmuch as under section 92 of the Civil Code the court, upon application of the plaintiffs, must allow them to file separate petitions for the different causes of action, it is due to the parties that we should examine further, and determine whether the second ground of demurrer, namely, that the petition does not state facts enough to constitute a cause of action, is sustainable." In the case of *Barnes v. City of Beloit*, supra, the supreme court of Wisconsin, in holding that a demurrer to the complaint upon the ground that several causes of action were improperly joined would lie, used the following, among other, language: "But the complaint in the action sets forth separate causes of action, one in favor of each plaintiff, without being separately stated; and, if so, several causes of action are improperly united. The counsel for the respondents, however, maintains that different causes of action, within the meaning of section 5, c. 125, Rev. St., are improperly united only where there are in the same complaint causes of action of the different classes mentioned in section 29 of the same chapter,—as, for instance, where the complaint contains one count in tort and another on contract,—and that, where there are several causes of action, to-wit, one in favor of each of several plaintiffs, in the same complaint, and all of the same class, the remedy is not by demurrer, but by motion. He cites several cases to this point, but they are all cases where several causes of action in favor of all the plaintiffs, affecting all the parties, and which might be united in the same complaint, were not separately stated. But in this case each separate cause of action does not affect all the parties to the action, and they could not be united without violating the provisions of section 29, aforesaid. In other words, the plaintiffs have no common pecuniary interest. The complaint would have been held bad before the Code for multifarious-

ness." In the case of *Fuller v. Fuller*, supra, the following was decided: "Where upon the trial of an action brought by two plaintiffs to recover for the conversion of a team of oxen it appeared that each of the plaintiffs owned one of the oxen, held, that a motion for a nonsuit of both of the plaintiffs, on the ground that they had brought a joint action, and shown a several interest, was properly denied." Syllabus. In the case just cited the case of *Simar v. Canaday*, 58 N. Y. 298, is referred to, which decides as follows: "A misjoinder of parties plaintiff is not a ground for dismissal of the complaint as to all the plaintiffs if either has shown that he has a good cause of action. In such case the motion must be for dismissal of the complaint of the plaintiff, in whom no right of action appears." Syllabus. In the case of *Fisher v. Hall*, supra, the plaintiffs were the children and their husbands and the grandchildren of George Fisher. Their action was for the recovery of certain undivided interests in real property, and they brought their action as devisees under the last will and testament of Leonard Fisher, the father of George, by which will Leonard devised to George the property in question, with other property, in trust for the use of George's children and their heirs. The plaintiffs were only a portion of the tenants in common of the real estate in controversy, and not all of such tenants in common; and the case was decided upon the theory that such an action could be rightly maintained only by each tenant in common separately or by all the tenants in common jointly, and not by simply a portion of the tenants in common. A judgment, however, in favor of the plaintiffs, who were only a portion of the tenants in common, was affirmed upon the grounds stated in the following language, contained in the opinion of the court, to-wit: "As tenants in common, representing less than the aggregate common interests in the estate, the plaintiffs probably would have been unable to have maintained a joint action if that objection had been taken in time. * * * But as the facts of the case were fully stated in the complaint, showing that the plaintiffs did not represent all the common interests in the estate, if any objection was intended to be taken to their right to maintain the action on the account it should have been presented at that time. By answering and taking issue on the case alleged this objection was waived, and it became the duty of the court to try and determine the issue as it had been joined by the pleadings. If any objection existed to the form in which the action was brought it was that the complaint contained several causes of action which had been improperly united, and that should have been raised by demurrer. As it was not, it was waived within the express language of section 148 of the Code. The judgment should be affirmed, with costs." The above section 148 of the New York Code, together with section 147 of that Code, corresponds precisely with section 91 of the Kansas Code, hereafter quoted.

We know of no decision by any court of last resort adverse to any of the fore-

going cases. There is a *dictum*, however, in the case of *Masters v. Freeman*, 17 Ohio St. 323, which comes near it. The case of *Bort v. Yaw*, 46 Iowa, 323, which is supposed to be strongly against the above views, has no application whatever to this case, for the reason that under the statutes of Iowa a demurrer will not lie on the ground of a misjoinder or improper joinder of causes of action; nor can a defendant ever waive anything under the statutes in that state by merely failing to file such a demurrer and failing to raise the question specifically by answer. The contention on the part of the defendant below would seem to be substantially that, where two or more persons commence an action jointly, they must allege and prove a joint cause of action in favor of all the plaintiffs, or all must utterly fail in their action; or, in other words, the contention is as follows: Where two or more persons sue jointly for anything,—as for the purchase price of land,—and upon the trial it appears that each is entitled to a part, or that one or more of the number, and not all, are entitled to a part or the whole, and the others not entitled to anything, then that the action must fail as to each and all, upon the principle that a cause of action in favor of each or any one or more of the plaintiffs less than all is not a cause of action in favor of all. This would certainly be a harsh rule, especially in the light of section 396 of the Civil Code, which provides, among other things, that "judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants." It is certainly not the law that where two or more sue jointly all must recover jointly or all utterly fail. Mr. Pomeroy in his work on Remedies and Remedial Rights under the Code Practice, section 41, after first speaking of the equitable theory of judgments, then uses the following language: "The common-law theory of the judgment was in every respect different from this. Based upon the intensely arbitrary notion of joint rights and obligations, it regarded the demand of co-plaintiffs on the one side and the liability of co-defendants on the other, except in a certain well-defined class of cases, as a unit, as utterly incapable of being severed, as something which must be established as to all or must fail as to all the parties. In no instance was affirmative relief granted to the defendant. Recoveries by plaintiff against plaintiff, or by defendant against defendant, were unknown. Since the right of the plaintiffs or the liability of the defendants was conceived of as one, and indivisible, the recovery must be against all the defendants equally, and in favor of all the plaintiffs alike. As a general rule, therefore, independent of statute and of the few excepted cases, the judgment in a common-law action could not be severed, and be pronounced in favor of some plaintiffs and against the others, nor in favor of some defendants and against others. No principle of the common-law procedure was more firmly established than this, and it represented all the technical and arbitrary notions which characterize the entire sys-

tem. The Codes are unanimous in their dealing with this subject. In the most direct and comprehensive language they reject these narrow dogmas of the law, and establish the liberal doctrines of equity, which they apply to the civil action without exception or limitation. The statutory provisions are so clear, definite, and certain that no reasonable doubt as to their scope and meaning is possible. Although the purpose of the law-makers and the theory of their legislation are so plainly expressed, the courts have hesitated and halted in giving effect to this extent, and in carrying out this design. The change made in the ancient order of things is so radical and sweeping that judges sometimes shrink from its contemplation, and seem to regard the statute as though it could not mean what its language declares. This evasion or ignoring of the legislative will has by no means been universal. In many states the courts have conformed to the letter and the spirit of the Codes, and have by their decisions established the true principles which can and must be adopted and used in constructing and arranging the practical rules of procedure that regulate the recovery of judgments by means of the civil action."

There are cases in some of the states where they have no Code like ours, or where the Code is ignored and the common-law rules followed, in which it is held that the several plaintiffs in an action must all recover jointly or all utterly fail; and, following this doctrine, it is further held that it makes no difference how many causes of action may be stated in the plaintiffs' original pleading in favor of one or more of the plaintiffs, still, if no joint cause of action is stated in favor of all the plaintiffs, the pleading may be demurred to upon the ground that no cause of action at all is stated in the pleading. Such can hardly be the law, however, in any state like this, where all the distinctions between actions at law and suits in equity and all the forms of all such actions and suits are abolished, and where we have in their place only one form of action, which is called a "civil action," (Civil Code, § 10,) and where "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants," (Civil Code, § 396.) It would seem strange that a petition may contain several causes of action and yet not contain one. The petition, however, in the present case contains only one cause of action, and that is a joint cause of action in favor of both the plaintiffs and against the defendant. Where a petition, however, of several plaintiffs, which sets forth several causes of action, one in favor of each of two or more of the plaintiffs, but none in favor of all the plaintiffs,—which is not the present case,—such petition may be demurred to upon the ground of an improper joinder of causes of action. See the authorities above cited. The argument is this: Section 83 of the Civil Code provides for the joinder of causes of action, but provides that causes of action can be joined only where they all "affect all the

parties to the action, except in actions to enforce mortgages or other liens." If the causes of action attempted to be joined do not affect all the parties within the requirements of section 83, then there is an improper joinder of causes of action. And section 89 of the Civil Code provides that a demurrer will lie to a petition where "several causes of action are improperly joined," (subdivision 5.) And section 91 of the Civil Code then provides as follows: "Sec. 91. When any of the defects enumerated in section eighty-nine do not appear upon the face of the petition, the objection may be taken by answer; and, if no objection be taken either by demurrer or answer, the defendants shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action." Where a separate cause of action in favor of each of the several plaintiffs is stated in the petition, so as to subject the petition to a demurrer upon the ground that several causes of action are improperly joined, and where a demurrer upon such ground is interposed and sustained, then the proper practice is as follows: Each of the plaintiffs will be permitted upon application to file a separate petition for his or her own cause of action, and each of such plaintiffs will then be permitted to separately proceed upon his or her own separate petition. Civil Code, § 92; *Jeffers v. Forbes*, 28 Kan. 180. In all probability, however, each of the plaintiffs in the present case had an interest in the entire amount of the purchase price of their land; and, if the question of their interests, whether joint or several, had been properly raised, it would probably have been shown and found that their interests were joint. But what if they were not joint? What harm could the defendant suffer by paying to the plaintiffs jointly just what he owed to them in severalty? He could lose nothing by such a transaction. But he did not need to litigate with them jointly if their claims were really separate, unless he chose to do so. In all cases a defendant may raise the question of the misjoinder of the separate causes of action of several plaintiffs, either by demurrer or answer, and have such separate causes of action separated and litigated separately. But, if a defendant chooses to permit such separate causes of action to be litigated together, he should not complain of a joint judgment against him, where there can be no complaint against it except that it is joint. As to the judgment, see *Hall v. Jenness*, 6 Kan. 365. It might be doubtful, however, in this case, even if the plaintiffs were entitled to separate portions of the purchase price of their land, and not entitled to the same jointly, and even if the question of misjoinder had been properly raised by the defendant, whether he could have defeated the plaintiffs' joint action. Section 28 of the Civil Code provides that "a person with whom or in whose name a contract is made for the benefit of another * * * may bring an action without joining with him the person for whose benefit it is prosecuted." In this case the con-

tract was made with both the plaintiffs jointly. It was made in their names jointly, and upon its face it was for their benefit jointly. But suppose that it was really for their benefit severally, then may they not, as the contract was made with them jointly and in their joint names, bring the action in their joint names for the benefit of themselves severally? See what is said in *Walburn v. Chenault*, 43 Kan. 352, 358, 23 Pac. Rep. 657. Upon the facts of this case, and with our views of the law, it is the opinion of this court that the judgment of the court below should be affirmed, and that the motion for the rehearing should be overruled, and it is so ordered. All the justices concurring.

(47 Kan. 315)

ATCHISON, T. & S. F. R. CO. v. SCHROEDER.

(Supreme Court of Kansas. Nov. 7, 1891.)

MASTER AND SERVANT—DANGEROUS APPLIANCES—ASSUMPTION OF RISK.

1. While it is the duty of an employer, whether a railroad company or other corporation or person, to make the work of his or its employes as safe as is reasonably practicable, yet when the employe, with full knowledge of all the dangers incident to or connected with the employment as it is conducted, accepts the employment, or, having accepted the same, continues in it with such full knowledge, and without any promise on the part of the employer, or any reason to expect on the part of the employe, that the employment will be made less dangerous, the employe assumes all the risks and hazards of the employment.

2. Other matters referred to in the opinion.

(Syllabus by the Court.)

Error from district court, Butler county: T. O. SHINN, Judge.

Action by Jacob Schroeder against the Atchison, Topeka & Santa Fe Railroad Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

STATEMENT BY THE COURT. This was an action brought in the district court of Butler county on February 24, 1887, by Jacob Schroeder against the Atchison, Topeka & Santa Fe Railroad Company to recover damages to the amount of \$5,000, for alleged personal injuries. On March 7, 1888, the plaintiff amended his petition, setting forth his cause or causes of action in two counts, the first of which reads as follows: "The plaintiff, for his cause of action against the defendant, says that he has been in the employ of various railroad companies for sixteen years last past, and that for the last ten years he has been in the employ of the defendant, the Atchison, Topeka & Santa Fe Railroad Company, in the capacity of section foreman, and that he has during all that time honestly and faithfully performed every duty required of him as such foreman. That he has given to said defendant his entire time, attention, and services, and has at all times obeyed and complied with all the requests and orders emanating from those in authority over him; and says that in the regular discharge of his duty as such foreman in charge of section number 4CX, on the Florence, El Dorado & Walnut Valley Railroad, owned and operated by the defendant. That the defendant furnished the plaintiff with only one man to

assist him in keeping said section number 4CX in order and in good repair, and that he, so employed as such foreman, and with said help, was ordered by the agents and employes of the defendant railroad company, in authority over him, to replace certain rails on said track of said company's railroad, and which said rails it was necessary to replace for the safety of the passengers on the said line of road, and for the cars running thereon; and that said rails were of the weight of 560 pounds each, which rails the defendant required this plaintiff, as such foreman, with the aid of only one man, to load on hand-cars, take to the place where wanted, and place upon the ties of said line of railroad. And the plaintiff alleges and avers the fact to be that the labor required of him by the defendant was unusual and extrahazardous, and exposed the plaintiff to unusual and extrahazardous risks to life and limb and of injury to his health and strength; and that the defendant knew that said labor was unusual and extrahazardous, and demanded the plaintiff to perform such labor and to handle such rails, knowing said labor was unusual and extrahazardous, and then and there informed the plaintiff that unless he handled such rails and performed such services he would be discharged from the services of the company and from the position of foreman, and a man put in his place who would handle such rails of the weight of 560 pounds with the help as above stated. The plaintiff alleges that he objected to performing the work so required, and notified the defendant of his objections, and that the defendant stated to the plaintiff that he could take his choice to perform the labor or throw up his job as foreman on said section; and that the plaintiff, after two or three times notifying the railroad company of the great risk there was in attempting to handle such rails, at the special instance and request of the defendant undertook said work and labor cautiously and prudently, guarding against accident and unnecessary exposure. Notwithstanding, however, after the plaintiff had used all the caution that it was possible for him to use in handling said rails, and placing them upon the ties as required by the defendant in the regular discharge of his duty as such foreman, without any fault or negligence on his part whatever, the plaintiff received a severe injury, which injury will incapacitate him from the kind of work which he has heretofore been able to perform, or any other manual labor requiring great strength and endurance, which he had before that time possessed; which injury consisted of a rupture in the right side, which was caused by the handling of said rails for the defendant as above stated, and which injury greatly prostrated the plaintiff, and rendered him incapable of performing any manual labor whatever for some time thereafter; and that ever since said injury he has been compelled to wear a truss, and that he cannot and dare not exercise himself violently or to his full capacity or strength; and that by reason of said injury he has been made a cripple, and is physically in-

jured for life, to his great damage in the sum of five thousand (\$5,000.00) dollars. The plaintiff further alleges that immediately after being injured he reported the fact to the defendant, and that said defendant has failed and refused to compensate him for said damage. The plaintiff further alleges that, having been injured in the manner and form above specified, and incapacitated from hard work, he applied to A. A. Robinson, the agent and employe of the defendant, high in authority, for a position in the employ of the defendant with less exposure, less risk, and not requiring so much physical ability, tendering and offering to the defendant his time and services to the full extent of his strength remaining since said injury; but that the defendant has failed, neglected, and refused to furnish the plaintiff with any other or lighter employment, but, on the contrary, has lately notified the plaintiff that it no longer desired his services, and has dismissed and discharged the plaintiff against his wish and desire." The defendant demurred to this petition, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled; and the defendant then answered, setting forth: *First*, a general denial; *second*, that the injuries complained of were caused by the plaintiff's own negligence; *third*, the two-years statute of limitations. A trial was had before the court and a jury, and at the beginning of the trial the defendant objected to the introduction of any evidence upon the ground that the petition did not state facts sufficient to constitute a cause of action. This objection was overruled as to the first count and sustained as to the second count, and the trial then proceeded upon the first count only. After the evidence was all introduced the court gave to the jury the following, among other, instructions, to-wit: "You are instructed that a railroad company is bound to use reasonable precautions for the safety of its employes, and this extends to the furnishing sufficient force for the performance of any duty only ordinarily hazardous when performed by a sufficient force, but which would be extraordinarily hazardous when undertaken by an insufficient force; but in such case, if the employe undertook such duty without objection, knowing it to be extrahazardous, he would not be entitled to recover for any injury received in the performance of such duty; but, on the other hand, if he made his objections to his performance of such duty known, but was, notwithstanding, directed or ordered to undertake the same, and received an injury therefrom, he would be entitled to recover." The court also refused to give to the jury various instructions asked for by the defendant. At the close of the trial the jury found a general verdict in favor of the plaintiff and against the defendant, and assessed the plaintiff's damages at \$3,000, and the jury also made a number of special findings. The defendant then moved to set aside the general verdict, and for judgment in its favor, which motion was overruled, and then the defendant filed and presented a motion for a

new trial upon various grounds, which motion was also overruled, and the court then rendered judgment in favor of the plaintiff and against the defendant for the amount of damages found by the jury and for costs, and the defendant, as plaintiff in error, brings the case to this court for review.

Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. *E. N. Smith, Aikman & Brooks*, and *J. B. Larimer*, for defendant in error.

VALENTINE, J. This present action was commenced by Jacob Schroeder against the Atchison, Topeka & Santa Fe Railroad Company for \$5,000 as damages for personal injuries. It was tried in the court below upon the first count of the plaintiff's amended petition and the defendant's answer, and judgment was rendered in favor of the plaintiff and against the defendant for \$3,000 and costs; and the defendant, as plaintiff in error, now complains. The evidence of the plaintiff below fairly tended to prove the allegations of that part of his amended petition upon which his case was tried, and we have nothing to do with the other part of his petition, to-wit, the second count. Much of the plaintiff's evidence, however, was contradicted by the evidence of the defendant. The plaintiff's evidence showed that he was the section foreman of section 4CX of the "El Dorado Branch" of the defendant's railroad; that George J. Lockie was the road-master under whom he worked and received his orders; that John Faust was a section hand, working under the plaintiff, and subject to his orders. The injury of which the plaintiff complains occurred on February 17, 1886, substantially as follows: The plaintiff and Faust were unloading five railroad rails from what the witnesses call a "push-car," and while unloading the last rail, the plaintiff holding one end and Faust the other, Faust threw, or in some manner let fall, his end, while the plaintiff was holding his, and the plaintiff's end struck him in the lower part of his abdomen, and produced a rupture; and this is the injury of which he complains. The plaintiff testified that the handling of these rails was a part of his duties as section foreman; that he was required by the road-master, George J. Lockie, to perform all his duties as section foreman with only one assistant, to-wit, John Faust; that one assistant only was not sufficient; and that the handling of these rails in the manner in which he was required to handle them was dangerous and hazardous. The road-master, however,—George J. Lockie,—who at the time of the trial resided in California, and whose deposition was read in evidence on the trial, testified, among other things, as follows: "While thus employed as such road-master I was acquainted with the plaintiff, Jacob Schroeder, who was a section foreman under my orders, and in charge of section No. 4CX of said road; that being the first section north of the city of El Dorado. I never either ordered or requested Mr. Schroeder to change rails or to replace rails of said road with the help of only

one man, but, on the contrary, whenever there was work of that kind to be done by him I sent him whatever assistance he required. During the years that I have mentioned—that is, while I was in charge of the 'El Dorado Branch' as road-master,—it was customary for us to reduce the section force during the fall and winter months, and at times Mr. Schroeder only had one man regularly with him on his section; but, as I have already stated, whenever it became necessary from any cause to remove or replace rails, he was furnished with sufficient help, either by hiring an additional force for the time being or by sending him men from some of the other sections of the road to aid him in making such changes of rails as might be necessary. In fact, Mr. Schroeder and all the other section foremen of that branch had general standing orders and authority from me to call upon each other for assistance whenever such assistance was in their judgment necessary, for the purpose of changing or replacing rails, or doing any other work that rendered necessary or proper more force than such foreman might have under his immediate charge and direction at the time."

For the purposes of this case we shall take the evidence of the plaintiff as true, and, under such evidence and the allegations of the plaintiff's petition, can he recover in this action? We would think not. The only allegation of negligence against the railroad company was that it failed and refused, notwithstanding the solicitations and protests of the plaintiff, to furnish him with sufficient help to perform his duties as section foreman. It is admitted and was shown that the plaintiff was an experienced railroad man, had worked at this same kind of business for many years, and knew all the risks and hazards of the business, as well, perhaps, as any man could know the same. He was not employed for any particular length of time, and could have quit the defendant's employment at any time without violating any contract, or without leaving any contract of his own unfulfilled; and, if his own evidence is true, the company did not agree to furnish him with any additional help, but, on the contrary, utterly refused, and he had no reason to expect or to hope for any additional help. If the evidence of the defendant is true, however, he could have had additional help whenever it was necessary, by simply asking for it. We shall consider this case, however, upon the theory of the plaintiff, and that is that he desired additional help; that additional help was necessary; that he asked for it; that the railroad company, through its road-master, refused to give him any, and threatened to discharge him if he could not perform his duties without additional help; and that the injury occurred because of a want of sufficient help. This is substantially what the plaintiff alleged in his petition, and what his testimony showed on the trial. His testimony shows that the order from the road-master to reduce his force to one man only besides himself was received by him on November 30, 1885, and his injury did

not occur until February 17, 1886. It was therefore not an order to perform some duty on such short notice that he did not have a sufficient time for reflection or consideration before he encountered the danger. He protested against the order according to his own testimony, but it was not revoked or modified, and he had no reason to believe or to hope that it would be revoked or modified. We think the principles discussed and decided in the case of *Rush v. Railway Co.*, 36 Kan. 129 et seq., 12 Pac. Rep. 582, are controlling in the present case. In that case an elaborate opinion was delivered, which see. In the case of *Leary v. Railroad Co.*, 139 Mass. 580, 2 N. E. Rep. 115, the following is decided: "If a servant, of full age and ordinary intelligence, upon being required by his master to perform other duties, more dangerous and complicated than those embraced in his original hiring, undertakes the same, knowing their dangerous character, although unwillingly and from fear of losing his employment, and is injured by reason of his ignorance and inexperience, he cannot maintain an action against the master for such injury." Syllabus. In the case of *Railway Co. v. Drew*, 59 Tex. 10, the following is decided: "The master is not liable in damages for an injury to his employe which results from the use of defective machinery, if the employe has full notice of the defect and of danger which will attend continuing the employment. The simple protest by the employe against the use of the machinery, when directed to use it, will not vary the rule, if, when having knowledge of the risk, he obeys the order." Syllabus. In the case of *Railroad Co. v. Barber*, 5 Ohio St. 542, the following is decided: "It is the duty of a railway company to furnish the necessary and proper number of hands for the safe management of its trains; and for a delinquency in this particular the conductor of a train has a right to decline his charge, or refuse to run the train. But where he takes the charge, and runs his train for a length of time without a sufficient number of hands, he voluntarily assumes the risk, and waives the obligation of the company in this respect as to himself, and, if injured by means of such delinquency on the part of the company, he is without a remedy against the company for damages." Syllabus. Also in the case of *Woodley v. Railway Co.*, 2 Exch. Div. 384, 389, the language of Chief Justice Cockburn is strong and to the point. Among other things, he says: "If a man chooses to accept the employment or to continue in it with a knowledge of the danger he must abide the consequences so far as any claim to compensation against the employer is concerned." In the case of *Wormell v. Railroad Co.*, 79 Me. 397, 405, 10 Atl. Rep. 49, 51, 52, the following language is used: "Every employer has the right to judge for himself in what manner he will carry on his business as between himself and those whom he employs, and the servant, having knowledge of the circumstances, must judge for himself whether he will enter his service, or, having entered, whether he will remain. * * * But

there are corresponding duties on the part of the servant; and it is held that the master is not liable to a servant who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom." See, also, the cases cited in this last-cited case, and also the following cases: *Crutchfield v. Railroad Co.*, 78 N. C. 300; *Stephenson v. Duncan*, 78 Wis. 404, 41 N. W. Rep. 337; *Smith v. Railroad Co.*, 42 Minn. 87, 43 N. W. Rep. 968; *McGlynn v. Brodie*, 31 Cal. 376. After a careful consideration of all the cases, we must say that while, in our opinion, it is the duty of an employer, whether a railroad company or other corporation or person, to make the work of his or its employes as safe as is reasonably practicable, yet when the employe, with full knowledge of all the dangers incident to or connected with the employment as it is conducted, accepts the employment, or, having accepted the same, continues in it with such full knowledge, and without any promise on the part of the employer, or any reason to expect on the part of the employe, that the employment will be made less dangerous, the employe assumes all the risks and hazards of the employment. It is also claimed by the plaintiff in error that the court below erred both in the admission of evidence and in the exclusion of evidence; but with the views which we entertain concerning the matters already discussed, we think it is unnecessary to consider these other alleged errors. The judgment of the court below will be reversed, and cause remanded for further proceeding. All the justices concurring.

(47 Kan. 236, 306)

GUY V. DOAK *et al.*

(*Supreme Court of Kansas. June 6, 1891.*)

RECEIVERS — APPOINTMENT BEFORE ACTION BROUGHT—REPLEVIN—JUDGMENT.

1. A court or a judge at chambers has no power or jurisdiction to appoint a receiver when there is no action then pending.

2. Where a judge of the district court, by an order made at chambers, attempted to appoint a receiver on the 19th day of April, in an action that was not commenced until the 14th day of May of the same year, such appointment is absolutely void.

(*Syllabus by Simpson, C.*)

ON REHEARING.

1. Where a receiver is appointed before the intended action is commenced, the appointment is void; but where the intended action is afterwards commenced, and the defendant afterwards makes a voluntary appearance, and presents a motion to remove the receiver, and the court or judge overrules the motion, the person originally appointed as receiver will then become such, and be such from that time on.

2. Where an action of replevin is commenced by a person who was appointed receiver, but whose appointment was void, and afterwards, as between the parties, he becomes such receiver, and in that manner obtains an interest in the property in controversy, of which property he has the possession, while he must fail in the replevin action for the reason that when he commenced the same he had no right to do so, yet the defendant cannot recover in the action to an extent greater than his own special interest in the property in controversy.

(*Syllabus by the Court.*)

Commissioners' decision. Error from district court, Kearney county; A. J. AB-BOTT, Judge.

Action by A. E. Guy, as receiver of J. H. Allen and A. P. Allen, against D. P. Doak and A. T. Irvin. Judgment for defendants. Plaintiff brings error. Affirmed.

On motion for a rehearing. The motion granted, and judgment reversed.

Calhoun & Garwood, D. H. Ettlen, and W. R. Hazen, for plaintiff in error. *Morgan, Lawrence & Mason*, for defendants in error.

SIMPSON, C. A. E. Guy, as receiver of J. H. Allen and A. P. Allen, filed his petition in the district court of Kearney county on the 14th day of May, 1888, against D. P. Doak and A. T. Irvin, to recover the possession of 37 head of horses, 2 mules, 3 wagons, 400 tons of hay, and 218 head of cattle, alleged to be the property of the Allens. Guy claimed to have been appointed receiver in the action of Ott & Tewksbury, the Hamilton Land Company, and M. F. Cooley v. D. P. Doak, A. T. Irvin, the Kendall Exchange Bank, and Thomas Doak, then pending in the district court of Kearney county, in which it was sought to foreclose certain chattel mortgages given to these parties by the Allens, and to determine the order of priority of liens between them and the defendants, and for other relief. The receiver was authorized by the court to bring this action. The pleadings were filed, and issues made up, and the cause came on for trial at the October term, 1888. After the evidence had been submitted in behalf of the receiver, the defendants demurred to the evidence, for the reason that such evidence failed to show facts sufficient to constitute a cause of action against said defendants. The court sustained the demurrer, and, after hearing the evidence on behalf of the defendants, found that the defendant D. P. Doak is, and at the time of the commencement of this action was, the owner and entitled to the immediate possession of the property described in the affidavit for replevin in this action, and of the property obtained by the plaintiff under the order of delivery issued in said action. The court found the value of the property at \$4,977, and that Doak had been damaged by its detention in the sum of \$737.33; that Doak was entitled to a return of the property, and, in case it could not be returned to him, rendered judgment for above amounts, with interest. A motion for a new trial was overruled, all proper exceptions saved, and the cause brought here for review.

1. A preliminary question is raised upon the condition of the record. It is said that, because there are two distinct cases made, we cannot consider the errors assigned. The case of Ott v. Doak, 26 Pac. Rep. 1040, and this case were tried together, and both determined on the facts applicable to each case. A petition in error is filed in each case, the record being attached to one, and referred to in the other. While the better practice would be to file the transcript with each petition in error, in this particular case we think justice can be best subserved by disposing of

both cases without reference to the technical defect in the record. It seems that the ruling of the trial court was produced by the fact that the receiver was attempted to be appointed in the case of Ott v. Doak, on the ——— day of April, 1888, when the action was not commenced, or the papers filed, until the 14th day of May, 1888. Many days before the commencement of an action, a receiver was appointed, or attempted to be appointed, in that action. As a receiver is ancillary to the action, like an order of attachment, or an injunction, we know of no theory by which such an appointment can be sustained. No action was pending. No state of facts that could give the court power to make such an order had been presented. We regard the order appointing a receiver under such circumstances as an absolute nullity. It is a self-evident proposition that the court or the judge at chambers cannot make an order in an action until one is pending in his court. Attention is called to the fact that on the 30th day of July, 1888, the defendants in error appeared before the judge at chambers, at Garden City, in Finney county, and moved the court to remove the receiver for causes recited in the motion, and that this motion was overruled, and counsel assert that this ratifies the original appointment. It is a proposition too plain for argument that at the time the receiver commenced this action he must have been legally appointed in order to maintain it. This record shows that an order appointing a receiver was made by the district judge of the twenty-seventh judicial district, at chambers, in Garden City, Finney county, on the ——— day of April, 1888, in the case of Ott v. Doak, and that this order was filed in the district court of Kearney county on the 14th day of May, 1888. The bond of the receiver so appointed was filed and approved by the clerk of the Kearney county district court on the 14th day of May, 1888. It further shows that an order was made by the judge of the twenty-seventh judicial district, at chambers, in Scott City, Scott county, on the 9th day of May, 1888, authorizing the receiver to bring this action; this order being filed with the clerk of the district court of Kearney county on the 14th day of May, 1888, by instructions of the judge made at chambers in Kearney county on the 9th day of May, 1888. The question presented seems at first glance to be difficult of solution, because it is very near the dividing line of two well-recognized principles. If it had not been for this motion, there is no doubt, in the mind of the writer of this opinion, but that these defendants in error could take advantage of the fact that no action was pending at the time of this appointment, and hence there was a total want of power or jurisdiction to make such appointment. But the defendants in error having made a motion to discharge the receiver for various reasons, (not including the non-pendency of the action,) and that motion having been determined against them, can they now be heard on the question of the want of power? At the time of the ruling on the motion to discharge the receiver, the court

had undoubted power to appoint one. We find no case directly in point. Baker v. Backus, 32 Ill. 79, is one in which a receiver was appointed on an *ex parte* application at the filing of the bill to take possession of the property of a corporation which was not made a party to the action. Other creditors of the corporation who were made parties to the original bill, and who, by various acts pending the litigation, had recognized and dealt with the receiver both in and out of court, challenged the power of the court to appoint a receiver in the action on the ground that there was no suit pending against the corporation. The supreme court of Illinois decided that the circuit court had no such power, and that the other creditors had such an interest in the franchise that they could assign this as error. In the case of Hardy v. McClellan, 53 Miss. 507, the case came into the supreme court from a decree sustaining a demurrer to a petition by Josephine Hardy, the widow of Moses Hardy, to vacate an order made in the case of McClellan v. Hardy's Heirs, directing Bryan, as receiver, to pay over the money in his hands to McClellan. The widow contested the order, and in the course of the contest she petitioned the court to allow her to contest the legality of the appointment of the receiver. This the lower court would not do, and she appealed, and the supreme court say that the appointment was void, because no cause was pending at the time the receiver was appointed. In the case of Jones v. Schall, 45 Mich. 379, 8 N. W. Rep. 68, a receiver was appointed on the 13th day of November. The bill to set aside certain alleged fraudulent chattel mortgages was filed upon the 15th day of November of the same year. Possession was taken by the receiver, a sale made, and part of the money arising therefrom distributed by the final decree. The court say: "This appointment of a receiver, even if one could have been appointed at any stage of this case, was absolutely void, as the bill had not been filed and no suit commenced at the time." It seems in that case that some movement was made in the court below against the receiver, and the complaining parties appealed, and here they did not. So it seems, from a general consideration of these cases, that however much parties to the action may participate in the proceedings, and recognize for the time being an acting receiver, they still, at any stage of the action, may take advantage of the fact that the court had no power or jurisdiction to appoint a receiver at any time before the action was actually pending. Then again, the adjudication on the motion to discharge the receiver would go no further than the allegations in the motion, and hence they were bound only to the extent that the receiver was an impartial person. It may be that, as the court at the time he heard the motion had the undoubted right and power to have then appointed a receiver, the acts of the receiver, after the adjudication on the motion, are valid and binding on all parties to the action, and especially as to these defendants in error; and this is probably the most favor-

able view that can be taken for the plaintiff in error, because it is clear that the action of the court on the motion could not reach back and validate an appointment that at the time it was made had no element of judicial power, or no jurisdictional ground to sustain it. We have been unable to find a single reported case anywhere that sustains a court in the appointment of a receiver before an action is pending, but, on the contrary, the text-books and reports are all against the existence of such a power. This seems to have been the controlling question on the demurrer to the evidence. The fair implication from the record, the proceedings subsequent to the demurrer, and the assertions, and the assertions and arguments of counsel on both sides, concur that the demurrer was sustained because it was necessary that Guy, having sued as receiver, must establish his authority, and prove a legal appointment, and, having failed to do this, the ruling was against him for that reason. If this was the controlling question, the ruling of the trial court was right. We have to say, in reply to a suggestion of counsel for plaintiff in error, that we think that the demurrer reached the question of the illegal appointment. While we feel much reluctance, based on a general and equitable view of this case, in so doing, we are compelled by the mode of trial, the condition of the record, and the legal principles made applicable to the facts as presented by this record, to recommend an affirmance of the judgment of the district court of Kearney county.

PER CURIAM. It is so ordered; all the justices concurring.

ON REHEARING.

(Nov. 7, 1891.)

VALENTINE, J. This case was decided by this court on June 6, 1891. A motion for a rehearing was in due time filed, and afterwards presented to the court, and we shall now proceed to dispose of the same. It appears that some time in April,—about the 19th,—1888, A. E. Guy was appointed by the judge of the district court in the supposed or intended case of Ott & Tewksbury et al. v. D. P. Doak, J. H. Allen, and A. P. Allen et al., a receiver to take charge of the estate and property of said Allen & Allen. At that time, however, no such case had any existence. On May 9, 1888, the supposed receiver obtained leave of the judge of the district court to commence this present action of replevin against Doak and A. T. Irvin. On May 14, 1888, the intended action of Ott & Tewksbury against Doak, Allen & Allen, and others, and the present action of Guy, receiver, against Doak and Irvin, were commenced. On July 30, 1888, Doak and Irvin and others presented a motion to the judge of the district court to remove the receiver, Guy, in the aforesaid case of Ott & Tewksbury against Doak, Allen & Allen, and others, and this motion was duly heard and considered, and was overruled. On October 18, 1888, a trial was had in this replevin case before the court without a jury, and at the close of the plaintiff's (Guy's)

evidence a demurrer thereto was interposed by the defendants Doak and Irvin, and on October 20, 1888, the demurrer was sustained. Afterwards evidence was introduced, and judgment was rendered in favor of the defendant Doak, and against the receiver, Guy, for a return of the property, or, in case a return could not be had, then for the value thereof, found to be \$4,977, and interest, \$145.15, and damages, \$737.33; total, \$5,859.48; and judgment was also rendered in favor of both the defendants Doak and Irvin against the plaintiff, Guy, for costs of suit. The journal entry of the district court, showing these last-mentioned proceedings, reads, so far as it is necessary to quote the same, as follows: "And thereafter, on the 20th day of October, 1888, it being also one of the judicial days of said term of court, the court, after listening to the argument of counsel, and being fully advised in the premises, considers, orders, and adjudges that said demurrer be sustained; to which ruling plaintiff excepted at the time, and the exception was allowed by the court. And thereupon, and upon said 20th day of October, 1888, the defendant D. P. Doak introduces testimony as to the value of the property taken, and as to damages to said defendant, resulting from the taking and detention thereof by the plaintiff; and the plaintiff introduces testimony on the same matters. And after listening to the argument of the counsel, and being fully advised in the premises, the court finds for the defendants D. P. Doak and A. T. Irvin, and against the plaintiff; and that defendant D. P. Doak is, and at the time of the commencement of this action was, the owner and entitled to the immediate possession of the property described in the affidavit for replevin for plaintiff, and for the property obtained by plaintiff under the order of delivery issued in said action; that plaintiff, under said order of delivery, on the 16th day of May, 1888, obtained possession of the property enumerated in the following schedule; and that the value of said property at the time of its passing into the possession of plaintiff was as shown in said schedule, by the figures placed opposite each item of property. [Here follows schedule.]" The certificate of the judge of the district court appended to the case made, and brought to this court, also states that the case contains all the evidence, "except evidence as to value of property given after the demurrer was sustained." It also appears that this case was decided in the court below upon the theory that Guy had no possible interest in the property in controversy, and therefore that the defendants did not need to prove any interest in themselves, but only to prove the value of the property and damages, and this is probably all that they did prove. This we infer from the fact that no evidence is found in the record showing what their interest in the property was, except, possibly, that they were mortgagees thereof, with a possible mortgage claim against the property of about \$1,808, and no evidence is found in the record introduced by themselves showing that they had any right to the property or any right to the possession thereof.

We infer from the foregoing that no evidence was introduced by the defendants at all, nor by either party after the demurrer to the evidence was sustained, except evidence "as to the value of the property taken and as to damages." It is claimed by the defendants that Guy had no interest in the property when he commenced this action of replevin as receiver, for the reason that when he commenced the action he was not a receiver at all; and this for the reason that when he was appointed receiver the judge of the district court appointing him had no power or jurisdiction to make the appointment, and this for the reason that at that time no action was pending in which a receiver could be appointed. To this extent we think the decision of the district court extended, and to this extent we think its decision was correct, and this court so held in its former decision in this case. But there is still another element involved in this case. When the defendants and others appeared before the judge of the district court after the receiver was appointed, and after this action was commenced, and before the trial therein was had, and moved the judge to remove the receiver, which motion was overruled, we think such proceeding had the effect to make the receiver such from that time on as between the parties. As giving some support to this proposition, we would refer to the cases relating to voluntary appearances. *Cohen v. Trowbridge*, 6 Kan. 385; *Carver v. Shelly*, 17 Kan. 472. But the decision of this proposition does not depend upon any voluntary appearance on the part of the defendants, or upon any waiver by them of previous irregularities; for at the time of their appearance, and at the time when they made the motion to remove the receiver, and at the time when their motion was overruled, the district court, or the judge thereof, had the unquestioned right and the power to appoint a receiver without appearance or waiver by them, and without notice to them. See former opinion in this case. And, by the order of the judge overruling their motion to remove the receiver, the judge undoubtedly intended that the receiver should from that time on act as and be the receiver in the aforesaid case of *Ott & Tewksbury et al. v. Doak, Allen & Allen, et al.*, and be such receiver for the estate and property of the said *Allen & Allen*, which includes the property in controversy; and this action on the part of the judge, with his aforesaid intention, was equivalent to making a new appointment of Guy as receiver. The order overruling the motion to remove the receiver still stands unreversed and in full force. If the foregoing is correct, then Guy, from that time on, and at the time of the trial of this case, was receiver, and had some interest in the property in controversy. If, however, at the time of the trial, he had had no interest in the property, then the judgment of the court below, giving the property, or its full value, to Doak, would of course have been correct, and could not be disturbed. *Hall v. Jeanness*, 6 Kan. 365, 366. But as it was shown, as we now think, that Guy was receiver, and did have some interest in the

property at the time of the trial, it then devolved upon the defendants Doak and Irvin to show just what interest they had; for they had no right to recover from the plaintiff, Guy, who had the property in his possession, and some interest therein, more than their own special interest in the property. It is a universal principle in replevin that where each of the parties has an interest in the property, and the party not having the possession thereof at the time of the trial recovers in the action, he should recover from the other party, as value, only the value of his own special interest in the property, and not the actual value thereof. *Wolfley v. Rising*, 12 Kan. 535; *Shaban v. Smith*, 38 Kan. 474, 16 Pac. Rep. 749; *Friend v. Green*, 43 Kan. 167, 23 Pac. Rep. 93. In the present case we suppose that the defendants Doak and Irvin were mortgagees, and that the amount of their claim against the property was about \$1,808; while the judgment which they obtained was for a return of the property or the value thereof, \$4,977, and interest, \$145.15, and damages, \$737.33; total, \$5,859.48. It may be that the defendants' interest in the property is much greater or much less than \$1,808, but it can hardly be said that they showed it to be greater. In fact, as we construe the record brought to this court, the defendants did not attempt to show their interest in the property, but simply showed, after the demurrer to the plaintiff's evidence was sustained, what the value of the property was and what the damages were. Although the plaintiff failed to show that he had any right, at the time of the commencement of the replevin action, to commence the same, yet he showed that by subsequent proceedings he in fact obtained an interest in the property. It is admitted that the property belonged to *Allen & Allen*; and he showed that by the ratification, on July 30, 1889, of his prior appointment as receiver of the *Allens'* estate in the case of *Ott & Tewksbury et al.*, against Doak and the *Allens* and others, he obtained an interest in the property; and therefore, while the defendants had the right to defeat his action of replevin because he commenced it when he had no right to do so, yet they had no right to a return of the property, or the value thereof, unless they showed that they had some interest therein; and in that event they could obtain a judgment as to the value thereof only for the actual value of their own special interest therein. This, we think, follows from sections 184 and 185 of the Civil Code. Under section 184 of the Civil Code, they had the right to show that they had a right to the property, and a right to the possession thereof; and under section 185 they then had the right to obtain a judgment in the alternative for a return of the property to them, or for the value of their special interest therein in case a return of the property could not be had, and also damages.

We think that justice demands that this case should be returned to the district court for a new trial. There is nothing in the record that shows that the defendant Doak is entitled to any such enormous judgment as he obtained in the replevin

action; and, as we construe the record, there could not have been any evidence introduced in the case that would entitle him to any such enormous judgment; and in all probability no such evidence was introduced, and he is not entitled to any such judgment; but, if he is, he can show it on a subsequent trial. We think the motion for the rehearing should be allowed, the judgment of the court below should be reversed, and the cause remanded for further proceedings, and it is so ordered. All the justices concurring.

(47 Kan. 328)

PHIPPS v. PHIPPS et al.

(Supreme Court of Kansas. Nov. 7, 1891.)

TENANCY IN COMMON—RIGHTS INTER SE—TAX-CERTIFICATES.

1. Where a husband and wife have an interest in common with other heirs in real estate, and are in the possession and enjoyment of the premises under an agreement to pay the taxes and "keep the place up," and the husband takes an assignment from the county of a tax-certificate of sale, this operates as a payment of the delinquent taxes; and an assignee of the tax-sale certificate from the husband takes no greater or higher rights than the husband had, although such assignee furnished the money to the husband with which to purchase said certificate; and, in an action for partition between the heirs, where all questions of title are settled in favor of the heirs, the assignee of the tax-sale certificate is not entitled to interest on the amount paid for a tax-deed from the date of payment until the day of trial, but is only entitled to interest at the legal rate on the money advanced, subject to a reduction for the annual rental value of that part of the premises of which the assignee was in possession.

2. Under the peculiar circumstances of this case the tax-sale certificate in the hands of the original purchaser, or of his assignee, cannot be used against the heirs for any other purpose than as evidence of the amount of delinquent taxes paid by either of them on the land.

3. The assignee of the tax-sale certificate in this case can only recover for the value of such improvements as permanently enhanced the value of the land.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Bourbon county; C. O. FRENCH, Judge.

Suit for partition by Nora Phipps against William Phipps and others. Partition was granted, but certain allowances were made to one of the defendants. Plaintiff brings error. Reversed.

J. D. McCleverty, for plaintiff in error.
Hulett & Fletcher, for defendants in error.

SIMPSON, C. This is the second time that this plaintiff in error has brought this case to this court for review. For a statement of most of the material facts, see 39 Kan. 495, 18 Pac. Rep. 707. The action is one for partition of the east half of section No. 36, township 23, range 23, in Bourbon county. This court held, when the case was here before, that Daniel Van Buskirk and William H. Van Buskirk hold the title to the south-east quarter in trust only, so far as William and Nora Phipps are concerned, and this court ordered that an accounting must be had and the property partitioned as the interests of the heirs of David M. Phipps should appear, and reversed the cause, and remanded it

to the district court for another trial. The second trial was had, and the court made these special findings:

"(1) That the said plaintiff, Nora Phipps, and the defendants, William Phipps and Lilly Van Buskirk, as heirs at law of David M. Phipps, and the grantees of his widow, their mother, are the owners in fee-simple, subject to the claims of William H. Van Buskirk, as hereinafter mentioned, of all that tract or parcel of land situated in Bourbon county, state of Kansas, and described as follows, to-wit: The east half ($\frac{1}{2}$) of section No. thirty-six (36,) in township No. twenty-three (23) south, of range No. twenty-three (23.) That each of said parties owns an equal undivided one-third share and interest in said real estate, and they are entitled to have partition thereof made.

"(2) In the fall of 1877 the said Daniel Van Buskirk married the said Lilly, one of said heirs, and immediately after his marriage the said Daniel and Lilly Van Buskirk made an agreement with Margaret Zuck, the mother and natural guardian of said heirs, who, since the death of David M. Phipps, had married one Peter Zuck, by the terms of which agreement said Daniel and Lilly Van Buskirk were to pay all taxes due and to become due upon said land; also to pay all other claims against said land, including two annual payments due the state upon a school-land purchase upon said south-east quarter section, with accruing interest; the other heirs, the said Nora and William Phipps, then minors, to live with them on said land. Pursuant thereto, said Daniel and Lilly Van Buskirk at once went into the use and possession of said east half section, and the said Nora and William Phipps lived with them in the home place of the Phipps family, on the south half of said south-east quarter. Said Margaret Zuck also turned over to Daniel and Lilly Van Buskirk the crop raised upon said land for the year 1877, and some live-stock, the property of David M. Phipps' estate, upon which estate there had been no administration, to aid in paying any claims against said land. At that time the title of said south-east quarter section was a school-land purchase certificate, upon which two payments were yet to be made.

"(3) In November, 1878, the taxes were delinquent upon said south-east quarter section for the year 1875 and subsequent years, and there was also an installment of interest due on the school-land certificate. Daniel Van Buskirk, whose duty it was to pay these taxes and this interest, was unable to do so, and, in order to save a portion of said land to the heirs of David M. Phipps, procured W. H. Van Buskirk to pay the same, with the understanding and agreement that as soon as W. H. Van Buskirk obtained title from the state he would convey to the heirs of David M. Phipps the north half of said quarter section, and retain the south half for himself. At the time of this agreement W. H. Van Buskirk was informed by the county treasurer, and was under the impression, that the land was forfeited by reason of the failure to pay the taxes and installment of interest. The amount so paid by W. H.

Van Buskirk in pursuance to such agreement was on November 22, 1878, for taxes, \$89.94; for interest on school-land certificate, \$10.60; on October 10, 1879, balance due state, principal and interest, on school-land certificate, \$114.60; at which time W. H. Van Buskirk obtained title to said quarter section from the state, and thereupon caused the north half of said quarter to be conveyed to Daniel Van Buskirk, husband of Lilly Van Buskirk, while Lilly Van Buskirk, with Daniel Van Buskirk, her husband, conveyed to William and Nora Phipps all of Lilly Van Buskirk's interest in the north-east quarter of said section 36, as the heirs of David M. Phipps. The said Nora and William Phipps declined to accept the benefit of the said conveyance from Lilly and Daniel Van Buskirk for said north-east quarter section, and on trial consented that a decree might go re-vesting such title in said Lilly Van Buskirk.

"(4) On November 22, 1878, when W. H. Van Buskirk paid the taxes and interest aforesaid, he was living in Missouri, and it was mutually agreed between him, Daniel Van Buskirk, and the county treasurer that for the convenience of the parties the tax-certificate should be taken out in the name of Daniel Van Buskirk, which was accordingly done, although Daniel Van Buskirk did not at any time have any interest in said certificate, except to hold the same for the benefit of W. H. Van Buskirk, and the assignment of said tax-certificate by Daniel to William H., on October 16, 1879, was for the purpose of putting it in the original and actual owner, so that he might hereby complete the payment of the purchase price, and procure a patent from the state.

"(4½) Immediately upon getting the patent for the land and making the conveyances mentioned, Daniel Van Buskirk built a house and moved upon the north half of said quarter with William and Nora Phipps, who lived with him until about three years before bringing this suit. Daniel Van Buskirk has had exclusive possession of said north half of the quarter ever since he moved upon it, and has made lasting and valuable improvements thereon. W. H. Van Buskirk has had exclusive possession of the south of said quarter from the time he obtained the patent.

"(5) The said Wm. H. Van Buskirk has made lasting and valuable improvements upon said south half of said south-east quarter section, of the value of \$1,050, and is entitled to the amount paid on said south half of said quarter section on said tax-deed, and for subsequent taxes, with twenty per cent. interest thereon from date of payment, in amounts as follows: To paid for tax-deed, October 16, 1879, \$94.65; interest thereon to date at 20 per cent., \$163.62; tax paid December 16, 1879, \$6.73; interest thereon to date at 20 per cent., \$11.88; tax paid November 20, 1880, \$3.50; interest thereon at 20 per cent. to date, \$5.56; tax paid June 18, 1881, \$3.50; interest thereon at 20 per cent. to date, \$5.13; tax paid December 20, 1881, \$4.73; interest thereon at 20 per cent. to date, \$6.39; taxes paid December 12, 1882, \$9.33; interest thereon at 20 per cent. to date,

\$10.90; taxes paid December 19, 1883, \$8.11; interest thereon at 20 per cent. to date, \$7.83; taxes paid November 8, 1884, \$12.02; interest thereon at 20 per cent. to date, \$9.40; taxes paid November 16, 1885, \$8.74; interest thereon at 20 per cent. to date, \$5.04; total tax redemption, \$376.83. Said Wm. H. Van Buskirk paid October 16, 1879, the balance due on said school-land purchase,—principal \$104, and interest from November 22, 1878, at 10 per cent.; total, \$114.60. The amounts due said Wm. H. Van Buskirk are as follows, to-wit: Value of improvements, as above, \$1,050; tax redemption, as above, \$376.83; paid on school certificate and interest, \$114.60; interest on same at 7 per cent. to date, \$72.19,—\$1,513.62.

"(6) There is due and chargeable, as the rents and profits of said south half of said south-east quarter section from the year 1878 to date, in the sum of \$650.62, to be deducted from the amount due said Wm. H. Van Buskirk, being the total deduction to be made therefrom, and leaving a balance due him of \$963.

"(7) Said Wm. H. and Daniel Van Buskirk hold in trust the title to said south-east quarter section for the use and benefit of said Nora Phipps, Wm. Phipps, and Lilly Van Buskirk.

"(8) Said tax-deed is void, and said heirs are entitled to the possession of said south half of said south-east quarter section, (subject to a lien in favor of said Wm. H. Van Buskirk for the said sum of \$963;) and the said Nora and William Phipps are each entitled to be let into the possession of an equal undivided one-third interest in and to the north half of said quarter section. It is therefore by the court now here considered, ordered, and adjudged and decreed that the said Nora Phipps, William Phipps, and Lilly Van Buskirk have and recover of and from the said Wm. H. Van Buskirk the possession of the said south half of the south-east quarter (½) of section No. thirty-six, (36,) in township No. twenty-three (23) south, of range No. twenty-three (23) east. That he, the said Wm. H. Van Buskirk, execute and deliver to them a proper deed of conveyance therefor of all of his right, title, and interest therein, executed by himself and his wife; and that, in default thereof, this judgment shall operate as such conveyance, subject, however, to a specific lien thereon, which is hereby given the said Wm. H. Van Buskirk for the said sum of nine hundred and sixty-three dollars, and process is awarded to carry this judgment and decree into effect. It is further ordered that if said sum of \$963 is not paid on or before March 1, 1889, an order of sale may issue. It is further considered, ordered, and adjudged and decreed that the said Nora Phipps, William Phipps, and Lilly Van Buskirk have and recover as against the said Daniel Van Buskirk like relief as set forth in the above and foregoing judgment and decree against Wm. H. Van Buskirk, as to the north half of said south-east quarter section; and it is ordered that all questions as to any claims in favor of said Daniel Van Buskirk for improvements made and taxes paid upon said north half of said quarter section, as

also all claims for rents thereof from November, 1877, to this time in favor of said heirs, shall be left open for consideration upon the incoming of the report of the commissioners hereinafter appointed to make partition of said real estate. It is further considered, ordered, adjudged, and decreed that partition be and is hereby granted of all that tract or parcel of real estate mentioned in plaintiff's petition, situated in Bourbon county, state of Kansas, and described as follows, to-wit: The east half ($\frac{1}{2}$) of section thirty-six, (36,) in township No. twenty-three (23) south, of range No. twenty-three (23) east, subject to the lien and claim above mentioned, so that there shall be set off in severalty an equal one-third in value to each of the said Nora Phipps, William Phipps, and Lilly Van Buskirk; and, in order to make such partition, Geo. W. Armstrong, J. N. Post, and Clifford Latta are hereby appointed commissioners for that purpose, and if said partition of said half section can be made without manifest injury, said commissioners will lay off said several interests by metes and bounds; but if not, then they shall make a valuation and appraisal thereof, and return their doings under this order to this court. It is further ordered and adjudged that said Wm. H. Van Buskirk pay the costs and fees due his own witnesses herein, and one-half of the court costs; also that the other parties hereto pay the costs and fees due their witnesses and one-half the court costs, to be charged and adjusted upon the incoming of the report of said commissioners."

From these findings and the judgment based upon them there is no longer any question of title, as full title is now vested in all of the Phipps heirs. William and Nora Phipps having refused to accept the benefit of the deed for their interest made by Daniel Van Buskirk and wife to them for the north quarter section, each of the heirs of David M. Phipps, to-wit, Lilly Van Buskirk, William Phipps, and Nora Phipps, are entitled to one-third of the half section, subject to whatever rights accrued to William Van Buskirk by reason of the facts hereafter to be recited. So that the only question here is, what are the rights of William Van Buskirk under the second, third, fourth, fifth, sixth, seventh, and eighth findings? The fourth finding states that the tax-certificate was taken out in the name of Daniel Van Buskirk, by agreement, for the convenience of parties, because William Van Buskirk lived in Missouri, but that Daniel did not have any interest in the same, except to hold it for the benefit of William, and that the assignment of the certificate from Daniel to William was for the purpose of putting it in the original and actual owner, so that he could complete the payment of the purchase price and procure a patent from the state. Upon the theory of this finding, the court then proceeds in the fifth finding to state an account between William Van Buskirk and the Phipps heirs, and in this statement of account committed several grave errors, greatly to the prejudice of the heirs. The most flagrant of these is that William Van Buskirk is allowed interest on the

amount paid for the tax-deed from its date until the date of the findings at the rate of 20 per cent. per annum. Waiving any discussion at present as to whether he is entitled to any interest but that for money advanced, which would bear but the legal rate, it is evident that, being in possession of the premises, and enjoying the rents and profits thereof, these must be devoted as they annually accrue to the payment of the accruing taxes, and, if there be a surplus, to the annual reduction of the original cost of the tax-deed. In other words, it would be gross injustice to allow William 20 per cent. on the cost of the tax-deed from its date and 20 per cent. on the annual payment of taxes from the date of their payment up to the time of trial, when he was annually receiving from the proceeds of the farm sums that at the time of the trial aggregated \$650.62, and when no interest is allowed on these rents and profits so annually received. The rents and profits must be applied annually to the reduction of the amount paid for the tax-deed and accruing annual taxes. It may be said as a matter of strict law that William H. Van Buskirk could take no greater rights by virtue of the tax-certificate of sale than his assignor, Daniel Van Buskirk, acquired by the purchase of the certificate. It is difficult to see under this state of facts how Daniel Van Buskirk or his assignee, William, can use this certificate for any legal purpose except evidence of payment; so that, whatever claim William may have by reason of having furnished the money with which Daniel made the purchase, and thus by operation of law paid the delinquent taxes, arises from equitable considerations, and not from the face or terms of the tax-certificate of sale and its statutory attributes. Under the circumstances of this case, we do not think that it is either legal or equitable to allow 20 per cent. interest on the amount of money William furnished Daniel with which to purchase the tax-sale certificate, or to allow that rate of interest on the subsequent taxes paid. Again, it is only such improvements that enhance the value of the property that can be taken into account under all the facts and circumstances of this case. All absolutely necessary improvements that contribute to the comfort or convenience of the party in possession, and all those necessary to protect his stock and preserve his crop,—such as the repair of the dwelling-house, the repair of fences, the cleaning out of the spring that furnishes them water, and all acts of a similar character pertaining to the present use and enjoyment, and contributing to the comfort and profit of the occupant,—are not such lasting and valuable improvements as enhance the value of the property, and become the subject of equitable recognition and protection. The accounting between these parties ought to be done on this basis, and guided by these rules. There should be deducted from the amount of money furnished by William H. Van Buskirk and paid on school certificate and interest and for tax-deed and for taxes of 1879 the annual rental value of

the premises he occupied from the date of his occupancy to the end of the first year. This would bring a credit on the money furnished on or about the 1st day of December, 1880, the sums advanced by William bearing interest at 7 per cent. to that date. This balance would then bear interest until the next annual rent became the subject of deduction. The annual rental as it accrued should first be devoted to the payment of the taxes accruing annually on the land, and, if the rent is in excess of the taxes, the excess should be credited on the original amount paid for school certificate, tax-deed, and interest, the annual balance thus created bearing interest at 7 per cent. per annum. To any balance remaining at the expiration of William's occupancy should be added the value of such lasting and valuable improvements as he may have made in good faith while in the actual occupancy of the premises that have enhanced the value of the property. It seems to us, on the state of facts presented in this record and its peculiar circumstances, that this mode of accounting is as fair and equitable as any one that can be adopted. That the court has power to adjust on an equitable basis is clear from section 629 of the Civil Code, which gives the court full and ample power to settle all such questions in actions of this character on just and equitable principles. This is the view taken of the power of the court in *Sarbach v. Newell*, 28 Kan. 642, and that case is express authority to require the application of the rents and profits to the taxes as they annually accrue. Every case makes its own law, and the facts and attending circumstances of this one call for the fullest exercise of those equitable powers conferred upon the court by section 629 of the Code in actions of this character. We regard the declaration of the court when this case was here before, "that William H. Van Buskirk cannot claim any higher or greater rights" in the tax-sale certificate, as a correct exposition of the law governing that particular transaction, because the moment that certificate was assigned by the proper county officer to Daniel the law operated, and it became a payment of the delinquent taxes, and this operation of a well-settled principle cannot be varied to suit the necessities of any of the parties to a lawsuit. There are some of the reasons that induce us to recommend to the court that the judgment be reversed and a new trial ordered.

PER CURIAM. It is so ordered, all the justices concurring.

(47 Kan. 314)

MOODY v. BRANHAM.

(*Supreme Court of Kansas. Nov. 7, 1891.*)

NEW TRIAL—APPLICATION.

Where an application by petition is filed for a new trial, under the provisions of section 810 of the Civil Code, no verification thereof is required.

(*Syllabus by the Court.*)

Error from district court, Crawford county; GEORGE HANDLER, Judge.

Petition by I. W. Moody against B. F.

Branham for a new trial in an action in which defendant had recovered judgment against plaintiff. On defendant's motion, the petition was stricken from the files. Plaintiff brings error. Reversed.

Ware, Biddle & Cory and Ira D. Bronson, for plaintiff in error. *A. A. Fletcher and Cowley & Wiswell*, for defendant in error.

HORTON, C. J. On the 14th day of January, 1887, in the district court of Crawford county, B. F. Branham recovered a judgment against I. W. Moody for the sum of \$248.32 and costs. The court adjourned the day that this judgment was rendered. On the 7th day of November, 1887, Moody filed his petition for a new trial, upon the ground of surprise which ordinary prudence could not have guarded against, and also for misconduct of the plaintiff below. A demurrer was filed to the petition, alleging that it did not state facts sufficient to constitute a cause of action. No ruling was made upon the demurrer, but the defendant withdrew the same, and on September 14, 1888, with leave of the court, filed a motion to strike the petition from the files, upon the ground that it was not verified as required by law. Thereupon the plaintiff, with leave of the court, filed a new or amended verification. The motion to strike the petition from the files, as amended and verified, was sustained. The plaintiff below excepted, and brings the case here. The petition for the new trial seems to have been filed under section 310 of the Civil Code. Said section reads as follows: "Where the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after, the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition, filed as in other cases, not later than the second term after discovery, on which a summons shall issue, be returnable and served, or publication made, as prescribed in section 74. The facts stated in the petition shall be considered as denied without answer, and, if the service shall be complete in vacation, the case shall be heard and summarily decided at the ensuing term, and, if in term, it shall be heard and decided after the expiration of 20 days from such service. The case shall be placed on the trial docket, and the witnesses shall be examined in open court, or their depositions taken, as in other cases; but no such petition shall be filed more than one year after the final judgment was rendered." The causes for a new trial alleged in the petition were among those stated in section 306 of the Civil Code. No verification is required to a petition filed under the provisions of said section 310, and therefore the failure to verify the petition for a new trial was not sufficient ground to strike it from the files. No brief has been filed upon the part of the plaintiff below, and we have before us for consideration only the record filed and the brief of plaintiff in error. The order and judgment of the district court will be reversed, and the cause remanded. All the justices concurring.

(47 Kan. 297)

TENNEY *et al.* v. LAING.

(Supreme Court of Kansas. Nov. 7, 1891.)

EXECUTORS AND ADMINISTRATORS—RIGHT TO PARTNERSHIP PROPERTY—SURVIVING PARTNER.

1. The administratrix of the estate of a deceased member of a copartnership consisting of two persons has no legal right to take the possession of the property of the partnership from the surviving partner until such surviving partner has been cited for that purpose, and neglects or refuses to give the bond required by paragraph 2819, Gen. St. 1889, and until the administratrix of the undivided estate of the deceased partner has given the further bond required by paragraph 2820, *Id.*

2. When the administratrix of the estate of a deceased member of a copartnership consisting of two persons, without citing the surviving partner, and without executing the further bond, commences proceedings in the probate court under paragraphs 2982-2986, or under paragraphs 2821 and 2822, against the surviving partner and other persons, to get possession and control of the partnership property, it is error not to dismiss such proceedings on motion made for that purpose.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Chautauqua county; M. G. TROUP, Judge.

Proceeding by Mary Laing, as administratrix, against J. G. Teney and H. W. Laing. Judgment for plaintiff. Defendants bring error. Reversed.

W. C. Webb and J. Milton, for plaintiffs in error. J. D. McBrien and L. C. Whitney, for defendant in error.

SIMPSON, C. The material facts are that for years prior to September, 1886, H. W. Laing resided on a farm in Chautauqua county; his family consisting of a daughter, intermarried with J. G. Teney, and a son, named Thomas E. Laing. In April, 1886,—four months before his death,—the son married the defendant in error, and brought her to his father's house, where they lived together until the death of Thomas E. Laing. During all this time, and long before the marriage of Thomas E. Laing, there was a firm doing business, buying, selling, and shipping cattle and hogs, under the firm name of Teney & Laing, with headquarters at the residence of H. W. Laing. After the death of Thomas E. Laing, his widow, Mary, this defendant in error, in consideration of \$750, made a deed to an undivided half interest in a tract of land to Jacob G. Teney, this land being subject to a mortgage of \$1,500, and it seems from the evidence that the land conveyed was the tract upon which the residence of all these parties was situated. After the conveyance, Mary Laing, the widow, resided in the state of Colorado for about 18 months, and then returned to Kansas, and took out letters of administration on the estate of her deceased husband. Thomas E. Laing died on the 5th day of August, 1886, and letters of administration were granted to his widow on the 5th day of March, 1888. She caused an inventory and appraisement to be made of his personal estate, as well as the partnership estate of Teney & Laing, the firm that had been engaged for years in the cattle business, on the theory or claim that her deceased husband was a

member of that firm. This appraisement was made on the 29th day of March, 1888. On the 2d day of April, 1888, she made complaint, and an application for citation to the probate court as follows: "Now comes Mary Laing, administratrix of the estate of Thomas E. Laing, deceased, and makes complaint against said defendants, and says that said defendants, Jacob Teney and H. W. Laing, have concealed and conveyed away, and still conceal, certain moneys, goods, chattels, effects, rights, and credits of the said Thomas E. Laing, deceased, and have refused and still refuse to deliver the same to said administratrix; and she therefore asks that a citation issue to said defendants to appear forthwith before this court to be examined on oath touching the money, goods, chattels, property, and effects of said Thomas E. Laing, deceased, in their hands, or concealed, conveyed away by them, or within their knowledge. MARY LAING, Administratrix of the Estate of Thomas E. Laing, Deceased. By L. C. WHITNEY and MCBRIEN & PILE, Her Attorneys." A citation was issued to Jacob G. Teney and H. W. Laing and personally served on them by the sheriff on the 3d day of April, 1888, requiring them to appear in the probate court on the 5th day of April, 1888, to be examined on oath touching the moneys, property, goods, and chattels conveyed away by them, belonging to the estate of Thomas E. Laing, deceased. On the 30th day of April, 1888, a notice was served on J. G. Teney and H. W. Laing that on the 10th day of May, 1888, at 10 o'clock A. M., the administratrix would apply to the probate court for an order requiring them to turn over to her the money and property in their hands belonging to said estate. On the 10th day of May the administratrix filed a written motion, asking the probate court to make such an order. On that day the probate court heard the motion, and overruled it, and to this order notice of appeal was given in open court, and affidavit for appeal filed, and a transcript of these proceedings was filed in the district court. These proceedings were instituted under the first five paragraphs of article 10 of the act respecting executors and administrators, (pages 876, 877, Gen. St. 1889.) The transcript of the proceedings of the probate court filed in the district court and made a part of the record in this court does not show that paragraph 2984 was complied with, that requires "all such examinations, including as well questions as answers, shall be reduced to writing, and the answers shall be signed by the party examined, and filed in the court before which the same is taken." It does not show that either the persons who were cited, or any other person, were ever examined as witnesses. It does not show that the probate court ever passed upon the question of the guilt of the persons cited, of either having concealed, embezzled, or conveyed away any moneys, goods, chattels, things in action, or effects of the deceased, or that there was ever any hearing upon that question. The only question ever passed upon by the probate court was the refusal to make an order re-

quiring Teney & Laing to turn over any property belonging to the estate. The complaint itself does not charge them with the embezzlement or conveying away any of the partnership estate; it is confined by its phraseology to the personal estate of Thomas E. Laing.

In the district court these plaintiffs in error moved to dismiss the proceeding, because the court had no jurisdiction of the subject-matter of the proceedings, and because it had no jurisdiction of the parties defendant. This motion was overruled, and exceptions taken. The case was then tried to a jury, the question in issue being whether H. W. Laing or the deceased, Thomas E. Laing, was a member of the firm of Teney & Laing. The jury returned a verdict in the words and figures following, to-wit: "We, the jury impaneled and sworn in the above-entitled case, do upon our oaths find for the plaintiff, and find the property concealed to consist of 25 cows, 11 two-year-old steers, 25 yearlings, 32 two-year-old steers and heifers, 10 horses, and 8 mules, 2 colts, 20 hogs, 1 wagon, 1 pleasure carriage, 3 cultivators, 2 plows, 2 sets leather harness, 1 set chain harness, and five hundred dollars worth of notes given to Thomas E. Laing for cattle sold in Missouri." (Signed by the foreman.) A motion for a new trial was made and overruled. A motion in arrest of judgment was filed and overruled. The court ordered the plaintiffs in error to turn over the property enumerated in the verdict to the defendant in error, and, upon their failure, ordered them committed to the jail of the county until said order was complied with. The plaintiffs in error filed a motion for a stay of execution until the cause could be reviewed in the supreme court, and tendered a bond with good and sufficient sureties to stay execution pending proceedings for review. The court overruled the application for a stay of execution, and refused to accept the bond, on the ground that no stay of execution is permitted in cases of this kind. The assignment of errors by counsel for plaintiffs in error are numerous, but it will be necessary for us to notice but few of them.

1. Under the administration laws of this state, as declared by the statute upon executors and administrators, and as these statutes have been interpreted by this court, the primary right to settle the affairs of a partnership consisting of two persons, when one of the members of the firm died, rests with the surviving partner; but if the surviving partner, after having been duly cited for that purpose, neglects or refuses to give the bond required, the administrator of the personal estate of the deceased partner may execute the bond required by paragraph 2820, Gen. St. 1889, and take the whole partnership property into possession, collect the debts due the late firm, pay those due from the late firm, and pay over to the surviving partner his proportion of the excess, if any there be. In this case the record does not show that Jacob G. Teney was ever cited to give the bond required from a surviving partner, nor does the record show that Mary Laing, as ad-

ministratrix of the estate of Thomas E. Laing, ever executed the further bond required by paragraph 2820, Gen. St. 1889, that is necessary to authorize her to take possession of and administer the partnership estate. Both sides and all parties concede that Jacob G. Teney was a member of the firm of Teney & Laing. The controversy was whether H. W. Laing or Thomas E. Laing was the other member. As surviving partner, Jacob G. Teney had the undoubted legal right to the possession of all the partnership property at the death of Thomas E. Laing, if he was a member of the firm, until he had been cited to give bond, and refused, and until the administratrix of Thomas E. Laing had given a bond that would protect his interests in the partnership estate. If H. W. Laing was the partner of Teney, of course the administratrix of Thomas E. Laing had no possible control over or interest in the partnership assets. If these proceedings were valid, and complied with the law in all respects, no such order as was made in this case could be rightfully made against H. W. Laing without some positive evidence that he was withholding, concealing, or conveying away this partnership estate, or some portion thereof. We have read this record carefully to find some active or even passive action or declaration, movement, or transaction of H. W. Laing tending to show either possession, control, or disposition of any of this partnership estate. Jacob G. Teney claims that H. W. Laing was and is his partner. H. W. Laing himself was not permitted to testify in his own behalf on the trial of the cause. This court, in the case of *Blaker v. Sanda*, 29 Kan. 551, upon the question of the right of possession of the surviving partner, uses this language: "Upon the death of a partner, the survivor becomes a trustee for all concerned. He holds the legal title to all the personal property, choses in action, and other assets of the firm; and his control of all the partnership assets, real and personal, legal and equitable, is absolute and indefeasible, limited only by the purposes for which it is granted to him, and the provisions of the statute concerning partnership estates. Until the plaintiff was cited, under the provisions of section 35, c. 37, Comp. Laws 1879, to give bond as a surviving partner, he had the right to the possession of the partnership property. [Citing *Carr v. Catlin*, 13 Kan. 393.] The citation was a matter personal to the surviving partner, and it was an act required to be done to divest him of his right to control and dispose of the property. Unless he was cited, or voluntarily appeared in court and refused to give the statutory bond, or in some other way declined to take charge of the partnership property, so as to waive a citation, he was never divested of his control over said property." In the case cited—that of *Carr v. Catlin*—this court said: "The citation is jurisdictional in the sense a summons is; it brings the party into court. But when a party voluntarily appears in court, it is unnecessary to inquire what, if any, process has been served upon him." It is also said in this case that

the surviving partner may insist on his possession of the partnership property until after citation and a refusal or neglect to give a statutory bond. This was the doctrine of the common law. It has been repeatedly held that, upon the dissolution of a firm by the death of one of the members, the survivor has the legal right to the possession and disposition of all the partnership effects for the purpose of paying the debts of the firm and distributing the residue to those entitled. 1 Woerner, Adm'n, § 124, and authorities cited in foot-note No. 6. By the language of paragraph 2819 of the General Statutes of 1889 it is expressly provided that in case the surviving partner, having been duly cited for that purpose, shall neglect or refuse to give the bond required by this article, the executor or administrator of the estate of such deceased partner, on giving a bond as provided in the next section, shall forthwith take the whole partnership estate, etc., into possession. Paragraph 2820 prescribes the condition of such a bond. It seems that the giving of the further bond required by this statute is a condition precedent to the taking possession of the partnership estate by the administrator of the deceased partner. The supreme court of the state of Missouri, in the cases of *Bredlow v. Savings Inst.*, 28 Mo. 181, recognized in *Savings Inst. v. Enslin*, 37 Mo. 453; *Holman v. Nance*, 84 Mo. 674; *Easton v. Courtwright*, Id. 27; and the court of appeals in *Welse v. Moore*, 22 Mo. App. 530,—hold that the surviving partner is not divested of his common-law powers to wind up the partnership until the administrator of the deceased partner has given bond authorizing him to take charge of the partnership effects on the survivor's refusal to do so. Now, in this case, it is not shown by the record that the surviving partner was cited, or that the administratrix of the estate of the deceased partner had given the further bond required by our statute, before this proceeding was commenced in the probate court. This proceeding was therefore instituted in violation of plain statutory command and repeated judicial direction, and cannot be maintained, and the district court erred in overruling the motion to dismiss. We might stop here, but cannot refrain from the suggestion that, if Jacob G. Teney is the surviving partner, and Thomas E. Laing was the deceased partner, of the firm Teney & Laing, paragraphs 2821 and 2822 are the law that ought to have been invoked by the administratrix if she had herself complied with the other provisions of the statute. We recommend that the judgment be reversed, and the cause remanded, with instructions to the district court to dismiss the proceedings.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 324)

MYERS *et al.* v. CENTER.

(Supreme Court of Kansas. Nov. 7, 1891.)

CONCEALMENT OF FRAUD—LIMITATION OF ACTIONS.

1. The statute of limitations does not begin to run against an action for relief on the ground

of fraud until the fraud is discovered by the party aggrieved; but where this exception is relied on, and the plaintiff's petition shows that the fraud was consummated more than two years before the commencement of the action, it is incumbent on him to allege that he did not discover the fraud until within the two-year period of limitation, in order to take it out of the operation of the statute. An allegation that he did not find the whereabouts of the defendant is not equivalent to an averment of a failure to discover the fraud.

2. "Absconding and concealing," as used in section 21 of the Civil Code, refers to the acts of the party within this state. *Hoggett v. Emerson*, 8 Kan. 263; *Frey v. Aultman*, 30 Kan. 181, 2 Pac. Rep. 168.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. REED, Judge.

Action by John N. Myers and others against Cynthia Center. Judgment for defendant. Plaintiffs bring error. Affirmed.

Sunkey, Campbell & Amidon, for plaintiffs in error. *Stanley & Hume*, for defendant in error.

JOHNSTON, J. The plaintiffs, who are alleged to be the sole heirs at law of Francis Myers, deceased, who died intestate in April, 1869, brought this action in the district court of Sedgwick county against the defendant, Cynthia Center, who was formerly the wife of Francis Myers, deceased, asking for relief on account of the fraud of the defendant. The petition was in two counts, in which it was substantially alleged that Francis Myers and the defendant were married to each other in Indiana in 1852, and lived together as husband and wife until the fall of 1859; that in 1858 or 1859 Francis Myers sold his farm and other property, and with the defendant moved to Iowa; that in the fall of 1859 Francis Myers was taken sick, and while he was confined to his bed his wife secretly absconded, taking with her a team and wagon of the value of \$400, and \$1,600 in money, the property and money of her husband; that she "fled from the state of Iowa, and soon thereafter changed her name, and removed from place to place, so that the said Francis, during his life-time, although making diligent search therefor, was unable to learn where she had gone, or her place of residence; that said Francis Myers died in April, 1869, without having heard from defendant, or knowing where she had gone; that plaintiffs, after the death of said Francis Myers, were unable to learn of the whereabouts of the defendant until within the past two years." It is alleged that the defendant has invested the money so obtained from time to time in real property situated in Sedgwick county, Kan., and that such property in fact belongs to the plaintiffs, who are the sole heirs of Francis Myers, who died intestate in Iowa, leaving no debts. In one count the plaintiffs ask that the defendant be declared to hold the property in trust for them, and to account for the rents and profits of the same, and that she be required to convey the property to the plaintiffs. In the other count they ask for judgment against her for the sum of \$2,000, with 7 per cent.

annual interest thereon from October, 1859. The defendant demurred to the petition upon the grounds that the action was barred by the statute of limitations; that it did not state facts sufficient to constitute a cause of action, and that the plaintiffs are not the proper parties to sue, nor the real parties in interest. The demurrer was sustained by the court, and, the plaintiffs electing to stand upon their petition, judgment was rendered against them for costs.

The ruling on the demurrer was correct. The causes of action which the plaintiffs attempted to state are manifestly based on the fraud of the defendant, and, if they ever existed, are barred by the statute of limitations. Such an action can only be brought within two years after the cause of action shall have accrued. Civil Code, § 18, subd. 3; *Young v. Whittenhall*, 15 Kan. 579; *Main v. Payne*, 17 Kan. 608; *Doyle v. Doyle*, 33 Kan. 721, 7 Pac. Rep. 615. The averments of the petition disclose that the fraud was consummated over 30 years ago, but the plaintiffs rely upon the exception that the cause of action does not accrue until the discovery of the fraud. As it was apparent upon the face of the petition that the fraud was consummated and that the cause of action was complete in 1859, it devolved upon the plaintiffs to plead this or any other exception which would take the case out of the operation of the statute of limitations. *Young v. Whittenhall*, supra. The averments of the petition show not only the commission of the fraud, but that it was discovered soon afterwards by Francis Myers, in his life-time, as it is alleged that he made diligent search to find her, but that he died in 1869, without finding her or the property which she carried away. It is the failure to discover the fraud, and not the inability to find the person who has committed the fraud, which gives rise to the exception that has been mentioned. The plaintiffs also claim that the allegation that the defendant absconded and concealed herself brings the case within the exception provided in section 21 of the Civil Code. It is not enough to establish an exception that the defendant absconded from Iowa, or concealed herself elsewhere than in Kansas. "The words 'absconding and concealing,' as used in that section, refer to the acts of the party in this state." *Frey v. Aultman*, 30 Kan. 182, 2 Pac. Rep. 168; *Hoggett v. Emerson*, 8 Kan. 262. It is not stated in the petition when the defendant came to Kansas, nor are there any averments of acts or efforts on her part to conceal her whereabouts since she came to Kansas. It is stated that she left the state of Iowa, changed her name, and removed from place to place, so that Francis Myers during his life-time was unable to learn where she had gone, or her place of residence; but even these allegations, although insufficient to create an exception, do not apply to the plaintiffs. Francis Myers died in 1869, and there is no allegation that the defendant changed her name or place of residence since 1869. The mere general allegation that plaintiffs were unable to learn the whereabouts of

the defendant until two years prior to the commencement of the action is of itself insufficient to bring it within the exception mentioned in section 21. If the concealment is such as is contemplated by that section, it devolved on the plaintiffs to clearly set forth the acts constituting the same, and, failing to state this or any other exception, the petition was fatally defective, and the demurrer was rightly sustained. As this ground alone is sufficient to sustain the ruling of the court, it is unnecessary to examine the others. The judgment of the district court will be affirmed. All the justices concurring.

(47 Kan. 309)

MANLOVE *et al.* v. COMMERCIAL MUT. FIRE INS. CO.

(Supreme Court of Kansas. Nov. 7, 1891.)

INSURANCE—CANCELLATION OF POLICY—FORFEITURE OF CHARTER.

1. The repeal of a statute under which an insurance company is organized, by a subsequent act of the legislature, which declares the charter of such insurance company forfeited unless the company complies with the provisions of the repealing act within a limited time, does not work the cancellation of policies of said company outstanding at the time of the passage of the later act, though the company failed to comply with its provisions, and thus forfeits its charter.

2. The acts of the insurance company in deciding to close up its business, and notifying the plaintiffs that the company would not be liable on its policies issued to them, without returning to the plaintiffs the unearned cash premium paid by them to secure said policies, did not operate as a cancellation of said policies.

(Syllabus by *Strang, C.*)

Commissioners' decision. Error from district court, Miami county; J. P. HINDMAN, Judge.

Action by Ed. H. Manlove and K. W. Harkness against the Commercial Mutual Fire Insurance Company of Paola, Kan. Judgment for defendant. Plaintiffs bring error. Reversed.

James D. Snoddy, for plaintiffs in error. *J. A. Hoag* and *W. Freeland*, for defendant in error.

STRANG, C. December 13, 1883, the defendant company issued its policy of insurance to the plaintiffs in the sum of \$3,000, upon their frame elevator and machinery therein. November 20, 1884, it issued its policy to the plaintiffs in the sum of \$1,000 additional insurance upon the same property. Each of these policies was to run for the period of five years from date. The plaintiffs paid the defendant as cash premium \$47.50 on the first policy, and also gave the defendant their premium note for the sum of \$750; and on the second policy they paid the defendant a cash premium of \$15, and gave their premium note for \$250. On the night of July 7, 1886, the property so insured was entirely destroyed by fire. This action was brought to recover the amount of said policies as the loss suffered thereunder. On the trial of the case the defendant admitted the execution and delivery of the policies sued on; the total destruction of the property insured; that it was of the value of \$8,000; and that the plaintiffs were entitled to a judgment for the

amount claimed against the defendant, unless the defendant shows a good defense to the plaintiffs' claim as follows: The defendant shows that it was organized under and pursuant to the provisions of the act of the legislature approved March 6, 1875; that said act was repealed by the act of March 7, 1885, but that the repealing act gave the defendant and other companies the right to continue business, provided they complied with the provisions of the later act by the 1st of December following; otherwise they should forfeit their charters. The defendant company failed to comply with the provisions of the new law, and thus forfeited its charter. Now, the defendant claims that the repeal of the act under which it was organized and did business, and its failure to comply with the provisions of the repealing act, operated to cancel all its outstanding policies. We do not think so. The legislature of 1885, in the passage of the bill of March 7th of that year, simply provided that mutual fire insurance companies, like the defendant company, should forfeit their charters, and cease to issue policies or do new business, unless they complied with the provisions of that act within the time indicated therein. The legislature did not intend nor attempt to cancel any policies of such companies outstanding at the time. Such policies were contracts in which the holders had an interest that could not be destroyed by legislative action.

For a second defense the defendant alleges that the directors of the defendant company, at a meeting of the policy-holders, December 1, 1885, of which the plaintiffs had notice, but which they failed to attend, decided to quit business, and appointed W. B. Brayman attorney of the company to close up the affairs of the company, directing him to notify policy-holders that the company would not be liable for any loss occurring after December 31, 1885, which notice Mr. Brayman says he sent to the plaintiffs. Counsel for plaintiffs argues in his brief that Brayman's evidence does not show that he sent notice to the plaintiffs. From our view of other matters connected with this alleged defense, it is not very material whether he sent the notice or not, hence we accept the defendant's position that such notice was sent to the plaintiffs as alleged. Having decided to close up the business of the company, the defendant claims that it had a right, under the following provisions contained in each of the policies sued on, to cancel them: "This policy, because of increased risk, or for any other cause, may be canceled on the company giving notice thereof, and returning a ratable proportion of the original cash premium to the assured for unexpired time." Conceding that defendant gave plaintiffs notice that it had canceled their policies, to take effect on and after December 31, 1885, there is nothing in the record which shows that any of the original cash premium paid by the plaintiffs when they secured their policies was returned to them. The defendant was not authorized by the provision in the policies to cancel them, except upon condition that it returned to the plaintiffs the rata-

ble proportion of the original cash premium. Counsel for defendant notices this point in his brief, and says that no complaint was made because a part of the premium was not returned. With the agreement which was made a part of the case on the trial it was not necessary for the plaintiffs to complain of this. The defendant admitted that the plaintiffs were entitled to judgment against it for their claim unless it showed a good defense. Under this agreement, if the defendant intended to rely upon a cancellation of the policies as matter of defense, it was the duty of the defendant to show that such cancellation was authorized. There is nothing in the record to show that the premium notes given by the plaintiffs, amounting to the sum of \$1,000, were returned to them. We would think these must be returned to the plaintiffs if their policies were to be canceled. If the company, by its say so, and notice thereof, cancel all its policies, it could have little or no use for premium notes, and certainly no use for them after the cancellation of the policies took effect, unless in the mean time, before the cancellation of policies took effect, it should suffer a loss or losses, and then only for the purpose of assessments to pay said loss or losses. We do not think the defendant's action in relation to the cancellation of the policies sued on in this case operated to cancel said policies, and therefore this defense is not good. We therefore recommend that the judgment of the district court be reversed, and the case remanded for new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 351)

WICHITA & W. R. CO. v. JOHNSON.

(*Supreme Court of Kansas.* Nov. 7, 1891.)

MASTER AND SERVANT — RAILROAD COLLISIONS — NEGLIGENCE — NEW TRIAL — TIME OF FILING MOTION — PRESUMPTION.

1. Where an entry of the proceedings taken in a case shows when the trial was begun, but does not affirmatively show when the final decision was made, and it is shown that a motion for a new trial was filed five days after the trial was commenced, which motion was entered and allowed, it will be presumed by the supreme court, for the purpose of upholding the judgment of the court below in granting a new trial, that the motion was filed within three days after the final decision was made.

2. The evidence offered by the plaintiff below is found to be sufficient to take the case to the jury, over a demurrer interposed against it.

(*Syllabus by the Court.*)

Error from district court, Sedgwick county; C. REED, Judge.

Action by Frank E. Johnson against the Wichita & Western Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Geo. R. Peck, A. A. Burd, C. N. Sterry, Houston & Bentley, and J. G. Egan, for plaintiff in error. Crosby & Rusk, for defendant in error.

JOHNSTON, J. Frank E. Johnson brought this action against the Wichita & Western Railroad Company to recover damages for personal injuries alleged to have been

negligently inflicted by the company. It appears that about two miles south-west from Wichita there is a grade crossing, at almost right angles, of the railroads of the Wichita & Western Railroad Company and the St. Louis, Ft. Scott & Wichita Railroad Company. On the night of December 24, 1888, while a passenger train of the St. Louis, Ft. Scott & Wichita Company was passing over the crossing, a freight train of the Wichita & Western Company ran through the train of the former company, and destroyed the baggage-car, on which Johnson was employed in the capacity of express messenger and baggage-master. After the collision, Johnson was found some distance away in an injured condition, and he alleges that the collision and injury resulted from the negligence of the plaintiff in error. At the trial, Johnson introduced his evidence, and rested; and the railroad company then filed a demurrer, challenging the sufficiency of the evidence; and the court, upon an argument, sustained the demurrer, and rendered judgment for costs in favor of the company. Afterwards the court, upon motion, granted Johnson a new trial, and of this order the company complains. It is contended that the motion for a new trial was filed out of time, and therefore the court was without authority to grant it. It is claimed that the record shows the judgment upon the demurrer to have been given on October 26, 1888, and that the motion for a new trial was not filed for five days thereafter, nor until October 30, 1888. The record brought here is somewhat obscure as to when some of the steps were taken in the case. It shows when the demurrer to the evidence was filed, and also when the motion for a new trial was filed, but it does not affirmatively show when the decision upon the demurrer was made. In an entry made on October 31, 1888, it is recited that the case came on to be heard October 26, 1888. Then follow recitals of the impaneling of the jury, the introduction of the evidence of the plaintiff, the filing of a demurrer to the evidence, the argument of the same; then that the demurrer was sustained, the jury discharged, and judgment for costs awarded to the defendant; that a motion for a new trial was thereupon filed, giving a copy of the same, on which there is an indorsement that it was filed October 30, 1888. Later, there is an entry that the motion for a new trial was allowed on January 1, 1889. In the entry of October 31st, the only date mentioned is October 26th, when the trial commenced. If the decision on the demurrer was made on that day, the motion for a new trial was not in time. Some of the language used in the entry, including that referring to the filing of the motion for a new trial, in some degree would indicate that all of the steps were taken on the day mentioned in the entry. But it is clear that the motion for a new trial was not filed on that day; and it appears to us that a fair interpretation of the record is that the entry contains a recital of all that occurred from the 25th of October, when the trial commenced, until the 31st of October, when the entry was made. If all had transpired

on the 25th of October, probably all would have been entered on the journal of that day. The record shows when the demurrer was interposed, but it was probably held under advisement and decided at a later day, prior to October 30th, when the motion for a new trial was filed. As there is nothing in the record which affirmatively shows when the decision was made, and as the motion for a new trial was entertained and determined by the court, it should be presumed, for the purpose of upholding its judgment, that the motion was filed within three days after the decision was made. If the court had refused the motion, and the record was silent as to the date when the decision was made, it would be presumed by this court, for the purpose of upholding the judgment of the court below, that the motion was not made in time. *Hover v. Tenney*, 27 Kan. 133. So here, where the date of the decision is omitted from the record, we will, for the purpose of sustaining the ruling of the district court, presume that the decision was made within three days preceding the filing of the motion for a new trial. Error is never presumed, but must be affirmatively shown, and, in the absence of facts affirmatively showing the decision of the court to be erroneous, we will presume it to be correct.

It is next insisted that there were no reasons which justified the court in granting a new trial. The right to a new trial turns upon the proposition as to whether the evidence offered by Johnson was sufficient to take the case to the jury over the demurrer interposed by the railroad company, and it is still insisted that it was insufficient. An examination of the testimony, however, satisfies us that this claim cannot be successfully maintained. Upon a demurrer to the evidence, the court must look at the testimony in the light most favorable to the plaintiff, and allow all reasonable inferences in his favor. It "cannot weigh conflicting evidence, but must consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer." *Wolf v. Washer*, 32 Kan. 533, 4 Pac. Rep. 1036; *Rogers v. Hodgson*, 46 Kan. —, 26 Pac. Rep. 732. Viewed in this light, it is clear that there is evidence tending to establish the issues made by the pleadings, and therefore the demurrer should have been overruled. There is testimony tending to show that the train on which Johnson was riding was on time; that it was brought to a full stop near the crossing, and the whistle of the engine sounded, while those in charge looked to see if there were any approaching trains on the other road; that they did not see any; and that they then proceeded to cross at a moderate rate of speed, when the locomotive of the Wichita & Western freight train struck the baggage-car with great force, knocking it to pieces, and passing on through the passenger train. There is some testimony tending to show that the freight train approached the crossing at a high rate of speed, and proceeded over the crossing without slackening its speed, or stopping to ascertain whether they were entitled to pass over the crossing, and thus

negligently collided with the train of the other company, which was entitled to the crossing. It is proper to state, however, that some of the testimony is inconsistent with that which has been mentioned, and would tend to show a lack of care on the part of the engineer of the St. Louis, Ft. Scott & Wichita train; and still more which in some degree tends to show that the Wichita & Western train stopped and whistled for the crossing, and obtained the right to pass over in advance of the other train. As before stated, however, we cannot weigh the conflicting evidence; and, in view of the fact that there is to be another trial, we will not at this time enter upon a detailed examination of that which has been given. It is enough for the present to say that there was sufficient testimony to take the case to the jury, and therefore the order of the court granting a new trial will be affirmed. All the justices concurring.

(47 Kan. 349)

MISSOURI PAC. RY. CO. v. YOUNGSTROM.

(Supreme Court of Kansas. Nov. 7, 1891.)

RAILROAD COMPANIES—CONSTRUCTION OF ROAD—FENCES.

Under the provisions of chapter 154 of the Laws of 1885, compelling railroad companies to fence their roads through lands inclosed with a lawful fence, before the owner of the lands can recover the value from a railroad company of a fence built by him in accordance with the provisions of the statute, he must prove that his lands, or a part thereof, which are claimed to be inclosed, have a lawful fence; that is, such a fence as is defined by the statute to be a legal or lawful fence.

(Syllabus by the Court.)

Error from district court, Wilson county; L. STILLWELL, Judge.

Action by Peter Youngstrom against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

W. A. Johnson, for plaintiff in error. S. S. Kirkpatrick, for defendant in error.

HORTON, C. J. Peter Youngstrom commenced his action against the Missouri Pacific Railway Company to recover the value of a fence alleged to have been built by him along the line of the right of way of the Leroy & Caney Valley Air-Line Railroad, through his premises, and also for an attorney's fee. He alleged that the Missouri Pacific Railway Company was operating the Leroy & Caney Valley Air-Line Railroad, as lessee. Trial before the court without a jury. Judgment was rendered in favor of the plaintiff below, and against the railway company, for \$45, for the value of the fence constructed, and \$25 as a reasonable attorney's fee, together with the costs, taxed at \$9.35. The railway company excepted, and brings the case here. The railway company claims that chapter 154, Sess. Laws 1885, to compel railroad companies to fence their roads through lands inclosed with a lawful fence, is unconstitutional. This court has recently decided otherwise. *Railway Co. v. Harrelson*, 44 Kan. 253, 24 Pac. Rep. 465. It is next claimed that the trial court erred in overruling the demurrer of the rail-

way company to the evidence of plaintiff below, and also erred in rendering judgment against the railway company because of the absence of sufficient proof. The petition alleged, among other things, "that before and at the time of the construction of the Leroy & Caney Valley Air-Line Railroad, in 1886, through the premises of the plaintiff, said premises were inclosed with a good, sufficient, and lawful fence." There was no evidence introduced upon the trial showing, or tending to show, that the premises of the plaintiff below, or any part thereof, were inclosed with a lawful fence. The only evidence concerning the inclosure of the premises was as follows: "Peter Youngstrom testified in his own behalf: Question. What part of section 25 do you own, Mr. Youngstrom? Answer. The north half. Q. This Leroy & Caney Valley Air-Line road runs through it? A. Yes, sir. Q. Were your premises fenced at the time the railroad was constructed through there? A. Yes, sir. Q. Well, you are the owner of those premises, are you? A. Yes, sir. Q. What time was the railroad constructed through there? A. About two years ago. Q. In 1886? A. I suppose so; yes, sir." Under the provisions of chapter 154, Sess. Laws 1885, the plaintiff was not entitled to recover unless he showed that his premises, or a part thereof, were inclosed with a lawful fence. Chapter 40, §§ 1-5, Gen. St. 1889, defines what are legal or lawful fences. Evidence that premises are fenced is not sufficient to show that the premises are inclosed with a legal or lawful fence, within the terms of the statute. The burden of proof was upon the plaintiff below, and, in the absence of proof of a lawful fence, the demurrer to the evidence should have been sustained. The plaintiff was not entitled to any judgment. In the case of *Railway Co. v. Harrelson*, supra, it was expressly stipulated by the parties in writing that the premises "were inclosed with a good, sufficient, and lawful fence." There was no such stipulation in this case, and no proof that the fence inclosing the premises was a legal or lawful one. The judgment of the district court will be reversed, and cause remanded. All the justices concurring.

ALLEN *et al.* v. GARDNER. (47 Kan. 337)

(Supreme Court of Kansas. Nov. 7, 1891.)

REPLEVIN — REVIEW OF APPEAL — EVIDENCE — WAIVER OF ERROR.

1. Where, in a suit in replevin, the action is tried upon the theory that the property was in the possession of the defendants, and the trial court so finds, and such finding is unchallenged, this court will not consider the question of the right of the plaintiff to maintain such action because he may have been a bailee of the property in controversy.

2. Where the trial court permits a witness, over the objection of the defendants, to write his signature in the presence of the jury, for their inspection and comparison with a signature to a chattel mortgage, which is claimed to have been forged, and afterwards, upon cross-examination, the defendants ask the witness to stand up and write his name in the presence of the jury, and then offer the same in evidence, held, that the defendants cannot now complain of such evidence.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Pottawatomie county; R. B. SPILMAN, Judge.

Action of replevin by F. P. Gardner against W. A. Allen and W. W. Allen. Judgment for plaintiff. Defendants bring error. Affirmed.

Thomas A. Fairchild and W. F. Challs, for plaintiffs in error. D. V. Sprague, for defendant in error.

GREEN, C. This was an action in replevin, commenced in the district court of Pottawatomie county by the defendant in error, to recover certain cattle. It seems from the evidence that John Wall was indebted to the plaintiffs in error in the sum of \$500, which had been secured by a chattel mortgage. On the 16th day of August, 1887, Wall executed a renewal note for such indebtedness in the sum of \$624.35, and, it is claimed by the plaintiffs in error, at the same time secured the same by giving a chattel mortgage upon the cattle in controversy. It was claimed by the plaintiff below that he purchased these cattle of Wall on the 18th day of November, 1887. On the 17th day of February, 1888, the plaintiffs in error, through C. E. Morris, as their agent, went to the premises of the defendant in error, and took possession of the cattle, but left them in the custody of the defendant in error, upon his executing a paper, of which the following is a copy: "Redelivery Bond. Whereas, on the 17th day of February, 1888, came W. A. Allen and son, by their agent, C. E. Morris, sheriff of Pottawatomie county, with a certain chattel mortgage, given by John Wall to W. A. Allen & Son on 74 head of cows and calves, to secure the payment of a certain promissory note for \$624.35, the same being past due and unpaid, now the said Morris takes possession of 29 head of cows and 30 head of yearlings and two-year-olds next spring; and whereas, I, C. E. Morris, turned said cattle over to F. P. Gardner, to keep for him, the said F. P. Gardner agrees to deliver to the said Morris, on demand, the above-named cattle, or pay him \$775, or enough thereof to pay the above-named note and all costs that may accrue. [Signed] F. P. GARDNER. D. R. ROUNDTREE." The defendant in error afterwards demanded possession of the cattle from Morris, which was refused, and on the 2d day of March, 1888, commenced this action. The plaintiffs in error answered by general denial, and alleged that they had a special ownership in the cattle by virtue of a chattel mortgage. The plaintiff below denied the execution of this chattel mortgage. A trial was had before a jury, and a verdict and judgment rendered in favor of the plaintiff below for a return of the property. The plaintiffs in error ask a reversal, for two reasons: *First*. That the plaintiff below was estopped from claiming title to the stock as against the defendants, under the agreement entered into; that the instructions of the court failed to present the effect of this contract; and that the instruction upon such contract was erroneous. *Second*. That the trial court erred in allowing a witness to write his name in the

presence of the court and jury, and admitting the same in evidence.

Upon the trial of the case the real controversy seemed to have been the question of the genuineness of the chattel mortgage under which the plaintiff in error claimed title to the cattle. The evidence was mainly directed to that one question. It was in evidence that the plaintiff below signed an agreement with the sheriff to keep the stock until the question of the ownership was settled. We cannot tell from the record who obtained possession of the property, but it does appear from a finding of the court that at the commencement of the action the property described in the petition was in the possession of the defendants, and that they still retained such possession at the time the verdict was rendered; and the judgment of the court was that the plaintiff should have a return of the property replevied in the action, then in the possession of the defendants, or, in default thereof, a money judgment for \$1,185 and costs. There was no objection to the finding of the court as to the possession of the stock. Upon this state of facts we do not think any material error was committed by the trial court in sustaining the verdict of the jury. The case seemed to have been tried by both parties upon the theory that the defendants below had the possession of the stock, and the court so found, and we do not feel justified in disturbing such finding now. It is true, as a general rule, that a bailee receiving goods from his bailor cannot set up title in himself at the time of the bailment for the purpose of defeating a recovery by the bailor, (*Thompson v. Williams*, 30 Kan. 114, 1 Pac. Rep. 47;) but that question was not properly raised in the court below, and we do not think it should be now considered here for the first time. The court instructed the jury that, if the plaintiff willingly surrendered the cattle to the defendants, believing that they were being taken under the chattel mortgage, he would be estopped from afterwards setting up any claim of ownership to the cattle; but, if the jury should believe at the time he did surrender the cattle he believed that the agent of the defendants was taking the property under a legal process, and also surrendered them because he believed that the agent of the defendants was taking them as sheriff, then the plaintiff would not be estopped from setting up an ownership to the cattle after that time. We think, in the light of all the facts surrounding the case, this instruction was a proper one for the jury.

The second assignment of error is that the court permitted John Wall, over the objection of the defendants, to write his name in the presence of the jury for their inspection and comparison with the signature to the chattel mortgage, which the plaintiff claimed was forged. This became harmless error by the subsequent cross-examination of this witness. The witness was asked to write his name upon a table, standing, in the presence of the court and jury, and the signature so written was introduced in evidence by the defendants. Having adopted the same method as that

of the plaintiff to test the genuineness of the witness' signature, we do not think the defendants can now be heard to complain of the introduction of such evidence. The judgment of the trial court should be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 307)

WORK et al. v. COVERDALE et al.

(Supreme Court of Kansas. Nov. 7, 1891.)

FRAUDULENT CONVEYANCES — RIGHTS OF BONA FIDE PURCHASER.

Where an insolvent merchant sells his stock of merchandise to defraud his creditors, his vendee, without notice of the fraud at the time of the sale, is protected only to the extent of payments made, or security or property appropriated in payment thereof, before he obtains knowledge of the fraud of his vendor.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Pottawatomie county; R. B. SPILMAN, Judge.

Action by George Z. Work and others against T. J. Coverdale and others, to set aside a conveyance as in fraud of defendant Coverdale's creditors. Judgment for plaintiffs, in which the purchaser was allowed a certain amount as having been paid by him in good faith without notice of the fraud. Plaintiffs bring error. Reversed.

W. F. Challs, for plaintiffs in error. *Keller & Noble*, for defendants in error.

STRANG, C. On the 11th day of September, 1886, the defendant T. J. Coverdale was a merchant doing business at Havensville, in Pottawatomie county. He had in his possession and was the owner of a large stock of goods. He was indebted to the plaintiffs in the sum of about \$240. On that day he agreed to sell his stock of goods to the other defendants, Ellis & Osborn, which sale was fully consummated on the 13th day of said month, by delivering said stock of goods to said Ellis & Osborn, receiving from them cash and their separate notes for the purchase price of the goods. Among the notes given Coverdale for the goods was the note of Ellis for \$1,550, payable 10 months from date. This action was brought May 24, 1887, to set aside the sale of the stock of goods by Coverdale to Ellis & Osborn, and subject said goods to the payment of the debt of the plaintiffs. A jury was waived, and the case was tried by the court, which, among others, made the following finding of fact: "That about the 1st day of July, 1887, Ellis paid the note of \$1,550 which he had given when these goods were purchased, and which was due ten months after date, to Ralph Coverdale, son of T. J. Coverdale, who presented the note to him for payment. He paid it by turning over to Ralph Coverdale two notes which he held, one against Ralph Coverdale, and one against his brother, amounting to \$600, and paying said Ralph Coverdale \$900 in cash. The money thus collected by Ralph Coverdale was paid by him to his father, of which transaction Ellis had no knowledge." Plaintiffs claim that, as Ellis & Osborn knew of the in-

debtedness of T. J. Coverdale to them before this payment of \$1,550 was made by Ellis to Ralph Coverdale, such payment was made in fraud of their rights to the extent of their claim; and that the second conclusion of law of the trial court is wrong, as applied to the ultimate facts found by the court as they appear from the finding above quoted. We think this contention of the plaintiffs is correct. It is the settled law of this state that, where a merchant sells his stock of goods in fraud of his creditors, the purchaser thereof is protected only to the extent of payments made or securities or property appropriated in payment thereof before he obtains knowledge of the fraud of his vendor. *Bush v. Collins*, 35 Kan. 535, 11 Pac. Rep. 425. But the defendants claim that the \$1,550 note paid by Ellis after the defendants became aware of the character of the sale from Coverdale to them, and after they had learned of his indebtedness to the plaintiffs, was a negotiable note, and indorsed by Coverdale to his son, and that therefore the security was in the hands of an innocent purchaser, and under the law was already appropriated to the payment of the debt, and hence the payment of the note to the holder was not in fraud of the right of the plaintiffs. If T. J. Coverdale had in good faith transferred the note by indorsement to his son Ralph, this contention of the defendants would be true. But we do not think the finding of the court shows that the note had been indorsed to Ralph at all. The court finds that the note was presented by Ralph Coverdale for payment, but it also finds that the money paid to him on said note was by him turned over to his father. If the note was the property of Ralph, why did he pay the money therefor to his father? We think that a correct construction of this finding shows that the note was still the property of T. J. Coverdale. If we should construe this finding otherwise, we would then be compelled to say that such finding was not only unsupported by the evidence, but was contrary to the only evidence in the case upon the question of ownership of the note, since the only evidence on that point is the statement of Ralph Coverdale, who says his father left the note with him for collection. In that event, we would be compelled to reverse the case upon the ground that the controlling finding of fact in the case is not supported by any evidence. *Railroad Co. v. Cassity*, 44 Kan. 207, 24 Pac. Rep. 88. We think, however, that the finding of fact, while it is not as full as it should have been upon this point, is consistent with the construction which leaves the ownership of the note at the time of its payment in T. J. Coverdale. It therefore follows that the payment of the same was in fraud of the rights of the plaintiffs to the extent of their claim, and that the second conclusion of law reached by the trial court is erroneous. We recommend that the judgment of the district court be reversed, and judgment be entered for the plaintiffs for the sum of \$269.20.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 313)

GROUCH v. MARTIN.

(Supreme Court of Kansas. Nov. 7, 1891.)

SERVICE BY PUBLICATION—AFFIDAVIT.

Before service can be made by publication, an affidavit must be filed stating that the plaintiff is unable to make service of the summons upon the defendant, and that the case is one of those mentioned in section 72 of the Civil Code. Without such an affidavit, the attempted service by publication is insufficient.

(Syllabus by the Court.)

Error from court of common pleas, Sedgewick county; JACOB M. BALDERSTON, Judge.

Action by F. L. Martin against W. S. Grouch. Judgment for plaintiff. Defendant brings error. Reversed.

Hallowell & Hume, for plaintiff in error. Parsons & O'Bryan, for defendant in error.

HORTON, C. J. On the 10th day of April, 1889, F. L. Martin obtained judgment against W. S. Grouch for \$427, and for a sale of certain lots in Wichita, which had been attached at the commencement of the action. The only service had in the case was by publication. Grouch filed no pleading, and made no appearance. Judgment was taken upon default. The affidavit filed for the publication was wholly insufficient. It did not state that the plaintiff was unable to make service of the summons upon the defendant, or that the case was one of those mentioned in section 72 of the Civil Code. Section 73, Civil Code; Shields v. Miller, 9 Kan. 390; Harris v. Claflin 36 Kan. 543, 13 Pac. Rep. 830. The judgment of the district court must be reversed. All the justices concurring.

(47 Kan. 289)

BEVERLY v. FAIRCHILD et al.

(Supreme Court of Kansas. Nov. 7, 1891.)

MORTGAGES—FORECLOSURE—PERSONAL JUDGMENT—PRACTICE.

Where an action is brought for the foreclosure of a real-estate mortgage and a personal judgment upon the notes secured thereby against the purchaser of the mortgaged premises, who has assumed the payment of the notes secured by the mortgage, and the makers of the notes and mortgage, the failure to indorse the summons, as in an action for the recovery of money only, will not render the personal judgment against such purchaser, or the maker of the notes and mortgage, void.

(Syllabus by the Court.)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Action by J. L. Beverly against William Fairchild, John Higginbotham, and A. M. Fuller for an injunction. Judgment for defendants. Plaintiff brings error. Affirmed.

STATEMENT BY THE COURT. On the 25th day of April, 1887, S. N. Burgen and wife and A. J. Arnold and wife, for the consideration of \$7,000, executed a deed to J. L. Beverly for lots 381, 391, and 393, on Kansas avenue, in Holzey's addition to the city of Topeka, and also for a certain tract of land adjoining said lots. In the deed, which Beverly accepted, was the statement that Beverly assumed to pay two notes, secured by mortgage upon the premises, amounting to \$4,000. On the 22d day of September, 1888, William Fairchild and John Higgin-

botham commenced their action against A. J. Arnold and wife, S. N. Burgen and wife, and J. L. Beverly, to foreclose the mortgage of \$4,000, mentioned in the deed of the 25th of April, 1887, upon the premises purchased by J. L. Beverly, and also to recover a personal judgment against all of the defendants for the amount of the notes secured by the mortgage. At the commencement of the action a summons was issued and served upon the defendants, but there was no indorsement thereon for the amount claimed or any amount. J. L. Beverly made no appearance, but a personal judgment was rendered against him, as also against the other defendants. The judgment, with interest, amounted to \$4,193. Afterwards the mortgaged premises were sold to Fairchild and Higginbotham for \$2,135, and subsequently an execution was issued and a levy made upon the individual property of J. L. Beverly. The premises levied upon under this execution were not embraced in the mortgage. On the 23d of April, 1889, J. L. Beverly commenced his action against William Fairchild, John Higginbotham, and A. M. Fuller, the sheriff of Shawnee county, to prevent them from selling or causing to be sold the real estate levied upon under the execution issued against them, but which real estate was not embraced in the mortgage. On the 24th of April, 1889, the defendants filed their answer. Subsequently J. L. Beverly filed his reply. Trial had on 24th of April, 1889, before the court without a jury. The injunction was denied, and the defendants recovered a judgment for costs. Beverly filed his motion for a new trial, which was overruled. He excepted to the judgment and rulings of the court, and brings the case here.

M. E. Matthews, for plaintiff in error. Vance & Campbell, for defendants in error.

HORTON, C. J. The mortgage which was foreclosed was dated the 18th of March, 1887. J. L. Beverly purchased the premises mortgaged on the 25th of April, 1887, and assumed the payment of the mortgage. He was, therefore, the owner of the premises, subject to the mortgage lien, and entitled to the possession of the same. When the action was commenced by William Fairchild and John Higginbotham on the 22d day of September, 1888, to foreclose the mortgage and obtain personal judgments, Beverly was a necessary party defendant in the foreclosure proceedings. It was decided by this court long ago that in an action to recover upon a note and foreclose a mortgage given to secure the same no indorsement was required on the summons, it not being an action for the recovery of money only. Section 59, Civil Code; George v. Hatton, 2 Kan. 333; Weaver v. Gardner, 14 Kan. 347. Therefore we think in this case, considering the action and the judgment rendered, that the failure to indorse the summons did not make the judgment void. Simpson v. Rice, etc., Co., 43 Kan. 22, 23 Pac. Rep. 1019; Friend v. Green, 43 Kan. 167, 23 Pac. Rep. 93. If the plaintiffs in the original action had wholly disregarded the mortgage, and brought their action against Beverly only upon his promise to

pay the notes secured by the mortgage, the action might then have been considered one for money only, and in such a case an indorsement of the summons would have been necessary; but such was not the action which was commenced. The judgment of the district court will be affirmed. All the justices concurring.

(47 Kan. 294)

PICKENS *et al.* v. TAYLOR.

(Supreme Court of Kansas. Nov. 7, 1891.)

CORPORATIONS—RIGHTS OF STOCKHOLDERS AND CREDITORS.

T. and P. were members of a corporation. The company, being in debt, conveyed its real estate to P., in trust, upon which to borrow money to pay indebtedness; but P. afterwards refused to recognize the trust, and claimed the property as his own. T. was an indorser and guarantor of the company, and to protect himself was compelled to take an assignment of a judgment obtained by a creditor against the company. He caused a levy upon the property to be made upon the property transferred to P., and also began proceedings to cancel and set aside the conveyance to P., and to have the property subjected to the payment of his judgment. P. claimed that the company was owing him a large sum of money. Afterwards the land was sold on execution levied at the instance of T. A sale was fairly and regularly made of the property to T., was confirmed by the court, and a sheriff's deed made to the purchaser. Afterwards, P. proposed to pay T. the amount of his claim, but no actual tender was made, nor was any proposal made until after the claim was extinguished by the sale and conveyance of the property to T. On the trial, the issues were found in favor of T. P. then asked the court to fix a short time within which he could pay off T.'s judgment, and take the land free from the lien of such judgment; but the request was refused, and a judgment canceling the deed of the company to P. was entered. *Held*, that the refusal and entry of judgment were not erroneous.

(Syllabus by the Court.)

Error from district court, Morris county; M. B. NICHOLSON, Judge.

Action by David Taylor against Richard Pickens and another. Judgment for plaintiff. Defendants bring error. Affirmed.

Kellogg & Sedgwick, for plaintiffs in error. *J. Jay Buck*, for defendant in error.

JOHNSTON, J. This action was brought by David Taylor to set aside a conveyance made by the Dunlap Stone & Lime Company to Richard Pickens, as trustee for the company, which trust it is alleged he violated, and that he was endeavoring to apply the property intrusted to him to his own use and benefit, instead of to the purposes intended by the company. David Taylor was a judgment creditor of the company, and brought the suit, not only to set aside the conveyance, but to prevent Pickens or the corporation from selling or mortgaging the property of the company which he had levied upon to satisfy his judgment, and to have the land adjudged subject to the execution, and that he be permitted to sell it in satisfaction of his judgment. There were charges of fraud and collusion made against Pickens and the company in absorbing the property of the company for the payment of fictitious claims, and in endeavoring to defeat the plaintiff below in obtaining satisfaction of his claim and judgment.

The case was here before, and the nature and allegations of the same have been fully stated. *Taylor v. Stone, etc., Co.*, 38 Kan. 547, 16 Pac. Rep. 751. There were countercharges of fraud made against Taylor, who was a member of the corporation, and assisted in its organization; but the final trial of the case has resulted in Taylor's favor, and the general findings which have been made sustain the allegations made against the plaintiffs below, and overthrow those made against Taylor. The testimony in the record is sufficient to sustain the findings and judgment of the court. It was adjudged and decreed that the conveyance made by the company to Pickens was invalid, and that the company was the owner of the land at the commencement of the suit, subject only to a lien in favor of the Kansas Loan & Trust Company for \$109.25, with interest, and therefore subject to sale to satisfy the judgment and execution of the defendant in error. It appears that the land was sold under the execution to Taylor on July 27, 1886; the sale was confirmed by the court on October 15, 1886; and, October 30th following, a sheriff's deed was executed to Taylor in accordance with the direction of the court. There is testimony offered by the plaintiffs in error that after the sale and conveyance to Taylor they proposed to pay Taylor the amount of his claim, and they asked the court to fix a short time after judgment in which Pickens could pay off the amount due to Taylor, which the court refused. This refusal is substantially the only objection made against the judgment of the court below. It does not appear, however, that a tender of the money was actually made, nor was any specific amount named or proposed to be paid. Neither is it shown that Pickens had any ability to pay the amount of the judgment for which the land was sold. More than that, no proposal to pay Taylor was made until after the judgment had been extinguished by sale and a conveyance of the land. Taylor was a *bona fide* judgment creditor, and entitled to have the property of the company subjected to his judgment, and for that purpose was entitled to have any fictitious or fraudulent conveyance held by Pickens against the property canceled and set aside. The property was levied upon as the property of the company, and that it was the property of the company is clearly shown by the testimony. The claim and lien of Taylor appears to have been paramount and superior to that of Pickens, if he held any claim against the company or its property. The sale upon execution appears to have been fair and regular. It was confirmed by the court, and a formal sheriff's deed was executed. By this sale and conveyance he acquired a good title to the land, and no equitable considerations are presented which would require that conveyance to be set aside for the protection of any claim made by Pickens. Under the circumstances of the case, it was too late after that conveyance for Pickens to propose to pay Taylor's claim. It had been satisfied and extinguished, and the property in question had effectually

passed to the purchaser. Under the findings, it must be taken that the charges of fraud and conspiracy against Taylor are groundless, and have been disproved. We see no reason to disturb the findings and judgment, and hence there must be an affirmance. All the justices concurring.

(47 Kan. 268)

MISSOURI PAC. RY. CO. v. LEA.

(Supreme Court of Kansas. Nov. 7, 1891.)

AMENDMENT OF JUDGMENT — ATTORNEY'S FEES — QUESTION FOR JURY — APPEAL — JURISDICTION — WAIVER.

1. Railway Co. v. Merrill, 40 Kan. 404, 19 Pac. Rep. 793, followed.

2. Where a trial court renders a judgment for a less amount than the verdict returned by the jury, such judgment cannot be corrected in the supreme court to conform to the verdict of the jury in proceedings in error brought by the party against whom the judgment is rendered, when no cross-petition is filed by the party in whose favor the verdict is returned, asking for a correction or modification of the judgment.

3. Where an action is appealed from a justice of the peace to the district court, and the plaintiff, with the consent of the defendant, filed in the district court a new petition, setting up a claim exceeding \$300, and the defendant voluntarily appears and files his answer thereto, the district court has jurisdiction to hear and determine the action upon the pleadings filed in that court, the same as if there had been no appeal.

(Syllabus by the Court.)

Error from district court, Marshall county; E. HUTCHINSON, Judge.

Action by William H. Lea against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Waggner, Martin & Orr and John V. Coon, for plaintiff in error. W. H. H. Freeman, for defendant in error.

HORTON, C. J. William H. Lea filed his bill of particulars against the Missouri Pacific Railway Company before a justice of the peace of Marshall county, asking judgment for \$300 for the burning of a hay-stack and 10 tons of hay, all valued at \$360. He recovered judgment against the railway company, and the case was taken to the district court by appeal. In that court Lea filed his petition, claiming judgment for \$360, with interest, and a reasonable attorney's fee. The railway company filed an answer containing a general denial, and alleging contributory negligence upon the part of Lea. The jury returned a verdict for \$207.98 for Lea, but the trial court deducted \$21.98 of interest, which was included in the general verdict, and rendered judgment in favor of Lea for \$186, and also for \$60 attorney's fee. It appears from the record that the evidence as to the amount of the attorney's fee was taken from the jury and passed upon by the court. To this ruling the railway company excepted. The exception ought to have been sustained. "What is a reasonable attorney's fee is a question of fact which should be submitted and determined the same as any other fact arising in the case." Railway Co. v. Merrill, 40 Kan. 404, 19 Pac. Rep. 793. The attorney for Lea expressly stated at the oral argument,

if the attorney's fee of \$60 and the interest of \$21.98, deducted by the trial court from the general verdict of the jury, could not be allowed, that he desired a new trial for his client. The interest, amounting to \$21.98, if recoverable by Lea, cannot be added to the judgment by this court, because Lea has filed no cross-petition to correct or modify the judgment of the trial court. Upon the record and the statement of the attorney for Lea, a new trial must be awarded.

In view of a new hearing, it is necessary to dispose of another question presented. The railway company claims that its motion to dismiss the action for want of jurisdiction, and its objection to the introduction of any evidence for the same reason, should have been sustained. The following cases are cited: Stanley v. Bank, 17 Kan. 592; Wagstaff v. Challiss, 31 Kan. 212, 1 Pac. Rep. 631; Berroth v. McElvain, 41 Kan. 269, 20 Pac. Rep. 850. We think the motion and objection came too late. The petition was filed in the district court with the written consent of the attorney of the railway company indorsed thereon. After the petition was filed, the railway company made a voluntary appearance in the court, and filed an answer containing a general denial, and also alleging contributory negligence. The motion to dismiss was not made until several months after the answer was filed, and the objection to the evidence was not presented until the trial was commenced. Again, after the amended petition was filed, the railway company entered its appearance by filing a motion to make the petition more definite and certain. Under the statute, the district court had jurisdiction of the cause of action even if there had never been any bill of particulars filed before the justice. The voluntary and general appearance of the railway company in the district court gave it jurisdiction over the defendant. Hefferlin v. Stuckslager, 6 Kan. 166; Cohen v. Trowbridge, Id. 393; Carver v. Shelly, 17 Kan. 474; Haas v. Lees, 18 Kan. 454; Shuster v. Finan, 19 Kan. 116; Dickson v. Randal, Id. 212. "Any voluntary appearance of a party to an action, which recognizes the general jurisdiction of the court, or which is not made for the special purpose of contesting the jurisdiction of the court, or for any other special purpose, will be construed to be a general appearance in the case, and will be held to give the court general jurisdiction in the case of such party." Cohen v. Trowbridge, 6 Kan. 385, 393; McBride v. Hartwell, 2 Kan. 411, 415; 1 U. S. Dig. (1st Series,) 101, 103, par. 540 et seq. If the railway company had not consented to the filing of the new petition in the district court, and voluntarily filed its answer to the first petition, and, subsequently, its motion to make the amended petition more definite and certain, then its motion to dismiss ought to have been sustained, under the authority of Wagstaff v. Challiss, 31 Kan. 212, 1 Pac. Rep. 631; Berroth v. McElvain, 41 Kan. 269, 20 Pac. Rep. 850. The judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(47 Kan. 340)

HILL et al. v. WAND.

(Supreme Court of Kansas. Nov. 7, 1891.)

LANDLORD AND TENANT—ESTOPPEL—MOTION FOR NEW TRIAL.

1. "Thereupon the defendants filed in writing their motion for a new trial." The word "thereupon" in this sentence, which appears in the record immediately after the verdict of the jury, construed as an adverb of time, and held to mean "without delay or lapse of time."

2. A landlord who, having leased a portion of a building to H., and who informs W., occupying the balance of the building under a lease which is about to expire, that he has leased the whole building to H. from the expiration of his (W.'s) lease, with authority on the part of H. to sublet, and advises W. to lease of H., and W. leases of H., is estopped from denying the authority of H. to sublet to W.; and the privies of said landlord, taking under him by a subsequent lease, are also estopped.

3. The evidence examined, and held not to establish any cause of action in favor of the plaintiff below, and that the court erred in overruling the demurrer thereto.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Action by John Wand against Charles M. Hill and Horace P. Hill. Judgment for plaintiff. Defendants bring error. Reversed.

Martin & Keeler, for plaintiffs in error. *Russington, Smith & Dallas*, for defendant in error.

STRANG, C. Action for damages. The petition alleges that in June, 1886, John Wand was a druggist, with a stock of goods, in possession of the store-rooms on lot 213, on Kansas avenue, Topeka, as the tenant of Allen Sells, owner of the Windsor Hotel building, said store-rooms being a part of said building; that at the same time the plaintiffs, Hill Bros., as partners, were in possession of the Windsor Hotel under a five years' lease from said Allen Sells; that the plaintiffs represented to the defendant, John Wand, that they also had a lease on the store-rooms occupied by him covering the period of the last three years of their hotel lease, and thus induced said Wand to take a lease of said store-rooms of them for the period of three years, at the monthly rental of \$150; that, after giving Wand said lease, the plaintiffs sold their furniture, and assigned their lease of said hotel to Passmore & Wiggins; that after Passmore & Wiggins obtained possession of said hotel they notified the defendant that their predecessors, Hill Bros., never had any lease from Sells for the store-rooms occupied by him, and that he must either surrender the possession of said rooms to them or pay them a much higher rent; that he saw Mr. Sells, and learned from him that, while he thought he had leased said store-room to the Hills, he had ascertained that he had only contracted to lease it to them, and had not leased it; that said Wand, learning, as he believed, that the Hills had no lease of said store-rooms, and no authority to lease the same to him, and believing that his lease from them did not protect him, as he alleges it did not, was compelled,

rather than to move out, to take a lease from Passmore & Wiggins, and pay a much larger monthly rental, to-wit, the sum of \$175 per month, whereby he was damaged in the sum of \$25 per month for three years, or in the aggregate \$900. The defendants below answered by general denial. When the case was reached for trial, and the plaintiff had introduced his evidence, the defendants demurred thereto, for the reason that it failed to establish a cause of action, which demurrer was overruled.

The first question to be discussed here is a question of practice raised by the defendant, who contends that there is no case here for review; that the case made does not show that the motion for a new trial was filed in the court below within the statutory time; and that, therefore, under the decisions of this court, the case should be dismissed. Whether this contention is correct or not depends upon the construction of the word "thereupon," appearing in connection with the allegation of the filing of the motion for a new trial. The case made recites that "after hearing the arguments of counsel, and being duly instructed by the court, the jury, after due deliberation, returned to the court its general verdict, and its special findings upon particular questions of fact stated by the defendants, which verdict and findings are in the words and figures following, to-wit." Then follows the verdict and special answers, immediately at the end of which, and in close connection therewith, the following declaration appears: "Thereupon the defendants filed in writing their motion for a new trial, of which the following is a copy." Then follows a copy of the motion for new trial, and the reasons therefor. By reference to Webster's, Worcester's, and other Dictionaries, we find the word "thereupon" defined as follows: "Thereupon, (1) upon that or this. (2) On account of that; in consequence of that." In Anderson's Dictionary of Law, it is thus defined: "Thereupon,—without delay or lapse of time." From these authorities it will be seen that the word "thereupon" is employed to express a cause or condition, or is used as expressive of time. The record in this case shows the different stages of the trial, each succeeding the other in regular order, down to and including the return of the verdict of the jury. It then proceeds as follows: "Thereupon the defendants filed their motion in writing for a new trial." As employed here, and in this connection, we do not think the word "thereupon" refers to a cause or condition precedent, but that it is used as an adverb of time, and means, in the language of Anderson's work above referred to, "without delay or lapse of time;" and that, with the balance of the sentence which it introduces, it means that immediately upon the return of the verdict of the jury the defendants filed their motion for a new trial. With this construction upon the word "thereupon," it follows that the motion for new trial was filed in time, and the case is properly here for review.

The second contention of the plaintiffs is that the court erred in overruling their

demurrer to the evidence of the plaintiff below. Did the evidence of the plaintiff below establish a *prima facie* case against the defendants in the trial court? If it did not, then the court erred in its ruling; otherwise the ruling of the court was correct. The proper answer to this question must determine whether or not the plaintiff below had such a lease of the store-rooms occupied by him in the Windsor Hotel building, from Hill Bros., as would protect him in such occupancy. If his lease from the Hills was sufficient to protect him in his rights therein stipulated, then he had no cause of action against them, under the evidence, notwithstanding the fact that, ignorant of his rights under the law, he was induced by Passmore & Wiggins to take a new lease of them for the same premises at a higher rental; and the demurrer to the evidence should have been sustained. The Hills had a proper lease of the hotel building, except the store-rooms occupied at the time by Wand, from the owner, Allen Sells, for a period running three years yet, from the ensuing 1st of November, 1886. Said lease also contained the following clause: "Said Allen Sells agrees to lease said store room or rooms to said Horace P. Hill upon reasonable notice by said Hill, at a monthly rent of \$125 in advance; provided, always, that said Allen Sells can get peaceable possession of the same from the present occupant, and will connect said drug-store with the hotel by a door or other opening." Wand was in possession of said store-room as tenant of Allen Sells, the owner, and his term would expire on the 1st day of November, 1886. In June, 1886, Wand and the Hills had made the connection between the drug-store and hotel spoken of in the clause of the lease from Sells to the Hills above recited, and were in some trouble about the amount to be paid by Wand to the Hills for the privilege of said opening; he wishing said passage-way kept open to enable him to sell cigars to the guests of the hotel. Pending the discussion of said difficulty, and attempts to settle the same by Wand and the Hills, Allen Sells, the owner of all the property, and landlord of both Wand and the Hills, appears, and advised Wand to settle the passage-way matter with the Hills. He said to Wand that he (Sells) had leased the store-rooms to the Hills from the 1st of November following, and that if he (Wand) did not settle with the Hills they would put him out at that time. Sells left Wand, and after a short time returned, and told him that the Hills would settle the archway matter for \$25 per month, and give him a lease of the store-room from November 1st at \$150 per month, and the free use of the archway, and that he (Sells) would advise Wand to do that. Sells said he had leased to the Hills, and they could sublease to him. Wand concluded to do as Sells advised him, and settled up the archway dispute, and took a lease of the store-rooms of the Hills for the remaining three years of their lease of the hotel, to-wit, three years from November 1, 1886. Afterwards some time, the Hills sold out to Passmore & Wiggins, and assigned to them the hotel lease. Some time after Passmore & Wiggins got

possession of the hotel they obtained from Sells a lease of the store-rooms occupied by Wand. They then notified Wand to quit and surrender to them the rooms he occupied, and when Wand objected, and informed them of his lease, they told him it was not valid, because the Hills never had a lease of said rooms from Sells, and no authority to rent them to him. Passmore & Wiggins, however, offered to rent the rooms to Wand, but at a much higher rental per month. Wand, believing his lease not good, finally rented of Passmore & Wiggins at a rental of \$25 per month in advance of the amount he was to pay under his lease from the Hills. Would the lease from the Hills to Wand for the store-rooms, under all the circumstances under which it was made, have protected him in the possession thereof? We think it would. The lease from the Hills to Wand was a proper lease in writing for the premises occupied, and to be occupied, by Wand. The Hills actually had in writing, at the least, an agreement on the part of Sells to lease to them the rooms occupied by Wand for a stipulated rental, upon reasonable notice, provided he could get peaceable possession of the same from Wand. The evidence shows that he either had notice or it was waived. The peaceable possession of the premises was surrendered to him by Wand, and the opening between the drug-store and hotel had been made, so that all the conditions upon which Sells was to lease the premises occupied by Wand and the Hills were executed. At this juncture Sells, who has agreed in writing to lease to the Hills, appears and informs Mr. Wand that he has leased to the Hills, and advises, and, in the language of Wand, begs him to take a lease from the Hills, saying they have authority to sublet. In pursuance of Sells' advice and importunities, Wand does take a lease from the Hills, and remains in possession thereunder. After all that had transpired, could Mr. Sells have come forward and demanded and obtained possession of said rooms from Wand during the life-time of Wand's lease from the Hills, upon the ground that Hills had no authority to make the lease to Wand? We think not. Mr. Sells would be fully estopped from denying the authority on the part of the Hills to make the lease in question, and such lease would amply protect Mr. Wand in his rights thereunder, as against Mr. Sells. Having told Wand that he had leased the rooms to the Hills, that they had authority to sublet, and thus induced Wand to lease of the Hills, he (Sells) could never be heard to say that the Hills did not have authority to make the lease to him. The law will not tolerate such conduct, and declares whoever indulges in it forever estopped from denying the authority he has affirmed to exist. "In accordance with this case, it is now a well-established principle that where the true owner of property, for however short a time, holds out another, or allows another to appear, as the owner of, or as having full power of disposition over, the property, the same being in the latter's actual possession, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. • • •

Such rights do not depend upon the actual title or right or authority of the party with whom they have directly dealt, but are derived from the conduct of the real owner, which precludes him from disputing against them the existence of the title or right or power which he caused or allowed to appear to be vested in the party making the sale." Bigelow, Estop. 560. "Where the owner of property confers upon another an apparent title to or power of disposition over it, he is estopped from asserting his title, as against an innocent third party, who has dealt with the apparent owner in reference thereto, without knowledge of the claims of the true owner. The rights of such third party do not depend upon the actual title or authority of the one with whom he dealt, but upon the act of the owner, which precludes him from disputing the title or authority he has apparently conferred." McNeil v. Bank, 46 N. Y. 325.

These two authorities, which are so near alike, the one from Bigelow on Estoppel, and the other from a decided case in the New York courts, seem to be in point in this case. These authorities hold that, where the owner of property holds out another as having power of disposition or authority over the same for any purpose, he is estopped from denying the existence of such power of disposition or authority over the property, as against the rights of a person who has innocently dealt with him, who is thus given such apparent power of disposition or authority. Allen Sells not only told Wand that he had leased the store-rooms to the Hills, but told him they had power to sublet, and "begged" Wand to take a lease of the Hills. In this he not only held the Hills out to Wand as having full power of disposition of the rooms by lease, but advised Wand to take a lease from the Hills under the power of disposition he declared they possessed. Wand dealt with the Hills, believing from the representations of Sells that they had full power of disposition over the rooms he desired. Can it be that Sells could afterwards be heard to deny, as against Wand, that the Hills had full power of disposition over the store-rooms leased by him from them? We think not. If he could not deny the existence of such power in the Hills by word, could he by any act of his destroy, set aside, or annul the apparent power of disposition over said rooms existing in the Hills? Again we say, "No." "The rights of such third party do not depend upon the actual authority of the one with whom he dealt, but upon the act of the owner, which precludes him from disputing the authority he has apparently conferred." 46 N. Y., supra. So, in this case, the rights of Wand under the lease from the Hills did not depend upon any actual authority or power of disposition over the rooms leased in the Hills, but upon the apparent power of disposition thereof conferred upon them by Sells holding them out to Wand as rightfully possessed of such power. That is, it mattered not, so far as Wand's rights under his lease from the Hills were concerned, whether the Hills had a lease from Sells or not. After Sells had repre-

sented them to Wand as having one, with power to sublet, he could not deny that they did have one containing such authority. This being true, a subsequent lease from Sells to Passmore & Wiggins conferred upon them no greater rights as against Wand than Sells had, and no more power to deny the authority of the Hills to make the lease to Wand than Sells himself possessed. The Hills did not at any time dispute their power to lease to Wand, but all the time affirmed that their lease to Wand was a good one, and that it fully protected him in the enjoyment of his rights stipulated therein. As neither Sells nor Passmore & Wiggins could dispute the validity of Wand's lease from the Hills, we take it that such lease would have protected him in the enjoyment of the rights in said lease stipulated, against all the world. *Anderson v. Armstead*, 69 Ill. 452, holds with the two authorities above cited, and says the third party will be protected. "If one whose name is signed by another to a deed so far acknowledges the deed as to induce third persons to act on it as his, he may, without evidence in writing of an estoppel, be held precluded from subsequently denying the deed." *Goodell v. Bates*, 14 R. I. 65. "Where the owner or the person having an interest in property represents another as the owner, or permits him to appear as such, or as having authority over it, he will be estopped to deny such ownership or authority against persons who, relying on his representations or silence, have purchased or acquired interests in the property." 7 Amer. & Eng. Enc. Law, 18. "Privies are bound by or may take advantage of an estoppel *in pais*." *East Alabama R. Co. v. Tennessee & C. R. R. Co.*, 78 Ala. 274; *Karnes v. Wingate*, 94 Ind. 594; *Timon v. Whitehead*, 58 Tex. 290; *Wood v. Seely*, 32 N. Y. 105. "Where a person is estopped, his creditors attaching the property in question are estopped also." *Parker v. Crittenden*, 37 Conn. 148. A point is made that the special findings of fact are not sustained by the evidence, but that the jury, in making them, ignored all the evidence in the case relating to the questions to which their findings are answers. The findings are not only not supported by any evidence, but are directly against all the evidence relating thereto. With our view of the law of this case, this is all we care to say about the findings. We think the lease from the Hills to Wand protected Wand in the enjoyment of all the rights he stipulated for therein. It follows, then, that if Wand, having a lease that would protect him in his rights, allowed Passmore & Wiggins, or any one else, except the Hills, to persuade him to take a subsequent lease at a higher rental, the Hills were not to blame; and having done so, and paid a higher rental, he had no cause of action against the Hills therefor, and the demurrer to the evidence should have been sustained. It is recommended that the judgment of the district court be reversed, and the case remanded for new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 274)

WICHITA & C. RY. CO. v. GIBBS.

(Supreme Court of Kansas. Nov. 7, 1891.)

RAILROAD COMPANIES — STOCK-KILLING CASES—
PLEADING—EXCESSIVE VERDICT.

1. In an action brought under the railroad stock law of 1874, it is essential to allege that the stock was killed or injured in the county in which the action was brought; but where the plaintiff alleges that the defendant company owned and operated the road over and across the plaintiff's premises, in Reno county, and that the defendant killed the plaintiff's cow "on the said railway track of said defendant, and by the operation of said railway," and no other railroad or railway track is mentioned in the pleadings except the one through the plaintiff's farm, the pleadings sufficiently show that the accident occurred in Reno county, where the action was brought.

2. Where a railroad company owns and operates a railroad, the construction of which is not entirely finished, and, while so operating the road, permits the contractor who constructed the road to run his construction train over the road so owned and operated by the company, and which at the time is unfenced, and a cow is killed by the construction train in consequence of the omission to inclose the road with a fence where it could have been fenced, an action may be maintained against the railroad company to enforce the statutory liability for the loss of the cow. Railroad Co. v. Ewing, 23 Kan. 273; Railway Co. v. Wood, 24 Kan. 619.

3. The rejection of testimony which only tended to establish questions not in dispute is not error.

4. The verdict in the case found to be excessive, and the judgment is directed to be modified in accordance with the undisputed testimony as to the amount of damages sustained.

(Syllabus by the Court.)

Error from district court, Reno county; L. HOUK, Judge.

Action by W. E. Gibbs against the Wichita & Colorado Railway Company. Judgment for plaintiff. Defendant brings error. Modified.

J. H. Richards and C. E. Benton, for plaintiff in error. R. A. Campbell and W. E. Vincent, for defendant in error.

JOHNSTON, J. This action was brought by W. E. Gibbs against the Wichita & Colorado Railway Company to recover as damages the value of the plaintiff's cow and calf, alleged to have been killed by the negligence of the railway company in the operation of its railroad at a point where it was not fenced. The jury returned a verdict in favor of Gibbs for \$64.59, and judgment was rendered thereon. The railway company alleges numerous errors. The first complaint is that the amended bill of particulars upon which the case was tried failed to state facts sufficient to constitute a cause of action, and therefore the court erred in overruling the demurrer thereto. As the action was brought under the railroad stock law of 1874, it was essential to allege that the stock was killed or injured in the county in which the suit was commenced; and it is contended that there is an entire omission of any allegation in regard to the county in which the animal in controversy was alleged to have been killed. Although the allegations are not as explicit in this respect as they should have been, we think they sufficiently show that the accident occurred in Reno county,

where the action was brought. It is alleged that the defendant company owned and operated a road over and across the plaintiff's farm, describing it, in Reno county, Kan.; and that the defendant killed plaintiff's cow "on the said railway track of said defendant, and by the operation of said railway." No other railroad or railway track is mentioned in the pleading except the one through the plaintiff's farm, which is alleged to be in Reno county. It was found by the jury that the cow was killed by a train operated upon the line of the Wichita & Colorado Railway, but that it was killed by a construction train operated and controlled by Guy Phillips. He contracted to build the railway for the company for a stipulated consideration, and at the time the cow was killed the road was incomplete. The company complains because the court refused to receive in testimony the contract between the company and Phillips, which was offered for the purpose of showing that the killing occurred when the road was in the course of construction, and was still under the control of the contractor. The contract, however, contained nothing showing who was in control of the road at the time complained of, nothing which would shed any light upon the questions in dispute, and hence the testimony offered was immaterial. There was no question but that Phillips was the contractor engaged in building the road between Wichita and Hutchinson, nor any question that the construction of the road was not entirely finished. There is evidence, however, that the road was so far completed through the land of the defendant in error that it could be used by the company, and that the railway company was in possession of the road when the accident is claimed to have occurred. It was operating regular trains through his farm, and carrying both passengers and freight. It is claimed by the company that because the cow was killed by the construction train, which was operated and controlled by the contractor, it cannot be held liable for damages. The record shows that the company was the owner of the road, and was engaged in its operation. The fact that the road was incomplete, or that the company permitted Phillips to run a construction train over it, will not absolve it from liability. It was not inclosed with a lawful fence, and the statute casts a liability upon the company for cattle killed or injured by the engine or cars on such railway; "and that this does not require that such engine and cars be owned and operated by the company was decided in the case of Railroad Co. v. Ewing, 23 Kan. 273." Railway Co. v. Wood, 24 Kan. 619. See, also, Railway Co. v. Curl, 28 Kan. 622. Under the cases cited, the contention of the plaintiff in error cannot be sustained, and there was no error in refusing the instruction which was requested, or in denying the motion of plaintiff in error for judgment upon the findings of the jury.

The objections made against the admission of testimony are not good. The company contends that the verdict is not sustained by sufficient evidence. The tes-

timony, though very weak, tends to sustain the claim of the defendant in error that the cow was killed in the operation of the railroad; but we are unable to find testimony which justified the jury in awarding damages in the sum of \$64.59. The evidence of the plaintiff and his witnesses placed the value of the cow at \$35, and the question of damages for the loss of the calf was excluded from the consideration of the jury. The only evidence as to any attorney's fee fixed the sum of \$20 as a proper and reasonable charge. Gibbs, then, is entitled to \$35, the value of the cow, with interest at 7 per cent. on that sum from September 4, 1886, when the cow was killed, until July 18, 1888, when the verdict was returned, which was \$4.59, making the amount \$39.59; and this amount, with the \$20 attorney's fee, is all that should have been included in the verdict. The judgment must therefore be modified, and the case is remanded, with the direction to the district court to enter judgment in favor of Gibbs for \$59.59. The costs in this court will be divided between the parties. All the justices concurring.

(47 Kan. 247)

BOOGE v. SCOTT *et al.*

(Supreme Court of Kansas. Nov. 7, 1891.)

APPEAL—HARMLESS ERROR.

Where special findings are immaterial, a judgment will not be reversed, although there may be no evidence to support such findings.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Action by H. D. Booge against Walter Scott and George Steinmiller. Judgment for defendants, and plaintiff brings error. Affirmed.

H. H. Harris, for plaintiff in error. J. G. Slonecker, for defendants in error.

GREEN, C. This was an action in the nature of ejectment, brought by the plaintiff in error to recover lot 109 and the north half of lot 111, on Taylor street, in the city of Topeka. The district court found for the defendants, and the plaintiff brings the case here. The material facts are that the real estate sued for was a part of an Indian float, which was purchased by C. K. Holliday, president of a company known as the "Topeka Association," and became a part of the Topeka town-site. The land was divided into shares, and Milton C. Dickey became the owner of the property in question. On the 16th day of February, 1858, he conveyed the lot and a half described in the plaintiff's petition, with other land, to Benjamin J. Fisk, by a deed of special warranty, which was immediately recorded in the office of the register of deeds of Shawnee county. The Topeka Association authorized C. K. Holliday, as its trustee, to convey the legal title to the lots to the parties who had drawn them, or to their grantees. On the 10th day of July, 1858, Benjamin J. Fisk reconveyed the lots he had received a deed for to Milton C. Dickey, but described the lots as being situated on Tyler instead of

Taylor street. On September 24, 1859, Dickey conveyed the lots to Saunders R. Shepherd, who deeded the same to Joseph F. Cummings. On November 1, 1859, C. K. Holliday, as president and special trustee, conveyed the lots to Sarah Harlan Cummings, the wife of the grantee last named, and from her there is a regular chain of title to Walter Scott, one of the defendants in error. On the 24th day of September, 1887, Fisk conveyed the property to Milo J. Goss by quitclaim deed, and on the 7th day of November following Goss conveyed the same to the plaintiff in error, who had no notice that Fisk had attempted to convey this same property to any one else. This property was vacant until 1882, when it was occupied, and has been in the possession of the defendants ever since. The plaintiff had no actual notice that the deed from Dickey to Fisk was claimed to be a mortgage. The case was tried by the court, and, among others, the following special findings of fact were made: (1) On February 9, 1858, Milton C. Dickey borrowed from Benjamin J. Fisk \$100, and as security therefor Dickey made to Fisk a deed of conveyance for the land described in plaintiff's petition. (2) On July 10, 1858, Dickey repaid Fisk the \$100, and on the same day Fisk made a deed of conveyance of certain lots, but by mistake of the conveyancer in preparing the deed, or the register in recording the same, the lots described in the deed as recorded were designated as being on Tyler street, when in fact Fisk intended to convey to Dickey lots numbered 109, 111, and 113, on Taylor street. (3) That Fisk never owned lots numbered 109, 111, and 113, on Tyler street, in the city of Topeka; and that the Topeka Association, or C. K. Holliday as trustee, never executed to Dickey any writing whereby it or he agreed to convey to Dickey the lots described in the plaintiff's petition. The case made shows that the only evidence introduced to support the above findings of fact was the deposition of Benjamin J. Fisk, and a deed from him to Dickey. Complaint is made that Fisk, who testified by deposition, was permitted to give evidence as to what a certain diary which he had kept showed concerning the transaction between him and Dickey; that without this evidence these findings are unsupported, and with them eliminated from the case the judgment should be for the plaintiff. We do not think that the findings complained of are material. The plaintiff must recover upon the strength of his own title, which he alleges was a legal one. The common source of title was from Holliday, as trustee, who held the legal title until he conveyed to Cummings, from whom the chain is complete to the defendants; and there is no deed from the Topeka Association to the plaintiff or any of his grantors. Before the plaintiff can recover in an action in the nature of ejectment he must show that he has either an equitable or a legal title to the real estate. In this case the plaintiff relied upon a legal title, and we cannot say that the three special findings complained of are material; and therefore the judgment should not be reversed because there was no competent

evidence to support them. We recommend an affirmance of the judgment of the district court.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 250)

BOOGE v. HUNTOON et al.

(Supreme Court of Kansas. Nov. 7, 1891.)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

H. H. Harris, for plaintiff in error. C. M. Foster and J. G. Stonecker, for defendants in error.

PER CURIAM. The facts in the case of Booge v. Scott, 27 Pac. Rep. 992, just decided, and the questions of law maintained therein, being substantially the same as in this case, the judgment will be decided upon the authority of that case.

Judgment affirmed.

(47 Kan. 304)

SWARTZ v. LARGE et al.

(Supreme Court of Kansas. Nov. 7, 1891.)

MANDAMUS TO COUNTY COMMISSIONERS — RECOGNITION OF MEMBER OF BOARD.

Mandamus will not lie to compel one of the members of a board of county commissioners and the county clerk to recognize a person as county commissioner who has had a judgment rendered against him in a contest proceeding, instituted to determine who was elected to such office, and who has also been ousted from the office by a judgment of the district court in proceedings in *quo warranto*. The peremptory writ of *mandamus* should not issue unless there is a clear and specific legal right to be enforced, and there is no other particular and adequate legal remedy.

(Syllabus by Green, C.)

Commissioners' decision.

Application for *mandamus* by W. H. Swartz against J. A. K. Large and others. Writ denied.

J. K. Beauchamp and A. M. Mackey, for plaintiff. S. B. Bradford, B. E. Johnston, and M. B. Carskadon, for defendants.

GREEN, C. At the election held on the 4th day of November, 1889, in the third commissioner district of Stevens county, W. H. Swartz and J. W. Spoon were the only candidates for county commissioner, and each received 72 votes. The board of county commissioners, sitting as a board of canvassers, decided the tie by lot, and W. H. Swartz received the certificate of election, gave bond, took the oath of office, and entered upon the discharge of his official duties. On the 25th day of February, 1890, Spoon commenced contest proceedings against Swartz, under the provisions of chapter 36 of the General Statutes of 1889. On the 3d day of March, 1890, the contest court decided in favor of Spoon, and ordered a certificate of election to be issued to him, which was accordingly done, and he qualified as commissioner, and entered upon the discharge of his duties at the following April meeting of the board. Swartz had a bill of exceptions allowed, and took this contest case to the district court, where it is still pending and undetermined. On the 7th day of August, 1890, Spoon commenced an action

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in *quo warranto* in the district court of Stevens county against Swartz for the purpose of settling the question as to who was entitled to the office in dispute. This case was decided in favor of Spoon on the 22d day of January, 1891, and a final judgment was rendered against Swartz, forever enjoining him from setting up any claim or title to the office in question. This case was not appealed from. On the 20th day of November, 1890, the plaintiff applied for a writ of *mandamus* in this court to require the defendants, one of whom is commissioner and the other county clerk, to recognize him as county commissioner at all the meetings of the board, and at all other times until such office shall become vacant, or until the plaintiff shall be ousted from such office by due process of law. The alternative writ was allowed. The question for our determination is whether or not the peremptory writ of *mandamus* shall issue. Courts and text-writers have justly considered the remedy by *mandamus* as one of the highest known to our system of jurisprudence, and the peremptory writ issues only when the legal right to be enforced is clear and specific, and no other adequate remedy exists. The writ should never be granted in doubtful cases. If another action is pending in which the same questions may be determined, the court may, in its discretion, refuse *mandamus*. High, Extr. Rem. § 9, and cases there cited; Wood, Mand. 17; Smalley v. Yates, 36 Kan. 519, 13 Pac. Rep. 845; State v. Railway Co., 33 Kan. 176, 5 Pac. Rep. 772. When an office is already filled by a person who has been admitted and sworn, and is in by color of right, a *mandamus* is never issued to admit another person. The proper remedy for the applicant is by proceedings in *quo warranto*. Moses, Mand. 150; Bonner v. State, 7 Ga. 473; People v. Scrugham, 20 Barb. 302; King v. Mayor, 2 Term R. 259. In this case both parties claim the office. The defendant instituted contest proceedings, and obtained a decision in his favor. The plaintiff obtained a bill of exceptions, and the case is now pending in the district court of Stevens county. After obtaining a favorable decision in the contest court the defendant instituted proceedings in *quo warranto*, and obtained a judgment in the district court of Stevens county ousting the plaintiff from office. That judgment is a finality, unless reversed, and forever settles the question between the plaintiff and defendant as to who is entitled to the office. The plaintiff says that this suit is brought to compel Large, as commissioner, and Davis, as county clerk, to recognize Swartz as commissioner until the contest case and the action in *quo warranto* can be determined in this court. The extraordinary remedy of *mandamus*, as we have seen, will not lie for any such a purpose. It is recommended that the peremptory writ be denied, and that this action be dismissed, at the costs of the plaintiff.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 255)

SCHUSTER et al. v. KURTZ et al.

(Supreme Court of Kansas. Nov. 7, 1891.)

FRAUDULENT CONVEYANCES—EVIDENCE.

In an action to set aside a conveyance on the ground of fraud, proof was offered tending to show that the conveyance was executed when the grantor, a merchant, was financially embarrassed, and practically insolvent, to his clerk, who had no money with which to pay for the property, and who gave an unsecured promissory note for the entire consideration; also that there was an agreement between them to say to any inquirers that the consideration was the promissory note and \$500 additional, which the grantor was owing the grantee, when, in fact, no such indebtedness existed. Testimony was also offered to show that the grantee had been in the employment of the grantor for about a year, and had opportunity to know the condition of his business, and that he purchased the land without examining its quality or the condition of the title thereto. A demurrer was interposed to the testimony of the plaintiff; and it is held that the evidence, measured by the rule applicable when a demurrer is filed thereto, warranted the inference that the conveyance was voluntary, and made with the intent of both grantor and grantee to hinder and delay the creditors of the former, and that it was sufficient to resist the demurrer which was interposed.

(Syllabus by the Court.)

Error from district court, Lane county; S. J. OSBORN, Judge.

Action by Schuster, Hingston & Co. against Fred H. Kurtz and others to set aside a conveyance as fraudulent. Judgment for defendants. Plaintiffs bring error. Reversed.

T. J. Womack, Geo. S. Redd, and L. R. Lancaster, for plaintiffs in error. C. D. Pillsbury and C. E. Lobdell, for defendant in error.

JOHNSTON, J. On December 24, 1887, Fred H. Kurtz, a clothing merchant at Dighton, made an assignment. Prior to that time he had purchased large quantities of goods on credit, and, the credits having expired, the creditors had for some time been pressing him for payment of their claims. He owed Schuster, Hingston & Co., one of the creditors, about \$4,000, and they instituted an attachment suit against Kurtz, and caused a levy to be made on a quarter section of land in Lane county as the property of Kurtz. This action resulted in a judgment in favor of Schuster, Hingston & Co. for about \$4,200. A few days prior to the assignment Kurtz had executed a conveyance, purporting to convey to Z. J. Anthoni the land mentioned, which was afterwards attached at the instance of Schuster, Hingston & Co. Anthoni was a young man, who had been employed as a clerk by Kurtz for about a year prior to that time at a small salary. Schuster, Hingston & Co. brought this action to set aside the deed as fraudulent and void, and to subject the land to the payment of their judgment against Kurtz. After the plaintiffs had introduced their evidence, a demurrer to the same was interposed by the defendant and sustained by the court, and this ruling is assigned for error. Upon that demurrer the question before the court was not what portion of the conflicting evidence introduced was the most credible, nor how the conflict should be

determined; but it was, rather, whether, taking as true every part of the evidence which tended to prove plaintiffs' claim, did it make out a *prima facie* case in their favor? All reasonable inferences and presumptions should have been resolved in favor of the plaintiffs, as the demurrer admitted every fact and conclusion which the evidence most favorable to the plaintiffs tended to prove. *Bequillard v. Bartlett*, 19 Kan. 382; *Brown v. Railroad Co.*, 31 Kan. 1, 1 Pac. Rep. 605; *Wolf v. Washer*, 32 Kan. 533, 4 Pac. Rep. 1036; *Christie v. Barnes*, 33 Kan. 317, 6 Pac. Rep. 599; *Rogers v. Hodgson*, 46 Kan. —, 26 Pac. Rep. 732. Looking at the testimony offered in that light, we are led to conclude that the demurrer should have been overruled. Although there was no direct and positive proof of fraudulent motives on the part of Kurtz and Anthoni, there were many facts and circumstances indicating a want of good faith on the part of both. It appears that a short time before the making of the conveyance in question Kurtz bought large lots of goods from several creditors on short periods of credit. The claims had become due, and he was unable to pay them. Not only this, but it appears that at the time of the conveyance his liabilities exceeded his entire property and assets. Shortly before that time he had marked down the prices on his goods, and Anthoni had assisted him in doing so. The conveyance was made when he knew he was insolvent, and to Anthoni, who was unable to, and did not, pay him any money. Anthoni gave his note, payable in 30 days, for \$1,000, which was alleged to be the agreed consideration, and it does not appear that he had any resources with which to make payment at that time or in the near future. Kurtz was being pressed by his creditors, and was arranging to make an assignment at the time he made the conveyance. The deed was acknowledged on December 20, 1887, and he asked Riley to act as assignee for him, either on the 20th or 21st of the same month. For about a year previous to that time Anthoni was employed by Kurtz at a monthly salary of from \$25 to \$46, and in the absence of Kurtz he had charge of the store, and must have had considerable knowledge of the condition of the business. When Kurtz proposed to sell the land Anthoni replied: "I can't buy a setting hen." Notwithstanding this admission, he promised to pay \$1,000 within 30 days. After Kurtz had exchanged a deed for Anthoni's \$1,000 note, Kurtz told Anthoni to tell any one who inquired that the consideration was \$1,500, instead of \$1,000; and, further, that Kurtz had borrowed \$500 from Anthoni while he was in Kurtz's employment, and that Anthoni had given his note for the balance. No such indebtedness in fact existed, and Kurtz was only owing Anthoni at that time about \$13, which was due him upon his salary as clerk. As stated, Anthoni did not pay any cash, but gave his mere promise to pay; and it appears that at the time he did not have to exceed \$25 or \$30 in money, and the only property which he possessed was a little furniture, and a small piece of real property, which was heavily

incumbered. He did not have the ability to meet the \$1,000 note, and it was not paid at the time of the trial. He purchased without an examination of the land or any examination of the records with reference to the condition of the title. If every one of these facts and circumstances are taken in the light most favorable to the plaintiffs, it is difficult to reconcile the conduct of Kurtz and Anthoni with honesty of purpose in the transaction. Why did Kurtz, when he was in a failing condition, and in great need of money to satisfy importunate creditors, transfer property to one not able to pay him any money, and who had no prospects that he would be able to pay at the maturity of the promissory note which was taken? Why did he exchange property upon which his creditors had a right to depend, and which would have aided in relieving his financial stress, for an unsecured promissory note? Why did he not even take any security upon the land which he transferred? And, again, why did he advise the grantee to make a false statement as to his being indebted to him in the sum of \$500, and as to the consideration paid for the land? These and other matters which have been referred to can possibly be explained and shown to be consistent with honest motives, but they are so indicative of a purpose to hinder, delay, and defraud creditors as to require explanation. The circumstances surrounding the case are equally strong against the good faith and fairness of Anthoni. We think that, in the absence of explanatory proof, the court might reasonably infer that the conveyance was voluntary, and that the intent of both grantors and grantee was to hinder and delay the creditors of the former. Measured by the rule which must apply where a demurrer is interposed, the evidence must be held sufficient to resist the demurrer, and hence there must be a reversal of the judgment, and a new trial of the cause. All the justices concurring.

(47 Kan. 259)

STATE v. NULTY.

(Supreme Court of Kansas. Nov. 7, 1891.)

INTOXICATING LIQUORS—ILLEGAL SALES—INFORMATION—EVIDENCE.

Where a county attorney files an information charging the defendant with illegal sales of intoxicating liquor, and positively verifies the same, but files therewith, and by special averment makes a part thereof, a sworn statement of a private person who testified to illegal sales made to him by the defendant, and such person is not used as a witness at the trial, but the county attorney elects to rely on another sale made to a different person, and it sufficiently appears that at the time of the filing of the information neither the county attorney nor the person who made the sworn statement had notice or knowledge of the particular offense relied upon for conviction, the defendant should not be found guilty of such particular offense. The case of *State v. Brooks*, 33 Kan. 708, 7 Pac. Rep. 591, cited and followed.

(Syllabus by Simpson, C.)

Commissioners' decision. Appeal from district court, Chautauqua county; M. G. TROUP, Judge.

Information against Pat Nulty for the

illegal sale of intoxicating liquor. Defendant, having been convicted, appeals. Reversed.

W. P. Campbell, L. C. Whitney, and J. V. Beekman, for appellant. J. N. Ives, Atty. Gen., and J. D. McBrian, for the State.

SIMPSON, C. The appellant was convicted in the Chautauqua county district court of an illegal sale of intoxicating liquor. The information filed against him contained four counts. He was acquitted on the first, third, and fourth counts, and convicted on the second. The following language constituted a part of the information: "And said county attorney hereby refers to the testimony of Jeremiah Ellixson, hereto attached, marked 'B,' and makes the same part of this information, and each and every count thereof." The testimony of Ellixson referred to in the information was given under oath on the 19th day of April, 1890, in an inquiry made by the county attorney at his office. The statement recited that Ellixson "got some beer last fall, during the day of the Republican primary in Sedan, from Philip Smith and Pat Nulty. I paid Philip Smith once for it, and I think I got some once in which Pat Nulty made the change." At the close of the evidence the county attorney elected to rely on a sale made to one A. C. Hilligoss for a conviction on the second count. Hilligoss testified that he thought that some time during the year 1889 he bought more than once whisky by the drink from the appellant, and paid him 10 cents per drink for it. He also testified that he could not mention any one else that he saw buy intoxicating liquors from Pat Nulty in the year 1889. The information was filed on the 22d of August, 1890. The county attorney filed a written motion to be allowed to indorse the names of A. C. Hilligoss and others on the information on the 10th day of November, 1890. This motion is supported by an affidavit of the county attorney, in which he states that the testimony of said witnesses did not come to his knowledge in time to make this application at an earlier date. Ellixson was not a witness at the trial of the cause. Upon this state of facts we are compelled to reverse the judgment of conviction, and grant the appellant a new trial. It has been decided time and time again by this court that, when the information is verified by the oath of a private person, and not by the county attorney, the defendant should not be found guilty of any offense, except one of which the complaining witness had notice or knowledge at the time of verifying the information. *State v. Brooks*, 33 Kan. 708, 7 Pac. Rep. 591; *State v. Skinner*, 34 Kan. 265, 8 Pac. Rep. 420; *State v. Hescher*, 46 Kan. —, 26 Pac. Rep. 1022. It is true that this information is sworn to positively by the county attorney, but he filed with it and makes a part of it by special and express averment the sworn statement of Ellixson, and by this means presents to the defendant the particular offense with which he is charged. If he had not done this, but had relied on his own positive verification of the information, the judgment of conviction on the second count would not

have been open to the objection made. But his positive verification is based upon and justified by the sworn statement of Ellixson, incorporated into and made a material part of the information, and hence the information charges the particular offense of selling to Ellixson, as detailed in the sworn statement. It is shown conclusively by the record that, at the time the information was filed, neither Ellixson nor the county attorney had any notice or knowledge of the sale to Hillgoss. Ellixson does not make any statement of such a sale in his examination. The county attorney in November makes a motion to have the name of Hillgoss indorsed on the information, for the reason that the knowledge that Hillgoss would swear to an illegal sale had just come to his knowledge. So that it appears that at the time the information was filed notice or knowledge of the sale to Hillgoss was not had or possessed either by Ellixson or the county attorney. Apart from the reasons given by Justice VALENTINE in the Brooks Case, if we permit this practice we would encourage county attorneys to file a bill of particulars against a defendant, and at the trial prove an entirely different offense,—one of which the defendant had no notice or no time to prepare a defense. The other reasons urged for a reversal need not be considered. The judgment must be reversed, and a new trial granted. The county attorney can obviate this objection by filing another information, if the offense is not barred by the statute of limitation.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 291)

STATE V. ESTLINBAUM.

(Supreme Court of Kansas. Nov. 7, 1891.)

INTOXICATING LIQUORS—ILLEGAL SALES—COMPETENCY OF JUROR—EVIDENCE.

1. In a criminal prosecution, where the defendant was charged with keeping and maintaining a nuisance, to-wit, a place for the sale of intoxicating liquors, a person who was called as a juror was shown by his own testimony to be a member of an organization called the "Good Templars," whose object was as follows: "He did not understand the special object of such organization to be the enforcement of said [prohibitory liquor] law among others, but to promote temperance among its members by moral suasion." *Held*, that such person was not shown by the foregoing to be incompetent to serve as a juror in the case.

2. And in such a case it is not error for the trial court to permit the prosecution to introduce evidence of other sales of intoxicating liquors than those of which the county attorney or the prosecuting witness had knowledge prior to the commencement of the prosecution.

(Syllabus by the Court.)

Appeal from district court, Geary county; R. B. SPILMAN, Judge *pro tem*.

Prosecution of John Estlinbaum for the illegal sale of intoxicating liquor. From a judgment of conviction, defendant appeals. Affirmed.

John O. Marshall and James Ketner, for appellant. J. N. Ives, Atty. Gen., and Jas. V. Humphrey, for the State.

VALENTINE, J. This was a criminal prosecution instituted originally before a justice of the peace of Geary county upon a complaint containing two counts, the first charging the defendant, John Estlinbaum, with the offense of unlawfully selling intoxicating liquors, and the second charging him with the offense of unlawfully keeping and maintaining a common nuisance, to-wit, a place where intoxicating liquors were kept for unlawful sale and barter. The defendant, having been tried, found guilty, and sentenced in the justice's court, appealed to the district court, where he was again tried, and he was there acquitted upon the first count, and convicted upon the second; and he was then sentenced upon the second count to pay a fine of \$200, and to be imprisoned in the county jail for 30 days, and the nuisance was ordered to be abated; and the defendant now appeals to this court. In this court the defendant claims that the court below erred as follows: (1) In overruling his challenges of the jurors Durland and Cormack; (2) in permitting evidence to be introduced on the part of the state tending to show sales of which the prosecuting witness had no knowledge; (3) in giving the sixth and ninth instructions. We shall consider these alleged errors in their order.

1. The challenges of the jurors Durland and Cormack were for cause, and for the alleged reason that they were not impartial jurors, for the following reasons: It appeared that they belonged to an organization called the "Good Templars," the object of which, as shown by the testimony of one of such jurors, was as follows: "He did not understand the special object of such organization to be the enforcement of said [prohibitory liquor] law among others, but to promote temperance among its members by moral suasion." This certainly does not show that the jurors were not impartial, or that they could not try the case impartially, or that they were in any manner incompetent. These two jurors were afterwards challenged peremptorily, and their places were then filled with other jurors, and the defendant afterwards exhausted all his peremptory challenges.

2. The second and third alleged errors present only one question of law, and that is whether the state had the right, in order to prove the charge set forth in the second count of the complaint, to prove that the defendant made other sales of intoxicating liquors at the place charged to be a nuisance than those of which the prosecuting witness had knowledge. Such evidence was introduced, and the defendant claims that it was incompetent and prejudicial, and cites the case of *State v. Brooks*, 33 Kan. 708, 7 Pac. Rep. 591, as authority for his contention. That case, however, can have no possible application to the present case. The *gravamen* of the offense charged in the Brooks Case was the unlawful selling of intoxicating liquors; while the *gravamen* of the offense charged in the present case is the unlawful keeping of a place for the sale of intoxicating liquors. In that case it was absolutely necessary to prove an

unlawful sale, and to prove the very one which was in effect charged in the complaint; while in the present case it was not necessary for the state to prove any sale, but only to prove that the defendant kept a place for the unlawful sale of intoxicating liquors; but, in order to prove that the defendant kept such a place, and that the liquors were in fact kept for sale, the state had the right to prove that the defendant actually sold them at such place. The case of *State v. Reno*, 41 Kan. 674, 684, 21 Pac. Rep. 803, No. 8 of the syllabus and the opinion, is applicable to this case, and is against the defendant's contention. In a case like the present, the state may prove as many sales as it chooses, provided they are unlawful sales of intoxicating liquors made by the defendant at the place charged, and it makes no difference whether the county attorney or prosecuting witness knew of such sales or not prior to the commencement of the prosecution. The judgment of the court below will be affirmed. All the justices concurring.

(47 Kan. 288)

LAPHAM *et al.* v. STATE *ex rel.* BEEBE,
County Attorney.

(Supreme Court of Kansas. Nov. 7, 1891.)

COUNTY BOARD—PAYMENT FOR COUNTY PRINTING
—INJUNCTION.

Under paragraph 1655 of the General Statutes of 1889 the board of county commissioners of the several counties of the state have exclusive control over the county printing; and, in the absence of fraud or collusion, injunction will not lie to restrain the board from paying for such county printing at legal rates, although other parties may have been willing and did offer to do the county printing for a less sum than the amount fixed by law for doing such work.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Harper county; GEORGE W. MCKAY, Judge.

Action by the state on relation of T. J. Beebe, county attorney, etc., against J. M. Lapham and others. Judgment for relator. Defendants bring error. Reversed.

Geo. E. McMahon and Love & Snelling, for plaintiffs in error. T. J. Beebe, Shepard, Grove & Shepard, H. C. Finch, and H. Parke Jones, for defendant in error.

GREEN, C. This was an action for an injunction, brought upon the relation of the county attorney against the board of county commissioners of Harper county. The petition alleged that on the 9th day of January, 1891, the board of county commissioners entered into a contract with J. R. and S. C. Hammond, the proprietors of the Anthony Journal, by the terms of which it was agreed that for the period of one year then next ensuing all the county printing should be done by the Hammonds at legal rates; that at the time of the making of such contract the board of county commissioners had bids from two other newspaper publishers to do the county printing at much less than legal rates. It was claimed by the relator that the contract was void, for the reason that the board of county commis-

sioners had no authority to make the same. The defendants below filed a general demurrer to the petition, which was overruled by the district court. The defendants elected to stand on their demurrer, and declined to plead further to the petition, and objected to the granting of a temporary injunction, for the reason that, if the plaintiff was entitled to any order, it was a permanent injunction. A temporary injunction was granted, and this is assigned as error, together with the overruling of the demurrer of the defendants to the petition of the plaintiff below, upon the ground that the petition did not state facts sufficient to constitute a cause of action against the defendants, or to entitle the relator to any relief. Was the board of county commissioners authorized to make a contract at legal rates? Paragraph 1655 of the General Statutes of 1889 reads: "The board of county commissioners of the several counties of this state shall have exclusive control of all expenditures accruing either in the publication of the delinquent tax list, treasurer's notices, county printing, or any other county expenditures." This section originally contained this proviso: "Provided, that all county printing shall be let to the lowest responsible bidder;" but in 1872 it was amended by dropping off this proviso. By the statutes of 1868 the commissioners had the exclusive control of the county printing, with the condition that it must be given to the lowest responsible bidder. The legislature removed this restriction in 1872, but the board of county commissioners still had exclusive control of the county printing. In construing this section of the statutes in the case of *Quigley v. County of Sumner*, 24 Kan. 293, Mr. Justice BREWER said: "Referring again to the section defining the powers of county commissioners, we find that it gives them 'exclusive control of all expenditures.' Does this mean simply that they are to audit accounts? Or does it not also give them power in the creation of debts? It seems to us, the latter. It grants general control as to county expenditures, both as to items, amounts, and parties." In *Mooers v. Smedley*, 6 Johns. Ch. 28, which was a case to enjoin the supervisors of a town from the allowance of certain bounties for wolf scalps to non-residents of the town, and alleging that the bounties were confined to residents, and that by such action of the supervisors the tax of the plaintiff was greatly augmented, the law gave the supervisors authority "to examine, settle, and allow all accounts," etc. Chancellor KENT said: "I cannot find by any statute or precedent or practice that it belongs to the jurisdiction of chancery, as a court of equity, to review and control the determination of the board. * * * This power implied and required the exercise of sound judgment. * * * This is not the case of a private trust, but the official act of a political body; and in the whole history of the English court of chancery there is no instance of the assertion of such jurisdiction as now contended for." *Walton v. Develing*, 61 Ill. 201; *Darst v. People*, 62 Ill. 306. It is important to ob-

serve that courts of equity do not interfere by injunction for the purpose of controlling the action of public officers constituting inferior *quasi* judicial tribunals, such as boards of supervisors, commissioners of highways, and the like, on matters properly pertaining to their jurisdiction; nor will they review and correct errors in the proceedings of such officers. High, Inj. § 1311; Mechem, Pub. Off. § 991. Section 21 of article 2 of the constitution provides that "the legislature may confer upon tribunals transacting the county business for the several counties, such powers of local legislation and administration as it shall deem expedient." Under this power the legislature has given to the board of county commissioners the exclusive control of the county printing. The statute fixes the legal rates for such printing, so that the only existing restriction is that the printing cannot be let at more than the amount fixed by law. The only question, therefore, is whether or not there should be an interposition upon the part of the courts when it appears that the printing might have been done for a less sum. The board of county commissioners not only possesses the discretionary power, but the statute has given to that tribunal the exclusive control over the subject-matter; and, in the absence of actual fraud, courts cannot interfere with such discretion and power. As we have seen, up to 1872 the statute required that the county printing should be let to the lowest responsible bidder. It was then changed by striking out this proviso, so that the control was practically unlimited, except as to the compensation, which was fixed by law. "Before 1872 they must, since they may, let to the lowest bidder. Taking away a limitation in the one direction does not place a limitation in the opposite. Taking away a restriction upon full discretion leaves the discretion full and free, and does not superimpose another restriction." *Quigley v. County of Sumner*, supra. The case at bar is different in principle from the case of *First Nat. Bank v. Board of Com'rs of Barber Co.*, 43 Kan. 648, 23 Pac. Rep. 1079. In that case the board made another contract; in this, no effort has been made by the board to change the terms of the agreement, or to designate any other paper in which the county printing should be done, hence we think that, in the absence of any fraud or collusion, the determination of the board is conclusive in all matters wherein it has the exclusive power, and such discretionary power has been exercised with an honest purpose and within the authority conferred upon it by the constitution and the laws enacted thereunder; the courts having no authority to interfere by injunction so as to control such discretionary power, or restrain the board from the payment of claims for printing already done under contract. We think the preliminary injunction should be discharged. We recommend a reversal of the judgment of the district court.

PER CURIAM. It is so ordered; all the justices concurring.

LAWSON V. ZIMMERMAN et al.

(Supreme Court of Kansas. Nov. 7, 1891.)

COUNTIES—COUNTY AUDITOR.

After chapter 87 of the Laws of 1891 was passed and took effect, there could be no such officer as county auditor in any county with less than 45,000 inhabitants, except in Leavenworth county.

(Syllabus by the Court.)

Application by John H. Lawson for *mandamus* to G. M. Zimmerman and others. Writ denied.

Swigart, Martin & Crawford and Whiteside & Gleason, for plaintiff. C. M. Williams, for defendants.

VALENTINE, J. This was an action of *mandamus* brought originally in this court on June 11, 1891, by John H. Lawson against G. M. Zimmerman, W. P. D. Flemming, and William Potter, the board of county commissioners, and S. J. Morris, the county clerk, and J. M. Anderson, the county treasurer, of Reno county, to compel the defendants to recognize the plaintiff as the county auditor of Reno county. The General Statutes of 1889 contain an article, No. 13, divided into paragraphs or sections numbered from 1840 to 1859, under which the plaintiff claims that he is and has been since April 30, 1890, the duly appointed and qualified county auditor of Reno county. In March, 1891, the following act of the legislature, being chapter 87 of the Laws of 1891, was passed, approved, and published as follows: "Section 1. That section 1840 of the General Statutes of Kansas of 1889 be amended so as to read as follows: Par. 1840. That, in all counties containing over forty-five thousand inhabitants, there shall be appointed by the district court of the judicial district in which such county is located one person, who shall have the qualifications of an elector, and who shall be styled county auditor, and who shall hold his office for the period of two years, unless sooner removed by the appointing power, for cause, according to existing laws, and, if so removed, the cause thereof shall be made part of the record of the board of county commissioners: provided, that, for the purposes of this act, Leavenworth county shall be deemed to have over forty-five thousand inhabitants, and the office of county auditor is retained in that county. Sec. 2. Section 1840 of the General Statutes of 1889 be and the same is hereby repealed. Sec. 3. This act shall take effect and be in force from and after its publication in the official state paper. Approved March 10, 1891. Published in the official state paper, March 20, 1891." The original section (1840) was the same as the new section, (1840,) except as follows: In the original section the words "twenty-five" occurred where the words "forty-five" occur in the new section; the word "embraced" occurred in the old section where the word "located" occurs in the new; and the original section did not contain the proviso appended to the new. It is admitted that Reno county contains 25,000 inhabitants, but that it does not contain 45,000 inhabitants. It is claimed by the defendants that, admitting for the purposes of this

case that the plaintiff would be county auditor of Reno county except for said chapter 87 of the Laws of 1891, still that in that case said chapter 87 abolished the office of county auditor in Reno county and in all other counties of less than 45,000 inhabitants, except in Leavenworth county, and that as the office itself is abolished no one could fill the same; while the plaintiff claims that, under the general saving clause contained in paragraph 6687 of the General Statutes of 1889, he will retain the office for two years from the time when he first took the same, or up to April 30, 1892. Said saving clause reads as follows: "The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed. The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment." The most of the decisions of this court construing this saving clause will be found cited in the case of *In re Tillery*, 43 Kan. 188, 191, 23 Pac. Rep. 162. We do not think that this saving clause has the effect to continue the plaintiff in office. He had no vested right in the office, or in anything pertaining thereto, (*Harvey v. Commissioners*, 32 Kan. 159, 4 Pac. Rep. 153; *In re Hinkle*, 31 Kan. 712, 3 Pac. Rep. 531;) and the statute passed in 1891 clearly shows that the legislature intended to abolish the office at once. They provided that the act of 1891—and this means the whole of the act—should take effect and be in force from and after its publication in the official state paper, and provided that section 1840 of the General Statutes of 1889, the section under which the plaintiff claims his office, should be repealed; and the repeal seems to be absolute, and to take effect at once; and by the proviso the legislature declared that in Leavenworth county the office of county auditor should be "retained," indicating by the strongest of implications that it was the intention of the legislature that in every other county with less than 45,000 inhabitants the office of county auditor should be immediately abolished. This seems to be clear beyond all question. The writ of *mandamus* prayed for in the present case will be denied, and judgment will be rendered in favor of the defendants, and against the plaintiff for costs. All the justices concurring.

(47 Kan. 242)

STATE v. ZIMMERMAN.

(Supreme Court of Kansas. Nov. 7, 1891.)

FORGERY—INFORMATION—EVIDENCE.

1. It is proper to charge, in separate and distinct counts of the same information, the forgery of a promissory note, and the selling, exchanging, or uttering of it as genuine.

2. Where, in a criminal case, a defendant is charged with the forgery of a note and mortgage, and the state and the defendant both prove upon the trial that a former mortgage offered in evidence was signed by the party whose signature is charged to have been forged, such former mortgage is competent evidence to be examined

by the jury for the purpose of comparing the genuine signature upon the former mortgage with those disputed and denied, to assist in determining whether the latter were genuine.

(Syllabus by the Court.)

Appeal from district court, Barber county; GEORGE W. MCKAY, Judge.

Information against Charles Zimmerman for forgery. From a judgment of conviction he appeals. Reversed.

Martin & McNeal and E. Sample, for appellant. J. N. Ives, Atty. Gen., and Lyman W. De Geer, for the State.

HORTON, C. J. Charles Zimmerman was charged, in an information filed by the county attorney of Barber county, in the first count thereof, with having, on the 7th day of December, 1889, forged the name of Mrs. Ella Lee to a promissory note of the sum of \$450. The second count charged Zimmerman with having sold, delivered, and exchanged the note with intent to defraud Mrs. Ella Lee, knowing the same to be a forgery. The third count charged Zimmerman with having forged the name of Mrs. Ella Lee to a chattel mortgage purporting to secure the note of \$450. Zimmerman was convicted upon the first and second counts, and sentenced to imprisonment and hard labor in the penitentiary of the state for the period of one year on the first count, and also one year on the second count; the second term of imprisonment to commence upon the expiration of the first term. From the conviction and sentence of the trial court an appeal is taken to this court.

1. It is contended that the trial court erred in overruling the motion to quash the information, and also in refusing to compel the state to elect upon which count it would rely for conviction. The first count of the information for forgery in the third degree was drawn under section 129 of the act relating to crimes and punishments. This offense is punishable, under the statute, by confinement and hard labor not exceeding seven years. The second count of the information for forgery in the fourth degree was drawn under section 133 of the act relating to crimes and punishments. This offense is punishable by confinement and hard labor not exceeding five years, or by imprisonment in the county jail not less than six months. In support of the contention that the information should have been quashed, or the state compelled to elect, it is said that the information contains counts for separate and distinct felonies, and that these felonies are not necessarily punishable under the statute in the same way. The authorities fully sustain the information. It was decided in *State v. Hodges*, 45 Kan. 390, 26 Pac. Rep. 676, that "several separate and distinct felonies may be charged in separate counts of one and the same information, where all of the offenses charged are of the same general character, requiring the same mode of trial, the same kind of evidence, and the same kind of punishment." See *Whart. Crim. Pl. & Pr.* § 235 et seq., and cases there cited; 1 *Bish. Crim. Proc.* (3d Ed.) §§ 424, 450, 451; 4 *Amer. & Eng. Enc. Law*, 754-756; *State v. Bancroft*, 22

Kan. 170; *State v. Chandler*, 31 Kan. 201, 1 Pac. Rep. 787; *State v. Goodwin*, 33 Kan. 538, 6 Pac. Rep. 899; *State v. Fisher*, 37 Kan. 404, 15 Pac. Rep. 606. In this case, all of the counts are under different sections of the same statute, and relate to the same transaction. It matters not that the offenses alleged in the different counts are of different grades, and call for different punishments. So long as all of the counts relate to the same transaction, there can be no objection to the union of such counts in the same information. It is proper to charge in an information the forgery of a note or other written instrument, and the selling or uttering of the same as genuine. *State v. McPherson*, 9 Iowa, 53; *State v. Nichols*, 38 Iowa, 110; *Hoskins v. State*, 11 Ga. 92; *Barnwell v. State*, 1 Tex. App. 745; *Maxw. Crim. Proc.* 52, 53.

2. Upon the trial, Zimmerman claimed in his defense that the note of \$450, and the chattel mortgage given to secure the same, were signed by Mrs. Ella Lee, and therefore genuine. He also claimed that the note and mortgage were given in renewal of a promissory note dated the 12th day of June, 1889, of \$319, and secured by a chattel mortgage of the same date. This note and chattel mortgage he attempted to introduce in evidence before the jury, for the purpose of allowing them to be compared with the signatures to the note and mortgage of \$450, which he was charged with having forged. The state introduced Mrs. Ella Lee, who testified that she never signed the note of \$450, or the mortgage given to secure the same. She further testified that on the 7th of December, 1889, Charles Zimmerman called to see her about signing the note and mortgage of \$450; that he told her this note and mortgage were to renew the note and mortgage of the 12th of June, 1889. She then testified that she and her husband gave the mortgage of the 12th of June, 1889; that it was drawn up at her house, and that she signed the mortgage, but did not sign the promissory note which the mortgage was given to secure. During her examination, Mrs. Lee repeated the statement that she signed the mortgage of June 12, 1889. Mr. Zimmerman testified that Mrs. Lee signed both the note and mortgage of June 12, 1889. As the signature of Mrs. Ella Lee upon the mortgage of June 12, 1889, was testified to as genuine, both upon the part of the state and upon the part of the defendant, it must be admitted to be genuine. The trial court, upon the testimony, ought to have allowed the prior mortgage to be introduced in evidence for the purpose of comparing Mrs. Ella Lee's signature on that instrument with the signature on the note and mortgage described in the information. The jury ought to have been allowed to examine the admitted signature for the purpose of comparison. In *Macomber v. Scott*, 10 Kan. 335, it was said that: "It will generally be conceded that comparisons may be had between writings in the following cases: Where the writings to be used as specimens are admitted to be genuine, and generally where no collateral issues can arise; where the different writings are already properly in evidence,

or properly in the case for some other purpose; where the witness has seen the person whose signature is disputed previously write, although it has been only his name; where the witness has personal knowledge of the person's writing from some other proper source, as from having seen writing which the person in the course of business has acknowledged to be his, or has acted on as his, etc.; where writings are of such antiquity that living witnesses cannot be had to prove them, and such writings are not so old as to prove themselves; and probably in many more cases which we might mention." On account of the rejection of competent and important evidence offered by the defendant, the judgment must be reversed, and the cause remanded for a new trial. All the justices concurring.

(47 Kan. 287)

ANDERSON *et al.*, County Commissioners,
v. STOUFER.

(Supreme Court of Kansas. Nov. 7, 1891.)

COUNTY COMMISSIONERS — SETTING ASIDE CONTRACT — INJUNCTION.

1. Mere threats by county commissioners to ignore and set aside a contract let by them for the county printing, in the absence of any official offer or attempt to ignore or set aside such contract, do not constitute grounds for an injunction.

2. Some step must be taken by the commissioners as a board towards setting aside the contract before an injunction can issue.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Seward county; THEODORE BOTKIN, Judge.

Action by A. K. Stoufer against C. S. Anderson, and others, county commissioners and others, for an injunction. Judgment for plaintiff. Reversed.

J. N. Ives, Atty. Gen., and J. K. Beauchamp, for plaintiff in error. John H. Pitzer, for defendants in error.

STRANG, C. November 17, 1890, a proposition to do the county printing for Seward county was submitted to the county board of that county as follows: "By the Arkalon News and the Liberal Lyre to the Hon. Board of County Commissioners of Seward County, Kansas: The above-named papers hereby offer and agree to do all the county printing for the county of Seward and state of Kansas from the 17th day of November, 1890, to December 31, 1892, at the following rates, viz.: All the printing, including commissioners' proceedings, clerk's notices, treasurer's notices, and sheriff's notices, at \$1 per square of 250 ems nonpareil, all job-work that can be furnished by said paper at prices paid for said work by the county clerk, for a period dating from July 1, 1890, to November 17, 1890. Tax-lists at legal rates allowed. The Arkalon News to be named as the official paper, the editor of which shall furnish all necessary affidavits. A. K. STOUFER, Arkalon News. H. V. NICHOLS, Liberal Lyre." Which said proposition was accepted by the board. January 17, 1891, the board of county commissioners, again being in session, on motion ratified the former action of the commissioners in accepting said proposition, and

thereby entered into a contract with the plaintiff below, as editor and proprietor of the *Arkalon News*, and H. V. Nichols, as editor and proprietor of the *Liberal Lyre*, whereby they agreed that the plaintiff below and said H. V. Nichols should jointly do the county printing for said county upon the terms contained in said proposition for the period from November 17, 1890, to December 31, 1892. April 11, 1891, the plaintiff below commenced this action, and alleged in his petition that the said board of county commissioners, "without any cause or excuse therefor, are threatening and are about to ignore and set aside their said contract, and award said public printing to the *Liberal Lyre* and the *Springfield Republican*." A temporary injunction was allowed by the judge of the district court of said county. Afterwards, on the 9th of June, 1891, when the case came up for trial in the district court, the defendant objected to any further proceedings in the case for the reason that the petition did not state facts sufficient to entitle the plaintiff to any relief. The objection was overruled, and the injunction made perpetual. Motion for new trial was filed and overruled. The case is here for review, and the question is, does the petition state facts sufficient to entitle plaintiff below to any relief? We think it does not. The petition simply alleges that the defendants, the county commissioners, are threatening and are about to ignore and set aside the contract for the county printing, entered into by them with the plaintiff below and the editor of the *Liberal Lyre*. It nowhere discloses any action by said commissioners as a board calculated in any way to interfere with said contract. It sets forth no resolution, motion, or other official action of said commissioners, nor even the calling of a meeting for the purpose of rescinding said contract. Mere threats by the commissioners to ignore and set aside the contract without any offer or attempt to do so do not constitute grounds for an injunction to restrain them from so doing. *Bridge Co. v. County of Wyandotte*, 10 Kan. 326; *Challiss v. City of Atchison*, 39 Kan. 276, 18 Pac. Rep. 195; *Troy v. Commissioners, etc.*, 32 Kan. 507, 4 Pac. Rep. 1009; *Andrews v. Love*, 46 Kan. —, 26 Pac. Rep. 746. It is recommended that the judgment of the district court be reversed, and case remanded for new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 277)

In re HYDE.

(*Supreme Court of Kansas. Nov. 7, 1891.*)

DISTRICT COURTS—JURISDICTION—CLAIM AGAINST DECEDENT'S ESTATE.

The district courts of this state have jurisdiction to entertain and enforce a demand against property of a deceased person who, by will, devoted almost his entire estate to the perpetuation of a banking business in which he had been engaged during his life-time, and whose continuance he committed to executors named in his will; the claim sought to be enforced in the district court having originated in the course of the banking business, some years after the death

of the testator, and after all debts of the testator existing at the time of his death had been paid.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Petition by A. A. Hyde for a writ of *habeas corpus*. Petitioner remanded.

Campbell & Dyer and *W. E. Stanley*, for petitioner. *Brooks & Coffin*, for respondent.

SIMPSON, C. This is an application in *habeas corpus*, brought in this court by A. A. Hyde, who claims to be illegally restrained of his liberty by an order of commitment made by the court of common pleas of the county of Sedgwick as for contempt to enforce an order of that court. Hyde is one of the administrators with the will annexed of the estate of one W. C. Woodman, deceased. The order of the court of common pleas that he refused to obey, on which refusal the order of commitment was issued, was one made in an action against the executors of the estate of Woodman, commanding him to deliver to a receiver appointed in that action the property described in the order, belonging to said estate. The material facts are that in his life-time W. C. Woodman was engaged in the banking, loan, and investment business in the city of Wichita, under the name of W. C. Woodman & Son; otherwise, the First Arkansas Valley Bank. W. C. Woodman was the sole owner of the business. Woodman died on the 27th day of December, 1887, having disposed of all his property by a will that was probated on the 14th day of January, 1888; and on that day Elizabeth Woodman, his widow, and W. S. Woodman and U. S. Grant Woodman, his sons, were qualified as executors, having been named as such in the will. By the express provisions of the will all the property, real, personal, and mixed, of the deceased, except the homestead occupied by the family, was devised to the executors in trust as the capital of the First Arkansas Valley Bank of W. C. Woodman & Son, and the executors were directed to continue said banking business for the term of 20 years after the death of the said W. C. Woodman. It seems from a cursory examination of the terms of the will that the conduct and management of the banking business to be conducted by the executors was one of almost unlimited discretion on their part. There seem to be no limitations or conditions attached to the control of the executors in the transaction of the business; nor does it appear but that the whole estate, of every kind and description, except some specific legacies, was to be used as the capital and resources of the banking business. From the date of their qualification until the 4th day of February, 1891, these executors continued the business, receiving deposits, making loans and investments, buying and selling exchanges, and in detail transacting a general banking, loan, and investment business. On the 4th day of February, 1891, the bank, being unable to pay its current obligations, closed its doors, and suspended payment, owing debts exceeding the sum of \$100,000; all of said debts having been

contracted since the death of W. C. Woodman. All indebtedness of Woodman contracted prior to his death had been paid, and the statutory period within which such claims could have been presented and allowed in the probate court expired before the 4th day of February, 1891. After the failure of said bank on the 4th day of February, 1891, and prior to the commencement of the action in which the order of commitment was issued, the said Elizabeth Woodman and the other executors named in the will were removed by the probate court of Sedgwick county, and the petitioner, A. A. Hyde, and U. S. Grant Woodman were appointed administrators with the will annexed of said estate, and took possession of the assets thereof, and proceeded to the administration of said estate. After the appointment of said administrators, a large number of the creditors of said estate, whose claims grew out of the banking business as conducted by the executors, presented their claims for allowance in the probate court. On the 23d day of April, 1891, the National Bank of Kansas City, Mo., filed its petition in the court of common pleas of Sedgwick county on its own behalf and on behalf of all other creditors of said bank similarly situated, against the executors, administrators with the will annexed, legatees, and other beneficiaries under the will, praying the appointment of a receiver to take charge of the assets of said bank. On the 13th day of June, 1891, one W. D. Keyes, who claims to be the owner of a judgment recovered by T. B. Wall, one of the depositors of said bank, against Elizabeth Woodman, W. S. Woodman, and U. S. Grant Woodman, individually and as executors and trustees, by leave of the court filed his cross-petition in said action, and joined with the plaintiff therein in the application for the appointment of a receiver in that cause. On the 24th day of June, 1891, the district court appointed one Frank W. Oliver receiver in the action of the bank against Elizabeth Woodman et al. of all the assets, real estate, property, equitable interests, things in action, chattels, and effects of every kind and nature belonging or in any way appertaining to the estate of W. C. Woodman & Son, otherwise the First Arkansas Valley Bank of Wichita, Kan., vesting the said Oliver with all the rights and powers of a receiver in equity, and ordering the defendants to turn over all the property in their possession or under their control to him. Oliver filed his oath on the 27th day of June; filed a bond approved by the court on the same day. Hyde, as one of the administrators with the will annexed, refused to turn over property of the estate in his possession to the receiver. He was attached for contempt, and filed his reasons in writing for his failure to comply with the order of the court, and was adjudged guilty of contempt, was fined \$100, taxed with the costs of the attachment proceedings, and committed to the jail of Sedgwick county until he obeyed the order of the court and surrendered to the receiver the property of the estate in his custody. The commitment was dated on the 25th day of July, 1891. The principal

contention of the attorneys for the petitioner is based upon the assertion that the court of common pleas of Sedgwick county had no jurisdiction to entertain the action of the Kansas City Bank and to appoint the receiver; that the claim of the bank was one against the estate of Woodman, of which the probate court of Sedgwick county had primary and exclusive original jurisdiction. On the other side it is said that the claim of the Kansas City Bank is one against the Woodman bank, and not against the Woodman estate; that it originated long after the death of Woodman, and is not a claim properly against the estate, and is of that nature that the machinery, practices, and usages of the probate court are not sufficient to properly enforce.

This preliminary statement appears to be sufficient to develop the consideration that must control us, which is that, if the court of common pleas of Sedgwick county had, upon the facts presented, jurisdiction of the subject-matter of the action, its order appointing a receiver, however erroneous, will not be reviewed by this court on a *habeas corpus* proceeding. In *re Morris*, 39 Kan. 28, 18 Pac. Rep. 171; In *re Petty*, 22 Kan. 477; In *re Dill*, 32 Kan. 668, 5 Pac. Rep. 39. This court has said, in the case of *Shoemaker v. Brown*, 10 Kan. 383, that "the district courts of the state have jurisdiction concurrent with the probate courts over certain matters relating to the estates of deceased persons; and in the exercise of their equity or chancery jurisdiction the district courts may entertain and determine actions to foreclose mortgages where the defendant is a legal representative of a deceased person, or any other proper proceeding over the estates of deceased persons, and over the legal representatives and heirs of decedents." It is further said in that case that the district courts of this state have full chancery powers, and that courts of equity have always had a paramount jurisdiction over the estates of deceased persons; that these powers are not taken away by the statutes regulating the duties and defining the powers and jurisdiction of the probate court. This has been maintained in many other cases, and it must be held to be settled law in this state that when certain facts exist, growing out of the liabilities of a deceased person, or, it may be, arising out of the settlement of the estate of a deceased person, wherein the probate court, by reason of its limited jurisdiction and restricted authority, cannot protect and enforce the rights of all persons involved in the controversy, the equitable power of the district court may be invoked in their behalf. In the case of *Kansas City Bank v. Elizabeth Woodman et al.*, out of which this controversy grows, there are two questions that sufficiently support the jurisdiction of the district court to entertain the action. One of these is that the claim sued upon is not one against the estate of W. C. Woodman, deceased, because it originated long after his death, in the course of that banking business that he sought to perpetuate by the terms of his will, and, strictly speaking, is a claim against the assets of the bank, these assets being

held in trust for banking purposes; and the other is that it is an admitted fact on the hearing that all claims against the estate of Woodman that existed at the time of his death have been paid. It seems apparent that by the terms of the will the property enumerated in that instrument was a fund set aside and solely appropriated to the banking business to be conducted after his death by his executors; that it was a trust fund for the purpose of carrying on such banking business, and by the clearest principles of equity the debts contracted in the operation of such business must be paid out of such funds to the exclusion of other debts or to the claims of the heirs. The ordinary proceedings of the probate court are inadequate to the task of determining the many questions that may arise, and its restricted process and limited powers are not sufficient for all the purposes of such a litigation. The primary jurisdiction in such cases rests with the district court. The court of common pleas of Sedgwick county having jurisdiction of the persons and the subject-matter of the action, we cannot say that the order appointing a receiver was absolutely void, and it follows that the petitioner must be remanded to the custody of the sheriff.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 264)

In re BUSH.

(Supreme Court of Kansas. Nov. 7, 1891.)

INFANTS—ADOPTION—RES ADJUDICATA.

1. An order of the probate court permitting the adoption of an infant child is conclusive, so far as that court is concerned. Such court has no further jurisdiction in the matter.

2. The evidence in this case examined, and held not to justify this court in depriving the respondents of the custody of the child sought to be taken from them.

(Syllabus by Strang, C.)

Commissioners' decision. Petition for a writ of *habeas corpus*. Writ denied.

M. E. Matthews, for petitioner. J. F. Guernsey and W. C. Webb, for respondent.

STRANG, C. September 19, 1887, there was born to Ida May Potter, a single woman of 17 years of age, a female child, afterwards named Bessie May Potter. The said Ida May Potter being unable to properly support and care for her said child, and being anxious to procure a home for her, went, on the 28th day of August, 1888, before the probate judge of the county of Stafford, where she resided, and relinquished all her claim to said child to Calvin and Anna McClure, husband and wife, who at the same time appeared before said probate court, and expressed a desire to adopt said child as their own. The probate court, after investigating the fitness of said persons, Calvin and Anna McClure, to take the care and custody of said infant, and to assume the relation of parents thereto, made an order permitting and confirming the adoption of said infant by said Calvin and Anna McClure, which said order shows that the probate court, and all the parties to the adoption of Bessie

May Potter by Anna and Calvin McClure, complied with all the provisions of the statute relating to the adoption of minor children; after which the infant was taken by the McClures to their home, and from that time until the present has been cared for and supported as their own. On the 17th day of June, 1891, said Calvin and Anna McClure were cited to appear before the probate court of Stafford county, before which a hearing was then had, and a decision rendered by said court setting aside the order under which Bessie May Potter was adopted by Calvin and Anna McClure, because the mother of said child, Ida May Potter, who in the mean time had intermarried with a man named Bush, was not 18 years of age when she appeared before the probate court on the 28th day of August, 1888, and assented to the adoption of said infant by the McClures. The probate court also found that the mother of said child should pay the McClures some \$300 in money for the care and support of said child, and made such finding a part of its judgment, and required said sum to be paid before its judgment should take effect. The petitioner, not wishing to pay the \$300, and the respondents not wishing to accept the \$300 and surrender the child, then abandoned the probate court as a forum through which to obtain possession of her child, and filed her petition for a writ of *habeas corpus* in this court, July 22, 1891. Thereupon an order issued, requiring the respondents to produce the body of said infant before the court, September 8, 1891. The respondents answered the petition, setting up the record of the probate court of Stafford county, showing the adoption of said infant by them, and alleging that they had and retained the custody of said child as their own, by virtue of the proceedings and order of adoption of said probate court. A reply was filed by the petitioner, setting up the proceedings had in the probate court June 17, 1891. This court is of the opinion that the proceedings before the probate court of Stafford county on June 17, 1891, as set up in the reply of the petitioner, were wholly without jurisdiction, and therefore entitled to no weight in the consideration of this case. That the case is to be considered as having the same *status* here, now, as it would have if such proceedings had not been had, and the petitioner was here for her writ alleging the matters contained in her petition. That being true, the only question for our consideration is, does the evidence establish the fact that the respondents are not proper persons to have the custody, care, and education of said infant? If it does, it is our duty to take such infant from the possession of the respondents, and place it in proper hands, looking principally to the future welfare of the infant in so doing. The record shows that the infant was less than one year old when the respondents adopted it, and that it is now four years of age. Doubtless, having taken the child when it was so young, and having kept it so long, and adopted it as their own, the McClures have become greatly attached to the child; and, indeed, their evidence

shows that they entertain the same affection for it that they would had the child been born their own. Under such circumstances, it would take a strong showing to induce this court to take the child from them for any purpose. While this court would not hesitate to remove the child from their custody if we were satisfied the respondents were not proper persons to bring her up, yet it would require a stronger showing than under many other circumstances and conditions to induce us to take the child from persons who adopted it as their own, by permission of the court, at such a tender age, when it required so much attention and care, and after they have cared for it for a period of three years and over. In this case, however, an examination of the evidence shows no occasion for the intervention of this court in behalf of said infant. The evidence shows the respondents cherish it as their own; that they are possessed of a home of their own, wherein they live about like the average of farming people in this new country; that they are members, in good standing, of a Christian church; and, so far as we are able to gather from the evidence, are themselves, as individuals, among the average of the people in the community where they reside. We believe these people who have this child are giving her, and will continue to give her, reasonably good care, and a reasonably good home. If at any time in the future, during the infancy of Bessie May, the respondents should fail in their duty to her to such an extent as to render it necessary and proper for this court to interfere in her behalf, we would, upon our attention being called thereto, promptly relieve them of the custody of the child, and place her in other hands. It is recommended that the writ be denied.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 262)

In re **HARMER.**

(Supreme Court of Kansas. Nov. 7, 1891.)

INTOXICATING LIQUORS—ABATEMENT OF NUISANCE—INJUNCTION—CONSTRUCTIVE CONTEMPT—PUNISHMENT.

1. The judge of the district court has no authority to make an order at chambers abating a place as a nuisance where intoxicating liquors are alleged to have been sold in violation of law, and forever enjoining the owner, lessee, or keeper from maintaining such place.

2. It is error for a court or judge in any case to proceed against a person for a constructive contempt without an affidavit or information in writing containing a statement of facts constituting the contempt charged, being first filed in court or submitted to the judge.

(Syllabus by Green, C.)

Commissioners' decision. Petition by Bruce Harmer for a writ of *habeas corpus*. Petitioner discharged.

F. H. Foster, for petitioner. *T. J. Beebe*, for respondent.

GREEN, C. The petitioner, Bruce Harmer, alleges that he is restrained of his liberty and unlawfully imprisoned by the sheriff of Harper county under an order of

commitment for contempt of court for violating an injunction order issued by the judge of the district court of said county. It appears from the petition for the writ that the county attorney filed an information in the district court of Harper county against J. H. Selfert and others, charging them with keeping and maintaining a common nuisance in Harper City; that no warrant was issued for the arrest of the petitioner. On the 10th day of June, 1891, the information so filed was presented to the district judge of the county, who, without further evidence, made the following order: "In the District Court of Harper County, Kansas. The State of Kansas, Plaintiff, vs. J. H. Selfert, Bruce Harmer, et al., Defendants. Order. And now, on this 10th day of June, 1891, this cause coming on for hearing upon the application of T. J. Beebe, county attorney of said county, and it appearing from the evidence that a common nuisance is being and has been maintained on the following described premises, to-wit, the rooms of the old Rothwell real-estate building, situated upon the south half of lot twelve, block twenty-one, Harper City, Harper county, Kansas, by the unlawful keeping and selling and keeping for sale intoxicating liquors in and upon said described premises, contrary to law, it is therefore ordered and adjudged by the court that the sheriff of Harper county abate said nuisance kept and maintained upon said premises, and that the owner, lessee, and keeper of said above-described building and place be forever enjoined from keeping and maintaining said nuisance in and upon said above described premises." On the 29th day of August, 1891 the petitioner was brought before the district judge, and informed that he was charged with violating the above order, when the further hearing of the proceeding was postponed until the 31st of August, at which time he appeared, when certain affidavits were read, showing that beer had been sold by the petitioner on the premises described in this order. Evidence was given by the sheriff that he had never served any order on the petitioner, or otherwise notified him of the order made by the judge. Upon this showing the judge found the petitioner guilty of contempt of court for violating the above order, and ordered him committed to the jail of Harper county for 30 days and to pay a fine of \$100. The order of the district judge declaring certain premises to be a common nuisance, and that the same should be abated by the sheriff, was void. The statute nowhere gives the district judge authority to make such an order. Paragraph 2533, Gen. St. 1889, declares all places where intoxicating liquors are sold in violation of law to be common nuisances, and upon the judgment of a court having jurisdiction finding such places to be a nuisance the sheriff or other officers named shall be directed to shut up and abate such places. The petitioner had no notice served upon him of any order made by the district judge, and could not, therefore, have been guilty of any contempt. Another reason might be assigned why the proceedings against the petitioner for contempt were void. The alleged viola-

tion of the order was not in the presence of the judge or the court, and therefore, if such order had been authorized, it could only be characterized as constructive contempt, and the judge or court would have no authority to proceed against him without an affidavit or information containing a statement of the facts constituting the alleged contempt being first submitted to him or filed in court. *State v. Henthorn*, 46 Kan.—, 26 Pac. Rep. 937. The petitioner should be discharged.

PER CURIAM. It is so ordered; all the justices concurring.

(47 Kan. 250)

In re SHORT.

In re CROSS.

(Supreme Court of Kansas. Nov. 7, 1891.)

COUNTIES—CORPORATE EXISTENCE—COLLATERAL ATTACK.

1. Where a public organization of a corporate or quasi corporate character has an existence in fact, and is acting under color of law, and its existence is not questioned by the state, its existence cannot be collaterally drawn in question by private parties.

2. Therefore, where a county has been organized under valid laws, and is acting as a county under valid laws, and a judgment is rendered in such county, or by virtue of proceedings commenced in such county, against an individual, providing for his imprisonment because of his having committed a public offense in such county, and under the judgment he is imprisoned, such individual cannot, in a proceeding in *habeas corpus*, attack the validity of the existence of such county upon the ground merely that "the plats, field-notes, and records of the original government survey, now on file in the office of the auditor of state in the state capitol," show that the county as originally created by the legislature, and as afterwards organized, and as now existing, contains only 430½ square miles in area, while the constitution requires that no county shall be organized with a less area than 432 square miles. Const. art. 9, § 1.

(Syllabus by the Court.)

Petitions by Cordella Short and by James Cross for writs of *habeas corpus*. Writs denied.

Fred C. Thomas, for petitioners. *Milton Brown*, for respondent.

VALENTINE, J. Two proceedings in *habeas corpus* have been instituted in this court, in each of which the validity of the organization of Garfield county is attempted to be challenged. In the first proceeding it appears that Mrs. Cordella Short was regularly charged in the district court of that county, upon a criminal information, with committing the offense of manslaughter in the first degree. She obtained a change of venue from that court to the district court of Hodgeman county, where she was tried and convicted, and sentenced to confinement in the penitentiary for the term of five years; and it is now claimed that, because of the alleged invalidity of the organization of Garfield county, she is unlawfully restrained of her liberty by George H. Case, the warden of the state penitentiary. In the other case, the petitioner, James Cross, was charged before a justice of the peace of Center township, in Garfield county, with committing the offense of assault

and battery, and was tried and convicted and sentenced to pay a fine of \$2.50, and to stand committed to the county jail until such fine and the costs of suit should be paid; and he now claims that he is unlawfully restrained of his liberty by J. B. Newbold, a constable of said Center township. It appears that the county of Garfield was created as a territorial entity by an act of the legislature which took effect on March 23, 1887, (Laws 1887, c. 81, § 6; Gen. St. 1889, par. 1491.) It was to contain, and now contains, 12 congressional townships of land, to-wit, townships Nos. 21, 22, and 23 S., of ranges Nos. 27, 28, 29, and 30 W. This creation of the county had nothing to do with its subsequent organization as a political entity, a municipal county, a corporation or quasi corporation. Afterwards, and on April 16, 1887, the county was duly organized as a municipal county, a corporation, under the statutes of Kansas as they then existed. Comp. Laws 1885, pars. 1400-1412; Gen. St. 1889, pars. 1577-1593. It was divided into six municipal townships according to existing law, one of which was the above-named Center township. A full set of county and township officers was duly elected, and they qualified and served; a county-seat was duly established, and named "Eminence;" and since that time the county has had a full and complete county organization as a county municipality; and it has in fact and at all times since acted as a duly and legally organized and existing county, under the statutes of Kansas relating to counties and county officers, (Comp. Laws 1885, cc. 25, 26, pars. 1429-1736; Gen. St. 1889, cc. 25, 26, pars. 1611-1929;) and it has at all times since and by all persons been recognized as a duly and legally organized and existing county, and it is an organized and existing county *de facto*, if not such *de jure*. It will therefore be seen that the county was created territorially by a statute, and it was afterwards organized as a municipality under the statutes, and has since acted and continues to act as such under the statutes; and no question has ever been raised, or could fairly be raised, as to the legality or validity of any one of these statutes, except as to the first,—the one by which the county, or rather its territorial boundaries, was originally created. The petitioners, however, now raise the question of the validity of said first-mentioned statute in these proceedings. Or, in other words, they claim that the act creating Garfield county territorially, or in other words defining its boundary lines, is unconstitutional and invalid, although no claim is made that the statutes under which the county was organized, and the statutes under which the county has been and is now acting as a county, are subject to any such infirmities, or that they are not amply sufficient and adequate to authorize counties to organize and to act under them as legal and valid county organizations. The parties, however, agree that the county of Garfield in area contains only "four hundred and thirty and one-half square miles, and no more, as shown by the plats, field-notes, and records of the original government survey, now on

file in the office of the auditor of state in the state capitol;" while the constitution requires that no county shall be organized with a less area than 432 square miles. Const. art. 9, § 1. It is therefore claimed by the petitioners, upon the facts as set forth in the aforesaid agreement, and upon no other facts or evidence, that the organization of Garfield county was and is absolutely void; that the county now has no legal or valid existence as a municipal entity; that, therefore, the aforesaid criminal prosecutions were and are absolutely void; that the judgments rendered therein, to-wit, the judgment rendered by the district court of Hodgeman county against Cordella Short, and the judgment rendered by the justice of the peace of Garfield county against James Cross, were and are absolutely void, and therefore that the imprisonment of these two persons is without authority of law and illegal. We do not think, however, that the question of the validity or invalidity of the organization of Garfield county can be raised in these collateral proceedings or in any collateral manner. The question can be raised only by the state in an action or proceeding in the nature of *quo warranto*. Where a public organization of a corporate or quasi corporate character has an existence in fact, and is acting under color of law, and its existence is not questioned by the state, its existence cannot be collaterally drawn in question by private parties. Dill. Mun. Corp. (4th Ed.) § 43a; Cooley, Const. Lim. (6th Ed.) pp. 309, 310. See, also, the following cases: Voss v. School-Dist., 18 Kan. 467; School-Dist. v. State, 29 Kan. 57; Back v. Carpenter, Id. 349; Ritchie v. Mulvane, 39 Kan. 241, 255-257, 17 Pac. Rep. 830, 839; Mendenhall v. Burton, 42 Kan. 570, 22 Pac. Rep. 558; Tisdale v. Town of Minonk, 46 Ill. 9; Kettering v. City of Jacksonville, 50 Ill. 39; Town of Geneva v. Cole, 61 Ill. 397; City of St. Louis v. Shields, 62 Mo. 247; Inhabitants of Fredericktown v. Fox, 84 Mo. 59; State v. Fuller, 96 Mo. 165, 9 S. W. Rep. 583; People v. Maynard, 15 Mich. 463, 470; Stuart v. School-Dist., 30 Mich. 69; Bird v. Perkins, 33 Mich. 28; Arapahoe Village v. Albee, 24 Neb. 242, 38 N. W. Rep. 757; Town of Henderson v. Davis, 106 N. C. 88, 11 S. E. Rep. 573; Speck v. State, 7 Baxt. 46; Ford v. Farmer, 9 Humph. 152, 159, 160; Sherry v. Gilmore, 58 Wis. 324, 17 N. W. Rep. 252; Austrian v. Guy, 21 Fed. Rep. 500; Hill v. City of Kahoka, 35 Fed. Rep. 32. See, also, the cases of Worley v. Harris, 82 Ind. 493; State v. Leatherman, 38 Ark. 81. And as to officers *defuncto*, see the following cases: Ex parte Strang, 21 Ohio St. 610; Brown v. O'Connell, 36 Conn. 432; State v. Carroll, 38 Conn. 449; Laver v. McGlathlin, 28 Wis. 364; Cole v. Black River Falls, 57 Wis. 110, 14 N. W. Rep. 906; Burt v. Railroad Co., 31 Minn. 472, 18 N. W. Rep. 285, 289.

As before stated, the county of Garfield was organized under valid laws, it is now acting under valid laws, and the only question which we are now asked to consider is whether the statute defining its boundaries is valid or not. It is claimed that the statute does not give to it territory enough by $1\frac{1}{2}$ square miles, or 960 acres, to make it valid. We do not think that we

can consider this question in these proceedings. But we might say, however, that the plats and field-notes of the original government survey are not conclusive evidence upon this subject. They are only *prima facie*. They may be rebutted or impeached as to their accuracy and correctness, and the fact that the legislature and the governor have created the county, and that it has been duly organized and is now acting as a county, is some evidence against their correctness, provided they show what the parties have agreed they show in this case. The question, however, as to whether the county has sufficient area or not, cannot be litigated in either of these present *habeas corpus* proceedings. The writ of *habeas corpus* prayed for will therefore be denied, and a judgment will be rendered in each case against the petitioner for costs. All the justices concurring.

In re RABBITT. (47 Kan. 332)

(Supreme Court of Kansas. Nov. 7, 1891.)

Petition by Mike Rabbitt for a writ of *habeas corpus*. Writ denied.

T. A. Pollock, for petitioner. Henry McGrew and D. H. Morse, for respondent.

PER CURIAM. This is an application in this court for a writ of *habeas corpus* on the part of Mike Rabbitt, who claims that he is unlawfully restrained of his liberty in pursuance of a judgment rendered by a justice of the peace of Kansas City, Kan., sentencing him to imprisonment in the county jail of Wyandotte county for the period of three months for the offense of unlawfully carrying a deadly weapon. The only ground upon which it is claimed that the imprisonment is unlawful is that there is no such city or township as that of Kansas City, Kan., and this for the reason that the statute under which the city was organized is unconstitutional and void, and therefore it is claimed that there can be no such officer as justice of the peace of such city or township, and therefore that the judgment or sentence under which the applicant is restrained of his liberty is absolutely void. We think the principles enunciated and decided in the two cases of In re Short and In re Cross, 27 Pac. Rep. 1005, (just decided,) will control the decision in this case. See, also, the authorities therein cited. Kansas City is a city and township *de facto*, if not *de jure*. It is now acting under valid statutes and valid laws,—acts relating to cities of the first class; and the question of its legal organization or legal existence cannot be raised in this manner. The application for the writ of *habeas corpus* will be denied.

In re WILLIAMS. (47 Kan. 333)

(Supreme Court of Kansas. Nov. 7, 1891.)

Petition by James Williams for a writ of *habeas corpus*. Writ denied.

T. A. Pollock, for petitioner. Henry McGrew and D. H. Morse, for respondent.

PER CURIAM. The above case is decided adversely to the petitioner upon the foregoing authority of In re Rabbitt, *abi supra*.

(47 Kan. 355)

GOODRICH *et al.* v. BOARD OF COUNTY COMMISSIONERS OF ATCHISON COUNTY.

(Supreme Court of Kansas. Nov. 7, 1891.)

HIGHWAYS.—OPENING OVER MORTGAGED LAND.—OBJECTIONS TO EVIDENCE.—TRIAL.

1. On the trial of a cause a defendant may object to the reception by the court of any evi-

dence under the petition, although his demurrer to the same petition has previously been overruled; and the court commits no error by entertaining and passing upon said objection.

2. For all purposes of establishing and opening highways under our statute through mortgaged premises the mortgagor in possession is to be regarded as the owner of the land.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Atchison county; ROBERT M. EATON, Judge.

Action by J. C. Goodrich and Ann B. Sutherland against the board of county commissioners of Atchison county. Judgment for defendants. Plaintiffs bring error. Affirmed.

J. T. Allensworth, for plaintiffs in error. Wuggener, Martin & Orr, and T. M. Pierce, for defendant in error.

STRANG, C. September 24, 1881, one Silas H. Hamilton and Francis B. Hamilton gave Alexander M. Sutherland a mortgage upon a quarter section of land in Atchison county, to secure the sum of \$5,300, which mortgage was placed upon record October 9, 1883. Sutherland duly assigned said mortgage to J. C. Goodrich, and on the same day Goodrich assigned an interest in said mortgage of the value of \$2,318.05 to Ann B. Sutherland, both of which assignments were placed of record on the 12th day of October, 1883. January 8, 1884, a petition was filed with the county clerk of Atchison county, asking the board of county commissioners to cause a public road to be laid out, in part across and over the land covered by the mortgage above described. March 25, 1884, the road prayed for was established across said land, the viewers assessing damages to the said land in the sum of \$250 and awarding the same in the name of T. C. Beard, agent of the mortgagors. Afterwards said T. C. Beard appeared before the board of county commissioners, and procured an increased allowance of damages in the sum of \$100, making a total award of damages of \$350, which was paid to said Beard. During the time when said road was being laid out, as well as when the award of damages was paid to Beard, the mortgagors were in possession of the land, and had been ever since the execution of the mortgage. February 3, 1885, the mortgage was foreclosed in the United States circuit court, and the land sold by a master to the plaintiff J. C. Goodrich for the sum of \$2,500. April 11, 1887, this action was begun by the plaintiffs to recover the amount of said award from the board of county commissioners of Atchison county, claiming that they were entitled to the damages as mortgagees of the land, and alleging that said damages were wrongfully paid by said board to the agent of the mortgagors. March 7, 1888, defendants filed a demurrer to the petition, which demurrer was overruled by the Hon. S. H. GLENN, judge *pro tem.*, the regular judge being disqualified to sit in the case. Answer and reply were afterwards filed, and the case came on for trial February 5, 1889, before the regular judge of the district, Hon. ROBERT M. EATON, who in the mean time had been elected and qualified. A jury was ob-

tained, and a witness placed upon the stand, when the defendants objected to any evidence being received under the petition for the following reasons: "(1) Because this court has no jurisdiction to try this case; (2) because the petition does not state facts sufficient to constitute a cause of action against the defendant." This motion was sustained. A motion for a new trial was then filed, which, upon a hearing, was overruled, and the case brought here for review.

The first question presented is raised by the contention of the plaintiff that the action of the court in overruling the demurrer to the petition settled the law of the petition so far as the trial court was concerned; that, having overruled a demurrer to the petition, thus holding the petition to state a cause of action, the trial court could not subsequently in the same trial, when evidence was offered under the petition, sustain an objection to the reception of such evidence on the ground that the petition did not state facts sufficient to constitute a cause of action; that, when the court overruled the demurrer to the petition, such action of the court was a final adjudication in favor of the plaintiff as to the sufficiency of the petition, and, if the defendant felt aggrieved thereby, its only remedy was by appeal, and not by objecting to the introduction of the testimony. We do not think this position is tenable. This is a jurisdictional question, and we think the defendant may raise it at every stage of the trial. Though the court has overruled a demurrer, a party defendant may, in the same trial, object to the reception of evidence under the petition, and thus again secure the attention of the court to and challenge its judgment upon the same question raised by the demurrer; and if the court overrules its objection it may still raise the question before the final judgment against it by a motion for a new trial. The object of a motion for a new trial is to call the attention of the court to alleged errors, that the court may have an opportunity to correct its own errors, if it concludes, even after the trial, it has made any, or suffered any to be made. If it is proper to permit the defendant to argue the question raised by the demurrer anew on a motion for a new trial, we know of no reason why it is not proper to raise and argue the question by an objection to the reception of evidence under the petition. The object sought to be obtained is the same. By filing an answer the defendant waives his right to demur, but he does not thereby waive his right to raise the same question that he could have raised by demurrer to the petition by objecting to the reception of evidence under the petition. We have examined the cases cited. The case of *Sanford v. Weeks*, 39 Kan. 649, 18 Pac. Rep. 823, instead of supporting the position of the plaintiffs, seems to militate against such position, so far as it is in point. In that case *Sanford* demurred to the petition, which was overruled, and no exception taken. He then objected to the reception of evidence under the petition, which was the same practice that prevailed in this case, and which is now ob-

jected to. That case also holds that, if the defendant had taken exceptions to the overruling of his demurrer, the question raised thereby might have been reviewed by this court. There is nothing in the case of *Railroad Co. v. Estes*, 37 Kan. 229, 15 Pac. Rep. 157, that supports the contention of the plaintiff. That case simply holds that a party who seeks to have a ruling on a demurrer to a petition reviewed by this court may either stand on his demurrer, and bring the case direct to this court for review, or take his exception to the ruling, file his answer, and go to trial, and, after trial, bring his case here, and have the ruling on the demurrer reviewed. That a defendant, whose demurrer to the petition is overruled, may except and stand on his demurrer, and come to this court at once, and have the question settled as to the sufficiency of the petition, is not denied in this case. That question is not involved in the case. The case cited, however, settles the question that he need not stand on his demurrer, and come at once to this court, but may take his exception, answer over, and at the end of the trial come to this court and have the question raised by his demurrer reviewed. The cases cited from Ohio, Nebraska, and New York, relate simply to the question as to whether a defendant whose demurrer has been overruled can answer over, and afterwards at the end of the trial have the ruling on his demurrer reviewed by the superior court. What the law may be in those states upon that question is not very material, as that precise question is not raised in this case, and, if it were, the cases in 37 Kan., 15 Pac. Rep., and 39 Kan., 18 Pac. Rep., above cited, settle the law so far as this state is concerned.

The next and more important question in this case is: "Are the plaintiffs, mortgagees out of possession, owners," within the meaning of paragraph 5477, General Statutes of 1889? Mr. Lewis, in his work on Eminent Domain, (section 324,) enters upon the discussion of the general subject as to whether mortgagees are necessary parties to condemnation proceedings by saying that "the authorities on the question are not only conflicting, but very unsatisfactory." The same author adds: "The cases go almost entirely upon the language of the statutes, as though it was a matter entirely within the control of the legislature." So, in our examination of the question, we have found the authorities thereon inharmonious, and depending very largely upon the language of the statutes, and upon the law relating to mortgages in the states where the decisions are found. In those states where the common-law doctrine relating to mortgages prevails, where the mortgagee is held to be the possessor of a defensible title to the land, it is generally held that he is a necessary party to the condemnation proceeding; while in states where the mortgage is held to be a mere security creating a lien upon the property, but vesting no estate in the mortgagee, it is generally held that the mortgagee is not a necessary party to condemnation proceedings. In some of the states, where

the decisions depend upon the language of statutes, such language is broader than it is in others. In some states the statute simply requires notice to be given to the "owner," while in other states the language of the statute in relation to notice requires it to be given to the owner, mortgagee, lienholder, lessee, or other person having an interest therein. The law of mortgages is well defined in our state. In *Chick v. Willetts*, 2 Kan. 389, a mortgage is declared to be a mere security, creating a lien upon the property, but vesting no estate whatever in the mortgagee, either before or after condition broken. "It gives no right of possession, and does not limit the mortgagor's right to control the property." In *Vanderslice v. Knapp*, 20 Kan. 647, Justice VALENTINE, writing the opinion, says "that a mortgagor of real estate has the right to the possession of the mortgaged property, and to sever and remove timber, wood, sand, earth, coal, stone, or anything else therefrom, and to sell the same, unless it unreasonably impairs the mortgage security. When it unreasonably impairs the mortgage security, the remedy of the mortgagee is not at law, but in equity; not replevin to recover the property severed from the realty, but generally injunction to restrain the commission of waste upon the realty." Upon this question of the law of mortgages, see *Clark v. Reyburn*, 1 Kan. 281; *Curtis v. Buckley*, 14 Kan. 456; *Pritchett v. Mitchell*, 17 Kan. 358; *Alexander v. Shonyo*, 20 Kan. 705; *Robbins v. Sackett*, 23 Kan. 304; *Seckler v. Dells*, 25 Kan. 165; *Tomlinson v. Thompson*, 27 Kan. 72; *Perkins v. Dibble*, 10 Ohio, 439; *City of Norwich v. Hubbard*, 22 Conn. 587; *Astor v. Hoyt*, 5 Wend. 615. The statute of our state upon the question under discussion (paragraph 5477, Gen. St. 1889) reads, as follows: "It shall be the duty of at least one of the petitioners to cause six days' notice to be given in writing to the owner or owners or their agents, if residing in the county, through whose land such road is to be laid out and established, of the time and place of meeting, as specified in the notice of the commissioners." The notice of the commissioners is pointed out in paragraph 5476 of the same statutes, and requires the county clerk to give notice "by advertisement set up in the county clerk's office and every municipal township through which any part of said road is designated to be laid out for at least twenty days, and by publication for two consecutive weeks in a newspaper, if there be one published in the county, setting forth that such petition has been presented, giving the substance thereof, and that viewers will on the day designated proceed to view said road, and give all parties a hearing." In view of the statute in our state in relation to notice in road proceedings, and the law relating to mortgages, and rights of mortgagors and mortgagees, we do not think it was necessary to serve notice on the plaintiffs for the purpose of establishing the road which was laid out across the lands upon which they at the time held a mortgage. There is nothing in our statutes that requires service of notice upon any one in

such proceeding except the "owner." It has been seen that in our state a mortgagee of land is not the owner thereof. The mortgagor holds the legal title, and, in the absence of stipulations to the contrary, the right of possession. He is regarded as the owner of the land, and, when in possession by himself or agent, notice to him or his agent is, in proceedings to establish a public road, notice to the "owner," to the full intent of our statute requiring such notice.

The case of *Railroad Co. v. Wilder*, 17 Kan. 246, goes a long way towards settling the law of this case. In that case, Mr. Justice VALENTINE, speaking for the court, says: "We think Wilder is entitled to the same damages as though he owned the unincumbered fee of the land. Da Lee is not entitled to any portion of such damages. Da Lee is entitled to the \$2,000 which Wilder owes him, and to nothing more, except that he holds the legal title to the land (and possibly a lien on the damages awarded if he choose to assert that lien) as a security for his claim on Wilder." The case of *Kuhn v. Freeman*, 15 Kan. 423, is in line with the above case. The law upon this question is fully settled in many of the states. In *Parish v. Gilmanton*, 11 N. H. 293, Justice Woods says: "In the third place, it is objected that certain mortgagees of land over which the road is laid were not notified of the proposed laying out of the way, and that no damages were awarded them. By the first section of the statute, as already seen, it is provided that notice shall be given to the owners of the land through which the highway is to be laid out. Whether the exception can prevail depends upon the proper decision of the question whether the mortgagee is to be regarded as the owner of the land for the purpose of receiving notice, and having damages awarded for the injury done in taking easement to the lands mortgaged. It does not appear in the present case that the mortgagee was in possession. In such cases we think that the mortgagor in possession is to be regarded as the owner, and as such is entitled to the notice. Indeed, it would now seem to be a firmly established doctrine in this state, that the mortgagee is entitled to have his mortgage interest regarded as real estate, and himself as the owner of the land mortgaged, so far only as to enable him to protect and avail himself of his just rights intended to be secured to him by the mortgage, and to give him all necessary and appropriate remedies for that purpose, and that in all other respects, and for all other purposes, it is to be treated as a chattel interest; and we think this is not one of the cases in which the mortgagee is entitled to be regarded as the owner of the land mortgaged." In *Read v. City of Cambridge*, 126 Mass. 427, the court says: "In every taking of land for public use the mortgagor is regarded in this commonwealth as having, at law, the entire estate in the premises, and entitled to recover the whole value thereof, estimated according to the provisions of the statute, without any deduction on account of the mortgages and liens thereon." In *Paine v. Woods*, 108

Mass. 160, WELLS, J., delivering the opinion of the court, says: "This is a complaint for flowage under the mill act. The complainant is the mortgagor in possession of the land flowed. The mortgage was given before the erection of the dam of the respondents. The mortgagee has never entered or taken any steps towards foreclosure. The ground of defense is that the complaint cannot be maintained by the mortgagor without joining the mortgagee. The respondents insist that, as the mortgagee will not be bound by the judgment, they will be exposed to the risk of making double compensation for the same injury, if these proceedings are maintained. This objection is not tenable. For all the purposes of these proceedings, the mortgagor in possession is a sufficient party, without joining the mortgagee." "A mortgagee out of possession is not the proprietor of the mortgaged premises, and, in common parlance, is never spoken of as such; nor is he so recognized in a legal sense. In truth, the mortgagee has only a lien, and cannot be considered or treated as a proprietor or owner of the mortgaged estate." *City of Norwich v. Hubbard*, 22 Conn. 587. "In laying out new highways, either by selectmen or by the county courts, or in repairing old ones, no provision is made by law for notice to be given to mortgagees; nor in practice is this ever done. The interests of the mortgagees are not regarded in these proceedings. They are necessarily connected with the interests of the mortgagor, and, in this respect, subject to them." *Whiting v. City of New Haven*, 45 Conn. 305. "In a complaint under the mill act by a mortgagor it is no defense that the respondent has acquired the right of the mortgagee by an assignment of the mortgage." *Vaugh v. Wetherell*, 116 Mass. 138. "The mortgagor of land taken by a railroad corporation for the purpose of their road may recover the full amount of damages, without regard to the mortgages." *Ballard v. Ballard Vale Co.*, 5 Gray, 468. We have examined the case of *Severin v. Cole*, 38 Iowa, 463. The cases therein referred to in 2 Ohio St. 114, and 4 Ohio St. 101, in support of the position taken in that case, relate to mechanics' liens, and are not analogous cases, and do not depend upon the same principle as the case in which they are cited, nor upon the same principle as the case at bar. The case of *Ballard v. Ballard Vale Co.*, 5 Gray, 468, does not sustain the opinion promulgated in the Iowa case. The case in 5 Gray was under the mill act of Massachusetts. It was brought by the mortgagee in possession after foreclosure, and did not claim damages for any of the period of time during which the mortgagor was in possession of the premises. In fact, the case conceded that under the statute, which provided for the assessment of annual damages, the mortgagor is entitled to such annual damages while in possession; and it was undecided and left an open question as to whether the mortgagor in possession could, under the same statute, which provided also for the assessment of damages in gross,—that is, damages for all time,—elect to take dam-

ages in gross, and thus deprive the mortgagee of the right to recover annual damages after the reduction of the land to his possession; and whether the mortgagor in possession could release the owners of the mill, the dam to which caused the overflow, from the damages for all time, and thus conclude the mortgagees after obtaining possession. MERRICK, J., in that case uses the following language: "The respondents [assignees of the mortgagor] have never had any interest except that which they derived from Marland, the mortgagor. His deed to them was a mere quitclaim and release of all his right, title, and interest in the premises; and these consisted only of the right of redemption, and the right of possession, previous to a breach of the condition of the mortgage. Of the former the respondents have never availed themselves; and of the latter they have had the uninterrupted advantage and enjoyment,—no claim being made for damages occasioned by the flowing before the time when the complainant entered upon and took possession of the premises for the breach of the condition of the mortgage, and to foreclose the right in equity of redemption. The right of the respondents is now superseded by the paramount title of the complainant; and they have, therefore, no defense to set up against the complaint, and can show no reason why it should not be maintained. It has been argued for the respondents that a mortgagor in possession has the power and right effectually to release and discharge a mill-owner from all claims for damages which have been or which may be occasioned to the mortgaged premises, either by the past or future maintenance of the dam, used and to be used forever, for the purpose of raising water to work his mill. Without intending in any degree to sanction that position, as a principle of law resulting from a just interpretation of the provision of the statute for the support and regulation of mills it is sufficient to say that the determination of this question is not requisite in this case; for it does not appear that Marland (mortgagor) has released or discharged, or even attempted to release or discharge, the respondents from all the claim to which they were or might become liable by reason of the maintenance of their dam, and the consequence to the complainants' land by overflowing it with water." Justice COLE, in the opinion of the Iowa case, says: "The case of *Breed v. Eastern R. Co.* is only reported as a note to the case of *Ballard v. Ballard Vale Co.*" That is true; but the principle decided in the case of *Breed v. Eastern R. Co.* is carried back and made a part of the syllabus in the case of *Ballard v. Ballard Vale Co.* With this examination the Iowa case loses some of its force, and we prefer to follow the precedents cited from other states, as being in line with our authorities so far as this court has already gone in analogous cases, and also in line with our numerous decisions affecting the law of mortgages, and the rights, respectively, of mortgagors and mortgagees, and hold that for all the purposes of opening highways the mortgagor in possession is to

be regarded as the owner of the land. Whether a mortgagee may by a proceeding in equity intervene, and have the damages applied in accordance with what the court under all the circumstances might consider as equitable, we are not called upon in this case to decide, and therefore leave that question open to be settled in a case wherein it is raised. It will be seen that there is no provision in paragraph 5477 for notice to non-resident owners who have no agent in the county; nor is there elsewhere in our statute any provision for notice to them except the notice required to be given by the county clerk in paragraph 5476, above referred to. As that notice is required to be posted in the county clerk's office, and each municipal township through which the road or any part of it is to be established, and also published in a newspaper of the county, if there is one in the county, the legislature probably intended this notice to reach non-resident owners; but as, under our view of the law, the plaintiffs—mortgagees out of possession at the time the road was established—are not to be regarded as "owners," it matters little, so far as this case is concerned, what the legislature might have intended as to non-resident owners. We recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

MAY v PEOPLE.

(*Court of Appeals of Colorado.* Oct. 26, 1891.)

MUNICIPAL ORDINANCES—PREVENTING NUISANCES.

A municipal ordinance which prohibits the storing of hides within the city without permission from the city council, and provides that such permit shall not be construed into a license to cause a nuisance, is not authorized by Gen. St. Colo. § 3912, subds. 45, 53, which confer on municipalities authority to declare what shall be a nuisance, and to abate the same, and to prohibit any offensive or unwholesome business within the corporation.

Error to Las Animas county court; W. G. HINES, Judge.

Prosecution of Jacob May for violation of a municipal ordinance. Defendant brings error. Reversed.

Caldwell Yeaman, for plaintiff in error. *Jesse G. Northcutt*, for the People.

RICHMOND, P. J. This was a prosecution originally instituted before a police magistrate in the city of Trinidad to recover from Jacob May, plaintiff in error, a penalty for the violation of a regulation or ordinance. The case was tried, and a penalty of \$20 fine imposed. Thereafter an appeal was taken to the county court of Las Animas county, where it was tried upon an agreed state of facts, as follows: "That the defendant did, at the time and in the manner and form as alleged in the complaint filed herein, keep and store green and dry hides and pelts in large quantities within the corporate limits of the city of Trinidad, without permission from the city council of said city so to do. That the storing of green hides and pelts is the character of business which

may or may not be a nuisance, according to the surrounding circumstances. That section 11 of an ordinance concerning nuisances reads as follows: 'Sec. 11. Any person who shall kill or dress any cattle, calves, sheep, or swine, or shall steam or render any lard or tallow, or store any green or dry hides or pelts, within the city, without permission from the city council, shall, upon conviction, be fined in a sum not less than ten nor more than fifty dollars for each offense; and such permit shall not be construed into a license to emit, cause, or be the author of any nuisance in any case whatever.' That the storing of green and dry hides is a business which in its character is easily susceptible of becoming offensive and nauseous." Upon this agreed state of facts, the county court adjudged the plaintiff in error guilty, assessed a fine of \$10 and costs, and committed him to the county jail until paid. To reverse this judgment this writ of error is prosecuted.

There being no dispute as to the facts, the only question presented by the record is whether this regulation or ordinance is valid. It is true, plaintiff in error insists in his argument that the proceedings before the police magistrate were irregular; but the record fails to disclose the fact that he insisted upon this in the county court. Therefore it will not be considered. The contention of plaintiff in error is that the ordinance referred to is in violation of the federal constitution, and of article 2 of the state constitution, and that it is invalid because it is unreasonable, partial, oppressive, and unfair, and tends to confer upon the city council power to create a monopoly. An analysis of this ordinance becomes necessary to the determination of the question presented. Under the General Statutes of this state, (section 3312, p. 970,) the following authority is conferred upon municipalities, (subdivision 45:) "To declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist;" (subdivision 53:) "to prohibit any offensive or unwholesome business to be established within, or within one mile of, the limits of the corporation." This ordinance does not purport to declare the storing of hides and pelts within the city limits a nuisance, but does assume that the city council may prohibit by declining to grant permission, or may grant permission, as their inclination may prompt. They may go so far as to say that one individual may exercise the privilege, and that another equally respectable shall not. True, it is admitted in the stipulation that such business may become a nuisance; so also may many other vocations and trades, but yet they are not a nuisance *per se*. A livery stable, a slaughter-house, a butcher-shop, a boarding-house, an hotel, chemical-works, refinery and smelter, a sugar refinery, a railroad, enterprises requiring large smoke-stacks, a private barn where a number of horses are kept and cared for, a theater for the resort of all classes, a blacksmith-shop, a foundry,—all such may become a nuisance, and are as easily susceptible of

becoming a nuisance as it is admitted that of storing hides and pelts could be. Taking this view, then, of the ordinance, I can reach no other conclusion than that it does not come within the authority conferred by the General Laws upon a municipality, and that it is discriminating. It is true that it may be said the city council might not discriminate in favor of one against another; but that they have reserved to themselves the power so to do cannot be denied, and also that they have reserved the right to determine when, where, and by whom such an enterprise may be conducted cannot be disputed. That it may become a nuisance cannot contribute to the support of plaintiff in error's contention; for certain it is that, if it be a fact that the storing of hides and pelts within the city limits of a city is a nuisance, it conclusively follows that the city cannot, by its permission, allow a nuisance to exist within its limits. A license, an ordinance, a regulation, or a resolution permitting the existence of a nuisance within the limits of a corporate town or city would be held invalid. The language of the ordinance supports this assertion; for it declares that "such permit shall not be construed into a license to emit, cause, or be the author of any nuisance in any case whatever." If the storing of hides and pelts be not a nuisance, then the ordinance has no application, and is not within the authority conferred by the General Laws, and aims to suppress a lawful vocation. Ordinances must apply to all alike.

In *Tugman v. City of Chicago*, 78 Ill. 405, this doctrine is announced: "Where power is conferred upon the legislative department of a municipal corporation to enact by-laws and ordinances for the better government of the inhabitants of a municipality, the body intrusted with that power, in its exercise, cannot enact ordinances that are unreasonable, oppressive, or such as will create a monopoly. An ordinance, therefore, which would make the act done by one penal, and impose no penalty for the same act done, under like circumstances, upon another, could not be sanctioned or sustained, because it would be unjust and unreasonable." *City of Chicago v. Rumpff*, 45 Ill. 90. This doctrine has been followed by the supreme court of Illinois; also by the present appellate court of that state. In the case of *Village of Braceville v. Doherty*, 30 Ill. App. 645, involving the construction of a similar ordinance or regulation, the court, in delivering the opinion, quotes at considerable length from *Dillon on Municipal Corporations* in support of the theory herein advanced. It says. "Such ordinances must be reasonable, and not oppressive or repugnant to fundamental rights, or courts will declare them void. Ordinances must be impartial, fair, and general. It would be unreasonable and unjust to make, under similar circumstances, an act done by one person penal, and, if done by another, not so. Ordinances which have this effect cannot be sustained. Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal

corporations should, so far as practicable, be exercised by ordinances general in their nature and impartial in their operation." The prosperity alike of the community and of the individual is largely promoted by leaving every man free to occupy himself in such business and in such place as the demands of patronage, and his own particular means and qualifications, indicate. "Municipal ordinances are passed by a body that represents the whole community, and for the purpose of regulating matters which affect the general welfare; and their provisions should, so far as practicable, affect each member of the community alike. Ordinances should neither favor nor discriminate against any person or class of persons, or any particular portion of the municipal territory. Their burdens and their benefits should rest equally upon all. Laws of a municipality, like the laws of a state, should be uniform and of a general operation within the corporate limits; and any unnecessary, distinct discrimination between persons, classes, or locations, will invalidate them." *Horr & B. Mun. Ord. § 135; Town of Lake View v. Letz, 44 Ill. 82.*

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, have been followed in all communities from time immemorial, and must therefore be free in this country to all alike upon the same conditions. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birth-right." The above is the language of Justice FIELD in the case of *Butchers' Union Slaughter-House Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 757, 4 Sup. Ct. Rep. 652; and with the doctrine therein expressed I agree, and if it be correct, then this ordinance is absolutely invalid. If the city council can say that certain individuals may pursue a certain vocation, and that other individuals of the same class, of equal repute, and citizens of that community shall not, then the one great principle conferred upon the citizens of the United States, to-wit, the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them the highest enjoyment, is disallowed. In *re Jacobs*, 98 N. Y. 98. Measures of this kind are dangerous even to their promoters. If the power to grant exists, the power to take away may also exist; and an enterprise involving the all of an individual may suddenly be prohibited by a municipal council. The reasons for doing so need not be given. Caprice, interest, personal or political, may be the grounds upon which such legislation can be founded; and he who is indulged today may be the sufferer to-morrow. These deductions from the face of the ordinance as to its necessary tendency are supported by its language, and therefore I am not obliged to reason from the probable to the actual, and pass upon the validity of the

ordinance complained of, as tried merely by the principles which their terms afford of unequal and unjust discrimination in its administration. The case at bar presents the ordinance in actual operation, and the facts agreed upon establish an administration so exclusively against one person, and in favor of another, as to warrant and require the conclusion that, whatever might have been the intent of the ordinance, it is one applied, or can be, so unequally and oppressively as to amount to a practical denial of that equal protection of the law which is secured to every citizen of the land. I cannot escape the conclusion that this ordinance is invalid, and that the judgment of the court below must be reversed, with directions for further proceedings in conformity with this opinion.

COLORADO M. RY. CO. v. TREVARTHEN.

(Court of Appeals of Colorado. Oct. 26, 1891.)

EMINENT DOMAIN—COMPENSATION—RIGHTS OF PURCHASER—SPECIAL DAMAGES.

1. In an action to recover damages caused to a city lot by the construction of a railway the complaint must allege that plaintiff was the owner of the lot at the time the injury was suffered.

2. Where special damages from the construction of a railway abutting a city lot are sought they must be pleaded.

Appeal from district court, Pitkin county; THOMAS A. RUCKER, Judge.

Action in trespass by Gertrude Trevarthen against the Colorado Midland Railway Company. Defendant demurred to the complaint, and, on the demurrer being overruled, declined to plead. From a judgment for plaintiff defendant appeals. Reversed.

Rogers & Cuthbert, for appellant. *J. E. McGrew*, for appellee.

BISSELL, J. The injury complained of was occasioned by the construction of the Midland Railway in one of the streets of the city of Aspen. The suit was brought by Mrs. Trevarthen in the district court of Pitkin county. The company demurred to the complaint, and, when the demurrer was overruled, declined to plead further, and prosecuted this appeal from the final judgment. When it was entered, evidence was introduced to show the extent and character of the damages which had been sustained by the building of the road, and this is set out in the record. The only purpose sought to be subserved by the production of that testimony is to support the alleged error committed by the court in refusing to the counsel of the company the right to cross-examine the witnesses at the time the proof was taken. Whatever may be the law as to the right to cross-examine witnesses introduced under such circumstances and for such a purpose, the objection is untenable, since the record discloses the fact that the right to cross-examine was conceded. The court declined to state the legal effect of such action, but conceded the right of cross-examination to the fullest extent, leaving the matter of its effect open for subsequent consideration. There was no error in

this proceeding, and what the court did was not done in such a manner as to be prejudicial to the appellant's rights. The only error available is that predicated upon the ruling of the court on the demurrer to the complaint. It would not be advantageous to the profession to set out the complaint *in extenso* to show its insufficiency, or to confirm the adequacy of the reasons assigned for the overruling of the action of the court. It is enough to say that in two particulars the complaint was radically defective. It is the law of this state that a lot-owner can only recover for those damages which he has sustained from the construction or operation of a road subsequent to the time when he acquired his title to the property. If the road has been constructed and is in operation at the time he gets title, he is supposed to have taken it *cum onere*, and to have paid the lesser price because of the disadvantages. The damages arising from the construction inure to the holder of the fee, and do not pass by the deed which transfers the title. This principle, which has been recognized in the previous adjudications of the state, in no manner affects the right to recover any damages which may be sustained from those acts of the company which may further diminish the value of the property. The allegation of ownership with reference to the time of construction is essential, because it bears largely on the measure of recovery. It is a traversable fact on which the company has the right to take issue and be heard. It is equally true that for the construction of a road along the streets of a city, when it is built under statutes which authorize its construction, and under ordinances which permit the use and occupation of the streets of the city, the abutting lot-owner can only recover for the special damages which he sustains beyond what he suffers in common with the other denizens of the city. It is a necessary corollary that, if these special damages only are recoverable in this sort of an action, they must be averred, and averred in a traversable fashion, so that evidence may be taken upon the issue, and it submitted to the jury. The complaint was defective in these particulars, and, since they are of the substance, the ruling of the court may be complained of on this appeal. *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. Rep. 6; *Railroad Co. v. Domke*, 11 Colo. 247, 17 Pac. Rep. 777; *Jackson v. Ackroyd*, 15 Colo. 583, 26 Pac. Rep. 132; *Town of Longmont v. Parker*, 14 Colo. 387, 23 Pac. Rep. 443; *Walley v. Ditch Co.*, 15 Colo. 579, 26 Pac. Rep. 129; *Railroad Co. v. McLaughlin*, 77 Ill. 275. For the error committed in overruling the demurrer the cause must be reversed, and remanded to the court below for further proceedings in conformity with this opinion.

GILLETT et al. v. McALLISTER.

(Court of Appeals of Colorado. Oct. 26, 1891.)

ASSUMPSIT—SUFFICIENCY OF EVIDENCE.

Where defendant guaranteed the payment of a certain amount of P.'s indebtedness to plaintiffs, providing he owed that amount to P. at a

certain time, in an action against defendant it was incumbent on plaintiffs to show that defendant was so indebted to P. at that time.

Error to district court, Chaffee county; JOHN CAMPBELL, Judge.

Assumpsit by Jason Gillett and others against H. D. McAllister. On a judgment for defendant by the court plaintiffs assign error. Affirmed.

R. K. Hagan, for plaintiffs in error. G. K. Hartenstein, for defendant in error.

BISSELL, J. This action was brought by Gillett and his co-plaintiffs to recover of McAllister \$800, which they claimed under a contract entered into between them. The case was tried without a jury, and resulted in a dismissal of the suit, with judgment against the plaintiffs for costs. According to the evidence, the Pike brothers were producers of charcoal, and had large dealings in that material with McAllister, who apparently bought the most, if not all, of their product. The plaintiffs were grocers, and dealers in the general supplies used in charcoal camps, and had sold and were selling the Pike brothers what they used. The state of the account as between the Pikes and the plaintiffs apparently led them to curtail the credit which had been extended to the charcoal burners, and McAllister, who wanted the product to fill his contracts, undertook with the plaintiffs to guaranty the payment of the bills which the Pike brothers might contract for the months of September, October, November, and December, 1887, to an amount not exceeding \$800 for each month, conditioned that he should receive from the Pike brothers, under his dealings with them, that amount of coal; otherwise he was only to pay to the plaintiffs the value of what he might purchase. The contract was carried out and complied with on both sides for the months of September, October, and November, and the present suit was brought by the plaintiffs to recover the \$800 due for the supplies furnished the Pikes for December. The answer denied the contract as set up, and contained an affirmative plea that prior to the institution of the present action the plaintiffs had sued the Pike brothers for the amount of the account as it stood between them, including the \$800 claimed in the present suit; the plea averred that he had paid a judgment of four hundred and odd dollars rendered against him on his answer to a process of garnishment issued in the suit of the Gilletts against the Pikes, and thereupon had been discharged as garnishee. A demurrer was interposed to this plea, substantially attacking it because that action and the present were so far consistent and concurrent as to permit the prosecution of both to judgment with the right necessarily to only one satisfaction of the claim. This is only referred to because the question is discussed upon the present appeal as one still involved in the controversy which the court is called upon to decide. We do not so view it. A demurrer to this affirmative defense was overruled, and the plaintiffs replied to it, leaving only to them the right to preserve the question in the record by taking

proper objections to the introduction of the testimony, and preserving sufficient exceptions in the record. Neither the transcript nor the abstract shows an objection which necessitates the expression of an opinion upon this proposition. If a proper objection had been taken, so as to save the question, it would be entirely unavailable for the purposes of reversal in the view which the court takes of the case. If the testimony were entirely excluded from the record, the result would be the same; and, where a judgment is unaffected by incompetent testimony, its admission will not serve as a basis upon which to assign error. The plaintiffs were not entitled to recover. The contract was in terms dependent upon the purchase and delivery of coal, for McAllister expressly contracted that his liability should be measured by the value and quantity of coal that he might purchase and receive from the Pikes. In order, then, for the plaintiffs to recover, it was incumbent upon them to show by competent proof that the Pikes had delivered to McAllister, or to others by his order, coal enough to render him liable to the extent of their claim. Evidence was offered to show the shipment of divers cars of coal from Brown's Canon station, by the Pike brothers, to sundry smelters in Leadville. The proof was not completed by testimony which served to connect McAllister with these shipments, and it leaves the whole question of McAllister's liability thereunder to inference. The averments on this branch of the case were not sustained by sufficient or satisfactory evidence. The court evidently so concluded, and rendered judgment accordingly. Since the finding is so fully sustained by the evidence, this court, even though they had reached an adverse conclusion, would not be justified in disturbing the judgment. *Kinney v. Wood*, 10 Colo. 270, 15 Pac. Rep. 402. There is no error in the record, and the judgment will be affirmed.

HARBISON V. TUFTS.

(Court of Appeals of Colorado. Oct. 26, 1891.)

CONDITIONAL SALE—RIGHTS OF VENDOR.

In an action to try the title to a soda fountain, it appeared that the fountain was sold and transferred to a drug company; that an agreement was made and properly recorded that the title should remain in the vendor until the fountain was paid for; that one of the vendees bought out his partner, and gave a chattel mortgage on the stock and fountain, which provided that he might sell the stock without accounting for the proceeds; that the mortgage was assigned, and on maturity the assignee attempted to foreclose, and sold the fountain. *Held*, that the mortgage was void as to the original vendor, and that the last purchaser took no title as against him.

Appeal from district court, Las Animas county; J. C. GUNTER, Judge.

Action by James W. Tufts against Jennie Harbison to try the title to a soda fountain. Judgment for plaintiff. Defendant appeals. Affirmed.

John & McKeough, for appellant. *Jesse G. Northcutt*, for appellee.

BISSELL, J. This is a controversy over a soda fountain to which the respective

parties claim title. The cause was tried to the court upon an agreed statement of facts, from which it substantially appears that in March, 1889, Hosick & Co. bought the fountain of Tufts for \$500, and delivered to him for the purchase price some 12 promissory notes for different sums, maturing at various periods between the 1st of May, 1889, and the 1st of October, 1890. According to the statement, it was agreed between the parties at the time of the sale that the title should remain in Tufts to secure the purchase price until the maturity and satisfaction of the several notes. The agreement, which was in writing, was acknowledged by a member of the firm, and recorded in the proper office of the county for the record of such instruments. The fountain subsequently passed into Hosick & Co.'s possession, and was set up in a drug-store occupied by them for retail purposes. Within less than 60 days from the time of the purchase, Hosick, who had previously bought out his partner's interest in the concern, undertook to mortgage the property to Nelson T. and G. T. Clairborne. This mortgage covered, in terms, the whole stock and fixtures of the store, including the fountain. The mortgage provided that the mortgagor, until default, should keep, retain, and use the property described in it. Afterwards the Clairbornes transferred the note to one Gross, who, on the maturity of the paper and default in its payment, took possession of the property, attempted to foreclose the mortgage, and in the proceedings sold the fountain to the appellant, Jennie Harbison. To reverse the finding of the court adjudging the right of property to be in Tufts the appellant prosecutes this appeal.

The court did not err in its judgment. The law which is decisive of the rights of the parties to this controversy has been settled by the previous adjudications of the supreme court. By the terms of the attempted contract of mortgage between the Clairbornes and Hosick, he had the right to use and enjoy the property, and dispose of it in the ordinary methods and channels of trade, and he was under no obligation, by the provisions of the agreement, to account to the mortgagees for the proceeds of what might be sold. Such a mortgage has been adjudged invalid as to all existing creditors who are permitted to assert its invalidity as against any but *bona fide* purchasers for a valuable consideration. As was well said by the learned justice of the supreme court who delivered the opinion which first established the law in the state, (9 Colo., 13 Pac. Rep., *infra*;) "When the mortgagee stipulates, either in the mortgage or out of it, that the mortgagor may sell the very thing composing his security, and retain the proceeds, he thereby destroys every vestige of a valid statutory or common-law mortgage, and leaves himself in no better position than if it had not been executed. Besides, the inevitable tendency of the transaction is disastrous to other creditors of the mortgagor; for the effect is to hinder and delay such creditors, while the mortgagor makes way with the

property, and leaves the general aggregate of his indebtedness undiminished. Predicated upon these considerations, is the view sustained, as we think, by the larger number and the better reasoned cases, viz., that the existence of the facts mentioned, whether shown by the mortgage or by evidence *alunde*, wholly invalidates the transaction as to creditors." In the Brasher Case, *infra*, the court, by the learned commissioner, Mr. MACON, says "that the agreement to sell invalidates the mortgage as to creditors and incumbrancers, and this effect takes place at the moment of the delivery of the instrument. It is not necessary to this effect that any of the property be sold under the power. The transaction is vitiated *ab initio* as to all the property upon which it is attempted to create a lien, by the reservation of such right, and not by the exercise of it." It is thus plain that it is the law of this state that a mortgage like that from which Mrs. Harbison derives her title is invalid as against creditors and cannot prevail in a contest concerning the property. *Wilson v. Voight*, 9 Colo. 614, 13 Pac. Rep. 726; *Brasher v. Christopher*, 10 Colo. 284, 15 Pac. Rep. 403. These cases likewise declare the law to be that the security is unaltered by the inclusion of property other than the merchandise subject to sale. The result is thus wholly unaffected by the character of the property in controversy.

But one other question remains to be determined to dispose of this appeal, and that is as to whether Mrs. Harbison can be regarded as a *bona fide* purchaser, so that her title will be protected as against the claim of Tufts under his security. It is contended that the instrument upon which Tufts relies is wholly informal, and not in accord with the provisions of the statute concerning chattel mortgages, which requires that such instruments must contain an express provision permitting the mortgagor to retain possession of the property in order to render the instrument valid as against creditors if the mortgagor be found in possession. The circumstances of this case and the situation of Mrs. Harbison will not support this contention. It is the law, as between parties to the transaction, that no particular form is requisite for the creation of a valid instrument for security upon personal property. It may rest in parol, or it may be evidenced by a written instrument. It may contain the statutory provision concerning the possession, which will render it valid as against creditors, if in proper manner it reaches the record, or it may be without this provision, and without a record, and still be good as against everybody but creditors and *bona fide* purchasers without notice. In these principles all the authorities concur, and a citation would be useless. It therefore follows, as between Hosick & Co. and Tufts, the instrument upon which Tufts relies as the evidence of his title was valid and enforceable as against all but the excepted parties. This leaves the naked inquiry whether Mrs. Harbison is by the transaction placed within the protection accorded to the excepted classes. It is

evident from the preceding statement of the history of the case that she was neither a purchaser from Hosick nor one of his creditors when she acquired the title on which she relies. The mortgage which Gross attempted to enforce was void as against Tufts's claim, and he gained no advantage by reason of its seizure or sale, nor would it prevent Tufts, or any other *bona fide* creditor, from following the property, and securing precedence in the payment of his debt. This principle is clearly settled by the two cases cited, and, if possible, is made more plain by the subsequent decision of *Gerow v. Castello*, 11 Colo. 560, 19 Pac. Rep. 505. These considerations dispose of all the questions necessary to the settlement of the rights of these parties. Perceiving no substantial error in the record requiring a reversal of the case, the judgment is affirmed.

PIERSON *et al.* v. FUHRMANN.

(Court of Appeals of Colorado. Oct. 26, 1891.)

ACTION AGAINST FIRM—PLEADING—MISJOINDER OF PARTIES—RECOVERY OF MONEY LOST IN GAMBLING.

1. A complaint against partners, which names all of the defendants in the caption as partners, is sufficient without repeating the names in the body.

2. The question of misjoinder of defendants cannot be raised on demurrer.

3. Where F. lost at defendants' faro-bank money which he held in trust for plaintiff, the latter has her action against defendants for its recovery.

Error to Arapahoe county court; GEORGE W. MILLER, Judge.

Action for money had and received, by Mattie Fuhrmann against P. C. Pierson and another. Defendants demurred to the complaint. The demurrer being overruled, defendants elected to stand by the demurrer, and declined to answer. Judgment was given plaintiff for the amount claimed, from which defendants appeal. Affirmed.

Edgar Cayless, for plaintiffs in error. Bower & Baies, for defendant in error.

REED, J. Defendant in error (plaintiff below) brought suit against the plaintiffs in error by filing the following complaint: "Complaint. Mattie Fuhrmann, Plaintiff, vs. P. C. Pierson and John J. Hughes, partners, doing business under the firm name and style of P. C. Pierson & Co., Defendants. Plaintiff complains of the defendants and for cause of action alleges: (1) That she and the defendants are citizens of said county and state. (2) That she does not seek to recover in this action a sum in excess of \$2,000. (3) That the defendants, as this affiant is informed and believes, were, on the 16th day of September last, and still are, engaged in the city of Denver, said county and state, in the business of gambling and the running of a 'bank,' table, or game commonly known as 'faro.' (4) That on the—— day of September last, at Denver, Colorado, the plaintiff was possessed of, as her own separate property, one hundred and thirty-five dollars, (\$135.00,) lawful money of the United States. That on said day she

deposited the same with one Joseph Fuhrmann for safe-keeping. (5) And plaintiff further alleges on information and belief that the said one hundred and thirty-five dollars, (\$135.00,) her separate property as aforesaid, so deposited with Joseph Fuhrmann, was, between the 16th day of September last and the 4th day of October, instant, paid to the defendants by said Joseph Fuhrmann, without her knowledge, consent, or approval, by reason and on account of the said defendants engaging the said Joseph Fuhrmann in a game of chance, commonly called 'faro.' That the said payment by the said Joseph Fuhrmann to the said defendants of the said sum was illegal and without consideration, and wholly unauthorized by this plaintiff, wherein and whereby the defendants received the said \$135.00 to the use of the plaintiff. (6) That on the 8th day of October, instant, and prior to the commencement of this action, this plaintiff demanded payment of said sum of \$135.00 from the defendants. (7) That said defendants have not paid any part of said sum, though requested so to do. Wherefore plaintiff prays judgment against the said defendants, for \$135.00, with interest at 10 per cent. per annum since October 3, 1890, and for cost of suit." To which the defendants filed a demurrer, the grounds being: "First, that said complaint does not state facts sufficient to constitute a cause of action against the defendants, or either of them; second, that there is a misjoinder of parties defendant; third, that the complaint is ambiguous, unintelligible, and uncertain, in this: that it fails to show when and where, if at all, said money was paid to defendants, or either of them; fourth, that the relief sought is unlawful. Wherefore defendants pray judgment for their costs in this case."

The only questions to be determined are as to the sufficiency of the complaint to warrant the judgment. It is contended that the names of the defendants and the allegation of partnership should have been stated in the body of the complaint. They are fully stated in the caption, and a repetition is not required. Bliss, Code Pl. §145. It is claimed that there is a misjoinder of parties defendant. A demurrer can only go to matters apparent upon the face of the pleading. Nothing appears there to indicate a misjoinder. It is stated in argument that Hughes was not a partner,—that a man by the name of Murray was. Such fact might be made available by pleading it, but cannot prevail upon demurrer. The action is to recover money received by the defendants to the use of the plaintiff, and the action will lie where defendant has received money either from the plaintiff or a third person under such circumstances that in equity and good conscience he ought not to retain the same, and which *ex æquo et bono* belongs to the plaintiff. This was the rule at common law, and has been asserted in the courts of almost every state in the Union. In *Jacobs v. Pollard*, 10 Cush. 287, it is said: "In all cases where money is held by a person, whether it came into his hands rightfully or wrongfully, that in fact belongs to another, the true owner may maintain an

action against him for its recovery." See *Mason v. Waite*, 17 Mass. 560. In 4 Wait, Act. & Def. 508, the law is stated to be that, "whenever a person has money in his hands that belongs to another, no matter how he came into the possession of it, and upon which he has no legal or equitable claim as against the true owner, and which he has no right to hold against him, it may be recovered by the true owner in this form of action." See, also, *Alderson v. Ennor*, 45 Ill. 129; *Gilman v. Cunningham*, 42 Me. 98; *Norway Tp. v. Clear Lake Tp.*, 11 Iowa, 506; *Robbins v. Insurance Co.*, 12 Mo. 380; *Buel v. Boughton*, 2 Denio, 91. The complaint is inartificially drawn, but, tested by these well-settled rules, it contains, in substance, every material allegation necessary to constitute a cause of action by the plaintiff against the defendants. The individual money of plaintiff is alleged to have been placed for safe-keeping in the hands of Joseph Fuhrmann. He was only a custodian, without a right to use it. "Without her knowledge, consent, or approval" he lost it in gambling, to the defendants, who refused to return it upon demand. She was not *in pari delicto*. The judgment of the county court is affirmed.

MILLER V. GODFREY et al.

(Court of Appeals of Colorado. Oct. 26, 1891.)

DISSOLUTION OF ATTACHMENT — FAILURE TO PAY ON DELIVERY—SALE—TIME OF PAYMENT.

1. Where the allegation in an attachment is that defendant has failed to pay for goods sold him, which he should have paid for on delivery, and the answer is a general denial, on plaintiff's failure to sustain the allegation by proof the attachment will be dismissed.

2. Where goods are delivered at intervals between April 23d and August 28th, and payments made thereon between June 24th and August 1st, there is no presumption of an agreement to pay on the delivery of the goods.

3. To sustain an attachment under Civil Code Colo. § 92, subd. 10, which provides that attachment may issue on an affidavit alleging "that the defendant has failed or refused to pay the price or value of any article or thing delivered to him which he should have paid for upon the delivery thereof," where defendant makes a general denial, plaintiff must show an unconditional contract to pay on the delivery of each article, and a demand for such payment.

Error to district court, Arapahoe county; GEORGE W. ALLEN, Judge.

Attachment by Louis Miller against W. J. Godfrey and another. Defendants answered, denying the allegations in the affidavit, and moved to dissolve the attachment. Plaintiff filed a motion to sustain the attachment for alleged defects in defendants' answer. The court dissolved the attachment, and, on plaintiff's declining to submit further proofs, judgment was entered for defendants, on which plaintiff assigns error.

STATEMENT BY THE COURT. In the year 1890 parties to this suit had business transactions, which are best explained by the following bill of items, made by defendants, and furnished the plaintiff, the correctness of which is not challenged: "Denver, Colo., August 28, 1890. Mr. Louis Miller, bought of Arapahoe Iron-

Works, W. J. Godfrey & Co., Manufacturers, &c.

1890.				
June 24.	To cash.....	\$200 00		
July 17.	" "	200 00		
" 24.	" labor weighing....	1 20		
Aug. 1.	" "	6 60		
			\$407 80	
1890.	Cr.			
April 22.	By scrap-iron.....	\$357 66		
June 2.	" "	478 35		
July 17.	" "	690 21		
Aug. 28.	" "	701 55		
			\$3,227 77	
	Credit balance.....	\$1,819 97		
	"W. J. GODFREY & Co."			

The balance of \$1,819.97, as shown by the statement, is admitted to be correct. In September of the same year plaintiff brought suit to recover the amount, and sued out an attachment; the grounds stated for attachment in the affidavit being: "(1) Said demand is upon an overdue book-account; (2) that the defendants have failed to pay the price of articles delivered to him, which he should have paid for upon the delivery thereof." The traverse of the defendants was: "Prays judgment to the said writ, and that the same may be quashed, because the affidavit in said suit and the matters in the same are not true, and that the said defendants are not indebted to the plaintiff in the sum of eighteen hundred and nineteen dollars and ninety-seven cents; and the said defendants deny that the said sum of money, or any other sum of money whatsoever, is due from the said defendants to the said plaintiff upon an overdue book-account. And he further denies that he has failed to pay the price of any article or articles delivered to him by the said plaintiff, which should have been paid for upon the delivery thereof." The answer to the complaint was a general denial. The following motion was filed by the plaintiff: "Now on this day comes the above-named plaintiff, and moves the court to sustain the attachment herein, because the said defendants have failed to traverse the plaintiff's affidavit, herein filed, for grounds of attachment." Argument upon the motion, and same denied. At some stage of the proceedings (exactly when is not shown) permission was asked by the plaintiff and granted by the court to strike from the affidavit for attachment the first alleged ground, viz.: "That the demand was for an overdue book-account." The statement of account as made by defendants (supra) was admitted without objection. No other evidence was offered. Defendants moved the court to discharge the attachment and dismiss the suit. A jury was waived. The following colloquy occurred between the court and the respective counsel: "Plaintiff says that his 'evidence will be simply that the goods were sold and delivered to these parties.' Defendants say: 'We received \$1,819.97 worth of goods. Goods were received by Mr. Godfrey to that amount, which is shown by the statement marked "Exhibit A," which statement Mr. Godfrey says is correct.' (Plaintiff rests his case.) The Court, (to plaintiff:) 'Do you wish to offer any more evidence?'

Plaintiff: 'No, sir.' The Court: 'Then the motion dismissing the attachment will be sustained.' (Exception noted.) Plaintiff: 'Our evidence upon the merits would be the same as upon the hearing of this motion to quash the attachment; the defendants having admitted that they had received from plaintiff the goods to the amount of \$1,819.97, which sum has not been paid, because not yet due.' The Court: 'The cause of action will be dismissed, on the ground that the evidence shows that the attachment was for a debt not yet due.' (Exception noted.) The only errors assigned are to the judgment of the court in refusing plaintiff's motion to sustain attachment, and granting motion of defendants to discharge the attachment and dismiss the suit.

W. J. Weeber, for plaintiff in error.
Rogers & Stair, for defendants in error.

REED, J. The judgment of the district court must be affirmed. After striking out of the affidavit the first alleged ground of attachment, the only remaining ground was: "That the defendants had failed to pay the price of articles delivered to them, which they should have paid for upon the delivery thereof." This is fully and specifically traversed by the defendants, the language being: "And they further deny that they have failed to pay the price of any article or articles delivered to him by the said plaintiff, which should have been paid for on the delivery thereof." The issue thus formed was the only one to be tried, and was left untried. It is hard to gather, either from the course or conduct of counsel for plaintiff upon the trial or in his argument, what his theory was and is upon which he founded his right to recover under the pleadings and circumstances. It must have been based upon a misapprehension of the statute controlling the action. He seemed to regard the admission of the account showing an unpaid balance of \$1,819.97, coupled with the statement of the defendants that it had not been paid because not yet due, as affording him a statutory right to a judgment. There was no evidence whatever of any agreement between the parties for payment upon delivery, nor of any demand upon the delivery of each or any lot, or at the conclusion of the delivery. The course of dealing, as shown by the statement of account, admitted, negatives any such conclusion. The goods were delivered at intervals from April 22d to August 28th. The first delivery, made on April 22d, amounted to \$357.66: one on June 2d to \$478.35; on July 17th, \$690.21. The first payment of \$200 was made 22 days after the delivery of the second lot; the next payment on July 17th, the date of the delivery of the third lot; following this, on August 28th, there was a delivery amounting to \$701.55, and at that date the amount paid but slightly exceeded the price of the first delivery, after an interval of over four months. This shows conclusively that there had never been a sale for cash on delivery, or that, if there had been, it was waived, and a course of time dealing substituted. The tenth ground of attachment (Civil Code, § 92)—the one on which this

attachment was predicated—was never intended to cover a course of dealing like the one under consideration. To support it there must be fraud. It must be the very foundation. It is intended to cover cases where goods are obtained and the possession of them acquired under the promise to pay simultaneously with the delivery, and a retention of the goods after demand of the payment. It must be a wrongful obtaining of the goods with intent to defraud. Fraud is never presumed, and must be established by a preponderance of evidence. It was imperative upon the plaintiff, under the traverse, to show an unconditional contract to pay, on the delivery of each and every lot or parcel and a demand for such payment. In *Wade, Attachm.* § 100, it is said: "When the cause of attachment is that the action is for the price or value of an article or thing sold and delivered, which, according to the contract of sale, was to be paid for on delivery, there must be a concurrence of three facts in addition to that of indebtedness: (1) The thing must have been delivered; (2) there must have been no credit given; (3) and the contract to pay on delivery must be unconditional. If there has been a credit of ever so short a time beyond the delivery, or if the payment depends upon any condition whatever,—as a demand,—the contract does not come within the operation of the statute." See, also, *Young v. Lynch*, 30 Kan. 205, 1 Pac. Rep. 503; *St. Louis Type Foundry v. Union P. & P. Co.*, 3 Mo. App. 142. Plaintiff having not only failed, but also having declined, to establish the ground of his attachment by proof, the attachment was very properly discharged. The defense to the main action being that the money was not due, and that being the only issue to be tried, the plaintiff failing and declining to show that the balance was due at the time the suit was instituted, the action could not be maintained, and the judgment of dismissal was correct.

We cannot understand the contention and reasoning of plaintiff's counsel in his printed argument, where he attempts to bring the case under the provisions of section 94, Civil Code, which is: "Actions may be commenced and writs of attachment issued, as prescribed in this chapter, upon debts and liabilities not yet due, if the affidavit states any of the causes mentioned, except the first, second, third, and thirteenth subdivisions." He claims that the ground upon which he based his attachment being the tenth, and not excepted in the section, he had a right to judgment if the money was not due. Although the tenth cause is not in terms excepted, the section can in no way be made to cover it. It probably never occurred to the legislature that any such attempt would be made. The proposition stands thus: A writ of attachment may issue and be sustained in a case where goods are sold and delivered on a contract to pay on delivery, *eo instanti*, on failure and refusal to pay, although the money "is not yet due" at the time of bringing suit and suing out the attachment. The absurdity is too apparent to need comment. It is a well-settled rule of construction of statutes

to so construe them, if possible, as to give each part some meaning and effect, and allow the whole to stand. This is easily done in this case. There are several grounds of attachment stated, notably fourth to ninth, both inclusive, and the twelfth, where the attachment could be rightfully maintained when the money is not yet due. The eleventh is not excepted in section 92, and can no more be brought under the operation of the section than can the tenth ground. It provides for attachment where "the defendant has failed or refused to pay the price or value of any work or labor done, * * * which should have been paid at the completion of such work." The necessity of excepting these two clauses probably never occurred to the legislature. The judgment is affirmed.

(21 Nev. 184)

HORTON V. NEW PASS GOLD & SILVER
MIN. CO. *et al.* (No. 1,340.)

(Supreme Court of Nevada. Nov. 16, 1891.)

JUDGMENT BY DEFAULT—OPENING—LACHES OF DEFENDANT.

Judgment by default having been entered on May 2d, the defendant, on May 21st, gave notice that June 25th he would move to open the default. Court was in session from May 27th to May 31st, at which time the motion could have been heard had the notice required by law been given. The court, however, had on April 19th, adjourned to June 25th, and on May 31st there was no reason to suppose it would be in session before that time. Held that, notwithstanding the court was always open, and the sessions were held at the convenience of the judges and as the exigencies of business might require, the adjournment to June 25th was notice that a session would be held at that time, and it was not a want of diligence for defendant to assume that none would be held before that time, and to give notice of the motion accordingly. *MURPHY, J.*, dissenting.

On rehearing. See 27 Pac. Rep. 376.

Action by R. L. Horton against the New Pass Gold & Silver Mining Company and others on a contract for goods sold and delivered. Judgment for plaintiff by default. From an order denying a motion to open the default, the defendant company appeals. Reversed.

BIGELOW, J. A rehearing was granted in this case for the purpose of considering whether the defendant had been guilty of such laches in giving notice of the motion to open the default and judgment as justified its being overruled. The default was entered May 2, 1890. On May 21st the notice was given that on June 25, 1890, the motion would be made. The affidavit upon which it was based states that up to that time no court had been held, and it consequently appeared that the 19 days' delay in giving the notice had not caused the loss of any opportunity for the motion to be heard, or the case to be tried, had it been granted. It was in view of this showing that we said that it affirmatively appeared that the delay in giving the notice had not caused the loss of any opportunity for the case to be tried. It is now, however, shown, by certified copies of the minutes, that court was in session from May 27th to May 31st, and, presumptively, the motion could

have been heard then, had only five days' notice been given, as required by the law. This made a *prima facie* showing of such want of diligence as justified the refusal to open the default. But it is now shown in the same manner that on April 19, 1890, the court adjourned to June 25, 1890; and apparently, on May 21st, when the notice was given, there was no reason to suppose it would be in session until then. No objection has been made to these records, and we consequently prefer to consider them, without so deciding, as being competent for the purpose for which they have been offered, and to determine the matter upon its merits. Under the system prevailing in this state there are no terms of the district courts. The courts are always open, and the sessions are held at the convenience of the judges, and as the business may require. There is, consequently, no way in which it can be absolutely determined when court will be held. As in this instance, although an adjournment had been had to June 25th, there was nothing to prevent an earlier session should anything unexpectedly arise to require it; but when it has been adjourned to a stated time, this is notice that a session will be held then, and, it is fair to presume, not until then. Certainly we cannot say that it is want of due diligence for an attorney to assume that it will not be, and to give notice of the hearing, at that time, of any matter he may wish to bring before the court. The judgment is reversed, with directions to the district court to open the default upon such terms as may be just and proper in the premises.

MURPHY, J., (*dissenting*.) In my opinion, the judgment of the district court should be affirmed.

STATE *ex rel.* POST-INTELLIGENCER PUB.
CO. v. LINDSLEY, State Treasurer.

(*Supreme Court of Washington.* Nov. 14, 1891.)

STATE AUDITOR'S WARRANTS—POWERS OF
UNIVERSITY LAND COMMISSIONERS.

1. Under Const. Wash. art. 8, § 4, providing that no money shall be paid from the state treasury except pursuant to appropriations by law, the state treasurer may lawfully question the legality of an auditor's warrant.

2. The board of university land and building commissioners was created by Act Wash. March 7, 1891, for the purpose of gathering together all property to which the state is entitled for university purposes, to sell certain lands, relocate the university, and erect buildings on the new location for its use. *Held*, that such board cannot draw warrants on the university fund, which is under the control of the board of regents "for the maintenance" of the present university.

Application by the Post-Intelligencer Publishing Company for *mandamus* to A. H. Lindsley, state treasurer. Denied.

Arthur, Lindsay & King, for petitioner.
W. C. Jones, Atty. Gen., for respondent.

STILES, J. This is an application for an alternative writ of *mandamus*, directed to the respondent as treasurer of the state of Washington, and requiring him to pay the amount of a certain warrant drawn by

the auditor in the relator's favor, or, if there be not sufficient funds in his hands to pay the warrant, to indorse thereon a statement that the same has been presented to him for payment, and has not been paid for want of funds, or show cause, etc. The warrant is dated subsequently to September 24, 1891, is for the sum of \$42, is numbered 68 of warrants drawn upon the university fund, and was issued to the relator for services performed at the instance of the board of university land and building commissioners in the publication of a notice inviting bids from contractors in connection with the proposed erection of a university building. The petition sets out the organization of the board in accordance with the requirements of the act of March 7, 1891, (Acts, p. 229,) and shows that in pursuance of the requirements of section 9 of that act the notice in question was published by the relator in its newspaper, and that after the publication its account therefor was duly certified by the board to the auditor, who duly audited and approved the account, and issued his warrant therefor. It is conceded that it was the treasurer's duty either to pay the amount of the warrant, or, if he had not funds therefor, to indorse it as demanded, unless he is at liberty to dispute the legality of its issue, and on that ground refuse to recognize it in any manner. This application was made upon notice to the respondent, who presents as his reasons for his refusal either to pay or to indorse the warrant, that the treasurer may dispute the legality of a warrant, and that the warrant in question was illegally issued.

1. No money can be paid out of the treasury except in pursuance of an appropriation by law. Const. art. 8, § 4. The treasurer is required to disburse public money only upon warrants drawn upon him by the state auditor. Acts 1890, p. 642, § 1. If the treasurer shall willfully refuse to pay any warrant lawfully drawn upon him he is subject to certain penalties. Same act, § 7. The auditor is prohibited from drawing any warrant unless there is a law authorizing the issue of the same. Acts 1890, p. 637, § 6. Under these provisions of the constitution and of the statutes it would seem clear that the treasurer would be justified in paying no warrant unless there was an appropriation made by law to meet it, and that any warrant issued without a previous appropriation would be unlawful, since a warrant is merely an order for the present payment of money out of the treasury. The treasurer, therefore, being in a position where he is as well qualified as the auditor to say whether or not there is an appropriation, may lawfully question the legality of any warrant on that ground.

2. The remaining question in this case, then, is whether or not there is an appropriation made by law to meet the warrant before us. "Appropriation," as applicable to the general fund in the treasury, is defined to be an authority from the legislature, given at the proper time, and in legal form, to the proper officer, to supply sums of money out of that which may be in the treasury in a given year to speci-

fied objects or demands against the state. *Ristine v. State*, 20 Ind. 338; 1 Amer. & Eng. Enc. Law, 639*d*, note 7; *Stratton v. Green*, 45 Cal. 149. The case of *Ristine v. State*, supra, arose upon a demand made by bondholding creditors of the state of Indiana upon the auditor of that state for a warrant for interest on the public debt, contracted under a statute requiring the treasurer to pay the interest upon warrants of the auditor. The constitution of Indiana pledged all of the revenues of the state, after the payment of the ordinary expenses of government, to the payment—*First*, of the interest; and, *secondly*, of the principal of the public debt. But article 10, § 3, of that constitution prescribed: "No money shall be drawn from the treasury but in pursuance of appropriations made by law." Held that, in the absence of an act of appropriation by the legislature designating a fund for the payment of interest, the auditor could not be required to issue his warrant even for such a purpose. Such being the definition of an appropriation, we next turn to the act providing for the organization of the board of university land and building commissioners, and find therein no appropriation whatever. We do find, however, that by the seventh section of that act the treasurer is required to keep a separate and permanent fund, to be known as the "University Fund," into which is to be paid all moneys received from the sale of university lands, and all appropriations made by the state for the support and maintenance of the university, and all other moneys paid or received for the use of said university from other sources. And we also find in the general appropriation bill for the years 1891-92 the sum of \$12,500 per year appropriated for the maintenance of the state university, which sum, under section 7, above mentioned, was to be paid into the university fund. The relator maintains that its warrant is payable out of the appropriation for maintenance of the university in 1891, which is conceded not to have been yet exhausted. The act in question is entitled "An act providing for the establishment, location, maintenance, and support of the University of Washington," but the real purpose of the law seems to have been to provide a commission whose duty it would be to gather together the property held by the state for university purposes, or to which it is entitled for such purposes, to sell certain lands, to relocate the university upon school land section 16, township 25 N., range 4 E., and to erect upon the new location "a university building of such dimensions as may be suited to the wants of the state, and of such other buildings as may be necessary for the use of the officers, professors, students, and employes of said university." No limit whatever is set to the amount of expenditure which may be incurred for these purposes, and it is fair to say that the sum of \$25,000 would not be a beginning for the scheme here proposed. The act does not pretend to give to the board established by it any voice in the control or management of the university as it is now constituted, or as it will be when it is removed

to its new location. On the contrary, the act itself recognizes the board of regents constituted by the act of March 27, 1890, (page 395,) and by reference to the latter act we find the entire administration of the institution vested and continuing in that board. It also appears that under the act of 1890 the regents have as sources of revenue only tuition fees and the annual appropriation made by the legislature, and that they are prohibited from incurring any expense beyond their annual income. Now, there was no other universality appropriation for the years 1891-92, therefore, if the board of land and building commissioners may draw upon the appropriation for maintenance of the university for their purposes, the regents would very quickly be left without any funds whatever, and, as they can now create no debt, the institution must soon stop its invaluable work. Did the legislature contemplate such a result? We cannot reach that conclusion. It seems entirely probable that it was expected that under the provisions of the act the present site in the city of Seattle would be sold at an early date for a large sum, and that the money thus realized would be at the disposal of the commissioners for building and other purposes; but there was no intention that the moderate annual sum set apart for "maintenance" would be diverted to any other object. In this conclusion we are further strengthened by the final clause of the tenth section of the act, which makes it the duty of the treasurer to pay all warrants drawn by the auditor upon bills certified by the board of land and building commissioners "out of any money in the university fund" "not otherwise appropriated." Clearly the sum set apart for the maintenance of the university is "otherwise appropriated," although it is a part of the fund known in the treasurer's books as the "University Fund." There being no appropriation upon which the relator's warrant could be drawn, it follows that the alternative writ must be refused. But before concluding this opinion we deem it proper to guard its future construction by the statement that it is not our intention to rule by any inference that the auditor might not examine and approve an account against the state (not issuing a warrant therefor) for the expenses of one of its public institutions of necessity or charity existing under general laws, or of its governmental offices, where no appropriation has been made, or where, by reason of unforeseen circumstances, the appropriation made had been exhausted. The alternative writ is denied.

ANDERS, C. J., and DUNBAR, HOYT, and SCOTT, JJ., concur.

STATE *ex rel.* COLE v. CITY OF NEW WHATCOM *et al.*

(Supreme Court of Washington. Oct. 20, 1891.)
MUNICIPAL CORPORATIONS—CONSOLIDATION—GENERAL AND SPECIAL LAWS.

1. Const. Wash. art. 11, § 10, declaring that municipal corporations shall not be created by special laws, does not prevent two existing municipal corporations, or one existing corporation

and an adjacent body whose incorporation was void, from being consolidated under a law authorizing a special election on the question of consolidation.

2. The title, "An act providing for the organization, classification, incorporation, and government of municipal corporations," is sufficiently broad to cover provisions authorizing the consolidation of two municipal corporations, and the holding of a special election on the question.

3. Act Wash. March 27, 1890, (Acts, p. 138,) providing that "two or more contiguous municipal corporations may become consolidated into one corporation after proceedings had as required in this section," and authorizing a special election to be held on the question of consolidation, applies to pre-existing corporations, created by special charter, as well as to those organized under general incorporation laws.

Appeal from superior court, Whatcom county; J. R. WINN, Judge.

Quo warranto by the state of Washington on relation of Albert S. Cole, prosecuting attorney of Whatcom county, against the city of New Whatcom, Will D. Jenkins, mayor, and George Cooper and others, councilmen, of said city, to exclude defendants from exercising the privileges and franchises as officers of said city, and to declare said city not a municipal corporation duly and regularly organized under the laws of the state. A demurrer to the information was sustained, and relative appeals. Affirmed.

Fuirchild & Rawson and Harris, Black & Laming, for appellant. *Dorr & Finch, Rittenhouse & Ivy, Bruce & Brown, and Hadley & Hadley*, for respondents.

STILES, J. The issues in this case make the existence of the city of New Whatcom, Whatcom county, depend upon our answer to the following questions: (1) Must the vote of the electors of two municipal corporations, which propose to consolidate under the provisions of section 10 of the act of March 27, 1890, (Acts, p. 138,) be taken at a general election in accordance with the second clause of article 11, § 10, of the constitution; or may it be taken at a special election, as permitted by the act? (2) Is the subject-matter of section 10 within the title of the act referred to, viz., "An act providing for the organization, classification, incorporation, and government of municipal corporations?" (3) Does section 10 apply to municipal corporations organized under general incorporation laws, or to other corporations created by special charter, as well as those first mentioned. The city of Whatcom was a municipal corporation created by special act of the territorial legislature. Acts 1888, p. 137. In July, 1888, the inhabitants of certain territory adjacent to the city of Whatcom sought to incorporate that territory into a municipality by the name of the city of Sehome, under the invalid act of February 2, 1888. In April, 1890, the inhabitants of Sehome and certain adjacent territory caused the formation of a corporation under provisions of the act of March 27, 1890,

and section 6 thereof, under the name of the city of New Whatcom, they correctly interpreting the decision of this court in *Territory v. Stewart*, 1 Wash. St. 98, 23 Pac. Rep. 405, and treating the attempted incorporation of the city of Sehome as wholly void. In December, 1890, the cities of Whatcom and New Whatcom took measures under the act of March 27, 1890, which, according to the agreement of the parties to this action, were regular in form, with the exception hereafter noted, and which resulted in the consolidation of the two cities under the corporate name of the city of New Whatcom. The exception noted above is that the election held on the question of consolidation was a special election, which the appellant claims was not authorized by the constitution. The labors of counsel have furnished us with elaborate arguments on both sides, and we might indulge in lengthy discussion on all the points of disagreement; but in our view the grounds of decision are really few and simple.

With regard to the first point, it is to be remarked that the constitution (article 11, § 10) merely limits the legislature in its dealing with municipal corporations to a system of general laws applicable to all, instead of the system of no system through special laws theretofore prevalent; and it does not even permit existing special charters to be further made special and peculiar by amendment, unless the amendments are general, so as to affect an entire class; but to encourage uniformity it provides that existing cities and towns may, without legislative compulsion, drop their special charters, and take up the organization of their respective classes under such general laws as may be enacted. To do this is in no sense to destroy or disincorporate a city or town. The territory covered is to be the same. The name is continued, and the people are identical. But when two existing corporations are to be consolidated the preliminary thing to be accomplished is the disincorporation of the old, and then follows the incorporation of a new municipality, in which there must be new territory, a new name, (at least as to a part of the territory,) and new people. This operation must, under the constitution, undoubtedly be conducted under general laws, but it is not the operation contemplated by the second clause of section 10, art. 11, and may be accomplished by either a general or a special election, as the legislature may direct. The act in question having provided for a special election in each of the cities or towns proposing to consolidate, such an election we hold to be sufficient.

On the second point we are equally clear. What is effected in the consolidation of two cities is finally incorporation, which is the generic subject of this act. Preliminary to this in this case was the disincorporation of both cities; but the object to be attained was not the disincorporation or the reincorporation of either, but the incorporation of both as one. The title of an act is not intended to be a glossary of its contents, nor is the constitutional provision with regard

¹ Const. Wash. art. 11, § 10 declares that municipal corporations shall not be created by special laws, but the legislature, by general laws, shall provide for their incorporation, organization, etc.

to titles meant to provide an index to the statutes. The real object of such provisions is to prevent surreptitious legislation on matters which are not germane to the declared object of an act as expressed in its title; and certainly no one could have been surprised that the consolidation of cities should be included in an act having so comprehensive a title as this. As well might it be contended that because one provision of the constitution prohibits the legislature from passing any special law "for incorporating any town or village, or to amend the charter thereof," (article 2, § 28,) and another says that "corporations for municipal purposes shall not be created by special laws," (article 11, § 10,) while there is no mention of disincorporation, therefore the legislature would be free by a special law to disincorporate any city in the state,—a proposition which would not now be conceded.

Upon the third point we see no room for argument even. There is not a word going to show any intention to bar pre-existing municipal corporations from the privileges of section 10; and, had there been, query whether their exclusion might not have been unconstitutional. However, the clause of the section making the provisions of sections 5 and 6 of the act apply to the new corporation and the officers thereof is urged as rendering it impracticable to unite corporations, one of which was created by special charter. But we can see no difficulty which would be likely to arise upon the union of two such corporations that would not appear with equal force upon the consolidation of two entirely new cities, incorporated under the provisions of this same act, especially should they belong to different classes; and they, if any, would be difficulties of administration merely, with which this inquiry has no concern. Having found upon all the issues raised for the respondents, the judgment of the superior court is affirmed.

ANDERS, C. J., and HOYT, DUNBAR, and SCOTT, JJ., concur.

(3 Wash. St. 17)

JONES V. JENKINS *et al.*

(Supreme Court of Washington. Oct. 23, 1891.)

MALICIOUS PROSECUTION — PLEADING — INSTRUCTIONS — APPEAL — STATEMENT OF FACTS.

1. Act Wash. March 22, 1890, (appeal act.) § 4, provides that in all cases and proceedings in which an appeal lies to the supreme court any party feeling himself aggrieved "may have any material fact or facts not already a part of the record made so by a statement of facts," to prepare which he shall file with the clerk a statement of facts, complete and ready for signing, and shall, within 80 days after the decision to be appealed from, give notice to the opposing party that the statement has been filed, and that on a certain day he will apply to the court to settle and certify the same; and that the party on whom such notice is served shall serve on the opposite party a notice stating whether the correctness of the statement is contested, and, if so, in what particulars; and that on the day named in said notice the parties may appear before the court, who shall settle what is the proper statement, and certify that the same contains all the material facts in the cause or proceeding. Section 5 provides that in cases at law the statement need contain no more than was necessary or proper in a bill of exceptions. *Held*, that the

statement filed by appellant need not contain all the evidence produced at the trial, but is sufficient if in good faith, and without intent to file a mere excuse for a statement, it is made to contain so much of the evidence and proceedings as is required for the presentation of the errors alleged.

2. Under section 6 of such act, providing that in actions at law and in special proceedings which are appealable the appellant, instead of settling a statement of facts, may have his exceptions, and such facts as are material to the same, made a part of the record by bill of exceptions, the facts of the same case cannot be presented in part by a bill of exceptions and partly by a statement of facts, but either one course or the other must be followed exclusively.

3. A complaint for malicious prosecution against two defendants jointly, which alleges in one paragraph that defendants procured the arrest of plaintiff on a "false charge," stating it, and in another paragraph that in procuring such arrest and prosecution they "acted maliciously and without probable cause," sufficiently charges malice, want of probable cause, and that the charge was false.

4. The charge of joint responsibility for the prosecution on both defendants is not affected by other allegations in the complaint showing that only one of them swore to the complaint to obtain the warrant for plaintiff's arrest.

5. In an action for malicious prosecution the fact that plaintiff was bound over by the magistrate, and indicted by the grand jury, is not sufficient to show probable cause for the prosecution, where such proceedings were based on defendants' testimony alone, and such testimony is claimed by plaintiff to have been false.

6. In such case, an instruction that if the jury find that the testimony of defendants was willfully false they shall find that the prosecution was commenced without probable cause, and was malicious, is not erroneous on the ground that express proof of malice and want of probable cause is required.

7. In an action for malicious prosecution, in which no issue is raised nor evidence offered on the question of plaintiff's financial standing, an instruction that if the jury find that plaintiff is entitled to recover they may, in estimating his damages, allow him such further sum as will compensate him for injured "credit," peace of mind, and mental suffering, is not erroneous as apt to lead the jury to regard the word "credit" as used with reference to plaintiff's financial standing, instead of his reputation and the esteem in which he was held in the community.

Horr, J., dissenting.

Appeal from superior court, King county; THOMAS J. HUMES, Judge.

Action for malicious prosecution by John E. Jones against George Jenkins and Michael C. Hanson. Judgment for plaintiff. Defendants appeal. Affirmed.

Lewis & Gilman, (W. V. Rinehart, Jr., of counsel,) for appellants. *Thompson, Edson & Humphries*, for respondent.

SCOTT, J. The first point to be considered in this case arises upon a motion made by respondent to have the statement of facts stricken from the record. Judgment was rendered in the cause on the 14th day of July, 1890. On the 21st day of said month appellants filed a purported statement of the facts in the case, for the purpose of having the same settled accordingly, which statement, the respondent claims, totally failed to comply with the provisions relating thereto in the appeal act, approved March 22, 1890, under which this appeal was taken. The respondent objected to the statement offered, and it seems he caused to be prepared a full and complete statement of the facts in the case,

which was filed on the 29th day of November, 1890, and was the one adopted and settled by the trial judge. The respondent objected to the settlement of any statement, because the time therefor had lapsed, no proposed statement which substantially complied with the law having been filed within the time prescribed, the statement which was offered within the time allowed having been rejected on the ground of its insufficiency. For these reasons we are asked to strike the statement of facts from the record. The judge, in his certificate, says that he refused to sign the first statement offered, because it did not contain all the material facts, evidence, testimony, and exceptions given upon the trial. He caused it to be marked "Exhibit A," and sent up with the record. Sections 4 and 5 of said appeal act are as follows: "In all cases and proceedings in which an appeal lies to the supreme court, any party feeling himself aggrieved may have any material fact or facts, not already a part of the record, made so by a statement of facts. Such facts shall be settled and agreed on in the following manner: The party desiring to settle a statement of facts shall prepare and file with the clerk of the superior court a statement of facts, complete and ready for signing, and shall, within thirty days after the decision, order, or judgment to be appealed from was made or rendered, give notice to the opposite party or his attorney that the said statement has been prepared and filed, and that upon a day to be named in said notice he will apply to the court or judge who tried the cause or made the decision, order, or judgment complained of, at a place to be named in said notice, to settle and certify said statement of facts. Said notice shall be given within thirty days after the decision, order, or judgment is made, and the day fixed for the settling and certifying of the statement shall be at least ten days, and not more than thirty days, after the day of service. The party upon whom such notice is served shall, within ten days thereafter, serve upon the opposite party a written notice, in which shall be stated whether or not the correctness of said statement of facts is contested; and, if contested, in what particular or particulars the said statement is deficient, incorrect, or incomplete. Upon the day named in said notice the said parties or their attorneys may appear before the said court or judge, and it shall be the duty of said court or judge to settle between the parties what is the proper statement, and to certify the same. The settling of said statement may be adjourned to a later day by order of said court or judge. Sec. 5. The certificate of the judge that said statement contains all the material facts in the cause or proceeding shall be sufficient. In cases of equitable cognizance, where the appeal is from the final judgment, the said statement of facts shall contain all the testimony on which the cause was tried below, together with any exceptions or objections taken to the reception or rejection of testimony. In cases at law the statement of facts need contain no more than what is necessary or proper in a bill of exceptions." The appellant insists that the statement is first proposed substantially complied with

the law; that it is only necessary to send up so much of the evidence and proceedings as is required for the presentment of the errors alleged, and that anything which has no bearing upon any of the errors claimed may be omitted therefrom; and we are disposed to agree with this contention. Although the judge is required to certify that the statement contains all the material facts in the cause or proceeding, this should be construed to mean only such facts as are material to the matters to be presented upon the appeal, and that the word "material" has reference to such matters only, and not to the issues tried below. That it was not intended that it should be necessary to send up all the evidence produced at the trial in every case appealed is rendered evident by the concluding part of section 5, which provides that "in cases at law the statement of facts need contain no more than was necessary or proper in a bill of exceptions." The difficulty comes in determining what is necessary or material for the presentment and determination of errors alleged, as to how much or how little the proposed statement should contain; and here, of course, it is impossible to lay down any definite rule, as each case is governed by its own peculiar conditions and circumstances. A few general observations can be made, however. It is contended that respondents have no means of knowing at the time the proposed statement is filed how many or what points the appellant intends to present as error; that the motion for a new trial, being couched in the most general language, ordinarily covers every possible point without definitely indicating them; that many of these might be abandoned, and that such motion furnishes no guide in these particulars, and that the statement itself need not necessarily contain all the points intended to be urged as error upon which the evidence has a bearing; that respondents would be left largely in the dark as to what facts should be made to appear if only such facts as are material to the points to be urged as error are to be sent up; and that, consequently, to insure a fair presentment of the case, all the testimony and evidence material to the issues tried should be contained in the statement. The motion for a new trial, where one is made, of course affords no guide herein. It is not the essential office or purpose of such a motion to present for reargument before the same court questions which have been once disposed of at the trial, although the propriety of including such matters is unquestioned; nor can it serve to raise new questions over the proceedings had at the trial, which could have been raised then, but were not. It is true that the grounds of a motion for a new trial, as specified in section 276 of the Code, may cover about everything; and it is usual to allege most of these grounds in the general language there used, this general statement having been rendered permissible by the act of the legislative assembly approved January 31, 1888. Our attention has been called to Code, §§ 449, 450, which are as follows: "Sec. 449. A judgment or order shall not be reversed for an

error which can be corrected on motion in an inferior court, until such motion has been made and overruled. Sec. 450. The supreme court may review and reverse on appeal or writ of error any judgment or order of the district court, although no motion for a new trial was made in such court." Section 449 evidently relates to matters other than those which are grounds for a new trial, and which the party had no opportunity to otherwise raise, such as a mistake made in the rendition or entering of judgment, and it is not in conflict with section 450. From all of these, and the reason of the thing, it seems that a motion for a new trial need only present such grounds therefor as arise or are ascertained subsequent to the trial, which the party had no opportunity to or could not raise during the trial. Every point relied upon as error here must have been called to the attention of the trial court in some manner, and at the proper season; but, when once so presented, that is sufficient without a repetition. While the motion for a new trial would not necessarily indicate or control the points appellant might desire to present upon an appeal, and would be of little value in this particular as an aid in settling a statement, yet the proposed statement itself should furnish this information; it should contain every point made touching or depending upon the evidence. While it may be true that some question of fact might become matter of record during the pendency of the case before its final decision in the superior court, nevertheless such matter should be incorporated in the statement. If one is subsequently settled on appeal. It is not contemplated that the facts of the same case should in part be presented by a bill of exceptions and partly by a statement of facts, although there is now practically little or no difference between them, except in the manner of the settlement. While the language of section 4, wherein it provides that "any party feeling himself aggrieved may have any material fact or facts not already a part of the record made so by a statement of facts," would indicate that it would not be necessary to include such facts of record in the statement, but that they might come up in the nature of a bill of exceptions and the other facts by the statement, yet, if so, this must yield in this particular to section 6, which is as follows: "Sec. 6. In actions at law and in special proceedings which are appealable the appellant, instead of settling a statement of facts, as provided by this act, may have his exceptions and such facts as are material to the same made a part of the record by bill of exceptions, as provided by chapter nineteen (19) of the Code of Washington, relating to 'exceptions.'" While either course may be adopted, it is evident by this section that, whichever one is adopted, it must be followed exclusively, although an exception taken as provided by chapter 19 of the Code would not prevent the party having taken it from afterwards settling a statement of facts, and making such exception a part thereof. The proposed statement should fairly advise a respondent of every question to be urged as error upon an ap-

peal that is in any wise dependent upon the evidence, and in this way he is put upon his guard in the settlement thereof, and should make his objections and offer his amendments and additions accordingly; and the certificate that such statement contained all the material facts would be understood as applied to and limited to the questions presented by the statement, and none other, dependent upon the facts, would be considered.

A party offering a statement is in duty bound to fairly present the facts bearing upon the points raised, and if, through any mistake or inadvertence, any fact material to any of such points should be omitted, he would in good faith be bound to insert it when called to his attention. Should a difference of opinion occur as to what the facts were, or as to what was material, this would be settled by the judge. A proposed statement might be so palpably defective as to show a willful or wanton violation of the law, and possibly amount to a contempt of court. In such cases the judge might refuse to settle it. An appellant should not be permitted to file a mere excuse for a statement, and impose the burden of furnishing the material facts upon the opposite party. If there had been a *bona fide* attempt to present some of the points fairly it might be settled as to such points, and where it was evident that no attempt had been made to comply with the law as to any other points these might be ignored, in which case the certificate should show that the statement contained all the facts material to certain points, indicating them, and that the facts with regard to the other points were not sent up because no attempt had been made to supply them. But it is only in extreme cases, where an intentional failure to comply with the law is evident, or where there has been the grossest neglect, that either of these courses should be resorted to. In this case the motion to strike the statement settled should be denied. The original statement proposed, which was filed in time, while it did not contain nearly all the testimony, was sufficient, or substantially so, to present the points, or most of them at least, there raised. Quite likely, however, it should have contained additional testimony as to some of these points, but of no considerable amount. The proposed statement was not so faulty as to indicate gross neglect, or an intention to mislead the court or respondent, or to show an attempt to suppress the material facts. The respondent had an opportunity to offer this additional matter, and to have the same incorporated in the statement, with the consent of the appellant, or by the direction of the court, if deemed material, in case of a disagreement between the parties. Instead of pursuing this course, the respondent procured what was claimed to be a full and complete statement of all the testimony and facts, which was a much more voluminous document than the original statement proposed by the appellant. It contains much that is cumulative and immaterial to any of the questions raised. Such statement was not procured by the respondent to be offered as a substitute,

it seems, for the first statement proposed, but rather to show the defects therein, and to resist the settlement of any statement by reason thereof and of the lapse of time. The court settled the facts in accordance with the last statement, however, and made the points raised over the settlement a part thereof for our decision. The proposed statement was not sufficient to raise all the points which are presented by the statement settled, but it was the appellant's option, of course, which points he would urge upon appeal of those raised below. The respondent contends that, had the first statement been adopted, the appellant might have successfully urged that the evidence was not sufficient to sustain the verdict, as no evidence upon some of the essential points was incorporated therein, and that for such reason also all the facts should come up; but such a question could not be raised in this court originally, and it does not appear to have been raised in the superior court, either by a motion to quash, or by a request for an instruction for a verdict upon any such ground. Had the question been raised in the superior court, if the controversy was over the effect of certain testimony or proof, (and this might include all of it,) as to whether it did tend to prove such fact or facts, then such testimony or evidence should be set forth in the statement, together with the point raised thereon. If all the proof was not contained therein, the respondent could propose any additional matter which he should claim was material, but it would not always be necessary to incorporate all the testimony and proof in the statement—that which should be cumulative and that which would be immaterial—merely to show an absence of such proof. Of course, the statement might better be full than meager, but it is not a correct practice to burden the record with cumulative and clearly immaterial matters tending in a greater or less degree to inconvenience the hearing here.

The point was raised by a motion to set aside the verdict, and for a new trial, that the damages allowed were excessive; that the evidence was not sufficient to warrant so large a recovery; and this was sought to be preserved in the first statement, but what has been said with regard to the testimony and proof to be sent up applies to this point also. Only material matters should be sent up, and as to these the statement should not be cumulative, as the court does not weigh the proof in actions at law. The respondent would be advised of any claim, either that the damages were excessive, or that there was no testimony to prove some point claimed to be necessary to support a recovery, by the proposed statement itself. The motion for a new trial should be incorporated in such statement, and there would be the information as to any point over the excessiveness of the damages, or of any other point properly raised therein and not elsewhere appearing. If the point as to the failure of proof was raised by a motion, that should be set forth in the statement, and the instructions given or refused, if any point is claimed over them, should also be set forth in the statement; and, if such point was raised there-

by, it would likewise appear, and the respondent would be informed thereof, even though the statement proposed should contain no other direct allegation that the damages were excessive, or that there had been a failure to prove some necessary point, each of which, however, would be very proper allegations to make directly in the proposed statement where relied upon as error, and all the proof is not given. The motion is denied.

ON THE MERITS.

This action was brought by respondent against appellants to recover damages for a criminal prosecution, which he alleges was malicious. It appears by copies of an affidavit and warrant of arrest contained in the record that the respondent was first arrested for an assault upon appellant Hanson with intent to murder him, the charge being that at Maple Valley, in King county, on the 23d day of November, 1889, the said John E. Jones did then and there shoot at the said Hanson with a pistol, intending to kill and murder him, and that he did shoot him in the leg. The arrest was made upon a warrant issued by one John F. Miller, a justice of the peace of said county, before whom Hanson made complaint. An examination was held, and the respondent was bound over. The record shows, however, that the nature of the charge was subsequently changed, and that the respondent was indicted by the grand jury of King county for an assault upon Hanson with a deadly weapon, with intent to inflict upon him a bodily injury, etc., and that he was tried thereon in the superior court of said county on the 14th day of February, 1890, which trial resulted in an acquittal, the jury finding a verdict of not guilty upon the evidence.

The circumstances connected with the affair are something as follows: The respondent, Jones, filed upon a piece of government land in April, 1889, which adjoined land owned by the appellant Jenkins. There was testimony to show that Jenkins was very desirous of obtaining title to this land himself, and that he procured the appellant Hanson to file upon it in July of said year, with an understanding that it was to be for his (Jenkins') benefit; the intention of said parties being to either frighten Jones off the land, or to defeat his filing by contest, and a contest was subsequently instituted. Jones and Hanson each had built cabins upon the land, and each one was undertaking to hold possession of it. Hanson's cabin was torn down by some one, and, according to Jones' testimony, Hanson came to his (Jones') cabin upon the day the shooting occurred, where Jones was at work, and asked him who tore down his house. That Jones said he did not know; and that, after some altercation, Hanson, who had a revolver with him, ordered Jones to leave the premises. That Jones started to leave, and that Hanson then went over towards Jenkins' place. After they had got some distance apart, Jones testified, he heard a shot fired. He also claimed that Hanson was quite drunk at the time, and that no one else was present or within seeing distance,

That the revolver Hanson had belonged to Jenkins, and that he (Jones) had no revolver or gun of any kind. Hanson was shot through the calf of the leg. The inference drawn from this testimony was that Hanson had shot himself, accidentally or otherwise, and it was claimed that thereupon Hanson and Jenkins conspired to charge Jones with a felonious assault as aforesaid, thereby undertaking to get him imprisoned in the penitentiary. There was testimony to show that upon several occasions prior to this shooting Jenkins had said that, if Jones did not vacate the land in controversy, he would have him sent to the penitentiary, or that he would try to get up a charge against him for that purpose. Hanson's testimony in part was that at the time the shooting occurred he had gone over to Jones' cabin, where Jones was at work on the roof, to ask him who tore down his cabin; that Jones pulled a revolver, and as he (Hanson) turned to run Jones shot him. Jenkins testified about the shooting, in substance, that he and Hanson had returned to his (Jenkins') place from Seattle, just prior to its occurrence; that he went about preparing something to eat, while Hanson went to look at his torn-down cabin; that when he had gotten the meal ready he went and called to Hanson to come, but did not get any answer; that, hearing some talking, he went over towards Jones' place; that he went up to within 150 feet of them, and saw them both plainly, and that he there saw Jones shoot Hanson through the leg, after having told him to go out of there, and after Hanson had turned to go. There was testimony that Hanson had said that Jenkins was not present, and did not see them. Hanson and Jenkins were the only witnesses who testified for the prosecution before the justice of the peace. It was not claimed by the prosecution that any one other than the three—Jones, Jenkins, and Hanson—was present or witnessed the shooting, or that any one else knew anything very material in relation thereto. It was shown that Jenkins and Hanson were witnesses before the grand jury, and that both of them testified to the charge against Jones at his trial in the superior court, and gave the only direct testimony against him at said trial.

The first point made by appellants goes to the sufficiency of the complaint, to which they had jointly interposed a demurrer upon the grounds that it charged more than one cause of action, not separately stated, and that it stated no facts sufficient to constitute a cause of action against the defendants or either of them. Appellants' brief and argument thereon, however, were limited to the proposition that the complaint did not state a cause of action against Jenkins. It was contended that the complaint should allege malice upon the part of said defendant, that there was no probable cause for the prosecution, and furthermore that the charge was in fact false. It was argued that it made no difference how maliciously said defendant acted in the premises if there was probable cause for the charge and prosecution, and that it did not matter whether they had, or whether there

was probable cause within their knowledge or not, if the respondent had in fact committed the crime. It was urged that the complaint failed to show that Jenkins took any active part in the proceeding, or that he did anything beyond what he was required to do in obedience to process as a witness. But these points, if raised, under the circumstances, are not well taken. The first paragraph of the complaint alleges "that on the 23d day of November, 1889, the defendants procured the arrest of the plaintiff on a false charge of assault with a deadly weapon upon the person of defendant Michael C. Hanson on the 23d day of November, 1889, in the county of King and state of Washington," and the eighth paragraph alleges "that in procuring the arrest and prosecution of the plaintiff the defendants acted maliciously, and without probable cause." The responsibility for the prosecution is charged upon Jenkins equally with Hanson in these allegations, and this is not affected by the other allegations in the complaint, showing that only Hanson swore to the complaint to obtain the warrant; and it is alleged in the part of the complaint stated that the charge was false, and that the defendants acted maliciously and without probable cause.

It was further insisted that the action of the justice of the peace in binding the plaintiff over, and his indictment by the grand jury, of themselves showed probable cause for instituting the proceedings, and authorities are cited which appellants claim support this position; but, whatever force there is in the proposition as a general one, there is none in a case like this, where the whole proceedings were founded upon the acts and testimony of the defendants, which were alleged to have been malicious and false, and this was the very issue tried. Certainly the defendants should not be allowed to avoid responsibility upon such grounds if the very proceedings set up in defense were based and founded upon their own perjured testimony, and it could have been nothing less under the circumstances of this case. If it was untrue, there was no possibility for any mistake therein. Error is claimed upon the admission in evidence of the affidavit and warrant issued by the justice of the peace, and of the bond taken before him; also of the record of the proceedings had in the superior court in the prosecution of Jones, on the ground that they were not properly identified; but, owing to some inadvertence, none of these documents were sent up with the record, there being only the copy of the affidavit and warrant of arrest heretofore mentioned therein, and consequently no point over them is raised.

It is contended that the court erred in certain instructions given to the jury, and in refusing to give an instruction asked for by appellants. One of the instructions given, which is complained of, is as follows: "If you believe from the evidence that the defendant Hanson was shot by the plaintiff in the manner as claimed by him, and that Hanson and defendant Jenkins saw such shooting, were present and witnessed it; in other words, if you believe their testimony as given before

you, you will find that they had probable cause for commencing such prosecution, and your verdict should be for the defendants. On the other hand, if you find that the defendant Hanson was not assaulted and shot by the plaintiff at all, and that the testimony of Jenkins and Hanson is false as to the fact of shooting; that they both came into court and willfully testified falsely as to the shooting,—you may find that such prosecution was commenced without probable cause, and may find that the same was malicious." This instruction is objected to on the ground that an action for malicious prosecution requires express proof of malice, and absence of probable cause, and we are cited to the case of *Maloney v. Doane*, 15 La. 278. That case was an action for damages for malicious prosecution in having charged the plaintiff with enticing away and harboring a slave belonging to the defendant. In the action for damages the defendant offered to prove by two witnesses that they had stated to him before he instituted the prosecution against the plaintiff that a certain anonymous letter was in their opinion in the handwriting of the plaintiff. It appears by the reporter's statement that this letter charged the defendant with maltreating a certain female slave, and stated that the slave had friends, who would protect her, and that she was at that time beyond the reach of the defendant, and the court very properly held that this testimony should have been admitted. It went directly to the question of probable cause and the motives of the prosecutor, but the facts there are not at all similar to the facts in this case. There was no offer here of any testimony to show probable cause, outside of the testimony of the appellants, which was admitted; and the court very properly told the jury that, if they found this testimony was willfully false, they might from this find that there was no probable cause to warrant or excuse the prosecution, and that the same was malicious. In fact it would be hard to get stronger or more direct proof of these matters than evidence of this character.

Another instruction objected to is as follows: "If, from the evidence and the instructions I have given you, you find that the plaintiff is entitled to recover, in estimating the amount of his damage you have the right to take into consideration and allow to him such reasonable sum as the evidence may show he was compelled to pay in defending himself against said charge, and such reasonable sum the evidence may show to be a just compensation for the time necessarily lost in attending upon said trial, and such further sum as will compensate him for injured credit, peace of mind, and mental suffering." The controversy here arises over the meaning which should be given to the word "credit." The appellants urge that the jury would naturally understand it as relating to the financial standing of the plaintiff, the being the sense in which the word ordinarily is used; and that it was error, as there was no proof that the plaintiff had any credit, or that he had sustained any injury therein; and that the instruc-

tion was erroneous as not predicated on the testimony in this particular. But the very fact that no issue had been made thereon, and that it was not claimed the financial standing of the plaintiff had been injured, or any testimony offered in regard to it, would of itself indicate that the word was used here as relating to the reputation of the plaintiff and the esteem in which he was held by the community; and the use of the word in this sense, while possibly not so common as in the other, is certainly not exceptional, and the connection in which it was used in this instance, with the surrounding circumstances, rendered its meaning obvious, and the jury could not have been misled thereby.

The request to charge which was refused is as follows: "In order to find for the defendants, or either of them, it is not necessary that it be shown by the defendants to you that the plaintiff did assault Hanson to such an absolute certainty as would be required for you in order to convict the plaintiff of the charge; even though if upon the evidence you should not feel justified as jurors in finding a verdict of guilty against the plaintiff, still this of itself would not be sufficient to justify you in finding a verdict in favor of the plaintiff. Either defendant would be entitled to a verdict in his favor if the evidence taken altogether should show that he had probable cause for doing whatever he did in the premises." This request was fully covered in the instructions given to the jury. The jury were told that the plaintiff must make out his case by a preponderance of the evidence, and, in order to find a verdict in his favor, they must find that the appellants came into court and willfully testified falsely as to the shooting; and that in no case could a verdict be found against Jenkins unless the jury were satisfied by a preponderance of the proof that he acted in conspiracy with Hanson, and so acted without probable cause.

The jury returned a verdict in favor of the plaintiff for \$3,000, and the appellants moved to have the same set aside as excessive. The motion was denied, and error is claimed thereon. If the plaintiff was entitled to recover anything, the amount recovered is not excessive. Two juries found against the testimony of the appellants; and in this action, in order to find for the plaintiff under the evidence and instructions, they had to find that the appellants willfully testified falsely, in relation to the charge against the plaintiff, and for the purposes of this case that fact is settled, whatever the real truth of the matter may be. The charge brought against the plaintiff was a most grievous one, and the consequences, in case of conviction, were likely to be serious indeed. The very fact that Hanson had been wounded in some manner lent an air of plausibility to the charge. Such a prosecution would be a very great damage to an innocent man in more ways than one, outside of the actual expense put upon him in defending the same, and the loss of time involved. Judgment affirmed.

ANDERS, C. J., and DUNBAR and STILES, JJ., concur. HOYT, J., dissents.

STATE V. SMITH.

(Supreme Court of Washington. Oct. 22, 1891.)

PERJURY—INFORMATION.

An information for perjury which alleges that defendant made a false affidavit, setting forth the matter therein contained, which "became material to a matter and proceeding about to be made in and before" a certain court, for the purpose of obtaining a new trial, or the release of a certain named person who was at the time under sentence of imprisonment, but which does not allege that the affidavit was made for the purpose of being used in the proceeding, or, if it was filed, that it was with the knowledge or consent of defendant, does not allege the crime of perjury, under Code Wash. § 867, making any one guilty of perjury "who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath states, as true, a material matter which he knows to be false."

Appeal from superior court, Klickitat county; SOL SMITH, Judge.

Information against Ed. Smith for perjury. A demurrer to the information was overruled, and defendant was convicted. He appeals. Reversed.

W. B. Presby, for appellant. H. Dustin, Pros. Atty., for the State.

HOYT, J. Appellant was convicted of the crime of perjury, and from sentence therefor prosecutes this appeal. The information upon which he was convicted was substantially as follows: "Ed. Smith is accused by the prosecuting attorney of Klickitat county, state of Washington, by this information, of the crime of perjury, committed as follows, to-wit: That on the 11th day of June, 1891, at the county of Klickitat, state of Washington, the matter of the hereinafter mentioned affidavit became material to a matter and proceeding about to be made in and before the superior court for Klickitat county, state of Washington, for the purpose of obtaining a new trial for, or the release of, one Frank Hanshew, who was at said time under sentence of said court for a period of two years and six months in the state penitentiary at Walla Walla, for the crime of grand larceny, committed in this county on the 3rd day of June, 1891, from the stealing of a quantity of money from one Ed. Smith, defendant herein, of the value of (\$77.00) seventy-seven dollars, which sentence had been passed by said court, but had not yet been signed of record by the judge of said court, which affidavit as aforesaid was on the 12th day of June, 1891, presented to the judge of said court, and filed in said court on said date; whereupon the defendant, Ed. Smith, then and there being in said county and state, did purposely, willfully, feloniously, and corruptly make a solemn oath before one W. B. Presby, a duly-commissioned notary public of the state of Washington, and having lawful authority under the laws of the state to administer said oath, that a certain written affidavit to which he, defendant, had subscribed, was and is true, in substance and effect, as follows: That certain money which he had heretofore accused the said Frank Hanshew of stealing from him, to-wit, the sum of \$77.00 in

money, and for the larceny of which he, the said Frank Hanshew, was then under sentence so as aforesaid, had been since said sentence by him, this defendant, found in the lining of his (defendant's) pants, and that he (defendant) must have had that money upon him in his pants, between the pants and lining, so as aforesaid during all of the time from the third day of June, 1891, until the 11th day of June of said year, at which latter date the defendant, while changing his pants, had found; that when he went to change his pants on the 11th day of June, so as aforesaid, he held them up by the bottom, and that the money he had charged Frank Hanshew of taking fell out between the lining of the pants, and that he was positive he must have had it all the time, and that it was never stolen from him. Whereas, in truth and in fact, the said allegations contained in said written affidavit so as aforesaid, and to which the defendant, Ed. Smith, then and there made oath to, so as aforesaid, were utterly false and untrue, and he, the said Ed. Smith, defendant herein, well knew that they were false and untrue, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the laws of the state of Washington."

To this information a demurrer was seasonably interposed, and the overruling thereof is assigned as error. The only question for us to decide, then, is as to whether or not said information states facts constituting a crime. Interpreted in the light of the common law, it clearly does not. Does it under our statute? Many of the formalities, and much of the detail, required at the common law in an information for perjury, has undoubtedly been made unnecessary by our statute; but we do not understand that such statute has gone so far as to make the taking of a purely voluntary oath a crime. Even under such statute, one can only be convicted of perjury for the making of a false affidavit when such affidavit is sworn to for the purpose of being used in some action or proceeding wherein by law such affidavit could be material, or by using or consenting to the use of such affidavit, after having been sworn to, in such action or proceeding. Are either of these necessary facts sufficiently stated in this information? We cannot see that they are. We are unable to find any language which clearly shows that at the time of making such affidavit it was made for the purpose of being used in the proceeding stated in the information, nor can we find that when it was so filed or used it was with the knowledge or consent of the defendant. It must follow that the crime of perjury has not been sufficiently alleged in the information. The judgment and sentence must be reversed, and the

¹ Code Wash. § 867, declares: "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath states, as true, a material matter which he knows to be false, is guilty of perjury."

cause remanded for further proceedings according to law.

ANDERS, C. J., and DUNBAR, STILES, and SCOTT, JJ., concur.

(3 Wash. St. 12)

STATE v. HANSHEW.

(Supreme Court of Washington. Oct. 22, 1891.)

LARCENY — INFORMATION — DESCRIPTION OF MONEY TAKEN.

An information for grand larceny, which merely describes the property taken as "a quantity of money of the value of \$77, the property of one E.," though insufficient under the common law, is, after verdict, sufficient, under Code Wash. § 1023, making it sufficient, in charging the larceny and embezzlement of money, to describe the property taken by giving it its general name of "money."

Appeal from superior court, Klickitat county: SOL SMITH, Judge.

Information against Frank Hanshew for grand larceny. Defendant was convicted, and appeals. Affirmed.

W. B. Presby, for appellant. H. Dustin, Pros. Atty., for the State.

HOYT, J. Appellant was prosecuted in the court below upon an information substantially as follows: "Frank Hanshew is accused by the prosecuting attorney of Klickitat county, state of Washington, by this information, of the crime of grand larceny, committed as follows, to-wit: The said Frank Hanshew, on the 3d day of June, 1891, in the county of Klickitat, state of Washington, then and there being, did unlawfully and feloniously steal, take, and carry away a quantity of money of the value of (\$77.00) seventy-seven dollars, the property of one Ed. Smith, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the laws of the state of Washington." Verdict of guilty was duly rendered, and motion in arrest of judgment filed and denied, and sentence had, from which this appeal is prosecuted.

The only question presented for our decision is as to the ruling of the court in denying said motion, it being claimed on the part of the appellants that the information does not state facts sufficient to constitute a crime, and that, therefore, judgment should have been arrested. The attack of appellant upon said information is founded upon the manner in which the property alleged to have been stolen is described, and it is clear that if the information is investigated under the rules applicable to an information or indictment at common law it would be insufficient; but section 1023 of our Code¹ has materially changed such rule, and under it a much less complete description of money or other property mentioned therein than that required at common law is sufficient. Investigated in the light of said section, and of the other provisions of our Code relating to the sufficiency

of indictments, we think the description sufficient, and that the information states facts constituting a crime. It is possible that such statement is imperfect, and that the defendant ought to have been furnished with further particulars, and, had he reasonably raised a question as to the sufficiency of the information, it might have been the duty of the court to have required a better pleading on the part of the prosecution; but where, as in this case, the question as to the sufficiency of the pleading is not raised until after verdict, every intendment will be brought to the aid of the pleading, and, thus aided, we think this information clearly sufficient. The judgment and sentence of the court below will therefore be affirmed.

ANDERS, C. J., and DUNBAR, STILES, and SCOTT, JJ., concur.

(2 Wash. St. 552)

STATE v. LYBARGER.

(Supreme Court of Washington. Oct. 27, 1891.)

REHEARING—AMENDED RECORD.

A rehearing will not be granted on an amended record raising questions not before the court on the hearing.

On rehearing. For former decision, see 27 Pac. Rep. 449.

DUNBAR, J. The petition for rehearing in this case is founded on the alleged imperfection of the transcript sent up to this court from the superior court, and the petition is to rehear on an amended record. The case was tried on the record brought here by the appellant. Had he suggested a diminution of the record when the case was before this court, it would have ordered the record supplied; but public policy will not allow cases to be tried by piecemeal. It cannot allow an appellant to rest his case on certain points of the record, and, if he fail, to try his case on another and different record.

ANDERS, C. J., and STILES, HOYT, and SCOTT, JJ., concur.

(3 Wash. St. 73)

ROURK v. MILLER.

(Supreme Court of Washington. Nov. 10, 1891.)

MECHANICS' LIENS—FORECLOSURE—PLEADING—MOTION FOR JUDGMENT.

1. Where, in an action to foreclose a mechanic's lien, the complaint alleged—*First*, that the plaintiff contracted to furnish certain work and materials, for which the defendant was to pay him \$550; and, *second*, that the plaintiff had performed the contract, but that the defendant had only paid \$375,—an allegation in the answer that the contract price was "\$450, and not \$550, as stated in said second paragraph," should have been construed, although the contract was set up in the first paragraph, and only alluded to in the second, as amounting to a denial that the contract price exceeded \$450, and was good for this purpose on a motion for judgment upon the pleadings.

2. Where the complaint alleged that by the contract payment was to be made by a certain time, but not that the work was to be completed by that time, or that the payment of the price was contingent thereon, a denial in the answer of the completion of the work was not material, since the defendant might have agreed to make the payment in advance.

¹Code Wash. § 1023, makes it sufficient, in charging the crime of larceny or embezzlement of money, to describe the property taken by giving it its general name of "money."

Appeal from superior court, Pierce county; CARROLL B. GRAVES, Judge.

Action by John H. Rourke against F. C. Miller to foreclose a mechanic's lien. Judgment for plaintiff. Defendant appeals. Reversed.

A. A. Knight, for appellant. *Town & Likens*, for respondent.

SCOTT, J. It appears by the findings of fact that "this cause came on regularly for trial on the 14th day of January, 1891." "When the case was called, the plaintiff's counsel made a motion for judgment upon the pleadings, except as to the counter-claim of twenty-five dollars, referred to in the defendant's answer. Arguments were made by the attorneys of the respective parties for and against the motion. Previous to the announcement of the decision of the court upon the motion defendant's counsel applied for permission to amend his answer, which application of the defendant was denied, and the motion of the plaintiff was granted." An exception was taken. Testimony was introduced upon the issue formed by the answer and reply as to the counter-claim. The court found thereon that the defendant was entitled to an offset against the plaintiff of \$14.60, which he deducted from the amount stated to be due the plaintiff in the complaint, and rendered judgment in his favor for \$160.40,—the balance. It was error to thus render judgment for the plaintiff upon the pleadings. The first and second paragraphs of the complaint are as follows: "First. That on or about the 1st day of October, 1888, at Tacoma, Pierce County, Washington Territory, the above-named plaintiff entered into an oral agreement and contract, with F. C. Miller, the above-named defendant, whereby the said plaintiff was to do certain carpenter work upon, and furnish certain material to be used in the construction of, a certain building upon the lands hereinafter described; and the said defendant, F. C. Miller, promised and agreed to pay to the plaintiff therefor the full sum of five hundred and fifty dollars (\$550) on or before the 15th day of March, 1889. Second. The plaintiff further alleges that he did and performed the work and labor upon the said building, and furnished the material to be used in the construction of the said building, between the 1st day of October, 1888, and the 15th day of March, 1889, both days inclusive; and that he kept and performed the said agreement in all things to be kept and performed by him, but the said defendant has not paid the said sum of \$550, or any part thereof, except the sum of \$375, and there is now due and owing from the said defendant F. C. Miller, to this plaintiff, on said contract, the sum of \$175, and interest thereon from the 1st day of October, 1888." The remainder of the complaint related to the lien claimed. The material parts of the defendant's answer to be considered are as follows: "As regards the first paragraph in plaintiff's petition the defendant denies that he entered into the agreement with the plaintiff on the terms and conditions therein stated. As regards the second paragraph in the plaintiff's petition defendant admits

that the plaintiff performed work and labor upon the building referred to, and furnished materials used in its construction, but he says the work was not completed in a good, workman-like manner; that the same was not completed within the time agreed upon between the plaintiff and defendant; and that the plaintiff has not yet completed the work which he agreed to put into said building, or furnished the materials which he agreed to furnish in said building, and, as a consequence of plaintiff's failure so to do, said building is still uncompleted and unfinished. The defendant further says that the contract price between the defendant and plaintiff was \$450, and not \$550, as stated in said second paragraph." The remainder of the answer related to the lien set up in the complaint and to the defendant's counter-claim. The answer was defective, and could not have stood against a motion to strike; but as against a motion for judgment on the pleadings it is entitled to be more liberally construed, and, if it can be gathered therefrom that an issue is tendered by the pleading upon a material matter, the moving party should not prevail. The statement that the contract price was \$450, and not \$550, although it is directed to the second paragraph of the complaint by its reference thereto, while the contract is set up in the first paragraph and only alluded to in the second, should have been construed upon the trial as amounting to a denial that the contract price exceeded the sum of \$450, and given the effect of reducing the plaintiff's claim \$100 as against this motion. A denial of indebtedness in the specific sum claimed we have held to be an admission of any lesser amount, but the reason in this is to prevent evasive denials. If such a denial was to be given the effect of a denial of any indebtedness, a party could truthfully literally deny owing the specific sum claimed, and raise an issue as to owing any sum, when in fact he might be indebted upon the cause of action up to within a trifle of the sum claimed, and which he would not deny where pleadings are required to be verified especially. But the answer here goes further. The intention is apparent to deny that the contract price exceeded \$450; and, while defective in form, it ought to have been held good for this purpose, in the way it was attacked. There is no evasion, and the plaintiff is fairly notified of the intention to tender this issue, and, as the complaint admitted the payment of \$375, it had the effect of reducing the plaintiff's claim to the difference between the two sums. The answer also denies the completion of the work, and the furnishing of all the material, but this is not made material by any allegation that the payment of the contract price depended or was contingent upon either of these matters. The defendant may have agreed to make the payment in advance of the completion of the work, etc. The complaint alleges that by the contract the payment was to be made on March 15, 1889, but it nowhere appears that the work was to be done and materials furnished on or before that date by the terms of the contract. Judgment re-

versed, and cause remanded for further proceedings.

ANDERS, C. J., and DUNBAR, HOYT, and STILES, J.J., concur.

(91 Cal. 548)

DENNIS v. SUPERIOR COURT OF LOS ANGELES COUNTY. (No. 20,870.)

(Supreme Court of California. Oct. 17, 1891.)

JUSTICE OF THE PEACE — JURISDICTION — STOCKHOLDER'S LIABILITY.

The personal liability of a stockholder of a corporation, for his proportion of the indebtedness of the corporation, is an obligation arising on contract, within Code Civil Proc. Cal. § 112, giving original jurisdiction to justices' courts in actions on contract for the recovery of money when the amount claimed is less than \$300.

Application for writ of review directed to superior court, Los Angeles county.

Petitioner, Dennis, was sued by John Rebmán in justice's court, to enforce petitioner's liability as a stockholder in the San Gabriel Valley Land & Water Company, on a debt contracted by said company. Rebmán recovered a judgment for \$299, and petitioner appealed to the superior court of Los Angeles county, where said judgment was affirmed. He now applies for this writ of review, alleging that the justice had no jurisdiction of the action, that the superior court had none on appeal, and that he objected to the jurisdiction in both courts. Writ denied.

Wells, Munroe & Lee, for petitioner. Hourx & Haynes, for respondent.

PER CURIAM. We think that the personal liability of a stockholder of a corporation, for his proportion of the indebtedness of the corporation, is an obligation arising upon contract, within the meaning of section 112 of the Code of Civil Procedure, giving original jurisdiction to a justice's court in actions arising upon contract for the recovery of money, when the amount claimed is less than \$300. The court of appeals of Maryland had before it the question of the nature of such a liability upon the part of a stockholder, in *Norris v. Wrenschall*, 34 Md. 492, and in that case it was held to be an obligation so far *ex contractu* as fairly to come within the spirit and intent of a statute intended to facilitate the recovery of judgments in suits "when the cause of action is a contract, whether in writing or not, or whether express or implied." We are satisfied with the conclusion there reached. It follows that the application for the writ applied for herein must be denied, and it is so ordered.

(21 Or. 245)

COUGHTRY v. WILLAMETTE ST. RY. CO.

(Supreme Court of Oregon. Nov. 9, 1891.)

NEGLIGENCE—INJURIES TO ANIMALS—EVIDENCE.

In an action against a street-railway company for the negligent injury of plaintiff's horses, the evidence showed plaintiff's driver was holding the team beside the track; that when they saw the motor coming they grew uneasy, and when it was about 125 feet away one of the horses "danced" onto the track, and continued there until struck by the motor; that the motor was not going at the usual speed, but was going

so fast that it would have been unsafe to step on or off it. It did not appear whether the motor could have been stopped after it was seen by the engineer that the horses were on the track. Held, that there was no evidence of negligence on defendant's part to support a verdict for plaintiff.

Appeal from circuit court, Multnomah county; ERASMUS D. SHATTUCK, Judge.

Action by James Coughtry against the Willamette Street-Railway Company for the injury of plaintiff's horses. Judgment for plaintiff, and defendant appeals. Reversed.

STATEMENT BY THE COURT. This is an action to recover damages for alleged negligence, commenced in justice's court for East Portland precinct, in Multnomah county, Or. After alleging the defendant's corporate existence, the complaint charges "that plaintiff was, on the 9th day of February, 1891, the owner of one span of sorrel horses, seven years of age, and on that day was on said N street, at work, with said horses, and while so at work on said street, between Seventh and Eighth streets, with said horses, the defendant, while running its locomotive engine and cars on said street, through the carelessness, negligence, and willful conduct of its agents and employees, ran said locomotive engine and cars against the said span of horses of plaintiff, and broke one of said horse's legs and bruised the other one so that he became lame, sore, and crippled, to the damage of the plaintiff in the sum of two hundred and fifty dollars; that said injury was caused by the careless, negligent, and willful manner of the defendant's servants, agents, and employees in the running of said train along said street, without any fault on the part of this plaintiff." After denying each material allegation of the complaint, the defendant alleges "that said accident and injuries or damages that occurred to plaintiff's horses, or either of them, was caused solely by the careless and negligent manner in which plaintiff managed and drove said horses upon the track of defendant's railway; that, had plaintiff exercised ordinary care and prudence, said accident would not have occurred." The record does not show that this new matter in the answer was replied to. The plaintiff recovered a judgment before the justice for \$195, and on appeal to the circuit court he recovered judgment for \$250, from which last-named judgment this appeal is taken. At the conclusion of plaintiff's evidence, the defendant moved for a nonsuit, but the motion was overruled, and defendant excepted.

John H. Hall, for appellant. Ira Jones, for respondent.

STRAHAN, C. J. The only error relied upon on this appeal is the refusal of the court below to allow defendant's motion for a nonsuit. The ground of the motion was that the plaintiff had failed to prove a case sufficient to be submitted to the jury. This state of the record imposes the delicate duty upon this court of looking into and considering the evidence, to determine whether or not any facts were

proven which could in any view that could be reasonably taken of them entitle the plaintiff to a verdict. To sustain its contention, the appellant makes two points: *First*, that the plaintiff failed to prove that the defendant, its agents and servants, were in any respect negligent; and, *second*, that the plaintiff's evidence shows that he was guilty of negligence contributing to the injury. These two objections were both covered by the defendant's motion for a nonsuit, and may be considered together. The evidence is all contained in the bill of exceptions, and is very brief. John Beno testified that he was in the employ of the plaintiff at the time of the accident; that they were excavating a cellar on the north-east corner of Sixth and N streets, in East Portland, on the day of the accident; that they had taken out the last load of dirt, and dumped it on the east side of Seventh street, about 50 feet south from N street; that the driver, young Mr. Coughtry, turned around, drove back to N street, and there saw the span of horses in question, standing with heads towards the track, and the lines lying on the ground, where they had been left by young Coughtry, another son of plaintiff. Witness got off the wagon and picked up the lines, while Robert Coughtry drove around the loose team, and upon the bridge, to a point about 35 feet east of Seventh street, and stopped, while the witness held the lines of the team behind the wagon. They waited here for young Coughtry, who had gone to the cellar for his coat, some three or four minutes, when they saw the motor coming. The team held by the witness began to grow uneasy, and the horse on the near side "danced" upon the track when the motor was within about 125 feet of them, and continued upon the track until struck by the motor. The motor pushed the horses some 10 or 12 feet along the track before it stopped. This was about 5:30 or 6 o'clock in the evening of February 9th. Robert Coughtry testified that he had been driving the team along the street during the day, and passed the motor a great number of times; that while he was unloading the last load in the evening the motor passed down the street, going west; that the motor had been making trips every 15 or 20 minutes during the day; that it did not generally remain at the station but a few minutes before going back; that, after unloading his load, his nearest way home would have been to continue south on Seventh street to O street, thence east on O street; that O street was an improved street, but that N street was a better street; that he had to turn his team around to get back to N street; that he was sitting on the wagon when the motor struck the team. He also corroborates Beno's statement about the horses being on the track, and that Beno held the lines, and that the horses, not being fastened together behind, spread apart, with the result that the near one got on the track when the motor was about 125 feet away. H. Glenn testified that he was in the office of the East Portland Mill & Fixture Company at the time of the accident. His attention was at-

tracted by the tramping of the horses. He looked out, and saw the horses upon the track, and at the same time heard the motor coming. He then went to the west window, and saw the motor coming, at the same time saying: "It looks as though there was going to be an accident out there." The train was not running at the usual speed, but was going so fast that it would have been unsafe to step on or off it. That they usually came down the grade at a pretty lively speed, in order to get a good start up the grade which commenced just east of Seventh street. The witnesses, except the last, all substantially agreed as to the amount of damages. This was all the evidence offered on the part of the plaintiff. The complaint is very defective in not alleging the act of negligence upon which the plaintiff relies, but no objection appears to have been taken by demurrer or motion, so that the same will not be further noticed. The gist of this action is negligence, and, in order to enable the plaintiff to recover, he must prove by a preponderance of the evidence that the defendant violated some duty which it owed to the plaintiff,—that is, that it did some act without due care which it ought not to have done, or that it omitted to do some act which it ought to have performed,—and that such act or omission contributed to the injury of which the plaintiff complains, and, in addition to this, that the plaintiff was guilty of no act which contributed to the injury. After the most attentive and careful examination of this evidence, and giving full effect to every fact which it in any way tends to prove, we are unable to find that the defendant was in any way whatever negligent. It was engaged in running its motor over its track, as it had the lawful right to do, and the plaintiff knew the fact. Its time was about every 15 or 20 minutes, and the plaintiff knew the motor had passed west, and that it did not remain long at the station. Under these conditions, the plaintiff's driver stopped the team by the side of the track, to enable Mr. Coughtry to go back to the cellar they had been excavating, for his coat. Plenty of time elapsed from the time the team stopped by the side of the track before the motor returned for the team to have passed beyond possible danger from it. If the driver allowed the team to linger by the side of the motor line until the horses became unmanageable and "danced" upon the track, it is difficult to see how the defendant could be responsible for that act. Whether the motor could have been stopped after it was seen by the engineer that the horses were on the track does not appear. There is not a particle of evidence on the subject. As this record stands, there is no evidence of any negligence on the part of the defendant that could justify a recovery. In addition to this, it is difficult, under the circumstances, to resist the conclusion that the plaintiff was negligent in handling and caring for his team at the time of the injury, and that this negligence directly contributed to the injury. For these reasons the court below erred in refusing the defendant's motion for a nonsuit, and the

judgment appealed from must be reverse with directions to sustain the defendant motion for a nonsuit.

PUTMAN v. SOUTHERN PAC. CO.

(Supreme Court of Oregon. July 15, 1891.)

DEATH BY WRONGFUL ACT—RIGHTS OF PARENT
ACTION FOR INJURY TO ADULT CHILD.

Under section 34, Hill's Code, a mother during the continuance of the relation of parent and child, may maintain an action in her own right for damages caused by the death of her child, while section 371, Id., gives to the personal representative a right to recover for an injury which the estate may have sustained by reason of the death of an adult, or one emancipated from parental service.

(Syllabus by the Court.)

Appeal from circuit court, Lane county
M. L. PIPES, Judge.

Action by Catherine Putman against the Southern Pacific Company, to recover damages for the death of plaintiff's son, Robert Putman. There was judgment for defendant, and plaintiff appeals. The judgment was at first reversed in this court, but subsequently, on rehearing, was affirmed.

B. B. Beekman and Watson, Hunie & Watson, for appellant. Bronaugh, McArthur & Bronaugh for respondent.

LORD, J. This is an action brought by the plaintiff, as the widowed and dependent mother of Robert Putman, deceased, to recover damages from the defendant company on account of his death. In substance, the complaint alleges that the deceased was in the twenty-third year of his age, was active, strong, in good health, etc., and that up to his death by the wrongful act of the defendant, and long prior thereto, he had contributed largely to the plaintiff's support, and would have continued to do so if he had lived, and that she was, and still is, in great need, etc. After making the usual denials, the answer sets up, as a separate defense, that the said Robert Putman was, at the time of his death, a married man, and left a widow surviving him, etc.; the appointment of an administrator of the estate of Robert Putman; and the recovery of a judgment by such administrator against the defendant in another action for his death, etc., and the payment and satisfaction thereof. A demurrer to this defense, as insufficient in law to defeat a recovery, was overruled, and judgment thereupon was rendered in favor of the defendant. This action is based on section 34, Hill's Code, which provides: "A father, or in case of the death, or the desertion of his family, the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward;" while the action by the administrator was prosecuted under section 371 of Hill's Code, which provides: "When the death of a person caused by the wrongful act or omission of another, the personal representative of the former may maintain an action in law therefor against the latter, if the former might have maintained an action had he lived, against the latter, if

"Lord Campbell's act," said Mr. Justice QUAIN, "gives an entirely new action, not an action connected with the estate of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased." *Bradshaw v. Railway Co.*, L. R. 10 C. P. 189. Under such statutes, then, the damages recoverable are never assets of the decedent's estate, to be applied according to its general necessities, but compensation wholly for the pecuniary loss sustained by those injured by his death, to whom such damages exclusively belong, and to whom they are to be distributed as may be directed by their provisions.

Under our statute, (section 371, *supra*), the damages recoverable, which are not to exceed \$5,000, are to be administered as other personal property of the deceased. They become assets to be applied by the administrator to the payment of debts, or distributed, as the exigency of the estate may require, and the law governing his duties as administrator may direct. He sues in his capacity as a legal representative of the estate, to recover, by the way of damages, for the loss which the estate has sustained, and not as trustee for those named in the act as its beneficiaries to recover the pecuniary loss which has been inflicted upon them by his death. In the one case, the object is to recover the loss sustained by the estate, but in the other to recover the pecuniary loss sustained by the designated relatives. The difference is between the damage done to the estate and the damage done to them. That to the estate is measured as near as can be by the value of the life lost, and that to the widow and next of kin by the value of the life lost to them. The right of action by the administrator for the benefit of the estate is co-extensive with the value of the life lost, while the right of recovery for the exclusive benefit of the widow and next of kin is co-extensive with the pecuniary injury resulting to them. In either case, as a basis for estimating damages, the expectancy of the life of the deceased, his age, health, habits, occupation or business, earnings, etc., are all important elements to be considered, with no other difference than in one case to get at the value to be derived from the continuance of the life of the deceased, as an injury to the estate, according to rational probabilities, and in the other to ascertain the present value of the beneficiary's interest in the continuance of his life. By force of section 371, the damages recovered become a part of the general assets of the estate, which, under our statute of distribution, are applied—*First*, to the creditors; and, *second*, to the next of kin; and which belongs to the latter, not strictly by a right of action for a pecuniary injury sustained by them as its beneficiaries, but by virtue of a kinship through the statute for the distribution of the estates of decedents. While, then, it is true that the right of action is given to the administrator as the legal representative of the estate, and he sues for its benefit, and the damages recovered become a part of its assets, yet the fact remains that, for all substantial purposes, the administrator, in the prose-

cution of that action and the distribution of its proceeds, represents, collectively, all who were interested in the continuance of that life, whether as creditors, or as wife, or as distributees. But, in giving this right of action to the administrator, section 371 makes no distinction on account of the age of the person whose death has been caused by the wrongful act or omission, and by its literal reading would seem to indicate that an action may be brought for the death of a child or an adult. But the loss of services before majority is an injury to the parent, and not the estate of the child, unless emancipated, and when his services are valuable. Besides, no injury would likely result to the estate from the death of a mere child. The more reasonable construction is that section 371 was intended to confer a right of action upon the administrator to recover damages for the benefit of the estate for any injury which may have been sustained by reason of the death of an adult, or one emancipated from parental service. As the damages recovered are intended to compensate for the injury sustained by the estate, and, in default of debts, belong to the wife or next of kin, our inquiry now is whether the purposes of section 371, taken in connection with section 34, are sufficiently identical in purpose and object to indicate that they were intended to accomplish practically the same end as statutes commonly known as "Lord Campbell's Act."

The effect of section 34 was to confer a new and independent right of action beyond that given at common law. Under it, the father could recover for loss of services for an injury to his child during the period of disability, and, if death ensued, for loss of services during the interim between the injury and the death, and the incidental expenses incurred for care and medical attendance. But he could maintain no action to recover for the death of his child, or for services lost by the death, as the death of a human being was not an injury for which redress could be given. As there could be no loss of services or incidental expenses when the death was instantaneous, the parent was without remedy after the death of his child. That section 34 was intended, at least, to obviate this defect of the common law, and remedy its injustice, there can be no question. Looking at its context, there is no doubt the language, "the father," etc., "may maintain an action as plaintiff for the injury or death of his child, and a guardian for the death of his ward," seems to imply that both rights rest on the same basis, and limits the claim for loss of services to minority. That it includes only the family relation during minority seems to be further indicated from the language, that "the father, or, in case of his desertion of his family," etc., "the mother, may maintain an action," etc., as being a recognition of her succeeding to the headship of the family, and legal right to claim the services of her child. This construction would cover the defect of the common law, and give the father the right to recover for lost services for the death of his child from the time of the injury until he attained his majority.

Does the section go further, and include a right of the parent to maintain the action, after his child has attained majority, when the relation of parent and child is maintained between them, and the parent is receiving support or services from the child? It is to be observed that the new right of action is given for the death of the child, as a right of action existed at common law for an injury to the child for loss of services and incidental expenses, and is based on the idea of a pecuniary injury sustained by the loss of the child's services or support. As section 371 gives a right of action to the administrator for the death of a person, wrongfully caused, the two sections are *in pari materia*, and must be construed together. To do that, they must be taken together and effect given to the purpose sought to be accomplished by them, if ascertainable, without doing violence to their language. It is plain that the language of section 34 is broad enough to include a recovery for the death of a child wrongfully caused, whenever the relation of parent and child exists. The word "child," though in many connections it means a person of tender age, is not the equivalent of "minor," and is often applied to persons who have passed their majority, when dealing with the relation which involves parent and child. In statutes passed for the protection of children, the word "child" means a person of tender years, without regard to parentage; while, in statutes passed in respect to wills and intestacy, age has nothing to do with the question, and parentage everything. Emancipation from parental service, or marriage, may have the effect to destroy the relation of parent and child, but the child remains a minor. In some of the statutes, like section 34, the words "minor child" are inserted so as to expressly limit the right to damages to the minority of the deceased, indicating that, without such qualification, or by the use of the word "child," the right would not be dependent upon the minority of the child. In commenting upon a like statute, Ray, J., said that "the position occupied by the person should determine the question, rather than age alone." Railroad Co. v. Vining, 27 Ind. 519. As we are regarding our sections as *in pari materia*, the language of Parsons v. Railway Co., 94 Mo. 295, 6 S. W. Rep. 464, is not inappropriate. The court says: "The first important difference to be noted, so far as the principle to govern in this case is concerned, is that, under those and similar statutes, the right of action, when it inures to the benefit of the parent for the death of a child, is not dependent upon the minority of the child. If the parent has a right of action under those statutes, it might be well said that such parent can recover for the value of the whole life of the child. Under our statute, a right of action can only accrue to the father or mother of a minor child." As the child, when it reaches majority, has the disposal of its services, he may give them, in whole or in part, to his parents, and continue the relation of parent and child. This principle is constantly recognized in other ways. No principle is bet-

ter settled than that if the child, after majority, continues with the parents, the family relation is presumed to continue, and the child cannot recover for services to the parent, unless there was an agreement therefor. By Lord Campbell's act, an action is given "for the benefit of the wife, husband, parent, and child," although brought in the name of the executor or administrator; yet the word "child" in this act has been held to mean an adult as well as a minor son or daughter. Dalton v. Railway Co., 93 E. C. L. 296; Franklin v. Railway Co., 3 Hurl. & N. 211. As counsel say, is there not "just as much reason for holding that the word 'child' in this act means a 'minor,' as to so hold under section 34?" The reason assigned in either case would be that, as the parent had no right at common law to the services of the child after it had passed its majority, the legislature or parliament could only have intended to give him a remedy for the loss of such services during the period of minority, had not death intervened.

The statute of Pennsylvania makes a similar provision in favor of the "husband, widow, children, or parents of the deceased," and it has been repeatedly held that the word "child," as employed in that statute, includes adults as well as minors. Railroad Co. v. Adams, 55 Pa. St. 499; Railroad Co. v. Kirk, 90 Pa. St. 15. But the case more directly in point, and which involved the consideration of sections of the Indiana statute almost identical with our own sections, and which presents an able and exhaustive argument upon the point of view now being investigated, is Mayhew v. Burns, 103 Ind. 328.¹ Section 266 of the statute of Indiana is identical with our own section 34, and section 284 only differs in providing that the damages "must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed as personal property of the deceased." Their section limits the right of recovery to \$10,000 and ours to \$5,000. There the damages recovered are for the exclusive benefit of the designated parties, in the order named, and are to be distributed in the same manner as personal property of the deceased, while ours include the creditor class; but, without debts, the direction is the same. The court says: "By the common law, the father had no right of action for lost services after the death of his child; and the effect of section 266 is to confer, to that extent, a new and independent right. In our view, both the common law and the statutory damages may be recovered under that section, as they are defined in Pennsylvania Co. v. Lilly, 73 Ind. 252; and, when recovered, they belong to the parent in his own right, and are not distributable under section 284. During the continuance of the relation of parent and child, the right of action is in the parent entitled to its service. This relation presumptively continues during the minority of the child. Railroad Co. v. Adams, 55 Pa. St. 499; Railroad Co. v. Kirk, 90 Pa. St. 15; Railroad

¹ 2 N. E. Rep. 793.

Co. v. Zebe, 33 Pa. St. 318. If the relation of parent and child continues after majority, the parent receiving support or service may nevertheless maintain the action. In such case, the reasonable expectation of pecuniary advantage by the relation remaining may be taken into account, and damages given for the probable pecuniary loss occasioned. *Dalton v. Railway Co.*, 93 E. C. L. 296; *Franklin v. Railway Co.*, 3 Hurl. & N. 211; *Railroad Co. v. Adams*, supra. This view accords with the construction given similar statutes in England, and some of the states in this country, and does not expose the wrong-doer to the hazard of being twice sued for the same wrong."

The result of this decision, as applied to their section, is that, where the wrongful act or omission occasions the death of an adult, or one not in the service of his parent, the right of action is exclusively under section 284, corresponding substantially to our section 371; but if the wrongful act or omission occasions the death of an adult who is rendering service or support to his parent, then the right of action is not exclusively under section 284, but, in addition thereto, the parent receiving such service or support may nevertheless maintain an action under section 266, which is like our section 34, and that, too, without exposing the wrong-doer to the hazard of being twice sued for the same wrong. The court in that case considered these sections *in pari materia*, and reached the conclusion that they were intended to accomplish the same end as the statutes of 9 & 10 Vict. c. 93, commonly known as "Lord Campbell's Act." Our sections are susceptible of the same construction, and, if they were intended to accomplish the same end, that case is an authority, able and strong, that a like result should follow. The objection reiterated, that such a construction would give a double reparation for the same injury, cannot possibly result from such an interpretation. Under age, and when the child is in the service of his parent, there is no right of action, under section 371, for its death, but under section 34; and the damages recoverable are for the value of the child's services from the time of the injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. *Pennsylvania Co. v. Lilly*, supra. But, when the relation of parent and child continues after majority, the parent receiving support and service may maintain his action under section 34, notwithstanding the administrator may prosecute his action under section 371, and the damages recoverable are the reasonable expectations of pecuniary advantage, or prospect of support, from the continuance of the relation, if his life had been spared. The wrong-doer is only required to respond in such an amount of damages as the parent has sustained by deprivation of the child's service or support, which would never have constituted any part of the child's accumulations, or formed any part of his estate, and consequently could not be included in any recovery by its administrator after its death. Nor is the claim based upon any legal obligation to

render the parent's support by any of the statutes. "That construction," said Mr. Justice NELSON, "has been rejected by every court before which the question has been presented." *Railroad Co. v. Barron*, 5 Wall. 90. It is founded upon an instinctive affection that nature has implanted in the child for its parents, to serve or support them when, for any causes, relief or protection is needed, which justifies the expectation in them of a continuance of support or service from a child who has regularly devoted his earnings, in whole or in part, for their use and benefit, and the loss of which is a pecuniary injury.

Can it be said, when the child, although of mature age, recognizes the filial duty of caring for his parents, who are perhaps aged and infirm, or without the means to provide for the necessities of life, and sustain the family relation by service or support regularly furnished, that they have not suffered a pecuniary loss by his wrongful death, and that the wrong-doer ought not to compensate them for the reasonable expectation of support destroyed? Years before section 34 was enacted, our statute imposed the legal obligation upon adult children to support their infirm and indigent parents, (Hill's Code, § 2875; and like statutes in other states have been regarded as of important consequence in the consideration of this subject, (*Chicago v. Keefe*, 114 Ill. 222, 2 N. E. Rep. 267; *Railroad Co. v. Wilson*, 12 Colo. 21, 20 Pac. Rep. 340.) To my mind, there can be no doubt, though the damages come through the estate of the deceased, that sections 34 and 371, when considered together, are based substantially upon the same principles, and were designed to serve the same end, as statutes modeled upon Lord Campbell's act. In both, a new right of action is given, and the results practically take the same direction in conferring benefits not before enjoyed. It matters not that the damages accrued to the estate, and become assets; the direction given them by law serves substantially the same purpose and ends of justice. As Mr. Justice NELSON observed, such statutes seemed "to have been enacted upon the idea, as a general fact, that the assets would take the direction given them by law." "Hence" he says (as we know many of the statutes do provide) that "the amount recovered is to be distributed to the wife and next of kin in the proportion provided for in the distribution of personal property left by a person dying intestate." *Railroad Co. v. Barron*, supra. It results, then, though a child may be of full age, if the family relation existed in fact, and the parent had a reasonable expectation of pecuniary advantage from the relation remaining, an action can be maintained by such parent, under section 34, for the death of his child, wrongfully caused, notwithstanding an action may be maintained by the administrator under section 371 for the benefit of his estate. While, therefore, the court erred in overruling the demurrer to the defense set up, and rendering judgment for the defendant on the ground that such a recovery, by the administrator, would be a bar to such action, yet the judgment must

stand, if the complaint is insufficient. After majority, the foundation of the action is the existence in fact of the family relation of parent and child. It is the reasonable expectation of pecuniary advantage from a person bearing the family relation of child to a parent, and the destruction of that expectation by the death of such person, wrongfully caused, that is the ground of the action. In *Railroad Co. v. Adams*, supra, the deceased, though over age, was unmarried, and had always lived with his parents, and labored for them. His earnings were devoted to their use, and his intention to continue to aid in their support while they lived was evidenced by repeated declarations as well as acts. In such a case, "the parents have a right to expect a continuance of support from a son remaining in the family, and who has for years contributed to it." Referring to the words "parents" and "children" in the section, the court says that they were "used with the intention to indicate the family relation in point of fact, as the foundation of the right of action." * * * Under age, the law presumes the relation to exist; * * * but over age the relation must be shown to exist in point of fact." And, after referring to the English cases of *Dalton v. Railway Co.*, 93 E. C. L. 296, and *Franklin v. Railway Co.*, 3 Hurl. & N. 211, the court further says: "We may repeat that the rule of these cases is that, if there be a reasonable expectation of pecuniary advantage, the destruction of such expectation by negligence, occasioning the death of the party from whom it arose, will sustain the action. This is the settled rule in England for the right of recovery where the family relation exists in fact, but not in law, so far as maintenance and support are concerned." In *Railroad v. Kirk*, 90 Pa. St. 17, the deceased was 28 years of age, had been away from home at intervals after he had attained his majority, and had been in business on his own account; but he had returned to his father's house, and for some months had been rendering service in his father's business without compensation. Upon these facts, the jury were instructed positively that unless they found that the parental and filial relation was subsisting, and that there was reasonable ground to believe that it would continue to subsist, between the plaintiffs and their deceased son, they could find only nominal damages. *WOODWARD, J.*, said: "The words 'parents' and 'children' are used to indicate the family relation in point of fact, as the foundation of the right of action." So in *Iron Co. v. Rupp*, 100 Pa. St. 98, the deceased was over 19 years of age; had been married six months; was keeping house and living about eight miles distant from his parents, who had given him furniture for his house-keeping, and received none of his earnings, etc.; and it was held that the father had no right of action; *TRUNKY, J.*, saying that it had uniformly been held that "the family relation, in point of fact," must exist "as the foundation of the right of action." It is essential, then, if the child be of full age, that the family relation exist in fact, and that the parents had a reason-

able expectation of pecuniary advantage from him, to maintain the action. This being so, as the foundation of the right of action, the facts showing the existence of the family relation and the pecuniary injury sustained by the death must be alleged. While the word "family" usually imports a household, including parents, children, and servants, it is not always necessary, to sustain the family relation between parents and children, that they should have a residence together. It is the assumption of the duties that belong to the relation of parent and child that determines such family relation as existing in fact, and fixes their social status after maturity. Whether the child, after maturity or marriage, remains at the home of its parents, or takes them to his home, or furnishes them with a home, can make no difference. It is his recognition of the obligation to support them, and its performance, that determine their social status,—that the relation of parent and child exists in fact,—and furnishes the reasonable expectation of pecuniary advantage from its continuance upon his life, and of its extinction upon his death. While the facts alleged might be made more definite, yet, taking them as true, we think they are sufficient to show a reasonable expectation in the plaintiff of pecuniary advantage, and that that pecuniary advantage is owing to the relation subsisting between the plaintiff and her son, which was destroyed by his death, wrongly caused by the defendant. It results that the judgment must be reversed, and the cause remanded for trial.

BEAN, J., did not sit in this case.

ON REHEARING.

(November 9, 1891.)

The opinion upon which the judgment is founded proceeds mainly upon the theory that section 371, Hill's Code, giving a right of action for the death of a person caused by the wrongful act or omission of another, and section 34, Id., giving a right of action to the parent for the death of his child, are to be construed *in pari materia*, and so considered that they were intended to accomplish the same end as statutes commonly known as "Lord Campbell's Act." While it is admitted that section 34, in giving a right of action to the parent for the death of his child, conferred to that extent a new and independent right of action, it is suggested that the object was only to obviate the defect or injustice of the common law, which deprived him of any remedy for the lost services of his child when death resulted, and consequently his right of action was confined to the minority of the child; that it was in this view that the word "child" was used in section 34, supra, and not in the broader sense, which results from construing the two sections *in pari materia* in the particulars mentioned, and to accomplish the objects already stated. In consideration of the fact that the case was of necessity argued before and decided by two members of the court, it is enough to say, without further remark or explana-

tion, that they are not now fully agreed that the result reached by the opinion and the judgment rendered upon it is correct, and, as a consequence, that such opinion and judgment must be held for naught, and the judgment of the lower court be affirmed.

STATE V. O'NEIL, (two cases.)

(*Supreme Court of Oregon. Oct. 19, 1891.*)

LARCENY—SUFFICIENCY OF INDICTMENT.

An indictment for larceny, which charges the crime to have been committed "in a dwelling, namely, the Riverside Hotel," sufficiently charges it to have been committed in a house; since, under Hill's Code Or. § 1277, the words in an indictment are to be construed according to their usual acceptation in common language.

Appeal from circuit court, Multnomah county; **LOYAL B. STEARNS, Judge.**

Indictment against Charles O'Neil for larceny. There was judgment of conviction, and defendant appeals. Affirmed.

McGinn, Sears & Simon, for appellant. T. A. Stephens, Dist. Atty., and W. T. Hume, for the State.

BEAN, J. This is an appeal from a judgment sentencing the defendant to confinement in the penitentiary for the crime of larceny in a dwelling-house. The sufficiency of the indictment to sustain the judgment is the only question presented on this appeal. The indictment charges the crime to have been committed "in a dwelling, namely, the Riverside Hotel." The point of the objection is that the word "dwelling" does not necessarily imply a house or building, but is simply a place of residence or abode, and may be a tent, booth, cave, or any habitation occupied as such. In this case, however, we are not left to conjecture as to the particular place in which this crime is alleged to have been committed, for it is designated in the indictment as the "Riverside Hotel;" and the words used in an indictment, with certain exceptions, which are unimportant here, must be construed in their usual acceptation in common language. Section 1277, Hill's Code. The usually accepted definition of an hotel is a house for entertaining strangers or travelers. Cent. Dict. tit. "Hotel." So that, when the indictment alleged the crime to have been committed in a dwelling, namely, the Riverside Hotel, we think it sufficiently charged it to have been committed in a house. Judgment of the court below is therefore affirmed. The question presented in the other case against this defendant for larceny in a dwelling, namely, the National Hotel, being the same as in this, it is also affirmed.

BELLINGER V. INGALLS.

(*Supreme Court of Oregon. Oct. 26, 1891.*)

**APPEALABLE ORDERS—ACCOUNTING BY EXECUTORS
DISTRIBUTION OF ASSETS.**

1. Under Hill's Code Or. § 535, which provides that an order affecting a substantial right, and which determines the action so as to prevent a judgment "for the purpose of being reviewed, shall be deemed a judgment or decree," an order refusing to require an executor to make a final

settlement and distribution of the moneys in his hands is reviewable.

2. Where an executor has collected all the moneys due decedent's estate except an unrecognized claim against the United States, the payment of which depends on an adjudication by the court of claims, and a judgment against a deceased debtor's estate, the collection of which is improbable, and he has a large amount of money on hand after paying all of decedent's debts, a final settlement and distribution should be made; and where there are infant distributees the unpaid claims should pass to their guardian, who can assert their rights thereto.

Appeal from circuit court, Multnomah county; **L. B. STEARNS, Judge.**

This proceeding was instituted by a petition filed by the appellant in the county court of Multnomah county as guardian of Linda and Ben Campbell Holladay, minor heirs of Esther Holladay, deceased. The object of the proceeding is to obtain a final settlement and distribution of the estate of the deceased, now in the hands of Rufus Ingalls, executor of her last will and testament. It sufficiently appears from the record that all of the debts of Esther Holladay have been paid, and that there are no claims outstanding against her estate. It also appears that the executor has collected all debts due said estate, except a part of a judgment recovered by him against James Steel, administrator with the will annexed of Ben Holladay, deceased, and some unrecognized claim against the United States for alleged depredations committed by Indians on the property of Ben Holladay many years ago. As to the first claim, it does not appear from the record before us that there is any probability that any more can be collected on said claim than has already been collected. As to the second claim, it depends altogether on an adjudication by the court of claims, and, if so established, upon provision by congress for its payment. The county court overruled the application of the petitioner, from which he appealed to the circuit court. That court affirmed the action of the county court, from which decree this appeal is taken. Reversed.

C. B. Bellinger, in pro. per. G. H. Williams, for respondent.

STRAHAN, C. J., (after stating the facts as above.) Counsel for respondent did not file a motion to dismiss this appeal, but a preliminary objection was taken by him to the consideration of this case for the reason that the order or judgment complained of was not appealable. Nor does it appear that any objection was made in the court below to the consideration of the appeal from the county court. On the argument here, however, it was assumed by counsel on both sides that, if the order was not appealable, there was no case presented for the consideration of this court, and to that question our attention will first be directed. Section 535, Hill's Code, defines the character of the order or judgment from which an appeal may be taken thus: "A judgment or decree may be reviewed as prescribed in this title, and not otherwise. An order affecting a substantial right, and which in effect determines the action or suit so as

to prevent a judgment or decree therein, or a final order affecting a substantial right, and made in a proceeding after judgment or decree, for the purpose of being reviewed, shall be deemed a judgment or decree." The question, therefore, is whether or not the order of the county court refusing to distribute the money in the hands of the executor, or to require the executor to file his final account, is a "decree" within the meaning of this section of the Code, and therefore reviewable on appeal. It appears from this record that there are no debts outstanding against the estate of Esther Holladay, and that all the moneys due her estate have been collected except the two outstanding claims referred to above; that a large amount of money is now in the hands of the executor; and that there is no reasonable probability of any further collections. Under this state of facts the denial of the guardian's application did affect a substantial right for which there is no remedy unless the right of appeal exists. The fact that this application might be renewed again at some subsequent time is no answer to the appellant's contention. It might also be denied as often as renewed, and, if no appeal lies, the rights of the petitioner, representing the heirs, could never be successfully asserted; at least it would depend largely upon the will of the executor when he would be pleased to file a final account. The objection that the executor may by some possibility realize something on the "depredation claim," if allowed to pursue it, does not seem to be conclusive for the reason that the decree of the county court on final settlement can pass that claim to the guardian for the use of the children, who can assert the same with like effect as can the respondent. The decree appealed from will therefore be reversed, and the court below is directed to reverse the decree of the county court of Multnomah county, appealed from, and to direct that court to require the respondent to file his final account as executor of the last will and testament of Esther Holladay, deceased, and that the same be then disposed of according to law and the usual practice of that court.

GALVIN V. MACKENZIE.

(Supreme Court of Oregon. Oct. 26, 1891.)

STATUTE OF FRAUDS—SALE—ACCEPTANCE AND DELIVERY.

1. The object of the words in the clause, subdivision 5, § 785, commonly called the "Statute of Frauds," "unless the buyer accept and receive some part of the personal property," is to require such proof of the existence of the contract as will be an impediment to fraud and perjury.

2. To constitute an acceptance there must be a delivery of the goods by the vendor with the intention of vesting the right of possession in the vendee, and there must be a receipt and acceptance by the latter with the intention of taking possession as owner.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; ERASMUS SHATTUCK, Judge. Action by E. G. GALVIN against MRS. KENNETH A. J. MACKENZIE. Verdict for

judgment for plaintiff. Defendant appeals. Affirmed.

Geo. H. Durham and H. G. Platt, for appellant. John U. Smith, for respondent.

LORD, J. This is an action to recover money upon an oral agreement to furnish the defendant with two dresses, and for which she was to pay the several sums specified, when completed. The answer of the defendant alleges that the dresses were misfits, and that they were never received and accepted by her, which is denied in the reply. On the trial, as the agreement was oral, the defendant relied upon the statute of frauds to exclude the testimony for the plaintiff, and also, after the plaintiff rested, moved for a nonsuit for the same reason, which the court overruled on the ground that there was some evidence for the jury to consider whether the dresses were received and accepted under the contract. The contention for the defendant was that the agreement in question was for the sale of personal property at a price of more than \$50, and was within subdivision 5, § 785, Hill's Code, otherwise called the "Statute of Frauds," and was not enforceable; or that no evidence of it was admissible, unless the defendant had accepted or received the property, or paid some part of the purchase money. The court adopted the view of the law that the agreement was for the sale of personal property at a price exceeding \$50, but left it to the jury to determine from the evidence whether or not there had been any receipt and acceptance of the dresses as would take it out of the statute. As the verdict was for the plaintiff, it must be presumed that there was a receipt and acceptance of the dresses under the contract, upon the evidence submitted. Upon this state of the record, the only question raised for the defendant and appellant is that there is no sufficient evidence of receipt and acceptance of the dresses to show compliance with the terms of the statute. The trial court and counsel for the defendant are in accord that the agreement was for the sale of personal property, and within the statute, but disagree as to the sufficiency of the subsequent acts done by the parties to comply with its terms. We are not, therefore, called upon to determine whether the agreement in this case should be considered as a contract for the sale of personal property, and, as such, within the statute, or a contract for services and materials, and, as such, not within that statute. That is a mooted question, upon which there is an irreconcilable conflict of authority, and which we are not required nor requested to consider, unless the evidence is wholly inadequate to prove the receipt and acceptance of the dresses, and the trial court erred in submitting it to the jury. In that event, the counsel for the plaintiff and respondent is prepared to urge that the agreement is not a contract of sale, but a contract for labor; in a word, that the facts disclose that the dresses were to be manufactured especially for the defendant, and upon her special order, and not for the general market; and within the

rule established by many highly respectable decisions the contract is not within the statute. Assuming, for present purposes, that the court adopted the proper view of the law as applied to the facts, we are to consider whether there was evidence which would entitle the jury to find that there was such acceptance and receipt of the property as would satisfy the provisions of the statute. It is said that the clause, "unless the buyer accept and receive some part of the personal property," is intended to require such proof of the existence of the contract as will be an impediment to fraud, perjury, and mistake. *Shindler v. Houston*, 1 N. Y. 261. To constitute an acceptance within the meaning of this provision the purchaser must so deal with the property as to prove that he acknowledged the existence of the contract. There must be some act on his part plainly recognizing the existence of the contract, and that the property has been received in accordance therewith. The property must be completely transferred, which includes both delivery by the vendor and acceptance by the vendee. There must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual receiving and acceptance by the latter with the intention of taking possession as owner. *Stone v. Brownlag*, 51 N. Y. 211; *Gilman v. Hill*, 36 N. H. 311; *Redington v. Roberts*, 25 Vt. 693; *Baker, Sales*, § 285. But any unequivocal act or acts on the part of the purchaser which amount to an assertion of ownership of the property are sufficient to take the sale out of the statute. Acts of ownership, consistent only with the intent to keep the property, are often sufficient, and sometimes conclusive, evidence of acceptance. *Vincent v. Germond*, 11 Johns. 283; *Gray v. Davis*, 10 N. Y. 285; *Benj. Sales, Amer. notes*, p. 152. The important matter is that the act or acts relied upon as constituting a receipt and acceptance must establish the broad fact of the relation of vendor and vendee. *Remick v. Sandford*, 120 Mass. 309. When that is shown to exist as the result of the transaction, it includes a receipt and acceptance sufficient to satisfy the statute.

The question of acceptance is one of fact for the jury, upon all the evidence. *Garfield v. Paris*, 96 U. S. 557. "And it should be steadily borne in mind," says Mr. Baker, "that the acceptance and receipt contemplated by the statute of frauds and as adjudged by the cases must always be governed by the circumstances surrounding the transaction, as to whether there has been such acceptance and receipt; and that in general these facts are to be passed upon by the jury." *Baker, Sales*, § 282a. With these suggestions as to the law, we now come to make its application to the facts. The defendant selected certain dress goods and the trimmings from the store of the plaintiff, and ordered them manufactured into two dresses, to correspond to particular styles she had chosen from a fashion plate. While the dresses were being made she called several times, as is customary, to try them on, so as to be certain to secure a good fit.

When the first dress was completed she tried it on, inspected it, and expressed herself satisfied in every particular, and ordered it sent to her boarding-house, a square distant, which the plaintiff did as directed. In the evening, for the purpose of exhibiting her dress to other ladies, she put it on, and the opinion was expressed that the trimming was somewhat too flashy for her. Next morning she carried the dress back, not to reject it, but to order the trimming upon it changed. She owned that the trimming was of her own selection, but said that it did not suit her, or that she had now become dissatisfied with it, and selected and bought other trimming to be substituted, and left her dress to have the change made as she had directed. These facts plainly indicate delivery and acceptance, and are not much, if at all, relied upon to show a want of evidence. It is the other dress upon which a want of evidence is relied to show its receipt and acceptance. The evidence discloses that after it was finished it was also tried on and examined; that it fitted her, and that she expressed herself satisfied with it. In a word, that it fitted her, and that she would take it. She thought a different lace, involving a slight change, would be more becoming, or in better taste, and selected other lace, and left the dress with the plaintiff to make such change, and for the further reason that she expected to wear it to a tea-party the ensuing day, and preferred to put it on at the plaintiff's, evidently to avail herself of the skill and taste of the plaintiff in making up her toilet for that occasion. The dress was made out of the material she had selected, and in the style she had ordered. It was all right and satisfactory, and was taken off, left with the plaintiff for the purposes stated, and for her own convenience and accommodation. As the evidence shows that the credit of the defendant was so good that no security for the price was desired or relied upon, and that, when the materials were selected and ordered made into dresses, the ordinary precautions usually taken were disregarded, it is plain that when the plaintiff put the defendant in possession of the dress it was to ascertain if it fitted her, and, if it did, that it was intended as a delivery of it. This is not disputed. Under such circumstances, when the defendant tried on the dress and examined it, and declared it satisfactory, the dress being in her possession, she accepted it. It was delivered for her acceptance if it fitted, and when she received it for that purpose, and, in pursuance of it, tried it on, and it fitted her, and she expressed herself satisfied with it, she accepted it. Her subsequent acts were for her own accommodation, and performed by the defendant on her order. It was to suit her own convenience and to carry out her own instructions that both dresses were left with the plaintiff, and her conduct in respect to them indicates that she considered she was dealing with her own property, and is only consistent with such ownership. A telegram unexpectedly summoning the defendant to leave town, she left her dresses behind, and when they were sent

to her she declined to accept them. Under the facts we think the evidence was sufficient to be submitted to the jury on the theory on which the case was tried; and as, without the statute, the evidence was admissible, and a like result must have ensued, the judgment must be affirmed.

WINTERS v. GEORGE *et al.*

(Supreme Court of Oregon. Nov. 12, 1891.)

MUNICIPAL CORPORATIONS — AUTHORITY TO ISSUE BONDS—EFFECT OF CONSOLIDATION—REPEAL OF STATUTE.

1. Act Feb. 18, 1891, entitled "An act to authorize the cities of Portland, East Portland, and Albina to build one or more bridges across the Willamette river," and providing that the authority so conferred should be exercised by a committee to be appointed, two from each of the cities of East Portland and Albina, and four from the city of Portland, and that the said committee should have power to issue the bonds of the three cities as the joint obligation of said cities to an amount not exceeding \$500,000, was not impliedly repealed by Act Feb. 19, 1891, consolidating the three cities into one, to be known as the "City of Portland," and providing that the said city might incur an indebtedness of \$500,000 for building bridges across the Willamette river, but that it should never incur an indebtedness for more than two years, except by the issue of negotiable bonds.

2. Act Feb. 18, 1891, was not rendered nugatory by the consolidation act of February 19, 1891, but the duty created by the former, and made to rest upon the several cities therein named, continued upon the new corporation after the consolidation.

Appeal from circuit court, Multnomah county; LOYAL B. STEARNS, Judge.

Suit by H. D. Winters against M. C. George and others to enjoin the defendants from issuing bonds of the three cities of Portland, East Portland, and Albina for the purpose of constructing or purchasing one or more bridges across the Willamette river. A demurrer to the complaint was sustained, and the suit was dismissed. Plaintiff appeals. Affirmed.

STATEMENT BY THE COURT. This suit was brought for the purpose of restraining the defendants from issuing bonds and constructing or purchasing one or more bridges across the Willamette river at Portland, as contemplated by the act passed by the last legislature, and generally known as the "Muesdorffer Act," (Sess. Acts 1891, p. 634 et seq.) The complaint charges that the plaintiff is a resident and tax-payer in the city of Portland, Or., organized under an act of the late legislative assembly of this state for the consolidation of the cities of Portland, East Portland, and Albina; that said legislative assembly passed an act, which was filed in the office of the secretary of state on the 18th day of February, 1891, and which took effect 90 days thereafter, entitled "An act to authorize the cities of Portland, East Portland, and Albina to construct, purchase, and acquire, by condemnation or other means, one or more bridges across the Willamette river between the city of Portland and the city of East Portland in Multnomah county, Oregon, which bridge or bridges shall be free to all pedestrians and all classes of vehicles and traffic except railways and street railways." Sev-

eral sections of the act are then set out; also some sections of the Portland consolidation act, which will be more particularly noticed further on. The complaint then continues: Plaintiff further alleges that said defendants, assuming to act as said bridge committee, are threatening to and have taken steps to issue bonds under and in accordance with section 20 of said first-named act, and, unless restrained by an order of this court, will issue said bonds, and thereby subject the plaintiff and the other tax-payers of said consolidated city to expense and trouble in resisting the collection of taxes to pay the interest and principal of said bonds, and will embarrass and prevent the city authorities of said city of Portland from issuing the necessary bonds, and constructing or acquiring a free bridge across the Willamette river, as provided for in section 190 of said last-mentioned act; that defendants are without authority of law to issue said bonds; and that said act of February 18, 1891, providing for said bridge committee, was repealed and abrogated by said act of February 19, 1891. The court below sustained a demurrer to this complaint, and entered a final decree dismissing the suit, from which this appeal was taken.

Wm. T. Mulr, City Atty., for the city of Portland; Dolph, Bellenger, Mallory & Simon, for the Willamette Bridge Company; Stott, Boise & Stott and Hall & Showers, for the Stark-Street Ferry Company,—all being of counsel for appellant. Williams & Wood and Killin, Starr & Thomas, (Paxton & Paddock, of counsel,) for respondents.

STRAHAN, C. J. The real contention here is that the act consolidating the cities of Portland, East Portland, and Albina into one municipal corporation repealed by implication the Muesdorffer act, and that is the only question presented by this appeal. A brief summary of the act will render the question at issue more apparent. The first section provides, in substance, that the cities of Portland, East Portland, and Albina are hereby authorized and empowered to provide one or more suitable and commodious bridges over and across the Willamette river, at such points between the north line of section 28, township 1 N., range 1 E., and the south line of section 3, township 1 S., range 1 E., as to the persons herein authorized to purchase, construct, hire, maintain, conduct, and control the same may be deemed most necessary and convenient; said bridge or bridges to be forever free to all pedestrians and all classes of vehicles and traffic except railways and street railways; and to that end said cities may acquire, by construction, purchase, or otherwise, and own and possess, all such bridges and all such real and personal property within the limits hereinbefore mentioned as in the judgment of the persons herein authorized to construct, purchase, keep up, and maintain the same may be necessary, and for such purpose may also issue bonds, and dispose of the same, as hereinafter provided: provided, the place or location of any bridge con-

structed and the plan thereof shall be submitted to and approved by the secretary of war. Section 2, in substance, provides that the power and authority given to said cities by section 1 to construct, purchase, hire, keep up, and maintain bridges across the Willamette river, and to issue and dispose of bonds therefor, shall be exercised, as hereinafter provided, by eight tax-payers of said Multnomah county, to be appointed by the two judges of the circuit court of the state of Oregon for the county of Multnomah,—two each from the said cities of East Portland and Albina, and four from said city of Portland,—who shall be styled the "Bridge Committee," and hereinafter mentioned and referred to as the "committee." Section 3 requires the judges to appoint the "committee" within 30 days after the act took effect, and to cause them to be notified of their appointment. Section 4 requires the committee to meet and organize within 20 days after their appointment, first giving notice of the time and place of such meeting by five of their number in a daily newspaper of the city of Portland. Section 5 empowers the committee to fill vacancies in that body by death, resignation, or removal from the city of which he was a resident, or otherwise; defines the qualification a person must possess to fill a vacancy, and the number of members necessary to constitute a quorum. Section 6 defines the chairman's duties, and authorizes the committee to appoint a chairman from their number for the time being, when the chairman is absent. Section 7 further defines the duties of the chairman. Section 8 defines the duties of clerk of the committee. Section 9 empowers the committee to appoint a treasurer, who shall give bond in such sum as it may require, and defines his duties. Section 10 makes it the duty of the clerk and treasurer to perform such other duties as the committee may require, fixes the tenure of their offices during the pleasure of the committee, and their salaries at such sums as the committee may prescribe. Section 11 authorizes the committee to employ and discharge such other agents, workmen, laborers, and servants at such compensation or wages as it may deem necessary for the accomplishment of the purposes of the act. Section 12 makes it the duty of the committee to meet in one of said cities, at such times and places as it may designate, at least once a month, and at such other times as it may appoint. Section 13 defines in what manner the committee and its officers shall qualify. Section 14 is as follows: "For the purpose of carrying this act into effect the committee is authorized to issue and dispose of bonds of said three cities of the denomination of from \$100 to \$1,000, as the purchaser may desire, with interest coupons attached thereto, the par value of which shall not exceed \$500,000, signed by its chairman and countersigned by its clerk; said bonds to be issued as the joint obligation of the three cities, whereby each of said cities shall be held and considered, in substance and effect, to undertake and promise in consideration of the premises to pay to the bearer of each of said bonds,

at the expiration of thirty years from the date thereof, the sum named therein, together with interest thereon at the rate of five per cent. per annum, payable yearly, as provided by said coupons." Section 15 provides, in effect, that whenever such bridges have been constructed, purchased, or hired, and are all ready for use, or the limit of the sum authorized to be expended has been reached, there shall be selected, as therein provided, four persons, for the purpose of maintaining, managing, and keeping in repair said bridges, who shall be styled individually "Bridge Commissioners," and collectively the "Bridge Commission," and thereafter the power and authority given to said cities to construct, purchase, and hire one or more bridges shall be exercised as therein after provided by said commission. Section 16 provides how the commissioners shall be selected, their places of residence, term of office, and how their successors shall be appointed, etc. Section 17 provides how the commission shall organize, what officers it may appoint, and regulates its meetings. Section 18 provides when and in what manner the commission shall succeed to the powers and duties of the committee, and section 19 contains a succinct enumeration of the powers and duties of the commission. Section 20 provides the method of levying a tax annually to meet the probable expense of maintaining and keeping in good condition during the ensuing year the bridges so constructed, hired, and purchased as in said act contemplated; also the costs of improvements, if any, together with one year's interest on all bonds issued by the bridge committee, and still outstanding. The remaining sections of the act need not be referred to, because their construction or effect is not involved in this suit.

Two sections of the Portland consolidation act, which was filed in the office of the secretary of state on the 19th day of February, 1891, and it is alleged took effect 90 days thereafter, it is claimed either repealed the foregoing act by implication or rendered it nugatory. The sections of the act are as follows: "Sec. 189. Except as otherwise expressly provided or permitted by this act, indebtedness of the city of Portland must never exceed in the aggregate \$150,000, except that said city may, in addition thereto, incur an indebtedness of \$500,000 for the erection and furnishing of a city hall, in addition to the \$175,000 heretofore authorized for that purpose; \$2,500,000 heretofore authorized for the purpose of furnishing the city and the inhabitants thereof with water; \$250,000 for the purchasing and improving city parks; and \$500,000 for building, buying, leasing, or otherwise providing free bridges across the Willamette river; nor shall said city ever contract any debt or assume any liability in any manner whatever, by means of which it may be called upon or be bound to pay any sum of money at any time beyond the period of two years from the date of such contract or assumption, except by the issue of negotiable bonds. Sec. 190. The city of Portland has power and authority to provide by ordinance for dredging the

bars in the Willamette river, and for improving and keeping improved the navigation of the same within and below the city of Portland, and in the exercise of such power and authority may provide and use all means necessary or convenient therefor, not prohibited by this act, including the levying and collecting of the tax provided for in subdivision 2 of section 37, and said city is hereby authorized and empowered to construct and maintain bridges across the Willamette river at any point within the limits of the said city, not already occupied by bridges or ferry lines, with such suitable draws, openings, as said city may deem proper; and it shall have power to purchase or lease any bridge or bridges already existing across said river within said city limits."

Two main questions were relied upon by the appellant. The first was that the Muesdorffer act was repealed by implication: and the second was that it was rendered nugatory, and incapable of being enforced, by reason of the changes wrought in the three cities affected by the consolidation in uniting them into one municipal corporation. These questions will be separately considered.

1. It is elementary law that repeals by implication are not favored. It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments in the statute-book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. Hence it is said to be a rule founded in reason as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it, the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and the earlier law so positive as to be irreconcilable by any fair, strict, or liberal construction, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving at the same time the force of the earlier law, and construing both together in harmony with the whole course of legislation on the subject. These principles are laid down by a recent author, (section 210, Endl. Interp. St.,) and by Judge Cooley, (Const. Lim. *153.) Applying these principles to the two acts in question, and construing them *in pari materia*, is there such a repugnancy between them that they cannot stand together? We think not. Section 189 of the consolidation act does not in any way conflict with the Muesdorffer act. That section was doubtless inserted in the charter in obedience to section 5, art. 11, of the state constitution, which requires that acts of the legislative assembly incorporating towns and cities shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit. The only repugnancy that

was claimed upon the argument to exist between the two acts was that section 189, supra, authorized the city to contract an indebtedness of \$500,000 for building, buying, leasing, or otherwise providing free bridges across the Willamette river, and the words, "except by the issue of negotiable bonds." But if these two acts—or at least the parts under consideration—are *in pari materia*,—as they must be, because they relate to the same subject,—the whole difficulty vanishes. On the subject of bridges and issuing negotiable bonds the two acts are to be read as one entire act: in other words, so much of the consolidation act as relates to bridges and the issuance of negotiable bonds is to be read as if they were actually inserted in the Muesdorffer act as a part of it. And, viewing the two acts in a broader sense, and looking at the objects the legislature had in view in passing them, and the means and agencies to be employed to work out results, we can have no doubt of the correctness of our conclusions on this subject. One purpose was paramount, and that was to secure one or more free bridges across the Willamette river between the cities of Portland and East Portland. The Muesdorffer act was one carefully prepared to accomplish that result. The agencies to be employed in its execution were to be so selected that they would be above and free from the conflicting and clashing interests that might so readily defeat the whole legislative intent if the question were placed within reach of their influence. Is it at all probable that the legislature intended to hazard such important results by repealing the very act so admirably designed for their accomplishment only about three days after its enactment? Such a supposition has no foundation in the text of the act, and is at variance with the expressed legislative intent apparent on the face of both acts.

2. The other objection relates to the changes made by the consolidation act in reducing the three cities of Portland, East Portland, and Albina into one city, to be known as the "City of Portland." It is suggested that the Muesdorffer act by its terms contemplated the existence of the three cities, and that, since two of them have ceased to exist, the execution of the act has been rendered impossible by operation of law. It must be conceded that the power of the legislature over public corporations within the state, so far as concerns their existence and boundaries, is practically without limit, unless restrained by some provision of the constitution, (Martin v. Dix, 52 Miss. 53; City of St. Louis v. Russell, 9 Mo. *507; Smith v. McCarthy, 56 Pa. St. 359; Commissioners of Laramie Co. v. Commissioners of Albany Co., 92 U. S. 307;) and several municipal corporations may be consolidated into one, even without the consent of the corporations affected, if the legislature so provide. It would seem to result as a consequence of this doctrine that, if a duty is created by law, and made to rest upon several municipal corporations, and afterwards they should be consolidated into one corporation, which was given

the name of one only of such corporations, such duty, being a continuing one, rests upon the new corporation created by the consolidation. This is a necessary consequence, arising out of the nature of the duty itself. The legislature, not having repealed the act creating and declaring it, intended that said duty should be performed, and, having merged the existence of two of the corporations in this case into the larger one, cast the duty upon such consolidated corporation. And why not? The distinction contended for is in name only. The same territory, the same inhabitants and property, will be affected in the same way that they would have been if the change had not been made. No possible injury can result to any one by this construction, and it carries into effect the manifest legislative intent. The provisions in section 13, and, perhaps, in some other parts of the Muesdorffer act, referring to the "three cities," "each of said cities," and other similar expressions, will have to be read in the singular, and be held to refer to the city of Portland only. This is the necessary effect of the adoption of the consolidation act. By that act the charters of the cities of East Portland and Albina were repealed, leaving the duty created by the Muesdorffer act to be performed by the city of Portland, but having the added territory and inhabitants of the other two cities to aid it in its performance. The decree appealed from must be affirmed.

DU BOIS v. PERKINS.

(Supreme Court of Oregon. Oct. 26, 1891.)

HEARSAY EVIDENCE—PRESUMPTIONS ON APPEAL— SALE OF GOODS—UNDISCLOSED PRINCIPAL.

1. A conversation between the porter at an hotel and one K., in relation to certain goods then being delivered at the hotel for P., who was not present, is not competent evidence in an action against P. for the price of the goods. Such conversation is hearsay.

2. On appeal, error will not be presumed, but, where it is shown by the record, there is no presumption that it was rendered harmless or obviated during the trial, where the record is silent.

3. An agent intrusted with the possession of the goods of another for sale, may sell the same to one who has no knowledge of his agency, and receive the purchase money therefor; and in like manner, if he sell in his own name, without disclosing his principal, he may receive the purchase money for the goods sold.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

Action by C. L. Du Bois against R. S. Perkins to recover the value of certain cigars. Judgment for plaintiff. Defendant appeals. Reversed.

STATEMENT BY THE COURT. This is an action to recover \$412.50, the value of a certain lot of cigars alleged to have been sold by the plaintiff to the defendant, at his request. The evidence offered tended to prove that one Ed Kidder negotiated the sale to the defendant, and billed the cigars to Perkins in his own name. The defendant was not present when the cigars were taken to his place of business,

and his contention is that he bought the cigars of Kidder, and paid him for the same, without any notice that they were owned or claimed by the plaintiff. The plaintiff, to sustain the issues on his part, called one C. A. Smith as a witness, who testified that he was a drayman, and delivered the cigars to the defendant. He was then asked by plaintiff's counsel the following question: "Who did you deliver the cigars to, and who was present when you delivered them?" And he answered: "I delivered them to the porter at the hotel. I think it was Mr. Perkins' son. There were present Ed Kidder, besides the porter and myself." And this question: "What conversation took place when these cigars were delivered?" Proper objections were made to this question, but the same were overruled, and an exception taken, and the witness answered: "The porter said to Mr. Kidder, 'I see you are in the cigar business now;' and Mr. Kidder answered, 'No: I am just helping out Du Bois.'" A verdict and judgment were rendered for the plaintiff, from which judgment this appeal is taken.

R. R. Giltner and J. J. Daly, for appellant. X. N. Steeves, for respondent.

STRAHAN, C. J. Only a single question is presented on this appeal, and that is whether or not Smith's evidence in detailing the conversation of the porter and Kidder at the time the cigars were delivered was competent. The defendant was not present at the time of this conversation, and it is not shown that the porter was his agent. How this conversation could affect or bind him does not appear; in fact, its competency was not claimed on the argument here, only as it may be supposed to have been rendered competent by other evidence given upon the trial, but which is not in the bill of exceptions. It was accordingly argued that, for the purpose of sustaining the judgment, we must presume that such evidence was actually given upon the trial. But this is not the correct rule. While it is true that error will never be presumed, the converse of the proposition is equally true. When error does affirmatively appear, it will not be presumed that it was rendered harmless or removed. If it were so, the respondent must see to it that the matter which renders it harmless, or removes it, is made to affirmatively appear in the bill of exceptions. By this evidence the plaintiff sought to charge Perkins with knowledge of his rights in the cigars, for which purpose it was not competent. Inasmuch as there must be a new trial, we think proper to suggest our views upon another phase of this case. Perkins' contention is that he bought the cigars of Kidder, who billed them to him in his (Kidder's) name, who delivered them at his place of business, and that before this action was brought he paid Kidder the full price agreed to be paid therefor without any knowledge of Du Bois' interest. We think under these circumstances, even though the cigars may have been the property of Du Bois, Kidder had authority to collect and receive the money. *Keown v. Vogel*, 25 Mo. App. 35; *Pardridge v. Bailey*, 20 Ill. App. 351; *Lud-*

wig v. Gillespie, (N. Y. App.) 11 N. E. Rep. 835; Rosser v. Darden, (Ga.) 7 S. E. Rep. 419. The judgment appealed from must be reversed, and the cause remanded for a new trial.

EPSTEIN v. STATE INS. CO.

(Supreme Court of Oregon. Oct. 26, 1891.)

REFORMATION OF INSURANCE POLICY—ACTION ON POLICY—DAMAGES.

1. A policy of fire insurance upon separate articles of personal property will not be reformed, so as to cover the property as a whole, on the ground of mistake, when the only evidence thereof is the testimony of the insured and his wife, which is vague and uncertain, and contradicted by the insurance agent, who testifies that he informed the insured that, under the company's rules, the policy must specify a separate amount on each article.

2. A tailor, dependent upon his trade for support, who lived with his wife and two children in four small rooms, procured a policy against fire of \$900 on his household goods, furniture, clothes, and tailor's trimmings. He testified that they were worth \$1,700, and that most of them were bought out of his earnings for the past eight months, which, as shown by the evidence, did not exceed \$1,100. When he obtained the insurance he had but scanty means. His estimates as to his loss were extravagant, and he was contradicted by the insurance agent, his neighbors, and the firemen. The trunk of trimmings, stoves, and some other articles of furniture were removed, and were only damaged slightly. Held, that the evidence did not warrant a judgment for \$900.

Appeal from circuit court, Multnomah county; LOYAL B. STEARNS, Judge.

Suit by N. Epstein against the State Insurance Company for the reformation and enforcement of a policy of fire insurance. From a judgment for plaintiff, defendant appeals.

W. W. Thayer and L. A. McNary, for appellant. Thomas O'Day, for respondent.

BEAN, J. This is a suit to reform an insurance policy issued by the defendant company to plaintiff, under the name of M. Epstein, against loss or damage by fire to the amount of \$900, as follows: \$500 on his household furniture, useful and ornamental, and family stores; \$200 on family wearing apparel; \$100 on his trunk of tailor's trimmings; \$50 on his sewing-machine; \$25 on carpets; and \$25 on two stoves. (an equal amount on each;) and for enforcing said policy as reformed. It is alleged that by the contract of insurance the policy was to be issued to N. Epstein against loss or damage by fire to the amount of \$900, generally on the property, without specifying the amount on each particular item. This, being denied, presents the first question for our examination. It has long since been settled that a court of equity will not reform a deed or other instrument in writing upon the ground of mistake, unless the mistake is established by clear and satisfactory evidence. Shively v. Welch, 2 Or. 288; Lewis v. Lewis, 5 Or. 162; Evarts v. Steger, 1 Or. 133; Murton, 6 Or. 133; 8 Or. 37; May, Ins. Co. v. The rule is stated by THAYER in Harrison v. Insurance Co., 30 Fed. Rep. 863: "The

is well settled that an application to reform a written contract, on the ground of accident or mistake, must be supported by clear and satisfactory proof; otherwise it will not be granted. If the testimony is conflicting, or of such undecisive character as to raise a substantial doubt in the mind of the court, the contract, as written, must stand. Besides the ordinary burden of proof which rests upon every litigant who holds the affirmative of an issue, there is in this class of cases the additional burden of overcoming the strong presumption created by the contract itself, which the proceeding seeks to reform." We think the evidence in this case is wholly insufficient, within this rule, to establish that the policy of insurance should have been upon the property as a whole, instead of being upon separate articles thereof in specified amounts. The testimony upon which reliance is placed to make out the alleged mistake is that of plaintiff and his wife, which is not only vague and uncertain upon the point, but is flatly contradicted by Mr. Ireland, the agent of the company who effected the insurance, and who testifies that he informed plaintiff at the time that under the rules the policy must specify a separate amount upon each item, and that he read that portion of the policy to plaintiff as he wrote it. Under this state of the evidence, the proof does not satisfy us that any mistake in this respect was made in the policy, and it must therefore stand as the exponent of the rights of the parties. It is conceded that a mistake was made in issuing the policy in the name of M. Epstein in place of N. Epstein, and in that respect it should be corrected.

It follows, therefore, that plaintiff should only recover for the goods destroyed and damaged, in accordance with the insurance upon the separate articles or classes as specified in the policy, and it only remains to ascertain the amount of such damage or loss. The evidence upon this question is indeed uncertain, indefinite, and exceedingly unsatisfactory, and we can only hope to approximate the amount of the loss. Plaintiff claims his damage and loss by the fire to have been about \$1,700, and undertakes to give the several items going to make up the amount, with the value of each; but he is contradicted by some of his neighbors and the firemen who assisted in extinguishing the fire, and whose attention was particularly called to the matter by the unusual conduct of plaintiff at the time, and their suspicions as to the origin of the fire, as well as by the agent of defendant who effected the insurance. But, aside from the testimony of these witnesses, plaintiff's valuations are so exaggerated, and his claim so inherently unreliable, on the face of it, that it is entitled to but little weight. With his family, consisting of his wife and two children, he was occupying at the time of the fire four small rooms on the first floor of a dwelling-house, which were used as a parlor, bedroom, dining-room, and kitchen, the furniture of which consisted of a wool plush walnut parlor suite, one walnut bedroom suite, and cot for the children, an ordinary amount of dining-room and

kitchen furniture, crockery and table ware, besides lamps, curtains, mirrors, etc.; the parlor and bedroom being carpeted with ingrain or three-ply carpet. Plaintiff is a man depending on his trade (tailor) for a living, and less than a year before the fire, when he arrived in Portland, he was compelled to work for two months, to obtain money to send for his family, whom he left in Dakota; and at the time of the insurance, although working steady, could only raise \$11.25 to pay the premium therefor; and it is utterly unreasonable to suppose that he had accumulated, and had in these rooms, a large quantity of expensive furniture, ornaments, and clothing, amounting to \$1,700, or even \$900, the amount of the insurance, mostly purchased, as he claims, during his eight months' residence in Portland. His entire earnings during this time, conceding that he was constantly employed, of which there is no evidence, at the maximum amount per week stated in the testimony, could not have exceeded \$1,100, out of which he was compelled to support himself and family, so that it was impossible for him to have expended the amount of money claimed in furniture and clothing. His estimates of values are so ridiculous and out of all proportion as to afford but little, if any, aid to the court. For example, he testifies that one feather-bed and six or eight pillows contained 125 pounds of feathers, and was of the value of \$200 or \$250, and many of his other estimates are in the same proportion. The trunk of tailor's trimmings, stoves, and some other articles of furniture were removed from the building, but little damaged by the fire; and, although they may have afterwards been lost to plaintiff, the defendant is not responsible for the fact that his landlord, believing the fire not to have been accidental, would not allow him to come to the premises to take them away. Without going into details, we are satisfied, from the facts and circumstances of this case as disclosed by the testimony, that plaintiff's loss by the fire did not exceed \$250 on household furniture, \$50 on family wearing apparel, \$20 on trunk of tailor's trimmings, \$50 on sewing-machine, \$25 on carpets, and \$10 on stoves, making a total loss of \$405, and the decree of the court below will be so modified. From the record in this case, we feel compelled, on this modification of the decree of the court below, to allow appellant costs in this court.

CRIBBEN et al. v. DEAL et al.

(Supreme Court of Oregon. Nov. 2, 1891.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.

A deed of general assignment was valid where a third person, after it was signed and sealed in pursuance of a parol authority, filled in the name of the grantee, and delivered the deed to him.

Appeal from circuit court, Multnomah county; LOYAL B. STEARNS, Judge.

Suit in equity by Henry Cribben and others against C. E. Deal et al. to have a deed of general assignment set aside and

declared void, and to have the property subjected to the payment of a judgment obtained in an attachment suit. From a decree dismissing plaintiffs' complaint, they appeal. Affirmed.

W. M. Gregory, for appellants. *Killin, Starr & Thomas*, for respondents.

LORD, J. This is a suit in equity, brought by the plaintiffs, to have a deed of general assignment set aside and declared void, and to have the attached property applied in payment of their judgment. The single proposition of law involved is whether, in a deed of general assignment, the name of the grantee could be inserted in a blank after the deed has been signed, sealed, and acknowledged, but before delivery, by some one authorized by the grantors to insert it, upon parol authority. For the purposes of this case the facts are these: That the deed of assignment was made on the 17th day of November, 1888, by C. E. Deal, J. C. O'Reilly, and J. W. Brackett, partners doing business under the firm name of Deal, O'Reilly & Co., to Thomas Connell, for the benefit of creditors; that it was in all things completed and signed and sealed and acknowledged, except that a blank was left for the name of the grantee; that F. A. E. Starr was authorized to insert as the name of such grantee any person satisfactory to himself and the members of such firm; that on the following day Starr, with the consent of the members of such firm, inserted the name of Thomas Connell as assignee in such deed, and the deed was delivered to Thomas Connell, and on the next day was recorded. Upon this state of facts the contention is that such deed is void because the name of Thomas Connell was not inserted when the deed was signed and sealed. It is said in *Shepherd's Touchstone* (page 54) that "every deed well made must be written—i. e., the agreement must all be written—before the sealing and delivery of it; for, if a man seal and deliver an empty piece of paper or parchment, albeit he do therewithal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed." This is founded upon that ancient and technical rule of the common law that the authority to make a deed, or to alter or fill a blank in some substantial part of it, cannot be verbally conferred, but must be created by an instrument of equal dignity. As the deed was under seal, to alter or complete it by the insertion of the name of the grantee required the authority to be under seal. So firmly rooted was this principle that, it mattered not with what solemnities a deed may have been signed and sealed, unless the grantee's name was inserted, and delivery was made to him, or some one legally authorized under seal, it was a nullity. It imposed no liability on the party making it, or conferred any rights upon the party receiving it; it was, in fact, no deed. Hence it was held that parol authority to fill a blank with the name of a grantee could not be conferred without violating established principles of law and rendering the deed void.

This doctrine still prevails in England. It is true that in the case of *Texira v. Evans*, cited in *Master v. Miller*, 1 Anstr. 225, Lord Mansfield held otherwise, but this was in effect overruled in *Hibblewhite v. McMorine*, 6 Mees. & W. 200, on the ground that an authority to execute a sealed instrument could not be given by parol, but must be given by deed, although this latter case seems more or less trenced upon by the decision in *Eagleton v. Gutteridge*, 11 Mees. & W. 465, and by *Davidson v. Cooper*, Id. 778, and in *West v. Steward*, 14 Mees. & W. 47. But the rule has never been universally accepted in this country, and, however the holding of some courts may be, still the better opinion and the prevailing current of authority is that when a deed is regularly executed in other respects, with a blank left therein for the name of the grantee, parol authority is sufficient to authorize the insertion of the name of such grantee, and that, when so filled out and delivered, it is a valid deed. It is true that Chief Justice MARSHALL, in *U. S. v. Nelson*, 2 Brock. 74, felt bound to follow the ancient rule, but his opinion clearly indicates that he felt that the authority to fill a blank in an instrument under seal should be held to be valid. He says: "The case of *Speake v. U. S.*, 9 Cranch, 28, in determining that parol evidence of such assent may be received, undoubtedly goes far towards deciding it, and it is probable that the same court may completely abolish the distinction in this particular between sealed and unsealed instruments." Again: "If this question depended on those moral rules of action which in the ordinary course of things are applied by courts to human transactions, there would not be much difficulty in saying that this paper ought to have the effect which the parties at the time of its execution intended it should have." And he concludes with this statement: "I say with much doubt, and with a strong belief that this judgment will be reversed, that the law on the verdict is, in my opinion, with the defendants." The rule was purely technical, and the outgrowth of a state of affairs and condition of the law which does not now exist. The reason of the law is the life of it, and when the reason falls the law itself should fail.

At the present day the distinction between sealed and unsealed instruments is fast disappearing, and the courts are gradually doing away with them. As Judge Redfield said: "But it [the rule] seems to be rather technical than substantial, and to found itself either on the policy of the stamp duties, or the superior force and sacredness of contracts by deed, both of which have little importance in this country; and the prevailing current of American authority and the practical instincts and business experience and sense of our people are undoubtedly otherwise." Redf. R. R. p. 124. In *Drury v. Foster*, 2 Wall. 24, the court says: "Although it was at one time doubted whether parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion of this day is that the power is sufficient." Again, in *Allen v. Withrow*, 110 U. S. 119,

3 Sup. Ct. Rep. 517, the court says: "It may be, and probably is, the law in Iowa, as in several states, that the grantors in a deed conveying real property, signed and acknowledged, with a blank for the name of a grantee, may authorize another party by parol to fill up the blank." "But," he continues, "there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it: The blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named." In the case at bar these conditions were fulfilled. In *Inhabitants of South Berwick v. Huntress*, 53 Me. 89, the court held that a party executing a deed, bond, or other instrument, and delivering the same to another as his deed, knowing there are blanks in it to be filled, necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed it. In delivering the opinion of the court, KENT, J., said: "The rule invoked is purely technical. Practically there is no real distinction in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond than there is in allowing them in a promissory note or bill of exchange, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz., that a sealed instrument cannot be executed by another, so as its distinguishing characteristic as a sealed instrument is in question, unless by an authority under seal." Likewise, in *Bridgeport Bank v. New York, etc., R. Co.*, 30 Conn. 274, ELLSWORTH, J., said: "Nor can any reason be assigned, which is founded in good sense, and is not entirely technical, why a blank in an instrument under seal may not be filled up by the party receiving it, after it is executed, as well as any other contract in writing, where the parties have so agreed at the time. In either case, the contract, when the blank has been filled, expresses the exact agreement of the parties, and nothing but an extreme technical view, derived from the ancient law of England, can justify the making of any distinctions between them." It is to be noted that both of these adjudications were by courts of states where seals were not abolished. In *Burnside v. Wayman*, 49 Mo. 357, where the name of the grantee in a trust-deed was left in blank, WAGNER, J., said: "It is contended that no recovery could be had or relief granted on the first count, because no grantee was named in the deed of trust, and that, in consequence thereof, the instrument was void, and no title conveyed; but we think otherwise. Whatever may have been determined in some of the old books, the better doctrine is against such a position." And subsequently, in *Field v. Stagg*, 52 Mo. 534, this doctrine was affirmed in all its breadth, the court saying: "A deed, regularly executed in other respects, with a blank left

therein for the name of the grantee, and placed in that condition in the hands of third person, with verbal authority, but no authority under seal from the person who executed it, to fill up the blank in his absence, and deliver the deed to the person whose name is inserted as grantee, when so filled out and delivered is a valid deed." In *Duncan v. Hodges*, 4 McCord, 239, it is held that a deed executed with blanks and afterwards filled up and delivered by the agent of the party is good. So in *Van Etta v. Evenson*, 28 Wis. 33, it was held that where a note and mortgage otherwise fully executed, but with a blank in each for the name of the payee and mortgagee, were delivered to an agent, who was to procure from whomsoever he could a loan of money thereon for the maker, this shows an intention that the agent should fill the blanks, and, when so filled, the instruments were valid without a new execution and delivery. And the same doctrine was expressly affirmed in *Schintz v. McManamy*, 33 Wis. 301, the court, by Lyon, J., saying: "It was doubtless competent for the grantors to authorize Emil by parol to insert the name of the grantee in the deed, after they had signed and acknowledged the same." And in *State v. Young*, 23 Minn. 551, it was held that authority to fill a blank in a sealed instrument may be given by parol, and that such authority may be either express or implied from circumstances, and that it may be implied from circumstances whenever these, fairly considered, will justify the inference. So in *Swartz v. Ballou*, 47 Iowa, 188, where the owner of land executed a deed in blank, and placed it in the hands of another party under circumstances which raised an implied authority in the latter to insert the name of the grantee, it was held that the insertion of the grantee's name, either by the party receiving the deed or by some one authorized by him, made the instrument perfect as a conveyance. Without referring to the authorities at greater length, there are numerous other cases supporting the same doctrine. *Wiley v. Moor*, 17 Serg. & R. 438; *Smith v. Crooker*, 5 Mass. 538; *Gilbs v. Frost*, 4 Ala. 720; *Woolley v. Constant*, 4 Johns. 54; *Ex parte Decker*, 6 Cow. 60; *Manufacturing Co. v. Davis*, 7 Blackf. 412; *Boardman v. Gore*, 1 Stew. (Ala.) 517; *Bank v. Hall*, 14 N. J. Law, 583; *Ragsdale v. Robinson*, 48 Tex. 379. The contrary rule was adopted in *Upton v. Archer*, 41 Cal. 85; *Preston v. Hull*, 23 Grat. 600; *Ingram v. Little*, 14 Ga. 173; and some other cases. It seems to us that the weight of authority and better opinion is that parol authority is sufficient to authorize the filling of a blank by the insertion of the name of the grantee in a deed, after its execution, but before delivery, as in the case at bar. There is no pretense of any mistake or fraud, or that the blank was not filled as authorized and directed; in a word, that it was filled by a party authorized to fill it, and was done after its execution and before its delivery to the grantee named. Nor is it questioned but that the deed faithfully expresses the intention of the parties and was duly exe-

cuted for the purposes specified; and in such case, it seems to us, complete effect ought to be given to that intention, notwithstanding the technical rule of the common law in respect to such instruments. As Mr. Justice SWAYNE said: "If a person competent to convey real estate sign and acknowledge a deed in blank, and deliver the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance, its validity could not be well controverted." *Drury v. Foster*, supra. It results that the decree dismissing the bill must be sustained.

STATE ex rel. EVERETT v. BOURNE.

(Supreme Court of Oregon. Nov. 2, 1891.)

DEPOSITION—LETTERS ROGATORY—CONTEMPT—JURISDICTION.

1. Even if Const. Or. art. 7, § 9, vesting in the circuit courts all the judicial power of the state not exclusively vested in some other court, did not give the circuit courts jurisdiction, under letters rogatory from the courts of another state, to compel the attendance of a witness before a commissioner appointed by the courts of such state, their jurisdiction in such a case would rest on national comity.

2. Where the clerk of a court issues process under the law, the court has power to punish any disobedience thereof, though such power may not be conferred by express statute.

3. Where a court of competent jurisdiction in Oregon has, under letters rogatory from a court of a sister state, issued what was intended to be a subpoena requiring a witness to appear before a commissioner appointed by the court of the sister state to answer interrogatories, such witness cannot raise the objection that the writ was not a subpoena for the first time on appeal from an order committing him for contempt in disobeying it.

4. A writ issued by a court of competent jurisdiction in Oregon, under letters rogatory from a court of a sister state, to compel the attendance of a witness before a commissioner appointed by the latter court, which orders such witness to appear before the commissioner, though it may not be a subpoena in form, is sufficient.

5. A witness who, under letters rogatory from a court of a sister state, has been ordered by a court in Oregon to appear before a commissioner appointed by the former court, cannot, in resisting the order, question the jurisdiction of the court which issued the letters.

Appeal from circuit court, Multnomah county; ERASMUS D. SHATTUCK, Judge.

Letters rogatory were issued by the superior court of Suffolk county, Mass., to the circuit court of Multnomah county, Or., requesting that the latter require Jonathan Bourne, Jr., to appear before a commissioner appointed by the former, and answer interrogatories. From an order committing said Bourne for contempt in disobeying a writ issued in pursuance of the letters rogatory, he appeals. Affirmed.

STATEMENT BY THE COURT. The following is a copy of the *dedimus potestatem* issued out of the superior court of Suffolk, Mass., authorizing the taking of the depositions of Jonathan Bourne, Jr.: "Commonwealth of Massachusetts. [The Superior Court Seal.] To any commissioner appointed by the governor of said commonwealth of Massachusetts, or to any justice of the peace, notary public, or other officer legally empowered to take

depositions or affidavits in the state of Oregon, greeting: Assured by your prudence and fidelity, we do, by these presents, appoint and empower you to take the deposition of Jonathan Bourne, Jr., of Portland, in said state of Oregon, to be used in a suit now pending in our superior court, between Annie B. Everett, as plaintiff, and John Stetson, Jr., as defendant, and, on certain days to be by you appointed, to cause the deponent to come before you, and him carefully examine, on oath or affirmation, in answer to several interrogatories hereto annexed; and reduce the examination, or cause the same to be reduced, to writing in your presence; and, after such deposition shall have been reduced to writing, it shall be carefully read to or by deponent, and shall then be subscribed by him. You shall permit neither party to attend at the taking of the deposition, either himself or by any attorney or agent, nor to communicate by interrogatories or suggestions with the deponent, while giving his deposition in answer to the interrogatories annexed to this commission; and you shall take such deposition in a place separate and apart from all other persons, and permit no person to be present at such examination, except the deponent and yourself, and such disinterested person (if any) as you may think fit to appoint as clerk to assist you in reducing the deposition to writing; and you shall put the several interrogatories and cross-interrogatories to the deponent in their order, and take the answer of the deponent to each, fully and clearly, before proceeding to the next, and not read to the deponent, nor permit the deponent to read, a succeeding interrogatory until the answer to the preceding has been fully taken down. Of this, our writ, with your doings by warrant of the same, you will make return under seal into our said court with all convenient expedition. Witness the Honorable ALBERT MASON, chief justice of our said court, and the seal thereof at our city of Boston, on the twenty-first day of November, in the year of our Lord one thousand eight hundred and ninety. JOS. A. WILLARD, Clerk."

On the 27th day of June, 1891, a paper was served on the appellant of which the following is a copy: "Superior court—November, 1890. Annie B. Everett, Plaintiff, vs. John Stetson, Defendant. Suffolk—ss.: To Jonathan Bourne, Jr.: In the name of the state of Oregon: The undersigned notary public, having been duly designated and appointed by the superior court of Suffolk county, Massachusetts, to take your testimony in a case now pending in said court, wherein Annie B. Everett is plaintiff, and John Stetson, Jr., is defendant: Now, therefore, you are hereby commanded to appear before the undersigned commissioner, at his office, room No. 11 in the First National Bank building, on the south-east corner of First and Washington streets, in the city of Portland, county of Multnomah, state of Oregon, on the 30th day of June, 1891, at 9 o'clock in the forenoon of said day, to give evidence in the above-entitled cause on the part of plaintiff, and seal this 27th day of June, 1891."

tary Seal.] A. C. EMMONS, Notary Public and Commissioner."

Thereafter, on the 5th day of August, 1891, the superior court of Suffolk, Mass., issued the following letters rogatory: "Commonwealth of Massachusetts. Suffolk—ss.: Superior court. To the circuit court within and for the county of Multnomah, in the state of Oregon, or any judge or tribunal having jurisdiction of civil cases in the city of Portland, in the county of Multnomah: Whereas, in our superior court, in the case of Annie B. Everett vs. John Stetson, Junior, the plaintiff filed in said court interrogatories to take the deposition of Jonathan Bourne, Junior, of said Portland; and whereas, after due notice, the defendant filed certain cross-interrogatories, and thereupon a commission to take the deposition of said Bourne was issued by this court, with the several interrogatories and cross-interrogatories thereto annexed, and afterwards A. C. Emmons, Esquire, of said Portland, a duly-authorized notary public, commissioned and authorized to take the said deposition in pursuance of said commission, issued his subpoena to said Bourne to appear before him and give answer to the said interrogatories, and said Bourne, although duly served and his fees paid him, refused to appear or show any cause why he did not appear at the time and place fixed, and said commissioner, doubting his authority to compel the attendance of said Bourne, has returned said commission into our superior court; and it appearing to us that, without the testimony of said Bourne, justice cannot completely be done between the parties: We therefore request you that, in furtherance of justice, you will afford your aid in the examination of said witness by said commissioner, upon said commission, upon the interrogatories thereto annexed; that you will, by the usual and proper process of your court, cause the said Bourne to appear before said commissioner at a time and place by you to be fixed, and him examine on oath or affirmation to the several interrogatories to said commission annexed, and that you will cause his deposition to be committed to writing, and returned, and duly closed and sealed up, and return with these presents; and we shall be ready and willing to do the same for you in a similar case, when required. Witness: ALBERT MASON, Esquire, Justice of our said Superior Court at Boston, in said County of Suffolk, this fifth day of August, A. D. 1891. JOS. A. WILLARD, Clerk. [Seal of the Superior Court.]"

On the 17th day of September, 1891, the circuit court of Multnomah county, Or., entered upon its journal the following order: "And now, at this day, upon presentation to this court of letters rogatory from the superior court of Suffolk county, Massachusetts, setting forth, among other things, the issuance out of said court of a commission in a cause therein pending between Annie B. Everett, as plaintiff, and John Stetson, as defendant, directed to A. C. Emmons, Esq., of Portland, notary public, as commissioner to take the deposition of Jonathan Bourne, Jr., of Portland, in

answer to interrogatories and cross-interrogatories attached to said commission, and setting forth that said Bourne refused to appear before said commissioner, but made default, and representing that without the testimony of said Bourne justice cannot be completely done between said parties, and requesting us that in furtherance of justice we afford our aid in the examination of said witness by said commissioner, upon said commission, under said interrogatories, and that by the usual proper process of our court we cause said Bourne to appear before said commissioner at a time and place by us to be fixed, and him examine on oath or affirmation to the several interrogatories to said commission annexed, and that we cause his deposition to be committed to writing, and returned, and duly closed and sealed up, and returned with said letters, and offering to do the same favor for us in a similar case when required, it is therefore ordered that in accordance with said request, a writ in due form issue, out of this court, directed to the sheriff of this county, and reciting the above facts, and directing said sheriff to summon said Jonathan Bourne, Jr., to appear before said A. C. Emmons, Esq., notary public, commissioner, at his office in the city of Portland, First National Bank building, corner First and Washington streets, upon Monday, September 21, A. D. 1891, at 10 o'clock A. M., and upon such further time or times to which the taking of said deposition may be adjourned by said commissioner, then and there to testify before said commissioner in answer to said interrogatories, and that said commissioner apply to this court for any further aid he may need in the premises, and that said deposition be by him committed to writing, and that when taken the same be duly closed and sealed up, and returned with said letters rogatory to said court from which the same issued."

Thereafter, and on the same day, the clerk of said circuit court, pursuant to said order, issued the following writ: "In the circuit court of the state of Oregon for the county of Multnomah. State of Oregon, county of Multnomah—ss.: In the name of the state of Oregon: Whereas, a commission was duly issued out of the superior court for Suffolk county, Massachusetts, addressed to A. C. Emmons, Esq., a notary public for the state of Oregon, to take the deposition of Jonathan Bourne, Jr., of Portland, in this state, to be used in a suit pending in said superior court, between Annie B. Everett, as plaintiff, and John Stetson, defendant, upon interrogatories and cross-interrogatories to be propounded to said witness; and whereas, said Bourne was duly notified and summoned to appear before said notary public, commissioner, and give answer to said interrogatories and cross-interrogatories to be propounded to said witness; and whereas, said superior court of said Suffolk county has requested us, by proper and usual process of our court, to cause said Jonathan Bourne, Jr., to appear before said A. C. Emmons, Esq., commissioner, at a time and place to be by us fixed, for examination on oath or affirmation to

said interrogatories to said commission annexed, and that we cause his deposition to be committed to writing and returned, and duly closed and sealed up, and returned to said court, and that we afford our aid in the examination of said witness by said commissioner upon said commission, and offering to do the same for us in a similar case when desired: Now, therefore, we command you that you summon the said Jonathan Bourne, Jr., to appear before A. C. Emmons, Esq., notary public, commissioner aforesaid, upon Monday, the 21st day of September, 1891, at 10 o'clock A. M., and at such further time or times to which the taking of said deposition may be adjourned by said commissioner at his office in the city of Portland, in the First National Bank building, corner First and Washington streets, then and there to testify in said cause in answer to said interrogatories to be propounded to him under said commission; and that you return this writ, with your doing herein, to this court. Witness the seal of said court, and the hand of the clerk thereof affixed, at Portland, Oregon, the 17th day of September, 1891. [Seal of Circuit Court.] JNO. R. DUFF, Clerk. By V. A. FRYER, Deputy."

This writ was duly served on the appellant in said city of Portland. On the 24th day of September, 1891, proof by affidavit was duly submitted to said circuit court of the service of said writ, and of the non-attendance of said witness at the time and place specified. Thereafter, and on the same day, said court made the following order: "In the circuit court of the state of Oregon for the county of Multnomah. The State of Oregon, Plaintiff, vs. Jonathan Bourne, Jr., Defendant. And now, this day the affidavit of A. C. Emmons, Esq., having been filed in this court, in the matter entitled, 'In the Matter of Letters Rogatory from the Superior Court of Suffolk County, Massachusetts, in the Case of Annie B. Everett vs. John Stetson, Junior, pending therein,' and it being shown to the court by said affidavit that the above-named Jonathan Bourne, Junior, has disobeyed the process of this court duly served upon him, requiring him to appear and testify before said A. C. Emmons, notary public as commissioner, under commission from the superior court of Suffolk county, Massachusetts, in said case of Everett vs. Stetson, pending therein, by failing to appear before said commissioner at the time and place named in said process, upon motion of Annie B. Stetson, by W. M. Gregory, her attorney: It is therefore ordered that said Jonathan Bourne, Jr., be required to be and appear before this court at 1:30 o'clock P. M. of this day, or, if service hereof be not so soon made upon him, then forthwith upon service hereof, then and there to show cause why he should not be arrested to answer for contempt of this court in disobeying the lawful process of this court as above mentioned, duly served upon him. It is further ordered that a duly-certified copy of this order be forthwith served upon said Jonathan Bourne, Jr. Dated September 24th, 1891. E. D. SHATTUCK, Judge."

Bourne appeared in said court pursuant to said order, and filed an answer in sub-

stance as follows: That in failing to appear and testify before A. C. Emmons, Esq., notary public, commissioner, appointed under the commission issued by the superior court of Suffolk county, state of Massachusetts, to take the deposition of said Bourne as set forth in said order, he, said Bourne, disclaims any intention of disrespect against this court or its officers. And, further answering said order, said Bourne alleges and says: "That this court has no jurisdiction of the person of said Bourne under this proceeding, and that this court has no jurisdiction in the above-entitled matter, and that this court has no right or jurisdiction to punish said Bourne, or to adjudge him in contempt for failing, neglecting, or refusing to appear before said commissioner as a witness on Monday, the 21st day of September, 1891, at ten (10) o'clock A. M., or at any other or further time, at the office of said commissioner, at the city of Portland, corner of First and Washington streets, or at any other place, or to testify in said cause of Everett vs. Stetson, or to answer to interrogatories to be propounded to him under said commission in said cause of Everett vs. Stetson."

This answer was demurred to, which demurrer was sustained by the court, and thereupon said court entered the following judgment: "That the defendant, Jonathan Bourne, Junior, be, and he is hereby, committed to the jail of Multnomah county, state of Oregon, for contempt of this court, in disobeying the lawful process of this court, requiring him to appear before said A. C. Emmons, Esq., notary public, commissioner, as herein recited, and that he be there kept in close confinement until he be ready to and do appear before said commissioner to testify, as required by said process of this court." The appeal is from this judgment.

Fred V. Holman, for appellant. W. M. Gregory, for respondent.

STRAHAN, C. J. It sufficiently appears from the foregoing statement that the superior court of Suffolk county, Mass., where the action of Annie B. Everett v. John Stetson, Jr., is pending, tried, through the usual instrumentality of a commission and issuing a *dedimus potestatem*, to obtain the evidence of the witness, and failed. Thereafter letters rogatory were issued under which the circuit court of Multnomah county has taken these proceedings, which have resulted in this appeal.

1. The real question here is one of jurisdiction. At the outset, it is conceded that there is no statute in this state expressly, and in so many words, conferring jurisdiction on the circuit courts of this state in such cases. The only statute having any bearing on the subject is section 790, Hill's Code, which provides: "The subpoena is issued as follows: * * * (2) To require attendance before a commissioner appointed to take testimony by a court of the United States, a territory thereof, a sister state, or a foreign country, by any clerk of a court of record, in places within the jurisdiction of such court." By this section a clerk of a court of record is

authorized to issue a subpoena requiring the attendance of a witness before a commissioner appointed to take testimony by a court of a sister state, and the subpoena, when issued, is the process of the court whose clerk issued it, and not of the clerk. But counsel take the objection here for the first time, so far as the record discloses, that the paper issued by the clerk of the circuit court of Multnomah county, and served upon Bourne, is not a subpoena, and therefore he was not bound to obey it; and he further insists that, as no statute expressly confers jurisdiction on the circuit court in such cases, it is without authority. These objections may be considered together. This question is one involving the comity of states, grows out of necessity, and is recognized by the law of nations. In discussing it, therefore, no narrow or merely technical view of the law is permissible. The constitution of the state (article 7, § 9) vests in the circuit courts all the judicial power of the state, not vested by the constitution or laws consistent therewith exclusively in some other court. If the authority to require the attendance of a witness before a commissioner appointed by a court of a sister state is a judicial power, and not vested exclusively in some other court, then the same belongs to the circuit courts; and, even if the constitution were silent upon the subject, we think the result would be the same. In speaking of this method of obtaining evidence, 1 Greenl. Ev. § 320, says: "This method of obtaining testimony from witnesses in a foreign country has always been familiar in the courts of admiralty; but it is also deemed to be within the inherent power of all courts of justice; for, by the law of nations, courts of justice of different countries are bound mutually to aid and assist each other, for the furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the court before which the action is pending may send to the court within whose jurisdiction the witness resides a writ, either patent or close, usually termed a 'letter rogatory,' or a commission *sub mutua vicissitudinis obtentu ac in iuris subsidium*, from those words contained in it." The same principle is stated in Weeks, Dep. § 128, and many authorities cited. And the practice under such letters is stated and discussed in Whart. Conf. Laws, § 722 et seq.; 3 Whart. Int. Law Dig. § 41 et seq.; Nelson v. U. S., 1 Pet. C. C. 235; Kuehling v. Leberman, 9 Phila. 160; In re Jenckes, 6 R. 1. 18. These authorities sufficiently show that the matter under consideration is one of judicial cognizance. It appertains to the administration of justice in its best sense, and its exercise is now common and unquestioned among civilized nations. It is true the duty may not be imposed by positive local law, but it rests on national comity, creating a duty that no state could refuse to fulfill without forfeiting its standing among the civilized states of the world. Aside, then, from the statute quoted above, we think the circuit court of Multnomah county had jurisdiction over this case, but the statute, no doubt, was designed to cover such cases. The

clerk of the court, in issuing the writ of subpoena or other writ, only exercises his appointed functions under the law, but the writ, when issued, is the writ of the court, authenticated by its seal, and over which it has jurisdiction. All writs so issued protect the officer executing them, and the court has power to prevent all abuses growing out of their use. As a necessary incident to this, it may punish all disobedience or resistance to its process and orders. This power inheres in the court, whether conferred by express statute or not.

It was finally argued that the writ which the clerk issued, and which was served on the appellant, requiring him to appear and submit to an examination, was not a subpoena. Two answers may be made to this objection. The first is that no such objection was taken in the court below. The appellant did not then object that the writ was illegal, or one that he was not bound to obey, because the writ was defective; but his objection went to the jurisdiction of the court. The one now made goes to the means or manner of its exercise. But whether taken here or in the court below, the objection could not be sustained. For all the purposes of this proceeding the writ which was served upon the appellant was a subpoena. It is true it is not in the form in common use in the courts of this state, but it required the attendance of a witness. (Hill, Code, § 789,) and that is sufficient.

It was finally objected by the appellant that the court in Massachusetts had no authority to issue the letters rogatory. The ground of this objection is not clear to us, but we are unable to find any satisfactory foundation upon which it could be placed. We cannot review the action of that court, or call in question its jurisdiction over the case pending before it. Any objection to excess of authority or irregularity in its exercise must be made in that court, and not here. It is sufficient for us to know that it has, by letters rogatory, asked the aid of one of the courts of this state, in obtaining the testimony of a witness domiciled here in a case pending before it, and over which it had assumed jurisdiction. We find no error in the judgment appealed from, and the same is therefore affirmed.

HISLOP v. MOLDENHAUER.

(Supreme Court of Oregon. Nov. 2, 1891.)

FORCIBLE ENTRY AND DETAINER—LANDLORD AND TENANT.

Under Hill's Code Or. § 3509, giving the owner of premises entitled to possession the right to maintain unlawful entry and detainer against one who forcibly holds possession, and section 3519, declaring that a tenant who shall fail to pay rent, or deliver up the premises for 10 days after demand of possession in writing, shall be deemed to be unlawfully holding by force, a lessor may maintain such action against a lessee who refuses to pay rent, or deliver possession for 10 days after demand, without proving that he actually holds possession by force. *Taylor v. Scott*, 10 Or. 483, and *Harrington v. Watson*, 11 Or. 143, 8 Pac. Rep. 173, distinguished.

Appeal from circuit court, Multnomah county; ERASMUS D. SHATTUCK, Judge.

Action of forcible entry and detainer by Thomas Hislop against W. J. Moldenhauer. Judgment for defendant. Plaintiff appeals. Reversed.

Hall & Showers, for appellant. *McGinn, Sears & Simon*, for respondent.

LORD, J. This is an action of forcible entry and detainer originally brought in a justice's court to recover the possession of an hotel building in East Portland. Judgment went for the plaintiff, from which an appeal was taken to the circuit court, and upon trial, after the testimony for the plaintiff was in, the defendant, by his counsel, moved for a nonsuit, on the ground that there was an entire absence of any intent upon the part of the defendant to hold possession of the premises by force. The court granted the motion on the ground that there was an entire absence of any proof of any force in the entry or in the holding, and discharged the jury from the further consideration of the case. Without detailing the evidence, it was conceded that the plaintiff was the owner of the property in question; that the defendant was his tenant, and refused to pay rent due on the premises; that thereafter the plaintiff gave the defendant a written notice to vacate the premises within 10 days from the date thereof, and that he neglected and refused to do so, etc. It thus appears that the relation of landlord and tenant subsists between the parties, and that the requirements necessary to constitute a statutory forcible detainer were admitted to be proven, unless some proof of force was an essential element in the case. The decision of the trial court discloses that his own opinion was that no proof of force was necessary in such case; that when a tenant had been notified in writing to leave or vacate the premises, and refused, it was a sufficient proof of force to authorize the action of forcible detainer to be brought, but that in consideration of the cases of *Taylor v. Scott*, 10 Or. 483, and *Harrington v. Watson*, 11 Or. 143, 8 Pac. Rep. 173, which the trial court thought included the case at bar and controlled it, it felt bound to grant the nonsuit. The opinion expressed by the trial court was undoubtedly correct, but its misconception of the effect of the two cases cited led it into error. In neither of them did the relation of landlord and tenant exist, which is disclosed by the facts and reiterated in the opinion to avoid liability to mistake when the action is brought to oust a stranger or trespasser. In *Taylor v. Scott*, supra, there was no privity of contract; both the plaintiff and the defendant claimed the right of possession to certain public lands as settlers; and it is expressly stated that "the relation of landlord and tenant does not exist between the parties." They were strangers to each other. The defendant was in possession, but refused to deliver or surrender his possession upon the demand of the plaintiff, but without indicating any purpose to resist the entry of the plaintiff with force. He brought forcible detainer against the defendant, which

was reversed on the ground that the nonsuit ought to have been granted for the want of any proof of forcible detainer. In *Harrington v. Watson*, supra, the defendant had rented a certain room which, with the building, was destroyed by fire. The thing rented was gone and the lease terminated. The defendant, a few days after the fire, upon the assumption that his lease included a demise of the land, and had not terminated, moved another building on the land occupied by the building destroyed by fire. The plaintiff served upon the defendant a written notice to quit, and demand of the possession of the premises, which the defendant refused to surrender, whereupon the plaintiff brought an action of forcible entry and detainer. The contention was that the refusal to surrender the premises on the written notice was the holding of the possession by force, or a forcible detainer. The court say: "Now, this is not the case of a defendant unlawfully holding over after the expiration of his lease,"—that is, where the relation of landlord and tenant exist,—"but the case of a defendant entering, peaceably, we must take it, upon the land of the plaintiff, under what he believed to be a claim of right, and refusing to deliver the possession upon a written notice and demand of the premises. To maintain his action, then, the plaintiff must bring his case within the principle, where 'possession shall be held by force,' as declared in our statute, (section 3510, Hill's Code;) and *Taylor v. Scott*, supra, is decisive that he cannot recover under this provision, unless he proves that the defendant forcibly detains the premises from him." As the thing leased had been destroyed by fire, and the lease terminated, the relation of landlord and tenant did not exist, and the case did not fall within the purview of section 3519, Hill's Code,¹ providing a remedy for landlords to regain a peaceable possession of their premises from tenants who had forfeited their right of possession, and refused to surrender, which are deemed cases of unlawful holding by force. That section creates a species of constructive force, where none in fact exists. A tenant, notified to quit, who refuses to surrender the possession of the premises, in holding over after the expiration of his lease, within the meaning of the statute, is guilty of holding by force, as much so as though he held it with force. In such case the landlord may bring his action at once to dispossess the tenant, and regain the possession of the premises. He is not required to exert actual physical force, and perhaps disturb the public peace and imperil his life, before he will be permitted to bring the action. When that relation exists, the tenant, by his refusal to sur-

render when he has had notice to quit, has placed himself in a situation to be sued, and to authorize the bringing of the action; for the case is within those enumerated which the statute has declared shall be deemed holding with force. Between cases of that sort and those of a stranger and intruder, who forcibly enters or forcibly detains where the entry was peaceable, there is a marked distinction. No notice is necessary, and the action may be brought at once. The gist of the action is the force either in the entry or the detainer, or both. In the case of the tenant he is deemed holding by force when he refuses to vacate after notice and the expiration of his lease, or to pay rent, while the intruder or trespasser forcibly enters or detains with force. The judgment must be reversed, and a new trial ordered.

(21 Or. 194)

WILHELM v. EAVES *et al.*

(Supreme Court of Oregon. Nov. 2, 1891.)

PENALTIES AND LIQUIDATED DAMAGES.

A contract stipulated that defendants would make plaintiff superintendent of their market, and in consideration of his services give him certain privileges and a salary. Plaintiff agreed to perform certain duties on his part. *Held*, that a provision that for the performance of "all and every" of the stipulations the parties bound themselves, each unto the other, in the sum of \$200 as liquidated damages, should be construed to mean a penalty.

Appeal from circuit court, Multnomah county; ERASMUS D. SHATTUCK, Judge.

Action by P. Wilhelm against D. W. Eaves and A. M. Plato for breach of contract. Judgment for plaintiff. Defendants appeal. Reversed.

STATEMENT BY THE COURT. This is an action to recover damages for a breach of the following agreement between plaintiff and defendants: "This agreement, made the fourteenth day of August, in the year of our Lord one thousand eight hundred and ninety, between David W. Eaves and A. M. Plato, doing business as Eaves & Plato, of the Metropolitan Market, parties of the first part, and Peter Wilhelm, the party of the second part, witnesseth, that the said party of the first part, in consideration of the covenants, promises, and agreements on the part of the said party of the second part hereinafter contained, hereby covenant, promise, and agree to and with the said party of the second part that the said party of the first part will, as soon as they become possessed of the Metropolitan Market, its lease, stock, fixtures, and appurtenances, all in clear title, from the administrator or representative of Todd's interest in said market, then the party of the first part will and hereby agree to make said Peter Wilhelm the superintendent of said market, with such duties as will be hereinafter described. The said party of the first part also agrees, in consideration of the services of said Peter Wilhelm as superintendent, to give said Wilhelm the free and full use of the room (known as the 'restaurant') in the east end of said market for use as a coffee-room during the continuance of said lease, and the faithful fulfillment of duties as said superintendent.

¹ Hill's Code Or. § 3509, gives the owner of premises, entitled to possession, the right to maintain an action of forcible entry and detainer against any person who forcibly enters upon the premises, or who, having peaceably entered, forcibly holds possession; and section 3519 provides that when a tenant shall fail or refuse to pay rent due on the lease or agreement under which he holds, or deliver up the premises for 10 days after demand of possession in writing, he shall be deemed to be holding by force.

And it is further agreed that whenever the rental income from stalls shall equal (\$500) five hundred dollars per month, then said Wilhelm is to receive, in addition to use of said coffee-room, the sum of fifty dollars (\$50) per month, and when income from stalls shall equal or exceed one thousand dollars per month said Wilhelm shall receive one hundred dollars (\$100) per month, for services as superintendent; and said Wilhelm agrees at such time to maintain a special night watchman in said Metropolitan Market. And the said party of the second part, in consideration of said covenants, promises, and agreements on the part of said party of the first part hereinafter contained, covenants, promises, and agrees to and with the said party of the first part that the said party of the second part will and hereby agrees to act as superintendent of said Metropolitan Market; and the duties to be performed and accepted as share of the work is to see that the said market shall at all times be kept clean and in a wholesome sanitary condition; that he will have said market properly opened every morning at five o'clock; and that said market shall be kept open for the transaction of business until the hour of eight at night, excepting Saturday nights, when the market must be kept open until eleven o'clock at night. He agrees further to see that rules and regulations governing said market shall be strictly enforced; that all occupants of stalls are to keep their premises in good order; and the said Wilhelm agrees to obey the parties of the first part in all matters relating to the welfare of the said market; and in the business it is understood that the said Wilhelm shall not contract any bills, order any labor performed, or do anything to bind or make the said party of the first part liable for money, excepting on the written order or authority of said party of the first part; nor shall the said Wilhelm collect any money, unless authorized to do so. Said Wilhelm accepts as pay in full such sums as hereinbefore agreed. And for the true and faithful performance of all and every of the said covenants, promises, and agreements, the said parties to these presents bind themselves, each unto the other, in the penal sum of two hundred dollars of the United States of America, as fixed, settled, and liquidated damages to be paid by the failing party to the other, their heirs or assigns; and if at any time either of the said parties shall be guilty of gross misconduct, drunkenness, or engaged in any dishonest or criminal matter, then agreement shall be void. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written. D. W. EAVES. [Seal.] ARTHUR M. PLATO. [Seal.] P. WILHELM. [Seal.] Signed, sealed, and delivered in the presence of WILLIE GILL. The breach of the agreement complained of was the discharge of plaintiff by defendants. Without any proof of actual damages a recovery was allowed of the stipulated sum of \$200, and hence this appeal.

T. J. Geisler, for appellants V. K. Strode and McGinn, Sears & Simon, for respondent.

BRAN, J. The decision of the question as to whether a given sum, provided in a contract to be paid on a breach thereof, shall be considered as liquidated damages or a penalty, is often inherently difficult, and there is much apparent conflict in the adjudged cases. The words "liquidated damages" are not at all conclusive as to the character of the stipulation. Compensation for breach of a contract is always desirable, and the courts are not bound by the language used by the parties; and, if the construction is at all doubtful, the tendency of the courts is in favor of the interpretation which makes the sum a penalty. *Cushing v. Drew*, 97 Mass. 445. While it is usually said that the intention of the parties, as gathered from the subject-matter of the contract, the language used, and surrounding circumstances, is to govern in cases of this kind, "such intention," says Mr. Sutherland, "under the artificial rules that have been adopted, is determined by very latitudinarian construction. To be potential and controlling that a stated sum is liquidated damages, that sum must be fixed as the basis of compensation, and substantially limited to it; for just compensation is recognized as the universal measure of damages not punitive. Parties may liquidate the amount by previous agreement; but where a stipulated sum is evidently not based on that principle, the intention to liquidate damages will either be found not to exist or will be disregarded, and the stated sum treated as a penalty." 1 *Suth. Dam.* 480. In *Jaquith v. Hudson*, 5 Mich. 133, *CHRISTIANCY, J.*, says: "The law, following the dictates of equity and natural justice in cases of this kind, adopts the principle of just compensation for the loss or injury actually sustained; considering it no greater violation of this principle to confine the injured party to the recovery of less than to enable him, by the aid of a court, to extort more. * * * This principle of natural justice, the courts of law, following courts of equity, have, in this class of cases, adopted as the law of the contract; and they will not permit the parties, by express stipulation, or any form of language, however clear the intent, to set it aside." From the confused array of individual cases upon this question there may be deduced certain general rules that are recognized and enforced by the courts, and the apparent conflict in the cases arises rather from the application of these rules to the facts of the individual case than in the principles themselves. One of these rules is that when a contract specifying one certain sum as liquidated damages contains various stipulations of different degrees of importance, and the damages from a breach of some of which would be easily ascertainable, though the remainder might belong to that class which justifies such arrangement as to damages, and by the terms of the contract such sum would be payable equally on the failure to perform the least as of that to perform the most important, or equally on the failure to perform that one the damage from the violation of which would be easily ascertainable as to that from the breach of which the loss would be diffi-

cult of ascertainment, the stipulated sum will be regarded as a penalty, and not liquidated damages, though the language of the parties be the strongest which could be employed to evince a contrary intent. *Kemble v. Farren*, 6 Bing. 141; *Carter v. Strom*, 41 Minn. 522, 43 N. W. Rep. 394; *Lampman v. Cochran*, 16 N. Y. 275; *Daily v. Litchfield*, 10 Mich. 29; *Cheddick v. Marsh*, 21 N. J. Law, 463; *Trower v. Elder*, 77 Ill. 452; *Lyman v. Babcock*, 40 Wis. 503; *Niver v. Rossman*, 18 Barb. 50; 3 Pars. Cont. 161; 2 Pom. Eq. Jur. § 443; 1 Suth. Dam. 521; 19 Cent. Law J. 282,—where the authorities are fully collated. This rule is decisive of this case. The contract provides, in effect, that, in default of any of the covenants, promises, or agreements contained therein, the sum of \$200 shall be paid by the failing party to the other. If, then, this be regarded as liquidated damages, that precise sum would be recoverable for the breach of any of the covenants, however unimportant, or however easily the damages for a breach thereof could be ascertained,—such as the failure by defendants to pay the fifty or one hundred dollars per month as agreed upon, or of the plaintiff to keep the market clean and in a wholesome sanitary condition, or to keep it open during the stipulated hours, or not to observe the prohibition against contracting bills, ordering labor performed, or collecting money, or any other of the numerous stipulations on his part to be performed, even though the damages for such breach might be no more than a very small fraction of the stipulated damages. The contract, when analyzed, contains some 16 different stipulations of varying degrees of importance, the damages for a breach of some of which would be easily ascertainable; and yet it is provided that \$200 shall be paid as stipulated damages for a breach of any of them, even the most unimportant. It is not to be supposed the parties intended their agreement to have any such effect, and, following the above well established rule in such cases, the stipulated sum must be construed as a penalty, and the judgment of the court below reversed, and a new trial ordered.

CALLAHAN *et al.* v. JENNINGS.

(*Supreme Court of Colorado.* Nov. 6, 1891.)

APPEAL — SPECIAL APPEARANCE — CONSTRUCTION OF STATUTES — EFFECT OF REPEAL — AMENDMENT.

1. The entry of a special appearance for the purpose of moving to dismiss an appeal, even though different grounds of dismissal are urged, is not a general appearance.

2. An order by the county court granting an appeal, and fixing a time for filing the appeal-bond, is necessary. But when such order is silent as to whether the appeal is allowed to the district or supreme court, and a bond properly conditioned is approved and filed perfecting the appeal to the former court, it will be presumed that the proceeding was regular, and the appeal will be sustained, even though the order also specifies time for filing a bill of exceptions.

3. A statutory right to have cases reviewed on appeal may be taken away by a repeal of the statute, even as to causes which have been previously appealed.

4. The foregoing principle applies to causes

pending on appeal for trial *de novo* as well as to those taken up for review; and such repeal may be implied as well as express.

5. But the doctrine of implied repeals should in such cases be recognized with greater reluctance, if possible, than in cases where vested property rights are acquired under statutes repealed.

6. There is no constitutional right to an appeal from the county court to the district court; such right exists only when the legislature has expressly or by clear implication declared in its favor.

7. The title, "An act to amend sections 18 and 17," does not authorize or permit the express repeal of those sections.

8. Under proper conditions, the void portions of a section or act may be rejected, and the valid portions be permitted to stand.

9. A statute can only be constitutionally amended by re-enacting and publishing at length the portions affected by the amendment.

10. When thus amended, no repeal of the portions retained has taken place. The original provisions appearing in the amended act are to be regarded as having been the law since they were first enacted, and the new provisions are to be understood as enacted at the time the amended act took effect.

(*Syllabus by the Court.*)

Appeal from district court, El Paso county; WILLIAM HARRISON, Judge.

Action of replevin by John Jennings against A. P. Callahan and others, begun in the county court. Judgment was there rendered for plaintiff, and defendants appealed to the district court, where the appeal was dismissed. Defendants appeal from the order of dismissal. Reversed.

T. J. O'Donnell, for appellants. Campbell & McIntyre, for appellee.

HELM, C. J. This suit in replevin was begun in the county court. Judgment was there rendered for a return of the property in controversy, or, if such return could not be had, for the value thereof, fixed at the sum of \$600. Appellants, who were defendants below, subsequently appeared, and, their motion for a new trial being overruled, gave notice of an appeal, without, however, specifying in the notice whether such appeal was desired to the district or supreme court. The county court thereupon entered an order "that said appeal be allowed, and defendants have twenty days to file their appeal-bond in the sum of \$1,500, and bill of exceptions." Within the time thus specified, defendants tendered, and the proper officer approved and filed, an appeal-bond in the sum mentioned by the order, conditioned according to the law regulating appeals to the district court. Thereafter, the necessary transcript and papers having been filed in the district court, appellee, who was plaintiff below, appeared and moved to dismiss the appeal. This motion was sustained, and the appeal dismissed. To review the action of the district court in the premises, the present appeal was taken. The act of 1885, providing for appeals to this court, being then in force, the review may take place though the judgment challenged was for costs only.

The motion filed in the district court did not constitute a general appearance, as counsel for appellants contend. It recites "that plaintiff herein enters his special appearance in this action for the purpose of

this motion, and for such purpose only, and moves the court to dismiss the appeal taken." The fact that different grounds for dismissal were then specified did not change the character of the special appearance to which the motion was limited. These grounds all bore upon the regularity and sufficiency of the steps taken in attempting to perfect the appeal to the district court, and its jurisdiction through the appeal to try the cause. Every allegation therein was directed to the same end, viz., the dismissal of the appeal. It would indeed be a paradoxical ruling that should hold the appearance of a party specially for the purpose of dismissing an appeal to constitute such a general appearance as waives the right to the dismissal prayed for. *Law v. Nelson*, 14 Colo. 409, 24 Pac. Rep. 2. The appeal in question was taken under section 499, Gen. St. 1883. All requirements of this section appear to have been complied with. The mere fact that the application did not specify the court to which the appeal was desired is not fatal. Nor is the further fact that the court, in entering the order granting the appeal and fixing the time for filing the bond, added a phrase providing for a bill of exceptions, decisive against the appeal. Such orders are undoubtedly necessary official acts; but when they are silent as to whether the appeal is to the district or supreme court, if within the time specified a bond properly conditioned be approved and filed perfecting an appeal to the district court, the presumption of regularity ordinarily attaching to the proceedings of courts of record will be indulged. The incidental circumstance that the order in the present case was broad enough to permit an appeal to the supreme court should not be held to invalidate the appeal actually taken. The original appeal, therefore, was, in our judgment, sufficiently perfected, and the cause was pending for hearing in the district court.

This brings us to the main contention in the present case, viz., that the section above mentioned, under which the appeal was prosecuted, was repealed before the cause was called for trial in the district court. If this be true, and if there is no saving clause in the act, the appeal, provided it was purely a statutory right, fell, and the court was left without jurisdiction save to enter the order of dismissal. "A statutory right to have cases reviewed on appeal may be taken away by a repeal of the statute, even as to causes which have been previously appealed." *Cooley*, Const. Lim. § 474; *Sedg. St. & Const. Law*, pp. 108-116, notes; *Ex parte McCordle*, 7 Wall. 506. The principle applies to causes pending on appeal for trial *de novo*, as well as to those taken up for review. *Smith v. District Court*, 4 Colo. 235; *Harrison v. Smith*, 2 Colo. 625. We cannot concede the correctness of counsel's position that appeals from the county to the district court are a constitutional right. The language of the constitution is: "Appeals may be taken from county to district courts, or to the supreme court, in such cases and in such manner as may be prescribed by law. Writs of error shall lie from the supreme

court to every final judgment of the county court. * * * The provision does not declare that appeals may be taken from all final judgments of the county court. It is only with reference to writs of error from the supreme court that the language is thus comprehensive. It is left for the legislature to prescribe the kinds or classes of cases in which appeals shall lie, as well as to provide the manner of perfecting them. If counsel's assertion that the provision was intended to confer absolutely the right to the appeal, simply leaving to the legislature the duty of prescribing the manner of taking the same, were correct, the phrase "in such cases" would perform no office, and would undoubtedly have been omitted. The employment of the word "may" instead of the word "shall" tends to show an intent to make the privilege permissive, not absolute. And when coupled with the phrase "in such cases," it settles beyond doubt the construction to be given. The right in question exists only when the legislature has expressly or by clear implication declared in its favor. *People v. Richmond*, 16 Colo. —, 26 Pac. Rep. 929. If, therefore, it be true that the statute under which the appeal in the present case to the district court had been perfected was repealed without a saving clause, the right to a trial *de novo* in the latter court was revoked, and its action in dismissing the appeal must be sustained. It is asserted that such repeal was accomplished by the act adopted in 1885, found on page 159 of the Session Laws of that year. Appellants do not contend that this act contained a saving clause; so our inquiry is narrowed to the single question of repeal. The title of the statute of 1885 is not challenged as unconstitutional, and we shall assume without argument that it may fairly be treated as if reading, "An act to amend sections 16 and 17 of chapter 22 of the General Statutes of the State of Colorado." Thus, it will be observed, this title expressly provides for the amendment of sections 16 and 17 of the former act. It does not contemplate the repeal of section 16, under which the appeal to the district court was taken. It follows, therefore, that, in so far as the introductory words in the body of the act tend to recognize an express repeal of this section, they are void. But it does not follow that on this account the whole act is unconstitutional; for, under proper conditions, the void portion of a statute may be rejected, and the valid portions be permitted to stand.

It becomes important to determine whether the new law can so operate as to repeal section 16 by implication, because the principle under consideration relates to implied as well as to express repeals. We preface the discussion of this particular subject with the observation that the doctrine of implied repeals should be recognized with even greater reluctance here than under ordinary circumstances. Vested property rights, contractual or otherwise, acquired under a statute, are protected notwithstanding the repeal of the statute. But in cases like the present, while the actual injury may be as great, upon the repeal the privilege of continu-

ing pending proceedings authorized by the statute repealed is, as already observed, denied. As will presently appear, it is unnecessary to consider the constitutional objection, if such there be, to recognizing an implied repeal under a title providing for amendment only. Const. § 24, art. 5, expressly provides that statutes shall be amended only by re-enacting and publishing at length the portions affected by the amendment. The intent and wisdom of this provision are obvious. It was framed for the purpose of avoiding confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes, or different portions of the same volume. This constitutional provision settles beyond peradventure the effect of amending a law with the introductory phrase, "so as to read as follows," or any other language showing clearly the intent only to amend. When a statute is thus amended, it is not accurate to say that a repeal thereof has taken place. Such a result was not contemplated by the framers of the constitution. The original provisions, in so far as they reappear in the amended act, are to be regarded as "having been the law since they were first enacted, and the new provisions are to be understood as enacted at the time the amended act took effect." *Ely v. Holton*, 15 N. Y. 595; *Moore v. Mansert*, 5 Lans. 173; *In re Miller*, 110 N. Y. 216, 18 N. E. Rep. 139; *People v. Briggs*, 114 N. Y. 56, 20 N. E. Rep. 820.

With the foregoing preliminary suggestions, let us carefully examine the act of 1885, through which the alleged repeal is claimed to have taken place. Our inquiry is, of course, what was the legislative purpose in its enactment? We start with the observation, already in effect recorded, that this intent, so far as the title can be indicative thereof, was to amend sections 16 and 17, not to repeal them. The act in question contains five sections. These five sections cover the precise ground originally covered by the sections 16 and 17 mentioned in the title. Section 5 deals with procedure in the district court after the jurisdiction of that court to try the cause *de novo* has attached by virtue of the appeal. This was the office of said section 17. The remaining provisions first expressly confer the right of appeal, and then prescribe the method to be pursued in obtaining and perfecting the appeal, together with the penalty for non-compliance therewith. These were the functions of said section 16. Important changes are made and new requirements are introduced. The procedure, especially that part of it originally covered by section 16, is more fully and carefully outlined. But applying to the act a liberal interpretation, for the purpose of effectuating the real legislative intent, it may fairly be said that the substance of the original sections is retained, being supplemented by amendatory provisions germane to the same general subject. There is, in our judgment, no reasonable doubt but that the legislative purpose, as ascertained from the body of the act, is correctly and accurately described by its title. And

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view of section 24, art. 5, of the constitution above mentioned, coupled with the rule of construction stated in *Ely v. Holton*, supra, we shall hold that section 16 was not so abrogated or affected as to warrant the judicial declaration that appeals properly pending in the district court when the act of 1885 took effect became lifeless and subject to dismissal for the want of jurisdiction. The judgment of the court below is reversed.

(16 Colo. 534)

CARTER v. CITY COUNCIL OF CITY OF DURANGO.

(*Supreme Court of Colorado. Nov. 6, 1891.*)

MUNICIPAL CORPORATIONS—REMOVAL OF OFFICERS—POWERS OF COMMON COUNCIL.

1. When the tenure of a municipal office is at the pleasure of the appointing body, the power to remove is discretionary, and may be exercised without notice or hearing.

2. The city council is primarily a legislative and administrative body, but it may now be clothed with at least quasi-judicial authority in connection with removals from municipal offices.

3. A distinction in regard to the manner of removals exists between those offices which are of the essence of the corporation and those which are not. A removal from an office (that of alderman, for instance) which is of the essence of the corporation can only take place for cause, and must be upon notice and investigation, with opportunity to be heard.

4. The motives actuating councilmen in connection with removals are not ordinarily subject to judicial inquiry, and, in the absence of deception or fraud, courts decline to interfere with the declaration of discretionary municipal pleasure by the council.

5. It is not within the power of a municipal corporation, by ordinance or by-law, either to extend or restrict the authority conferred upon the council by statute.

(*Syllabus by the Court.*)

Petition by Robert Carter for writ of *certiorari* to quash and annul the action of the council of the city of Durango in removing him from an office. Rule to show cause discharged.

O. S. Galbreath and W. E. Beck, for petitioner. Reese McCloskey, City Atty., (Russell & McCloskey and Wilson & McCloskey, of counsel,) for respondent.

HELM, C. J. Carter was duly elected by the city council police magistrate of the city of Durango. While engaged in the discharge of his duties, the council by resolution removed him, and appointed a successor. The present proceeding is brought to quash or annul the action of the council in the premises, upon the ground that such action was without jurisdiction. Under the statute existing at the time of the proceedings recited in the record, the police judge or magistrate, whose appointment was optional with and made by the city council, held his office during the "pleasure" of that body. Mills' Ann. St. § 4504. When the tenure of a municipal office is at the pleasure of the appointing body, the power to remove is discretionary, and "may be exercised without notice or hearing." 1 Dill. Mun. Corp. (3d. Ed.) § 250. Counsel for petitioner ably and ingeniously argue that the statutory provision above mentioned, subjecting the police magistrate's incumbency to

the "pleasure" of the council, does not correctly indicate the intention of the legislature; that it was adopted by inadvertence or mistake, while attempting to amend otherwise the section in which it occurs. Some of the reasons advanced are plausible, and may be sustained by the rules of construction relied on; but, without specifically considering either the reasons or rules in question, it is sufficient for us to say that more controlling, and at least equally pertinent, principles of statutory interpretation, forbid our acceptance of counsel's theory. The provision must be regarded as in full force, and binding upon the judiciary. The city council is primarily a legislative and administrative body. Its powers and duties are not essentially judicial. In *People v. District Court*, 6 Colo. 534, a doubt was expressed as to whether, under the constitution, the council could be invested with judicial authority. We there held, in effect, that an investigation of charges preferred against the city solicitor with a view solely to removal from office was not a judicial proceeding. We are now inclined to say that, while the action in question was not an exercise of ordinary judicial power, it might have been termed *quasi* judicial. Moreover, since that opinion was written, the limitation upon legislative discretion in regard to the lodgment of judicial power has been modified by constitutional amendment, (Mills' Const. Ann. § 373;) and, whatever foundation for doubt may have formerly existed, there is no question but that the city council may now be clothed with at least *quasi* judicial authority in connection with removals from municipal offices. But it does not follow that the possession or exercise of judicial power is a prerequisite to all such removals. A broad distinction in this regard is recognized by the authorities between those offices which are of the essence of the corporation and those which are not. For instance, an alderman can only be removed upon notice and investigation, with opportunity to be heard in his own defense, (*Board v. Darrow*, 13 Colo. 460, 22 Pac. Rep. 784, and citations;) while an officer whose appointment is optional with and made by the council, and who holds at its pleasure, may, as we have seen, be summarily removed without notice or hearing. In the former case a cause for a motion must exist, and the proceeding, possessing many of the features of judicial action, is properly characterized as *quasi* judicial; in the latter case there need be no cause for removal, save the arbitrary will of the council, and the expression of that will is destitute of judicial characteristics. When, as in the case at bar, the tenure of office is during the pleasure of the council, the subject of a motion is almost entirely within the discretion and control of that body. The motives actuating councilmen in the premises are not ordinarily subject to judicial inquiry; and universally, we believe, in the absence of deception or fraud, courts decline to interfere with the declaration of discretionary municipal pleasure by the council. *Hudson v. City of Denver*, 12 Colo. 157, 20 Pac. Rep. 329. The fact that an ordinance had been adopted by the municipal authorities of Durango providing for the preferment of

charges, and a hearing, upon notice, preliminary to removals from office, does not alter the result to which the foregoing conclusions would lead. The council were not bound to supply any specific procedure for the removal of police magistrates. The ordinance in question is general, relating to a number of offices, in some of which removals are not discretionary with that body. It reads: "Any officer named above may be removed by a majority of the city council for incompetency, or dereliction or violation of duty, whenever the council think the interests of said city require such removal: provided, that no officer shall be removed as aforesaid until he shall have notice of such intent of removal, and the charge or charges preferred against him, served on him by the city clerk, and an opportunity to exculpate himself before the city council. * * * We cannot assume that in adopting this ordinance the councilmen intended to curtail their statutory power of removing at pleasure, and limit themselves to removals for the specified causes alone. Besides, it is extremely doubtful if such intent, had it existed, could be thus given any force or effect; for it is not within the power of a municipal corporation by ordinance or by-law either to extend or restrict the authority conferred by statute. 1 Dill. Mun. Corp. § 317. It will be observed that the procedure specified in the ordinance above mentioned is limited to removals for "incompetency" or "dereliction or violation of duty." We are not apprised by the record that Carter was removed upon either of these grounds. The sole action through which his removal was ultimately accomplished was the following: "Resolved, that it is no longer the pleasure of the city council of the city of Durango that Robert Carter act in the capacity of police magistrate of said city of Durango; wherefore, be it resolved, that the said Robert Carter be, and he is hereby, removed from the said office of police magistrate." We might, perhaps, with the learned judge before whom this precise question was first raised, declare that the ordinance cannot be permitted under any circumstances to control the manner of expressing the "pleasure" vested by statute in the city council; but it is sufficient for us to say that the removal may have been upon grounds not mentioned in the ordinance, and, if such were the case, the question of duty or obligation to follow the prescribed procedure does not fairly arise. The rule to show cause must be discharged.

(16 Colo. 455)

KELLEY V. UNION PAC. RY. CO.

(Supreme Court of Colorado. Nov. 6, 1891.)

INJURIES TO PASSENGERS—NEGLIGENCE—SURVIVAL OF ACTION—APPEAL.

1. The general rule in this state is that actions at law do not die with the person; the exceptions are specified by statute.

2. Where it was alleged in the complaint that a person riding upon the train of a railroad company, under a contract with the company for safe carriage, was, without his fault, injured by the negligence of the company, and died without obtaining satisfaction for such injury, held, upon demurrer, that his administrator might maintain an action for breach of the contract, and thus

recover the pecuniary damages resulting to the deceased prior to his death.

8. As an appellate court, this court cannot properly take cognizance, through stipulation of counsel, of matters not in the record, nor can it properly express its opinion upon controverted legal questions in advance of their adjudication or presentation in the *vis prius* courts.

(Syllabus by the Court.)

Error to district court, Arapahoe county; DAVID B. GRAHAM, Judge.

Action by Ella Kelley, administratrix of Edward S. Kelley, deceased, against the Union Pacific Railway Company. Judgment for defendant. Plaintiff brings error. Reversed.

STATEMENT BY THE COURT. The amended complaint, *inter alia*, states, in substance: That one Edward S. Kelley died intestate February 21, 1889, and that plaintiff is his duly appointed and qualified administratrix. That the defendant is a railway corporation, duly organized, etc.; and at the time of the happening of the grievances complained of was managing and operating a certain railroad between the city of Denver and the city of Leadville, Colo., as a common carrier of passengers and freight for hire. That the defendant had entered into a contract with the Pacific Express Company for a valuable consideration to it paid by said express company to transport its express packages and express messengers over the line of defendant's said railroad between the points aforesaid, and undertook, promised, and agreed, in consideration of the premises, to safely carry said express packages and express messengers. That on November 11, 1885, said Kelley was a route express messenger in the employ of said express company, and while in the line and discharge of his duty as such was being carried over said railroad in one of the defendant's trains pursuant to the agreement aforesaid. That defendant, not being mindful of its contract to safely carry said Kelley, did so carelessly and negligently manage its train in which said Kelley was riding, upon a steep grade on the line of said road at or near the town of Breckenridge, Colo., that without notice or warning to said Kelley, and in some manner unknown to plaintiff, said train started down said steep grade, and soon acquired a rapid velocity, and so continued to run for a distance of four or five miles, when the same was thrown from the track, and said Kelley was, without any fault or negligence on his part, so greatly injured by the shock therefrom as to produce insanity; by reason of which he was adjudged insane, etc., and was thereafter confined in the state lunatic asylum at Pueblo, Colo., at which place he died as aforesaid, but not from the injuries caused by the negligence for which this suit is brought. That by reason of said injuries said Kelley became, and during all his life-time thereafter remained, sick, sore, lame, and disordered in mind and body, so as wholly to unfit him for following his usual occupation, or from engaging in any business or earning any wages whatever; in consequence of which a loss and damage has accrued to the personal estate of the said deceased in

the sum, etc. Prayer for judgment. The defendant's demurrer to the amended complaint was sustained, and thereupon judgment was rendered in favor of defendant. The plaintiff brings the case to this court by writ of error.

C. M. Campbell and D. V. Burns, for plaintiff in error. Teller & Oranhood, for defendant in error.

ELLIOTT, J. The several assignments of error present for determination but a single question: Did the cause of action stated in the amended complaint die with the person of Edward S. Kelley, or did it survive to his personal representative? The maxim, *actio personalis moritur cum persona*, is as old as the common law itself. Nevertheless, for more than 500 years, or since the reign of Edward III., the rule has been the subject of legislative modification both in England and America. It would serve no useful purpose to attempt to trace the various changes of the ancient rule. The general rule which has prevailed for many years in this state is that actions at law do not die with the person. It is expressed in the following statute: "All actions at law whatsoever, save and except actions on the case for slander or libel, or trespass for injuries done to the person, and actions brought for the recovery of real estate, shall survive to and against executors and administrators." Rev. St. 1868, p. 682; Gen. Laws 1877, p. 978; Gen. St. 1888, § 3635; Mills' Ann. St. § 4810. At common law the question whether a right of action survived to the executor or administrator in a given case depended in most instances upon the form in which the action might or must be brought to obtain relief. The general rule was that, if an action *ex contractu* might be sustained, the right of action survived; but if an action *ex delicto* must be resorted to, the right of action did not survive. 1 Chit. Pl. (16th Amer. Ed.) p. 77 et seq.; Ang. Carr. § 435. Though the forms of civil action have been abolished in this state, it is often convenient, and sometimes necessary, to refer to them in construing statutes enacted before the adoption of the Code. See Toothaker v. City of Boulder, 13 Colo. 224, 22 Pac. Rep. 468. Upon this ground counsel for plaintiff in error earnestly contends that, as the statute above quoted was enacted prior to the adoption of the Code, the word "trespass" must be held to mean the technical action of trespass as it existed under our former practice, and that it does not include other actions *ex delicto* for injuries to the person. It is unnecessary upon this review to decide the point thus presented. The complaint is in form *ex contractu*; the facts therein set forth are sufficient in substance to support the plaintiff's case as an action of *assumpsit*, the very gist of the action as pleaded being the breach of the contract to carry safely. Besides, no recovery is sought for the alleged injuries to the person of the deceased, but only for damages to his estate, which may be recovered in an action of *assumpsit* as well as in an action of trespass or case. 3 Suth. Dam. pp. 249, 259, 268; Patt. Ry. Acc. Law, §§

210, 349; *Pittsburgh City v. Grier*, 22 Pa. St. 65; *Nevin v. Car Co.*, 106 Ill. 222; *Staley v. Jamieson*, 46 Ind. 159; *Lemon v. Chancellor*, 68 Mo. 353. The act of 1872. (Sess. Laws, p. 117.) concerning damages to be awarded where the death of a person has been caused by the wrongful act of another, etc., was referred to in argument as having some bearing upon the construction to be given to the act above quoted, which is first found in its present form in the Revision of 1868. The two acts are not *in pari materia*. A comparison will show that they have no legal connection or relation to each other. The act of 1868 was to prevent certain actions or causes of action already accrued from abating by reason of the death of either of the parties, without regard to the cause of such death. The act of 1872 created a new cause of action, to-wit, the death itself. The act was not to prevent any cause or causes of action from abating; on the contrary, the cause of action provided for in the act did not accrue until death had already ensued. The language of the act was: "When the death of any person is caused by the wrongful act, misconduct, negligence, or omission of another, the personal representatives of the former may maintain an action therefor against the latter," etc. The present action is not to be confounded with the statutory remedy provided by the act of 1877, (Gen. Laws, p. 342.) That act is a substitute for the act of 1872, *supra*. It provides for the recovery of damages resulting from the death of the party injured under certain circumstances, in case the death were caused by the wrongful act, negligence, or default of another. In this case, as the complaint expressly states the death of said Edward S. Kelley was not caused by the negligence of the defendant, neither is the action brought to recover the damages resulting from his death to the parties entitled to sue under the act of 1877. On the contrary, the action is brought to recover only the pecuniary damages resulting to the deceased himself, and which are alleged to have accrued prior to his death. 2 *Thomp. Neg.* p. 1285; *Needham v. Railroad Co.*, 38 Vt. 294; *Barley v. Railroad Co.*, 4 Biss. 430. By stipulation of counsel, we are asked to consider and determine whether certain matters, if pleaded, would constitute a sufficient defense to the amended complaint. As the matters thus stipulated were not made a part of the record in the case in the court below, this court cannot properly take cognizance of them upon this review. See *Molandin v. Railroad Co.*, 3 Colo. 173; also *McKenzie v. Ballard*, 14 Colo. 426, 24 *Pac. Rep.* 1. If we were to yield to the stipulated request of counsel in this instance, it would be likely to prove a most dangerous and troublesome precedent. Such a practice would enable parties to obtain the opinion of this court upon controverted legal questions in advance of their adjudication or presentation in the *proper* courts. This would not only be contrary to the spirit and letter of our judicial system, but would tend to greatly increase the burden upon the already overburdened dockets of this court.

From the record before us it appears that the amended complaint and the matters therein stated are sufficient in law. The sustaining of the demurrer to it was therefore error. The judgment is accordingly reversed, and the cause remanded.

UNION COAL CO. v. EDMAN.

(*Supreme Court of Colorado*. Nov. 6, 1891.)

PRINCIPAL AND AGENT — EVIDENCE OF AGENCY — IMPEACHMENT OF WITNESS — DIRECTING VERDICT.

1. Where it is shown that a witness, not a party to the action, has made declarations out of court contrary to his sworn testimony, such previous declarations are admissible as affecting the credibility of the witness, but not as substantive evidence in the case.

2. The fact that a person represents himself in writing as the agent of another is of itself no evidence that he is such agent.

3. Where no evidence has been introduced tending to sustain a material and controverted averment of the complaint, in the absence of any motion for a nonsuit or other relief, it is error to refuse to direct a verdict in favor of defendant.

(*Syllabus by the Court.*)

Appeal from district court, Arapahoe county; GEORGE W. ALLEN, Judge.

Action by Charles J. Edman against the Union Coal Company. Judgment for plaintiff. Defendant appeals. Reversed.

STATEMENT BY THE COURT. This was an action brought by Charles J. Edman, plaintiff below, to recover for personal injuries alleged to have been occasioned by the negligence of the defendant, the Union Coal Company. The injuries are alleged to have occurred by the explosion of a steam-boller in certain coal mines belonging to the defendant company while plaintiff was at work therein for said company. The plaintiff recovered a verdict and judgment. The defendant brings this appeal.

Teller & Orahooa, for appellant. *Patterson & Thomas*, for appellee.

ELLIOTT, J. The defendant's ownership of the mines, being averred in the complaint and not denied in the answer, must be taken as admitted; but the answer expressly denies that plaintiff was employed by defendant, or that he received the alleged injury while engaged in and about defendant's work; and also denies that the mines were being worked or operated by the defendant in any manner at the time of the alleged injury. A careful examination of the record fails to disclose any substantive evidence that the defendant, the Union Coal Company, was engaged in operating the mines at the time the plaintiff was injured. The evidence was practically all one way upon that issue. Mr King, who was superintending the operation of the mines at the time of the accident, testified, in substance, that he was employed by the Union Pacific Railway Company, and that the Union Pacific Company, not the Union Coal Company, was operating the mines at the time of the alleged injury. The plaintiff himself testified that he was employed by Mr. King, that Mr. King was in charge of the mines as superintendent, and that the

mines were called the "U. P. Mines." He gave no testimony to the contrary on this point. Mr. Orahood, one of the attorneys for the defendant, was called and sworn as a witness for plaintiff. He testified to the effect that the mines were being operated by the Union Pacific Railway Company under a coal department, and not by the Union Coal Company. The testimony of Mr. Stockton, an employe of the Union Pacific Railway Company as foreman boiler-maker, tended to corroborate the other witnesses that the mines were operated by the Union Pacific Railway Company, and not by the defendant company. The tendency of Dr. De la Matyr's testimony was to the same effect. All the above-named witnesses were sworn in behalf of plaintiff; and, in substance, the foregoing was all the evidence showing or tending to show by whom the mines were being operated at the time of the accident. To overcome the effect of this proof, the plaintiff identified and introduced in evidence, in connection with the testimony of Mr. King, certain reports made by him as superintendent of the mines. The heading of most of these reports (not all of them) bore the name of the Union Coal Company. Mr. King explained that these were old blanks, which he found when he came to the mines. These reports, though signed by Mr. King as superintendent, were not substantive evidence in favor of plaintiff in support of his averment that the mines were being operated by the defendant coal company. They were at most evidence affecting the credibility of the witness King. See *Greenl. Ev.* § 444 et seq.; also *Babcock v. People*, 13 Colo. 519-521, 22 Pac. Rep. 817, and authorities there cited. The reports were nothing more than the unsworn declarations of the witness King; and, until there was proof of his authority or employment as the agent of the Union Coal Company, such declarations did not bind that company in any manner. That his agency could not be established by such reports alone is a proposition requiring no discussion. The certificates of Mr. Stockton as boiler inspector stand upon the same footing substantially as the reports of Mr. King. *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 1 Colo. 546; *Refining Co. v. Tabor*, 13 Colo. 46, 21 Pac. Rep. 925; *Scott v. Crane*, 1 Conn. 255-259; *Railroad Co. v. Cocke*, 64 Miss. 713, 2 South. Rep. 495. The issue as to the party actually operating the mines when the injury occurred was not a mere formal issue. It was material to the plaintiff's case and vital to the defendant's rights. Though the title of the mines was in the Union Coal Company, yet, if that company was not concerned in the working of the mines at the time of the accident, it was not liable for plaintiff's injuries under the averments of the complaint, and could not justly be made to bear the burden of the judgment for such injuries. Considering the state of the proof upon that issue at the close of the trial, in the absence of any motion for a nonsuit or other relief by either party, the court erred in refusing to direct a verdict in favor of defendant, as requested by its counsel. It is unnecessary to consider

the remaining assignments of error. The judgment is reversed, and the cause remanded.

HENNESSEY v. HOAG et ux.

(*Supreme Court of Colorado*. Nov. 6, 1891.)

LANDLORD AND TENANT — ACTION FOR USE AND OCCUPATION.

An action for use and occupation cannot be maintained except where the relation of landlord and tenant has existed between the parties. Unless there has been an agreement, express or implied, from which an obligation to pay for the use of the premises can be inferred, some other remedy than an action for rent or for use and occupation must be resorted to.

(*Syllabus by the Court*.)

Error to superior court of Denver; MERRICK A. ROGERS, Judge.

Action by William Hennessey against B. Hoag and wife. Judgment for defendants. Plaintiff brings error. Affirmed.

STATEMENT BY THE COURT. This action was commenced before a justice of the peace. Hence there are no written pleadings. The action was by Hennessey, plaintiff below, against Mr. and Mrs. Hoag, defendants, to recover for the use and occupation of certain premises for three months, at the rate of \$35 per month. Upon appeal in the superior court, after hearing the evidence, finding and judgment were rendered in favor of defendants. The plaintiff brings the case to this court by writ of error.

W. W. Cooke and Greeley Whitford, for plaintiff in error. Sullivan & May, for defendants in error.

ELLIOTT, J. The assignments of error in this court question the correctness of the decision of the lower court upon the law and the evidence. The facts of the case are practically undisputed. The plaintiff, Hennessey, claimed to be the lessee in possession of an unexpired term of certain real property, though he did not actually occupy it. Hennessey had some negotiations with Hoag about renting the premises. They disagreed about the price. Hennessey asked \$35 per month; Hoag offered \$25 per month. Neither would yield, and so they separated, Hoag saying that he could do better. Hoag afterwards obtained possession from the same party under whom the plaintiff claimed, but not by, through, or under plaintiff. It was admitted on the trial that defendants never agreed to pay rent to plaintiff. They always refused to pay rent to plaintiff, and never recognized him as their landlord, either before or after obtaining possession. Counsel for plaintiff in error relies upon the opinion in the case of *Dickson v. Moffat*, 5 Colo. 116, wherein it says: "Where one [who] contemplates entering into the possession of the lands of another, to occupy for use, is informed by the lessor that he can do so upon terms stated, * * * and the party thereafter makes entry, occupies, and uses the land, it is a good acceptance of the terms proposed, and he will become thereby bound, under an implied contract, to pay the sum named." The *Dickson-Moffat Case* is not

altogether analogous to the present case. In that case the court found, upon conflicting evidence, that the entry by defendants was an acceptance of the terms previously stated by the plaintiff, and that they did not enter under authority from any other person, or in pursuance of any other contract or agreement. In this case the evidence is express that the defendants not only refused to accept the plaintiff's terms, but that the entry was under a letting from another and different party, and that defendants always refused to pay rent to or acknowledge plaintiff as their landlord in any manner; so the possession of defendants was clearly adverse to that of plaintiff. An action for use and occupation cannot be maintained except in cases where the relation of landlord and tenant has existed between the parties. Unless there has been an agreement, express or implied, from which an obligation to pay for the use of the premises can be inferred, some other remedy than an action for rent or for use and occupation must be resorted to. 1 Chitty, Pl. (16th Amer. Ed.) p. 120; Wood, Landl. & Ten. § 549; Tayl. Landl. & Ten. § 636; Smith v. Stewart, 6 Johns. 46; Howe v. Russell, 41 Me. 446; Folsom v. Carl, 6 Minn. 420, (Gil. 284.) There is no ground for disturbing the finding of the superior court. The judgment is accordingly affirmed.

KLINK *et al.* v. PEOPLE.

(Supreme Court of Colorado. Nov. 6, 1891.)

CRIMINAL LAW — APPEAL — CONDUCT OF TRIAL — WAIVER OF OBJECTIONS — EVIDENCE — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE.

1. When the charge to the jury is not embodied in the record, the supreme court will presume that it correctly stated the law of the case.

2. As a general rule, the failure of opposing counsel to interpose objection, when improper language or argument is being used in addressing the jury, will be treated by the supreme court as a waiver of the objection.

3. After the final disposition of a criminal cause and lapse of the term, the trial court has no jurisdiction to entertain an application to reconsider its ruling upon motion for a new trial.

4. The provision of the Civil Code authorizing the vacation of judgments, under certain circumstances, within five months after the rendition thereof, is confined to civil actions; it has no application to criminal cases.

5. In a criminal case, if after the lapse of the term the principal witness for the prosecution admits that he committed perjury, such admission may, under proper circumstances, be ground for the exercise of executive clemency.

6. The testimony of an accomplice is received with caution and regarded with suspicion. The great importance of corroborating testimony or circumstances is always urged upon juries, and verdicts of conviction are seldom sustained in the total absence thereof.

7. Testimony of the accused concerning his whereabouts on the day of the forming of a conspiracy to commit crime is not newly-discovered evidence. Besides, proofs of his whereabouts, mentioning no particular hour, and which, if true, nevertheless leave ample opportunity for his being present and participating in the conspiracy, are not so material as to render the court's ruling denying a new trial reversible error.

(Syllabus by the Court.)

Error to criminal court, Pueblo county;
THOMAS T. PLAYER, Judge.

Indictment against Oscar Klink and others for assault with intent to rob. From a judgment of conviction defendants bring error. Affirmed.

McFeely & McAlhney, for plaintiffs in error. Joseph H. Maupin, Atty. Gen., for the People.

HELM, C. J. Plaintiffs in error were indicted, tried, convicted, and sentenced upon the charge of assault with intent to rob. The instructions not being embodied in the record before us, we must presume they correctly stated the law of the case. The verdict is not entirely unsupported by evidence. On the contrary, if the jury believed the testimony of Miller, the record amply warrants their finding. It does not appear that any objection was at the time interposed to the language employed by the prosecuting attorney in making his closing argument before the jury. The conduct imputed to him was not grossly improper; but assuming that he should have refrained therefrom, since defendants failed to interpose timely objection, we must decline, under the circumstances here presented, to consider the merits of this assignment of error. Cook v. Doud, 14 Colo. 483, 23 Pac. Rep. 906, and cases; Weeks, Attys., § 112. Undoubtedly, courts as well as attorneys are charged with the obligation of protecting parties from this kind of unfair treatment; and we do not say that an abuse of the attorney's privilege in this regard may not be so flagrant as to warrant reversal, even though court and counsel neglect to discharge their duty. But, as a general rule, the failure to interpose timely objection will be treated in this court as a waiver thereof. The application for a reconsideration of the ruling upon the motion for a new trial was not presented until a term of court subsequent to the term at which the trial, conviction, and sentence took place. The object of this proceeding was not to correct some clerical mispision of the clerk, or to amend the judgment in some merely formal particular, or to procure the entry of some ruling actually pronounced, but inadvertently omitted; its purpose was to reopen the judgment and obtain a retrial of the entire issues. There must be an end to criminal as well as civil proceedings. After the final disposition of the case and the lapse of the term, the court had no jurisdiction to entertain the application in question. If this motion could be heard, there would be nothing to prevent a repetition of similar proceedings at each and every subsequent term during the punishment of a convicted party. Harrison v. State, 10 Mo. 686; 1 Black, Judgm. §§ 154, 158. Counsel's contention that the proceeding in question was warranted by statute is erroneous. The provision relied on is found in the Civil Code, which relates alone to procedure in civil actions, and by its title is confined to that kind of litigation. It can have no application in criminal cases. Since the motion under consideration, if ever in order, came too late, we cannot notice the affidavit of Miller in support thereof. Relief to plaintiffs in error in case this witness

committed perjury must come, if at all, by way of executive clemency.

The sole remaining question discussed by counsel in their oral argument touches the ruling of the court upon the motion for a new trial. Miller, the witness above mentioned, who was regarded as an accomplice and indicted with plaintiffs in error for the crime charged, turned state's evidence, and it is probable that upon his testimony the conviction largely rests. The testimony of an accomplice is received with caution and regarded with suspicion. It is considered doubtful by some authorities if a conviction based upon such evidence alone should be sustained. Whart. Crim. Ev. (9th Ed.) § 441. The great importance of corroborating testimony or circumstances is always urged upon juries, and verdicts of conviction are seldom returned in the total absence thereof. *Roberts v. People*, 11 Colo. 219, 17 Pac. Rep. 637. The record before us, however, discloses evidence in corroboration of Miller's statements. Ryan, Woods, and Rebecca Matches were disinterested witnesses, and their testimony tends to sustain that of Miller.

The other ground averred in support of the motion for a new trial, while more serious, is not sufficient. The so-called newly-discovered evidence was intended to show that plaintiff in error Klink could not have been present at the alleged meeting of the conspirators on the 25th of July, the day preceding the commission of the crime. In the first place, this was not a newly-discovered matter, because it relates to the immediate whereabouts of Klink himself at a given time; and Klink knew upon the trial, as well as afterwards, all the circumstances mentioned in his affidavit. In so far as his own testimony is concerned, showing his alleged employment and whereabouts at different periods on the 25th of July, no valid excuse is presented for not offering it upon the trial. Besides, Klink's affidavit in support of the motion is simply to the effect that on the morning of the 25th of July one Amick employed him to haul a load of tools a distance of five or six miles, which work he did; that afterwards, and on the same day, he hauled another load from Pueblo to East Pueblo; also that he was at the home of his parents in Pueblo late the same evening. These things may have been true, and yet he may have met Miller and the other parties at the time and place of the alleged conference. This affidavit does not fix his whereabouts at any particular hour of the day, and, from aught appearing therein, he had ample time and opportunity to have been present at the forming of the alleged conspiracy. He mentions the names of two different men who assisted him in the transfer of the tools; but he makes no explanation regarding their absence from the trial, or their present whereabouts. The affidavit is altogether too indefinite to justify this court in setting aside the verdict. Amick, Klink's alleged employer, on July 25th, simply states that he has read over Klink's affidavit, and that the same is true touching the matter of the employ-

ment in question. It is doubtful if the testimony of Amick, had it been given before the jury, could have affected the result. Besides, it does not appear that Amick was absent from the county. Klink knew at the time of the trial that Amick was aware of the alleged employment, and no sufficient reason is given for not then calling him as a witness. There was, in our judgment, no such abuse of discretion on the part of the trial court as warrants interference by us. The judgment will be affirmed.

EMIGH v. STATE INS. CO.

(*Supreme Court of Washington*. Nov. 13, 1891.)

ACTION ON INSURANCE POLICY—COMPLAINT—BILL OF EXCEPTIONS—REPEAL OF STATUTE—REVIVAL OF FORMER LAW.

1. A complaint in an action on an insurance policy, which does not set out the policy, or show either proof of loss, ownership, or value, but only states that the insured was damaged in a certain sum, and that he gave the company notice of the fire, is demurrable. *DUNBAR, J.*, dissenting.

2. Act Wash. March 22, 1890, §§ 6, 12, enacting that a bill of exceptions may be made a part of the record, "as provided by chapter 19 of the Code," and repealing Act Feb. 3, 1886, which changed chapter 19, indicates an intention on the part of the legislature to revive chapter 19; and this is further shown by the fact that Act Feb. 25, 1891, purports to amend Code, § 260, which was one of the sections repealed by the said act of 1886.

Appeal from superior court, Klickitat county; CARROLL B. GRAVES, Judge.

This was an action by Jarvis Emigh against the State Insurance Company to recover upon a fire insurance policy. From an order overruling a demurrer to the complaint, defendant appeals. Reversed.

Bronaugh, McArthur, Fenton & Bronaugh and *A. S. Bennett*, for appellant. *H. Dustin*, for respondent.

STILES, J. The sixth section of the act of March 22, 1890, (Acts, p. 335,) enacted that a bill of exceptions might be made a part of the record of a case on appeal, "as provided by chapter 19 of the Code of Washington relating to exceptions." The twelfth section of the same act repealed the act of February 3, 1886, (Acts, p. 70,) which was entirely devoted to changing and remodeling chapter 19. In view of the language used in section 6, the intention of the legislature to revive chapter 19 is clear and unmistakable. This view is strengthened by the fact that the act of February 25, 1891 (Acts, p. 85,) purports to amend section 260 of the Code, which was one of the sections expressly repealed by the act of 1886. The bill of exceptions in this case was therefore governed by chapter 19, which required notice of presentation and settlement; and, as no notice of the settlement was given, it follows that the motion to strike the bill must be granted. This leaves the case to be considered upon the only error assigned which appears in the record, viz., the demurrer to the complaint. The complaint is in very general terms, and does not purport to set out the policy sued on. The demurrer was on the ground that

there were not sufficient facts. In every action for insurance money there can be no recovery except upon the performance of certain acts by the insured, and the existence of certain facts; and the performance of the acts and the existence of the facts must be alleged. May Ins. § 589. The interest of the insured in the property destroyed, and the value thereof, must also appear. Id., § 590. In this case the complaint does not show either proof of loss, ownership, or value. It does state that notice of the fire was given to the defendant, and that plaintiff was "damaged" by the fire in certain sums; but there is no allegation that plaintiff was the owner of the property. But notice of the fire is not proof of loss, nor would it admit evidence showing a waiver thereof; and the allegation that the insured was "damaged" in a certain amount is no allegation of value. In the absence of a demurrer, perhaps some of these objections might be taken as cured after verdict. But the demurrer challenged the pleading on account of their absence, and it should have been sustained. Owing to the peculiar attitude in which the cause is placed by the motion to strike out the bill of exceptions, we cannot notice other features of it. The judgment is reversed, and remanded to the superior court, with instructions to sustain the demurrer to the complaint.

ANDERS, C. J., and SCOTT and HOYT, JJ., concur.

DUNBAR, J., (*dissenting*.) I am unable to agree with the majority opinion, nor do I think it can be sustained on any other theory than that the complaint must set out the application and policy, which I think it is not required to do, especially under the provisions of the Code. This court knows nothing of the conditions contained in the policy, and it cannot presume that all policies have the same requirements. All we know of this contract is what is stated in the complaint, namely, that on a certain day defendant, for a certain consideration paid, insured plaintiff's property for the sum of \$1,700; and that thereupon, in consideration of the sum paid, the defendant agreed to pay plaintiff the sum of \$1,700 in case said property should be lost by fire within a certain time specified. This was a contract that the parties would have a right to enter into, and the court must presume that this was the contract they entered into. The complaint alleges that during the time prescribed the said property was destroyed by fire, and that plaintiff was damaged in the sum of \$1,700, the amount for which he was insured. I think it can be plainly gathered from this statement that the value of the goods so designated was more than \$1,700, and that any other construction as to the character of the damages would not be a natural but a strained one. In the second allegation the words, "insured plaintiff's store building and stock of goods therein," sufficiently, in my opinion, alleged ownership. Giving it the common-sense construction that we would lan-

guage outside of pleadings, no other conclusion can be reached. I know of no reason why language in a pleading should not be given its ordinary meaning. The complaint states that the defendant was notified of the loss and the destruction of the property so insured. I think that, without doing any violence to the rules of pleading, this must fairly be construed to be a notice of the loss by fire. So far as the allegation of furnishing the defendant with proof of the loss is concerned, this court has no way of knowing that the company required any proof. I do not see any good reason for construing contracts with insurance companies differently from any other contracts, and interjecting presumptions into them as a part of the contract. So far as appears by the pleadings, they insured against loss by fire, and they were notified of the loss and refused to pay, and plaintiff brings his action, where he is required to make proof of the loss and of the refusal of the defendant to comply with the conditions of his contract. His complaint is certainly very loosely drawn, and omits many averments that are usually contained in complaints of this kind; but, under the liberal rule of pleading prescribed by the legislature of this state, I think that substantial justice could have been done between these parties by a trial on the merits under this complaint. The judgment should have been affirmed.

In re CLOHERTY.

(*Supreme Court of Washington. Feb. 20, 1891.*)

POLICE COURTS—CREATION BY CITIES—CONSTITUTIONAL LAW.

1. Const. Wash. art. 11, § 10, which authorizes cities of 20,000 inhabitants to form charters for their own government, but subjects them to the general laws of the state, does not authorize them to create a police court.

2. Where the constitution of Washington empowers the legislature to create police courts, the legislature cannot delegate that power to a city.

3. Act Wash. March 24, 1890, § 5, subd. 36, which authorizes cities of 20,000 inhabitants to provide for the punishment of disorderly conduct, and make all regulations necessary for the preservation of peace and good order within their limits, does not authorize such cities to create police courts.

4. Act Wash. March 24, 1890, § 7, provides that cities of 20,000 inhabitants or over, adopting charters under its provisions, shall have all the "powers" thereafter conferred on cities, but the act did not name as one of such powers that of creating a municipal court. *Held*, that such power was not created by Act March 27, 1890, which conferred on certain other cities the power to create such courts.

Original proceedings in *habeas corpus* on petition of Joseph Cloherty. Prisoner dismissed.

Marshall K. Snell, for petitioner. *W. H. Snell*, Pros. Atty., and *M. B. Hoxie*, for respondent.

STILES, J. The petitioner, Joseph Cloherty, *alias* Charles Malone, shows that he is detained by James H. Price, sheriff of the county of Pierce, under conviction of the crime of assault and battery, committed in the city of Tacoma. This conviction was had in the police court of that

city, and he was sentenced to a term of six months in the county jail of Pierce county. He prayed a writ of *habeas corpus* from this court, directed to the sheriff, and that upon the return thereof he be discharged from custody. An order to show cause was issued, and, after argument, in which the petitioner, by his counsel, on one side, and the sheriff, by the prosecuting attorney of Pierce county and the city attorney of the city of Tacoma, on the other side, were heard, the question of his discharge is for decision.

Petitioner's ground for his application is that the police court of the city of Tacoma had no legal existence, and therefore no jurisdiction to arraign, try, or convict him. The city of Tacoma is a city of the first class, as defined by the act of March 24, 1890, and in the month of October, 1890, before the trial and conviction of petitioner, in pursuance of section 10, art. 11, of the constitution, and of the above-mentioned act, its people framed and adopted a municipal charter. Of this charter this court and all other courts in the state are required to take judicial notice. It therefore appears that, among the other provisions contained in the charter, was one establishing a "police court," and the language of this provision was identical with the language of sections 92-96 of the act providing for the organization, classification, incorporation, and government of municipal corporations, approved March 27, 1890; the sections above mentioned relating to the establishment, jurisdiction, and procedure of a police court in cities of the second class. We refer to the fact that the language found in the charter and that in the act are identical as a convenient method of making known what the constitution of the police court was without copying the instrument. It thus appears that, in so far as it was possible for it to do so, the city of Tacoma endeavored to erect a court having full jurisdiction of the offense charged against the petitioner. The petitioner, however, maintains that under the constitution of the state nothing less than the express enactment of the legislature could create or establish such a court, and that, therefore, the provisions of the charter of Tacoma were mere idle declarations, without force, and wholly void. The state of Washington is a sovereign, whose written constitution is her visible charter. By the constitution all the judicial power (which is a distinct branch of the sovereignty) is vested in the courts therein created, independently of all legislation. The jurisdiction of these courts is universal, covering the whole domain of judicial power, even to that growing out of the supposed existence of municipal ordinances. But to the legislature of the state the constitution delegates authority to transfer from one of the constitutional courts to another certain limited portions of the judicial power; and it may also provide new, inferior courts, not specifically mentioned in the constitution, to which may be assigned such part of the inferior judicial power as it may deem wise to transfer. *The natural conclusion would be that a court*

for the administration of municipal ordinances must have been created by an act of the legislature. But the respondent urges that the power to erect a court of this kind is necessarily implied from the constitutional authority given to cities of 20,000 inhabitants to frame a charter for their own government; that this concession is equally as strong as the provisions with reference to courts; and that no harmonious construction of the instrument can be made unless the power thus contended for is allowed to exist. An argument in many respects plausible may be built upon this foundation; but it must be remembered that, although the power to frame a charter is conferred by the constitution, no greater intendments are inferred from that fact than if it were conferred by a mere act of the legislature, since, by the same sections, these favored cities are to be at all times subject to the general laws of the state. They are not in any sense erected into independent governments; their existence as municipal governments depends upon the legislative will; their areas can be extended only in the manner prescribed by statute; the elective franchise is exercised under the general laws applicable to the whole state; the power of eminent domain is not extended to them except by statutory delegation; and their municipal legislation is restricted to those subjects which rightfully belong to them in their corporate capacity. A charter framed under the constitutional provision is of no more or larger force than a legislative charter, and can lawfully treat only of matters relating to the internal management and control of municipal affairs, subject to constitutional and legislative regulations. It provides officers, ways and means, police, and other *minutiae* of local administration which are necessary to the public convenience, peace, and good order; but for the enforcement of criminal ordinances the constitution and the legislature have provided independent courts of competent jurisdiction in the persons of justices of the peace. Cases are cited for our consideration, which we shall allude to at this time.

While Washington was yet a territory, although it was not held by any of the territorial courts, the legislature never attempted to create municipal courts, it being taken for granted that the organic act forbade the exercise of that power by prescribing that the judicial power of the territory should be vested in certain courts therein named. But in *State v. Young*, 8 Kan. 445, it was held that under the same organic act the legislature could provide courts in cities. And so, in *Schafer v. Mumma*, 17 Md. 381, under the constitution of 1851, it was held that the punishment of offenses against municipal ordinances was not a judicial function at all, but merely an exercise of a branch of the police power. The Kansas decision was based upon the fact that the legislature had committed to it all rightful subjects of legislation, which included the power to create municipal corporations, with their usual incidents, and upon the view that the organic act, in its provisions with regard to courts, had reference only to the enforcement of the

laws of the territory at large. The Maryland decision goes as far as the respondent's contention; but, upon examining the constitution of that state, we find no reference whatever to the subject of municipal corporations, except a single line, which provides that they may be created by special acts. Thus the whole matter is as completely left to the legislature as any other subject over which it has unlimited jurisdiction. We think, however, that, even conceding that case to have been well decided, it is the only one that can be found going that far, and that it is not applicable under our constitution, which clearly includes the administration of city ordinances among the judicial powers of the state. Nor would the offense charged against the petitioner have been within the decision of the Maryland case, since it is one against a public law of the state, (Code, § 808,) punishable only by indictment or information. We were referred also to *Hutchings v. Scott*, 9 N. J. Law, 218, a case determined in 1827, where the decision was that the legislature of New Jersey had the power, under the constitution of 1776, to declare the mayor, recorder, and aldermen of cities justices of the peace for the trial of certain causes. But here again the constitution contained no reference to municipal corporations, and no definition or limitation of the judicial power, excepting that section 12 prescribed the terms of judges of the supreme and common pleas courts and justices of the peace. We may not disagree with the cases in Kansas or New Jersey, and yet hold that the mere grant of a charter of incorporation, with power to pass ordinances and prescribe penalties for their infraction, does not confer the right to create police courts. The legislature has the largest power to define crimes and provide for their punishment; but, under the constitution, it can set up no other courts than are therein provided for the trial of persons charged with having committed those crimes. The highest authority we have on this subject, Judge Dillon, says that it is "competent for the state legislature to create municipal corporations with powers of local government, and to authorize them to adopt ordinances or by-laws, with appropriate penalties for their violation. The power to do this includes, by fair implication, the power to authorize violations of ordinances (when the acts are not criminal in their nature, or within the meaning of constitutional provisions requiring an indictment and securing the right to a jury trial) to be tried and determined in a summary manner by a local or corporation tribunal." Dill. Mun. Corp. (4th Ed.) § 428. Yet sections 427 and 428 clearly show that the author had in mind no other thought than that the local or special tribunal must be created by act of the legislature, and its jurisdiction be by it defined.

This disposes of the first proposition of the respondent, and we next consider the claim that the legislature, by the act of March 24, 1890, delegated to the cities of the first class the power to create police courts. But upon this point we deem it sufficient to say that the power conferred

upon the legislature to create additional inferior courts is not one of its original, inherent powers as the supreme legislative body of the state, which can be delegated by it, but is a delegated power, which must be exercised in the manner pointed out, and cannot be again delegated. Nor do we see in the act mentioned any convincing sign of an intention to delegate the authority contended for, although the thirty-sixth subdivision of section 5 of the act uses unusually strong language.¹ Part of respondent's argument on this point is based on section 7 of the act, and will be referred to later. As an illustration of the firmness with which the principle here in issue is held to by the courts in cases similar to this, we note the case of *People v. Toal*, 85 Cal. 333, 24 Pac. Rep. 203. The constitution of the state of California has substantially the same provisions with regard to courts and the charters of cities of the higher grade as that of Washington; but it is there provided that a charter adopted by a city must be submitted to, and have the approval of, the legislature, without power of amendment before it becomes operative. The city of Los Angeles adopted a charter which, upon its submission to the legislature, was approved by a joint resolution of both houses. The charter provided for a police court, and, upon a hearing similar to this, the supreme court held the provision establishing the court to be void, on the grounds that the power to create such courts was vested in the legislature; that, under the constitution, to create an inferior court, there must be a law passed in regular form, and approved by the governor; that the legislature could pass laws by bill only; and that a joint resolution was not a law, in the sense required. That would seem to be a much stronger case than the one at bar, and that decision was rendered in full view of *People v. Hoge*, 55 Cal. 612, which held that the article of the constitution conferring upon certain cities the power to make their own charters was self-executing. But now, inasmuch as the seventh section of the act of March 24, 1890, is in these words: "Any city adopting a charter under the provisions of this act shall have all the powers which are now or may hereafter be conferred upon incorporated towns and cities by the laws of this state, and all such powers as are usually exercised by municipal corporations of like character and degree, whether the same shall be specifically enumerated in this act or not,"—respondent contends that the unnamed "powers" thus conferred include the power to provide a court of the character of the one in question, since the same legislature, by the act of March 27th, created police courts in cities of the second, third, and fourth classes. Reverting to the last clause of section 7 first, we can see no possible way to give it any force whatever. By what standard could it be said that we should

¹ Section 5, subd. 36, authorizes cities of 20,000 inhabitants to provide for the punishment of disorderly conduct, and make all regulations necessary for the preservation of peace and good order within their limits.

judge what are the powers "usually exercised by municipal corporations of like character and degree?" The powers of municipal corporations are only those expressly conferred, or those necessarily implied from those expressly conferred. Are the statutes of our own state and the rulings of its courts to be taken as the standard, or shall we go abroad? And where abroad? Is it the powers usually exercised by such corporations in New York or New Mexico that we shall regard? It is, we believe, usual to give to the larger cities everywhere some tribunal for the disposition of offenses against their ordinances, and it is usual to provide for the tribunal in the law or charter governing the cities; but it is almost universal for the legislature to establish the courts in question by some positive enactment. This, too, is the course followed in this state, unless cities of the first class are an exception; but, were it not so, it would be a marvelous stretch of implied legislation to hold that, because cities in other states were given such courts by their legislatures, by the language in discussion our legislature intended in that manner to waive all ceremony and establish inferior courts here. In fact, the legislation would be accomplished by our decision, and not by the law-making power of the state.

The last question is upon the first clause of section 7, and it is whether, by the conference of "power" therein made, the cities of the first class may establish, or have already established, within them, such courts as are provided for in the act of March 27th. The legislature, treating section 10, art. 11, of the constitution as not self-executing, in the act of March 24th enumerated 38 powers to be exercised by cities of the first class. Sections 38, 45, and 53 of the act of March 27th enumerated the powers of cities of the second class, and similar sections fixed those of cities of the third and fourth classes. The powers thus enumerated are to be exercised or not, at the discretion of the municipal legislature; and it is so with every power delegated to a corporation of this kind. Other provisions of the same act enjoin duties which are in no wise discretionary, and still other sections provide for certain offices which must be filled in the manner laid down; but a court is created in those cities and exists from the moment of incorporation, without the will, and even against the wish, of the corporation, with its jurisdiction and procedure established and ready for action as soon as a judge is elected or appointed, as the case may be. Here certainly is no exercise of a "power" by the corporation. On the contrary, here is a branch of the state's sovereignty pertaining to the judicial power, established by positive law, without the interference or consent of the corporation. What broader distinction from a corporate "power" could there be than this? Now, the city of Tacoma has attempted to set up a court,—whether by charter or otherwise makes no difference, in so far as a construction of section 7 is concerned,—choosing as its model the police courts of cities of the second class, and, if this is the exercise of one of the powers conferred by

the general language of the section, it must be agreed that the power is availed of under precisely the same terms as it is conferred by the act of March 27th upon the other cities,—that is, the court came into existence, charter or no charter, the moment the city became incorporated. But which court? The act of March 27th provided for three different police courts, each differing from the others in many respects. How is it to be decided which of the three was intended to be impliedly erected in cities of the first class? Rather, should it not be forced to hold that all these courts were there? Which renders it scarcely necessary to pursue the absurdity further. But again, since by section 7 cities of the first class are to have all the "powers" of other cities, why may not the analogy be extended to powers other than those referring to courts? If a court like that of a city of the second class is by force of the act established in cities of the first class, why not all the officials prescribed for cities of the second class, with like powers and duties? Yet an inspection of the charter of Tacoma shows a very great variance in this respect, without any reason or authority if the term "powers" were to have the meaning contended for. Upon all the grounds urged, therefore, we are satisfied that the respondent's claims are not sustained. The truth is that, whether by oversight or mistake or intention we are not required to guess, the legislature, in omitting to enact a general law for the incorporation and government of cities of the first class, also failed to supply them with police courts, but left the administration of their criminal ordinances with the justices of the peace, where it had been for many years. It may well be that that body can easily be prevailed upon to supply the deficiency, but it is not within the province of this court to strain constructions to accomplish such an object without legislation. It follows that we hold the police court of the city of Tacoma to have no legal existence, and that the petitioner is entitled to be released forthwith.

ANDERS, C. J., and DUNBAR, HOYT, and SCOTT, J.J., concur.

JONES v. REED, State Auditor, *et al.*
(*Supreme Court of Washington.* Nov. 7, 1891.)

SUPERIOR COURTS—JURISDICTION—ENJOINING
STATE OFFICERS.

1. Const. Wash. art. 4, § 4, provides that the supreme court shall have "original" jurisdiction in *habeas corpus*, *quo warranto*, and *mandamus*, as to all state officers. *Held*, that the section does not confer exclusive original jurisdiction in such cases, but the superior courts also have jurisdiction under section 6, providing that the superior courts shall also have original jurisdiction in all cases and all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.

2. A private citizen and tax-payer cannot sue to enjoin a state officer from misappropriating the public funds, but the relief must be sought by the attorney general, under Laws Wash. 1887-88, c. 7, § 6, subd. 8, p. 7, making it his duty "to enforce the proper application of funds appropriated to the public institutions of the territory." HORT, J., dissenting.

Appeal from superior court, Pierce county; F. CAMPBELL, Judge.

Suit by W. L. Jones to restrain T. M. Reed, state auditor, A. A. Lindsley, state treasurer, and others from an alleged misappropriation of the public funds. The injunction was granted, and defendants appeal. Reversed.

Turner & Graves and W. C. Jones, for appellants. *Crowley & Sullivan and Sulvely, Reavis & Whitson*, for respondent.

DUNBAR, J. The first proposition urged by appellants is that, under the provisions of the constitution of this state, the superior court has no jurisdiction to entertain proceedings by *mandamus* against state officers to compel their performance of any official act; and, as the writ of injunction is in every respect the correlative of the writ of *mandamus*, it follows that it has no jurisdiction to enjoin state officers in cases of this kind. We do not think this contention can be maintained. All that is decided in *Board of Liquidation v. McComb*, 92 U. S. 531, cited by appellants on the point, is that in certain cases, probably analogous to this, writs of *mandamus* and injunction are somewhat correlative to each other. But the truth of this proposition may be granted without affecting the question of jurisdiction under our constitution. Section 4 of article 4 of the constitution provides that the supreme court shall have original jurisdiction in *habeas corpus* and *quo warranto* and *mandamus* as to all state officers, and appellate jurisdiction in all actions and proceedings, (with a \$200 limitation in civil actions for the recovery of money.) We know of no cases where a constitutional provision of this kind has been construed to confer exclusive jurisdiction. It is a grant of original jurisdiction, but there is nothing in the language of the grant to convey the idea of exclusiveness, or to exclude the idea of concurrent jurisdiction. In *Delafield v. State*, 2 Hill, 159, and a well-considered case, the court says: "There is nothing in the nature of jurisdiction, as applied to courts, which renders it exclusive. It is not like a grant of property, which cannot have several owners at the same time. It is matter of common experience that two or more courts may have concurrent powers over the same parties and the same subject-matter. Jurisdiction is not a right or a privilege belonging to the judge, but an authority or power to do justice in a given case when it is brought before him. There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular court, without any words of exclusion, has been held to oust any other court of the powers which it before possessed." In *Courtwright v. Mining Co.*, 30 Cal. 573, it is held that the grant of original jurisdiction to a particular court of a class of cases, without any words excluding other courts from exercising jurisdiction in the same cases, does not necessarily deprive other courts of concurrent jurisdiction in such cases. To the same effect is *Ames v. State*, 111 U. S. 449, 4 Sup. Ct. Rep. 437; *U. S. v. State*, 123 U. S. 32, 8 Sup. Ct. Rep. 17; *Bors v. Pres-*

ton, 111 U. S. 252, 4 Sup. Ct. Rep. 407. In fact, we think the universal current of decisions is that way, and that no cases can be found holding otherwise, excepting in a few instances where, under constitutional provisions giving original jurisdiction, congress has by law made the jurisdiction of the federal courts exclusive; but they were cases which were peculiar to and springing out of the very existence of the federal government, and the doctrine of exclusiveness in those cases is discussed from altogether a different stand-point, and involves altogether a different principle. But we do not base our judgment in this case entirely on authority, so far as the construction of section 4 is concerned; for the same fundamental law that grants the original jurisdiction to the supreme court is not silent as to the original jurisdiction of the superior court; and section 4 must not be construed as an independent section, but must be construed in connection with section 6, which, among other things, provides that the superior court shall also have original jurisdiction in all cases and all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court. Had the language of the constitution been that the superior court shall have "exclusive" original jurisdiction, etc., employing a word not uncommon in conferring jurisdiction on courts, there would not be much room for construction; but as the framers of the constitution did not see fit to use such a word, or any other word tending to confer exclusive jurisdiction, there is still, it seems to us, about as little room for construction. The language employed is in perfect harmony with the idea of concurrent jurisdiction, and the idea of concurrent jurisdiction is not an uncommon one in the history of our courts. It therefore seems reasonable that the framers of the constitution did not intend to vest exclusive jurisdiction in the supreme court, and it follows that, under the provisions of section 6, the superior court has original jurisdiction.

The second contention of the appellants is that the respondent has no interest in the controversy to enable him to prosecute this suit. The allegation is that he is a citizen and tax-payer of the state of Washington. On this proposition there is a perplexing conflict of authority, both as regards the cases reported and the opinions of eminent authors. Some authors assert, and some courts hold, that in no case can a private individual, in the absence of statutory authority, maintain a bill to enjoin a breach of public trust, without showing that he will be specially injured thereby; and that it must appear that his injury will be separate and distinct from the injury that he may suffer in common with the community at large, otherwise the remedy must be sought through those representing the public; while other authors and courts hold that municipal corporations, and their officers, may be restrained from transcending their lawful powers, or violating their lawful duties, in any manner which will injuriously affect the tax-payer, on the complaint of an inhabitant who shows no other

interest than that he is a tax-payer. The cases holding against the intervention of the tax-payer found their judgment on the theory that the misappropriation of public funds by the officers of a corporation is in the nature of a public nuisance, which cannot be abated at the suit of a private citizen, and that, unless some special private injury is shown, the relief must be obtained through the intervention of officers appointed to protect public interests. We will not attempt to collate the authorities *pro* and *con* on this proposition, but are inclined to the opinion that the right of a resident tax-payer to invoke the interposition of a court of equity to compel the officers of a municipal corporation to do their duty, or to restrain them from illegally increasing the burden of taxation by squandering the public funds of the corporation, has received the great weight of, at least, modern authority. The supreme court of the United States has spoken on this subject in *Crampton v. Zabriskie*, 101 U. S. 601. The doctrine was thus laid down by Justice FIELD: "Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question." It will be observed, however, that this case falls short of asserting the doctrine claimed here by the respondent, that courts of equity will restrain the action of state officers in matters of public concern on the petition of a tax-payer who shows no special interest; nor will the language or argument of the court bear any such construction. On the other hand, it is based on the relationship of the tax-payer to the municipal, or *quasi* municipal, corporation. Indeed, of all the cases cited by the respondent, not one case goes beyond the doctrine laid down in *Crampton v. Zabriskie*, so that it will not be necessary to review them here. Nor have we been able to find a case which extends the doctrine beyond that case. In all the cases reported, the restraining order has been asked against county, town, city, or district officers. It is argued by respondent that, notwithstanding the absence of authority, there is no difference in principle between restraining county officers and state officers, in matters of public concern, on the prayer of a tax-payer. The principle upon which the doctrine in regard to municipal, or *quasi* municipal, corporations is based, flows from its analogy to a well-settled doctrine in equity governing private corporations, where each stockholder has an interest in the property of the corporation, and may interfere to protect the corporate funds from the illegal or fraudulent acts of its officers. Dill. Mun. Corp. (4th Ed.) § 915.

But this reasoning cannot apply to a state government. The county is a *quasi* corporation; the state is a sovereignty. The county only possesses such powers as the legislature of the state confers upon it. Its revenues, its property, its very existence, depend upon statutory enactment.

It can be enlarged, dismembered, or annihilated, at the will of the state. The state, on the contrary, has all the powers not relinquished to the general government by the articles of federation, and, subject to these relinquishments, its sovereignty is supreme. One of the necessary attributes of sovereignty is the protection of the sovereign power and the maintenance of the state organization.

As the fallacy of a proposition can best be shown by distorting it, we may presume that if one of the departments of the state government can be suspended at the instance of a private citizen, who has nothing more than a community interest in a matter which concerns the general public, that every department of the state can be suspended at the same time, and the whole machinery of the government stopped, and the very existence of the state, so far as the exercise of its functions are concerned, destroyed. Surely such a theory of practice is not in harmony with the genius of our government, nor will authority sanction, or public policy permit, the adoption of a rule which will authorize any number of volunteers who may, rightfully or wrongfully, interpret the laws different from the interpretation put upon them by the officers of the state, to paralyze for a time every or any branch of the state government. It seems to us that there is a difference in principle, and there might be a very great difference in results; and probable results are what the policy of the law is based upon. To prevent just such results, and to protect the interests of the public, the statute has provided for the election by the tax-payers of an officer—the attorney general—who is especially clothed with authority to institute proceedings of this kind. In the act creating the office of attorney general, and defining his duties, in the Laws of 1887-88,¹ it is provided, among other things, that it is his duty "to enforce the proper application of funds appropriated to the public institutions of the territory;" nor do we understand that any of the provisions of that chapter have been repealed by subsequent enactments of the state. The constitution provides that all laws in force at the time of its adoption shall remain in force until their repeal; and there is nothing in the provisions of the act entitled "An act in relation to attorneys," (Laws 1891) which repeals any of the provisions of the act of 1887-88. It might as well be held that all the territorial acts in relation to prosecuting attorneys have been repealed by the same act. The law then having provided an officer for an especial duty, it is the better policy to submit such litigation to his guidance.

Showing the distinction in the minds of the courts between interfering with the collection and disposition of the revenue of counties and towns and cities, and the disposition of the revenue of a state, we quote from the language of the United States supreme court in *State Railroad Tax Cases*, 92 U. S. 575: "These reasons, and the weight of authority by which they

¹ Laws 1887-88, c. 7, § 6, subd. 8, p. 7.

are supported, must always incline the court to require a clear case for equitable relief before it will sustain an injunction against the collection of a tax which is part of the revenue of a state. Whether the same rigid rule should be applied to taxes levied by counties, towns, and cities, we need not here inquire; but there is both reason and authority for holding that the control of the courts, in the exercise of power over private property by these corporations, is more necessary, and is unaccompanied by many of the evils that belong to it when affecting the revenue of the state." This court, untrammelled by precedent or authority in laying down a policy for this state, deems it safer to relegate the instituting of suits involving the disposition of the revenue of the state, where no private interests are involved, to the judgment and discretion of the attorney general. With this view of the case, it is not necessary to examine other alleged errors. The demurrer should have been sustained. The judgment is therefore reversed, and, as the demurrer goes to the life of the complaint, the case is dismissed.

ANDERS, C. J., and SCOTT and STILES, J.J., concur.

HOYT, J., (*dissenting*.) I am unable to agree with the conclusions of the majority of the court in this case. If it is conceded that a tax-payer of a county, simply as such, has a right to appeal to the courts to prevent such action by county officials as will lead to the illegal disposition of the property or funds of the county, (and such I understand to be the position of the majority of the court.) I can see no reason why a tax-payer of a state, as such, cannot invoke the aid of the courts to prevent like illegal action on the part of state officers. It is true he is one degree further removed from the threatened injury, but I cannot see that such fact can affect the principle involved. The tax-payer of the county may apply for relief, not because he is to be affected by the proposed illegal action in a different manner from every other tax-payer in the county, but simply because, as such tax-payer, he is so interested in the property or funds of the county that he may ask the court to protect the same from illegal disposition. The tax-payer of the state bears exactly the same relation, excepting in degree, to the property or funds of the state, as does the tax-payer of the county to its funds or property; and to hold that in one case the courts are open to the tax-payer, and in the other not, seems to me inconsistent, and contrary to the course of courts in dealing with matters of this kind. It is the pecuniary interest of the tax-payer that gives him the right to appeal to the courts, and not the grade or character of the officer whose illegal action he seeks to prevent. The amount of such pecuniary interest has never been held material, for the complaint, if sustained at all, has always been so sustained regardless of the amount of taxes which that particular tax-payer might be called upon to pay. It has never been held nec-

essary to allege that complainant was a large tax-payer. Hence it cannot be said that the pecuniary interest of the tax-payer of the state is, by reason of his remoteness, too small to qualify him as a complainant. Besides, if the amount of the injury was to be taken into account, it might well happen that the individual interest of a particular tax-payer might be more largely affected by the action of the officers of the state than they could by almost any act that could be done by the officers of a county.

But it is said that the state is sovereign, and that from this fact a distinction can be drawn. It is true the state is sovereign, but what is it that makes up such sovereignty? The people of the state. And I cannot concede that there is an artificial something that is over and above the whole people of the state as such. Every citizen, as a constituent part of such sovereignty, is equally interested that the agents thereof do their duty; and were it not for the fact that, as a general rule, courts only deal with pecuniary rights, I see no reason why any citizen could not put in motion the judicial department of the state to prevent illegal action on the part of its officers. But, as such is the fact, only tax-payers can make such appeal; and, if he can thus appeal as a tax-payer of a county, I see nothing growing out of his relation to the state to prevent a like appeal to protect his interests as a tax-payer thereof. The majority of the court seem to have realized the force of considerations like these, and, to meet them, have suggested all sorts of probable or possible evils which might result if the individual tax-payer of the state was allowed thus to interfere with the proposed action of its officers. There would be much force in the suggestions of the majority in this regard were it within the power of such tax-payer, of his own motion, to so interrupt the business of the state, for then an evil-disposed person might causelessly so interfere; but when it is remembered that all such tax-payer can do is to go into a court of competent jurisdiction, and state the facts upon which he relies for relief, and take the judgment of such court thereon, before anything can be done to affect the action of the state, the danger is more fanciful than real. If courts can be trusted to interfere with the action of county officers in a proper case, I see no danger in their being likewise trusted in regard to the officers of the state. If it is necessary that the funds and property of the county should be guarded, not only by the prosecuting attorney thereof, but also by every tax-payer therein, the same reasons will require that the property and funds of the state should be likewise guarded, not only by the attorney general, but also by every tax-payer; and this is especially so, as the duty of the prosecuting attorney to protect the property and interests of the county is more clearly defined than is that of the attorney general to protect those of the state. If the contention of the majority is true, the tax-payers of the state are absolutely powerless, and must sit quietly by and see the officers of the

state do things which are clearly illegal, and which may result in incalculable losses to the state. The attorney general may be incompetent or corrupt, and may therefore refuse to institute proceedings to prevent actions however illegal, and the funds and property of the state be placed at the mercy of state officers, who, by corruption or incompetency, may produce or allow such a disposition of the property or funds of the state, during their term of office, and before they could be reached by the slow process of impeachment, as would practically ruin the state. To hold that such a thing is possible under our form of government, where the courts in all matters are made the final arbiters to decide as to the legality or illegality of almost every kind of action, simply because it is possible that such courts might improperly prevent certain proposed actions on the part of such officers, seems to me entirely untenable. The county can be fully protected against any illegal combination or conspiracy by which its funds or property are to be squandered, or applied to illegal uses, while the state, under the same circumstances, is held to be powerless.

I am of the opinion that every tax-payer of a city or county has a right to ask the courts to interfere between the tax-payers thereof and any proposed illegal action of its officers by which an illegal disposition of the funds or property of the city or county is threatened; and that, in like manner, any tax-payer of the state may ask the courts to interfere in a like case to prevent any illegal action by which the property or funds of the state are likewise threatened. If, in either case, the tax-payer appeals to the courts when no reason for such appeal exists, it will be presumed that he will be dismissed therefrom, and mulcted in costs. This presumption, and power of the courts to protect themselves, will lead the tax-payer to ask their interposition with caution, and only when, in his opinion, an urgent necessity exists. Courts, of course, will proceed with great care in these as in all other matters of such supreme importance, and will only put in force their machinery, to prevent the county or state authorities from acting, when the threatened action is clearly illegal, and will result in great loss to the tax-payers of the county or state; and to hold that because the courts might possibly be wrong in any case, and improperly tie the hands of the county or state officials, they must not move at all, would apply with like force to every important question which the courts might be called upon to decide. If the prosecuting attorney or attorney general set on foot the proceedings, it is still the courts which must decide as to their propriety, the same as they would if the proceedings were instituted by a tax-payer: so that the effect upon the state or county officials would be the same in one case as the other, and the only difference would be that the courts might be more often appealed to if the rule herein contended for were adopted; but, as we have suggested, courts always have abundant power to protect themselves. In my

opinion, the relator in this case was a competent party to institute and maintain the action, and the decision of the court below should be affirmed.

MAXWELL v. JOHNSON et al.

(Supreme Court of Washington. June 22, 1891.)

OBSTRUCTION OF HIGHWAYS — ABATEMENT OF NUISANCE — INJUNCTION — PLEADING — APPEAL — FAILURE TO MOVE FOR NEW TRIAL.

1. Since Code Wash. §§ 1245, 1246, declaring the obstructing or incumbering by fences or otherwise of the public highways to be a nuisance, and that any person may abate a public nuisance which is especially injurious to him, without committing a breach of the peace, or doing unnecessary injury, it is error to enjoin a person, whose only mode of ingress and egress is a public road, from tearing down a fence built thereon by the owner of the adjoining land, which especially interferes with such person's use of the road, and which the land-owner refuses to remove.

2. Under Code Wash. § 103, providing that every allegation of new matter in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true, in an action to enjoin defendants from entering on plaintiff's land for the purpose of grading and constructing a road thereon, and from tearing down or removing any part of plaintiff's fences on said land, an answer that the *locus in quo* was a public road, and that defendants entered thereon and removed a fence which was built thereon by plaintiff, and which obstructed the road, should be taken as true, unless controverted.

3. No motion for a new trial is necessary to entitle defendant to appeal to the supreme court from a final decree perpetually enjoining him from removing an obstruction in a public highway, since Code Wash. § 450, provides that the supreme court may review and reverse on appeal any judgment of the lower court, although no motion for a new trial was made in such court.

Appeal from superior court, King county.

Action by W. M. Maxwell against William Johnson and C. F. Miller, for damages for removing a fence built by plaintiff and for a perpetual injunction. Judgment for plaintiff, and defendants appeal. Reversed.

Howe & Corson, for appellant. McClure & Wheeler and Lewis & Gilman, for respondents.

ANDERS, C. J. Appellee moves this court to dismiss the appeal, and to affirm the judgment of the court below, for the reason that no motion was made for a new trial, and there appears no order, judgment, or decision made appealable to this court. No argument was made in support of the motion, and no authorities cited; but our attention is called to sections 446 and 449 of the Code, as sustaining the contention of appellee. These sections are not applicable to this case. This appeal is from a final decree in the cause, and section 450 of the Code provides that the supreme court may review and reverse, on appeal, any judgment of the lower court, although no motion for a new trial was made in such court. The motion to dismiss must therefore be denied. This action was brought by appellee, who was plaintiff below, to perpetually restrain and enjoin appellants from entering upon plaintiff's land for the purpose

of grading and constructing any road or roads thereon, and from tearing down or removing any part of plaintiff's fences on said land. The defendants in their answer admitted that they went upon the land described in the complaint, removed plaintiff's fence, and did some grading for the purpose of making a roadway thereon, but alleged, by way of avoidance, that the *locus in quo* was a public road, and that the acts complained of were done wholly within the limits thereof; that before grading said road, or removing the fence, they requested plaintiff to remove the said fence, which he refused to do; that they were accustomed to pass along said public road; and that it constituted their only convenience for traveling to and from defendant Johnson's farm to Maple Valley; and that the said fence so obstructed the said public road that the defendant could not pass along the same. No reply was filed by plaintiff to the affirmative allegations of the answer, and on the trial counsel for defendants claimed that those allegations were thereby admitted to be true. The court ruled otherwise, and treated the affirmative matter as denied, and permitted testimony to be given accordingly. This was in direct contravention of section 103 of the Code, which provides that every material allegation of new matter in the answer, not controverted by the reply, shall, for the purpose of the action, be taken as true, and was error. After hearing the testimony in the cause, the court made its findings of fact and conclusions of law, and thereupon rendered a decree in favor of the plaintiff, perpetually enjoining and restraining the defendants, and each of them, and each of their servants, agents, and employees, from tearing down, removing, or in any wise interfering with or molesting, the fence of plaintiff along the public road leading from the farm of defendant William Johnson to Maple Valley, King county, Wash., unless they shall be thereunto authorized by the board of county commissioners of said King county; and that in the mean time the plaintiff straighten the fence in accordance with the findings of the court; and that the plaintiff have and recover from the defendants his costs and disbursements, taxed at \$104.95. The defendants appealed, and the cause is now here for trial *de novo*.

The trial court found, in substance, as facts, from the evidence, that the road in controversy was a public road leading from the farm of appellant Johnson, on the south of appellee's land, to the town of Maple Valley, on the north, and that it was located by order of the board of county commissioners of King county, and was and is 30 feet in width; that the plaintiff encroached upon said road for the distance of 32 rods along the west side thereof, by placing his fence thereon, but that the encroachment upon the said road by plaintiff's said fence did not hinder, impede, or delay travel upon said road, nor render the same less convenient for public use; and that on the 27th day of August, 1890, the defendants tore down and removed plaintiff's fence for the distance of 32 rods

where it encroached upon the west side of said road, and that the defendants have threatened to continue to tear down said fence, and that plaintiff has good reason to fear that they will do so. Appellants contend that the fence in question incumbered, tended to obstruct, and did obstruct, a public road, and was therefore a public nuisance, both by statute and the common law; and that they were specially inconvenienced and damaged thereby; and that they therefore had a right to remove it, after the plaintiff had himself refused to do so. We think the position well taken. Our statute makes the doing of an act which unlawfully interferes with, obstructs, or tends to obstruct any public street or highway a nuisance. See Code, § 1235. And it is especially declared that the obstructing or incumbering by fences, buildings, or otherwise, the public highways, private ways, streets, or alleys, are nuisances; and that any person may abate a public nuisance which is especially injurious to him by removing, or, if necessary, destroying, the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury. See Code, §§ 1245, 1246. While this road is a public highway, it seems that it was established, according to law, primarily for the benefit, and at the expense, of appellant Johnson, whose land was so situated that it had no connection with any county road. Miller was a tenant of Johnson, and resided on his farm; and, from the circumstances of their situation, they both had an interest in the road different from that of the general public. It was their only means of ingress to or egress from their place of residence, and any incumbrance or obstruction thereon which interfered with their free passage along the same, in any manner which their business might require, worked a special inconvenience and damage to them. We think it is abundantly shown by the evidence that appellee's fence was situated within the limits of the road, and that at one point, at least, it extended up to, if not beyond, the center of the highway, and that at that particular place but a few feet of space intervened between the fence and the sloping bank of a creek, along which appellants, in going to and from their place of residence, were compelled to travel, or to go into the bed of the stream, by reason of the location of the fence; and that it was difficult, if not impossible, to pass along that portion of the way with wagons carrying ordinary loads. Johnson testified that he was unable to haul lumber over the road as it then was, to fix his house, and was compelled to remove the fence in order to do so. If that is true, and it does not appear to be successfully contradicted, the obstruction was certainly injurious to him, and he was justified in abating it, "without committing a breach of the peace, or doing unnecessary injury." If appellants thereby did unnecessary injury, they are liable therefor in damages. Whether unnecessary injury was done to appellee's property by the acts of appellants is a question which we are not now called upon to decide, nor do we deem it important in this

action. In no view of this case, as it appears to us, can the judgment of the lower court be sustained. Appellee, in violation of law, placed and maintained his fence upon a public highway, every portion of which appellants, and the public generally, had a right to use for the purposes of travel. He replaced the fence after it was removed. It was in the highway at the time of the trial, and, for aught we know, he still maintains it there, straightened though it may be at one point by order of the court. It is not the province of a court of equity to protect an individual in the violation of law, and it will be time enough for appellee to receive its aid when he ceases to be a wrong-doer himself. The judgment of the court below is reversed, and the cause remanded, with directions to dismiss the complaint.

DUNBAR, SCOTT, HOYT, and STILES, JJ., concur.

(3 Wash. St. 71)

MARSH v. DESELER et al.

(Supreme Court of Washington. Nov. 9, 1891.)

NOTICE OF APPEAL—WAIVER.

1. Defendants' motion for a new trial was overruled, and before judgment defendants excepted, and prayed an appeal to the supreme court, which was allowed. *Held*, that under Acts 1890, p. 333, and under the present statute allowing notice of appeal in open court on rendition of judgment, no notice of appeal given before final judgment can be of any effect.

2. The fact that plaintiff subsequently took part in the settlement of the statement of facts does not estop him from asking a dismissal of the case for want of jurisdictional process.

Appeal from superior court, Lewis county; EDWARD F. HUNTER, Judge.

Action by R. R. Marsh against F. A. Degeler, Theodore Howe, J. A. Hawley, and M. E. Hawley for forcible entry and detainer. Verdict and judgment for plaintiff. Defendants appeal. Appeal dismissed.

M. T. Curry and J. M. Epler, for appellants. Reynolds & Stewart and H. Julius Miller, for respondent.

STILES, J. The verdict of the jury in this case was rendered March 23, 1891. On the 26th of March a motion for a new trial was submitted and denied. In connection with the journal entry of the order denying the motion for a new trial there occurs the following: "To which order of the court in overruling of the defendants' motion for a new trial the defendants by their attorneys then and there excepted, and pray an appeal to the supreme court, which is allowed." Judgment was subsequently entered upon the verdict. The motion to dismiss the appeal for want of a notice of appeal must be granted. An appeal does not lie to this court until after final judgment. *Tripp v. Magnus*, 1 Wash. St. 22, 23 Pac. Rep. 805. Therefore no notice of appeal given before final judgment can be of any effect. The statutes (Acts 1890, p. 333) provided (and the present statute also provides) that a party might give notice of appeal in open court at the time of the rendition of the judgment, and it was entirely competent for the appellants in this case to give their notice in that way. But when this notice was given there was

no judgment. True, the court had just taken a very important step in the action adverse to the appellants, and so it may have taken many previous steps to which there were exceptions; but there was no more propriety in giving a notice of appeal upon the denial of the motion for a new trial than there would have been upon the court's refusal to allow a challenge to a juror for cause. Attorneys are perhaps liable to be taken unawares by this rule which allows oral notices of appeal, and, at a stage of a cause so nearly preceding the entry of judgment, are tempted at once to give the court and opposite parties notice of their intention to appeal. But, so long as the law only allows an appeal from a final judgment, there can be no such thing as notice of such appeal until the judgment has been entered, or, what is its equivalent, directed to be entered, by the court or judge. The fact that the opposite party, as in this case, subsequently took part in the settlement of the statement of facts, does not estop him from moving for want of jurisdictional process, and having the cause dismissed. The appeal is dismissed.

ANDERS, C. J., and HOYT, SCOTT, and DUNBAR, JJ., concur.

(3 Wash. St. 77)

BLEEKER v. SATSOP R. CO.

(Supreme Court of Washington. Nov. 10, 1891.)

PRINCIPAL AND AGENT—AUTHORITY OF AGENT TO BIND PRINCIPAL—BAILMENT—APPEAL—JURISDICTION.

1. A railroad company telephoned to one P. to send his tug with a scow to a certain place to remove some hay. *Held*, that P. could not bind the company by authorizing another tug-owner to take a tug, hire a scow, and remove the hay, so as to make the company liable for the services of such scow, or damages for injury to her while removing the hay.

2. In such case, even if P. had responded to the message and removed the hay by means of his tug and a scow employed by him, his relation to the company could not have been other than a common carrier, and the company could not have been held as bailee either of the tug or the scow.

3. Under Const. Wash. art. 4, § 4, providing that the appellate jurisdiction of the supreme court shall not extend to civil actions at law for the recovery of money when the "original" amount in controversy does not exceed \$200, the amount sued for, and not the amount recovered, determines the jurisdiction.

Appeal from superior court, Pierce county; F. CAMPBELL, Judge.

Action by James W. Bleeker against the Satsop Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Doolittle, Pritchard, Stevens & Grosscup, for appellant. Crowley & Sullivan and Judson & Sharpstein, for respondent.

ON MOTION TO DISMISS.

DUNBAR, J. Plaintiff in the court below brought his suit to recover the sum of \$670 as damages for the use of a scow. The answer of defendant was a general denial. Judgment was recovered by the plaintiff for the sum of \$156 damages, together with costs and disbursements, taxed at \$157.45. From this judgment defendant appealed. Respond-

ent moves to dismiss the appeal for the reason that the net amount in controversy does not amount to \$200, and that the supreme court has no jurisdiction to hear or determine the appeal. The limiting words in article 4, § 4, of the constitution are: "Excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property, does not exceed the sum of two hundred dollars, (\$200.) Some decisions were cited under statutes of limitations of jurisdiction which hold that the matter in dispute was the amount of the judgment, and not the original amount sued for; and that, although the action was for more than the jurisdictional amount, when the verdict was for less, the controversy in relation to the original amount had ceased, and that the court would not take jurisdiction of it on appeal; but those cases were all under statutes where the language was "the amount in controversy," and the intent of the law was probably sustained by the decisions; but the language of our constitution excludes the idea of the amount in controversy at the time the case reaches the supreme court. It says the "original amount in controversy." The word "original" is a word of plain import and well-understood meaning, and will hardly bear construction in this connection. The "original amount in controversy" can mean nothing more or less than the amount originally in controversy, or, in other words, the amount sued for. We think the court has jurisdiction. The motion is overruled.

ON THE MERITS.

DUNBAR, J. On the 17th day of August, 1889, A. H. Anderson, the general manager of the defendant corporation, sent to the Pacific Mill Company a telephone message in these words: "Shelton, Aug. 17th, 1889. To Pacific Mill Company, Tacoma, Wash.: Tell Pritchard to send tug Rip with scow to Webb's ranch, Skokomish river, for fifty tons of hay. Must be removed at once. A. H. ANDERSON. 23 Satsop Acct." It appears that Pritchard was the agent and manager of a steam-tug named "Rip Van Winkle," and was by means of said tug doing a general towing business on Puget sound; that he was secretary of the Pacific Mill Company; and the message was probably sent to the Pacific Mill Company on the theory that they would know his whereabouts, and forward the message to him in case of his absence. At all events, the message was duly received by Pritchard; but his tug, the Rip Van Winkle, was then engaged in other service, and, believing from the tone of the message that defendant's hay required immediate removal,—which supposition the testimony afterwards showed to be true,—he, according to his testimony, communicated to one J. S. Cook the fact that the Satsop Railroad Company desired to have 50 tons of hay moved from Webb's ranch to Shelton, and asked him if he could not move it. Cook was at that time managing a small fleet of steam-tugs on the sound. He took the tug Quickstep, and, hiring a scow of plaintiff at a certain

stipulated sum, proceeded to move the hay. Cook, however, testifies that he was simply employed by Pritchard to do the work. However this may be, Cook, while moving the hay, had to leave the tug to obtain fuel. On coming back it was discovered that the scow had sprung a leak, and that both the hay and the scow were damaged,—the hay to such an extent, as claimed by defendant, that it would not receive it. Plaintiff thereupon brings this action against the defendant, the Satsop Railroad Company, to recover the sum of \$5 per day for the use of plaintiff's scow for a certain number of days, upon an alleged contract between plaintiff and defendant; for \$10 per day for a certain number of days; and for damages caused by the detention of the scow, and for damages by the injury of the scow. The whole demand for judgment being \$670. It seems that when this case is stripped of all immaterial matter there can be but two propositions to consider: *First*, was Pritchard constituted an agent of the Satsop Railroad Company at all? and, *second*, if he was so constituted, was it such an agency as he could transfer to others to the extent of binding his principal by their acts?

Conceding for the present that Pritchard was the agent of the defendant, it would be well to keep in mind a few fundamental principles or elementary rules governing the law of agency. *First*. An agent must act within the scope of his authority. *Second*. Every person dealing with an assumed agent is bound at his peril to ascertain the nature and extent of the agent's authority; and it follows that, if the agency and authority are denied by the principal, the burden is upon the party attempting to bind the principal to prove both. *Third*. As the authority of an agent emanates from the principal, he may impose upon it as many limitations as he sees fit; and third parties, dealing with agents, must deal within those limitations. Of course this rule does not apply where parties deal with reference to the apparent authority of the agent, and where the limitations are secret, and of which they had no notice. *Fourth*. The appointment of an agent is presumed to be prompted by the knowledge of, or faith in, the fitness of the agent for the performance of the duties imposed, and upon this presumption is based the general rule that, in the absence of any authority, either express or implied, to employ a sub-agent, the trust committed to the sub-agent is presumed to be exclusively personal, and cannot be delegated by him to another, so as to affect the rights of the principal. Applying these fundamental principles to the case at bar, and at the same time recognizing the doctrine that no inflexible rule can be applied to all cases, but that each case depends largely upon the circumstances surrounding it, we must conclude that there are no circumstances surrounding this case taking it out of the general rule; and Pritchard had no authority to bind the Satsop Railroad Company by the contract he is claimed by the plaintiff to have made with Shaw, who employed and hired plaintiff's scow, to remove the hay of defendants. Espe-

cially is this true in view of the well-settled rule "that the authority of the special agent must be strictly pursued." In speaking of the distinction between the powers of a special agent and those of a general agent, Mr. Mechem, in his work on Agency, (section 285,) says: "But it is none the less true that the scope of the authority of a special agent is ordinarily much more restricted than that of a general agent. The fact that the authority is conferred in a special instance to do a specific act naturally leads to, if it does not positively require, much more minuteness of direction and much greater restrictions and limitations. From the very nature of the case particularity of instructions and singleness of method are to be expected, and of this, persons dealing with the agent may well be required to take notice." Again, in section 709, the same author says: "The true distinction between general and special agents lies, then, as has been stated, in this: that the apparent scope of the special authority is naturally and necessarily a limited one. Of these limitations its very nature gives peculiar warning, to which the persons interested must give heed." All the authority that was conferred in this case was that contained in the telephone message referred to. It was simply to transfer a certain lot of hay. It was not even an unqualified order to transfer it, but it was an order to transfer it in a certain way, by a specified medium of conveyance, viz., the tug Rip Van Winkle. If we adopt the theory that the defendant was to be responsible for the conveyance, then the doctrine of choice must obtain. Being a bailee for the vehicle of conveyance, it would be a hard rule that would deprive defendant of the right of selection. Assuming that risk, defendant may be presumed to have selected the tug Rip from a knowledge of its fitness for the work in hand. All tugboats are not equally safe or serviceable. In this case we may fairly presume that, if the instructions had been followed, the damage both to the hay and scow would have been avoided.

This case does not fall within the rule governing a class of cases where the work to be done was purely administrative, and where there was no judgment or discretion to be exercised, or where the deviation was slight and small. Conceding that Shaw's testimony is true, it was not competent, and should not have been admitted. To have the effect of binding the principal, a statement must have been made in respect to a matter within the scope of the agent's authority. The rule also laid down by Mechem on Agency, § 716, is as follows: "The fact of the agent's authority can neither be established, nor can its scope or effect be extended or enlarged, by his own statements, representations, or declarations, so as to charge the principal. There must be first a *prima facie* showing of his authority by other evidence before the admissions, declarations, or representations, if otherwise competent, can be admitted." "The authority of a supposed agent cannot be established by his own declarations." 1 Amer. & Eng. Enc. Law, p. 351. No inflexible rule

can be laid down by which all cases can be decided. In every case it becomes a mixed question of law and fact, to be considered with reference to the peculiar facts and circumstances of the case. Here all the circumstances or facts showing authority was the telephone message. The construction of that message was the province of the law; and its proper construction, as we view the law, is that it did not confer the authority to bind the defendant, as claimed by respondent. Neither do we think there is any testimony which could be construed as proof of ratification. The indorsement on the bill of the Quickstep, viz., "Payment refused until matter of freight and loss of cargo of Stmr. Quickstep is adjusted," cannot be held to be anything more than an acknowledgment of their indebtedness for services rendered, and is in no sense an acknowledgment of liability of damages of any kind. But back of all this, even had Pritchard responded to the proposition of defendant, and transferred the hay by means of the tug Rip and any scow he might have seen fit to employ, his relation to the defendant could not have been other than a common carrier; and in no sense could the defendant have been held as a bailee of the tug or of the scow. It would have been held for the value of the services, but there its responsibility would have ended. With this view of the law the instructions of the court become immaterial. There being no competent testimony to establish the responsibility of the defendant, the motion for nonsuit should have been allowed. The judgment is reversed, and the case remanded to the lower court, with instructions to grant the nonsuit asked for by defendant.

ANDERS, C. J., and HOYT, STILES, and SCOTT, J.J., concur.

STATE ex rel. SMITH v. SACHS, Judge.

(Supreme Court of Washington. Nov. 12, 1891.)
APPEAL FROM JUDGMENT OF OUSTER—STAY-BOND—MANDAMUS.

Under Laws Wash. 1891, p. 341, which provides for filing stay-bonds in all cases of appeal to the supreme court, when desired by appellants, where one has been ousted from the office of clerk of a school-district, he is entitled, on appeal, to have a stay-bond determined, and its amount fixed, after a demand made on the trial court, and such right will be enforced by *mandamus*.

Application of L. D. Smith for a peremptory writ of mandate to Morris B. Sachs, judge of the superior court of Jefferson county, to compel him to determine and fix the amount of relator's stay-bond on appeal from a judgment of ouster from the office of district-school clerk. Writ allowed.

Johnson & Moody, for relator. Geo. W. Tyler, for respondent.

ANDERS, C. J. On the 7th day of October, 1891, one Charles F. Bailey filed in the superior court of Jefferson county an information against the relator herein, claiming an interest in and right to the office of clerk of school-district No. 1, in said Jefferson county, and praying judg-

ment that the relator be ousted from said office, and that he, the said Bailey, be adjudged entitled to and be put into possession of the same. Upon the trial of the cause judgment of ouster and for costs was rendered against this relator, and in favor of said Bailey, from which judgment the relator, Smith, appealed to this court. Within five days after notice of appeal was given the relator filed his appeal-bond with the clerk of said superior court, which was duly approved by said clerk; and thereafter requested the respondent, as judge of said court, to fix the amount of a bond to stay proceedings in said cause pending the appeal to the supreme court. This the judge declined to do, whereupon the relator applied, upon motion and affidavit, to this court for an alternative writ of mandate commanding the said superior judge to order and fix the sum and amount in which a good and sufficient bond might be given by relator to stay proceedings on said judgment pending the appeal, or to show cause why the same had not been done. The writ was issued as prayed for, and on the return-day thereof the respondent appeared by his counsel, and filed his answer and return to said writ, wherein it is stated that he declined to fix the amount of a bond to stay proceedings, for the reasons—*First*, that, in his opinion, there is no law in this state providing for a stay of proceedings pending an appeal in the case of usurpation of an office and judgment of ouster; and, *second*, that, if the power to fix a bond and stay proceedings is in the discretion of the court, he (respondent) does not think this is a case in which such discretion should be exercised in favor of the appellant. The relator objects to the sufficiency of the return, and moves the court to issue a peremptory writ.

Upon the argument it was not seriously contended by the learned counsel for respondent that the relator had no right to file any stay-bond whatever. On the contrary, he conceded that execution for costs might be stayed by a proper bond. But he earnestly insisted that this court ought not to require respondent to fix the amount of a bond to stay all proceedings upon the judgment of the superior court, for the alleged reasons that such a bond would be wholly futile and ineffectual for any such purpose; that the relator could not thus be reinstated in the office from which he has been ousted; and that he would not be justified thereby in attempting to exercise the functions thereof. However that may be, the question seems to us to be one, not of expediency, but of right. It is not necessary for us, at this time, to determine or discuss what would be the *status* or right of the respective claimants to the office in controversy, upon filing a bond to stay further proceedings, or what would be the ultimate effect of the bond. The question for our determination is, has the relator a right to file such a bond pending his appeal? If he has, it is the manifest duty of respondent to order and fix the amount thereof. And, as the statute relating to appeals to the supreme court (Laws 1891, p. 341) seems to provide for filing stay-bonds upon ap-

peal, in all cases, when desired by appellants, we are of the opinion that the relator has a right to file such a bond in this case, and that the respondent ought to determine and fix the amount of the same. We conclude, therefore, that the return to the alternative writ is insufficient. Let the peremptory writ issue.

HOYT, SCOTT, and DUNBAR, JJ., concur.

STATE *ex rel.* SHANNON *et al.* v. HUNTER, Judge.

(*Supreme Court of Washington.* Nov. 12, 1891.)

JURISDICTION OF SUPERIOR COURTS — MANDAMUS TO COURTS.

1. The constitution of Washington provides that superior courts shall have jurisdiction in all cases in which some other court has not been given exclusive jurisdiction. The statute relating to justices of the peace provides that they shall have jurisdiction of civil actions where the amount is less than \$100. *Held*, that a superior court also has jurisdiction in such actions.

2. Where a superior court has erroneously dismissed a cause for want of jurisdiction, the proper remedy is by *mandamus* to compel such court to set aside the dismissal, and hear the cause upon its merits.

Application of R. M. Shannon & Co. for a peremptory writ of *mandamus* to Edward F. Hunter, judge of the superior court of Lewis county, to compel him to set aside the dismissal of a cause for want of jurisdiction, and hear the same upon its merits. Writ allowed.

Reynolds & Stewart, for petitioner.
Edward F. Hunter, in pro. per.

HOYT, J. The return of the respondent to the alternative writ of *mandamus* issued herein shows that he had dismissed the suit in question for want of jurisdiction to hear the same, because the amount sued for was less than \$100, and upon this return the questions to be decided arise. Some question is made by counsel as to whether in fact the sum sued for, as shown by the complaint, was less than \$100, but, as the view we take makes such question immaterial, we shall not attempt to decide the same. Two questions are presented which it is necessary for us to decide: *First*. Has the superior court jurisdiction where the sum sued for is less than \$100? *Second*. Is *mandamus* the proper remedy where a cause is wrongfully dismissed because in the opinion of the court it has no jurisdiction therein?

As to the first question above suggested, the constitution of this state provides that the superior courts shall have jurisdiction in all cases in which some other court has not been given exclusive jurisdiction by law, and, if the legislature has not provided that justices of the peace shall have exclusive jurisdiction in suits of this kind, it follows that the superior courts must have jurisdiction. The language of the act fixing the jurisdiction of justices of the peace, so far as it relates to this question, is as follows: "Every justice of the peace shall have jurisdiction and cognizance of the following civil actions and proceedings;" and it seems clear that by such language simply jurisdiction is conferred, and not exclusive ju-

risdiction. This is so plain from the language used that it seems entirely unnecessary to present argument in support of the proposition. If there could be any question as to the meaning of the legislature as conveyed in said language, such question would clearly be resolved in favor of such construction when the language used is interpreted in the light of other legislation bearing upon the subject. For instance, the act relating to costs in superior courts provides "that the plaintiff shall in no case be entitled to costs taxed as attorneys' fees in actions within the jurisdiction of justices of the peace when commenced in superior courts," which would be an absolutely senseless provision, and of no force whatever, if, as contended for by the respondent, the superior court could have no jurisdiction in suits of this kind. It must therefore be held that the legislature has not as yet conferred exclusive jurisdiction upon justices of the peace in actions like the one at bar, and for that reason the superior court must be held to have jurisdiction. Much has been said by the respondent upon the policy of the law in this regard, and the fact that the usefulness of the superior courts will be materially interfered with if their jurisdiction is held to extend to these minor suits; but such questions of public policy and convenience are for the legislative, and not for the judicial, department of the government, and, so long as the intention of the legislature is clear, the courts must give such intention effect, regardless of the question as to whether or not such legislation is or is not the wisest that might have been enacted upon such subject.

The superior court, then, erroneously dismissed the case, and the remaining question above suggested is as to the proper remedy. The position taken by the respondent is that such judgment of dismissal is a final judgment, and determines the cause as fully as would a judgment on the merits; that in rendering the same the court acts judicially, and its discretion in so doing cannot be controlled by *mandamus*. There is much force in this position, and, if the question were a new one, unaffected by authority, we might come to the conclusion that the proper remedy in such a case was by appeal, and not by *mandamus*; but the authorities seem to have established the other doctrine, and to have decided that from judgments of dismissal for want of jurisdiction no appeal will lie, but that the only remedy is by *mandamus*. This doctrine was established in the supreme court of the United States many years ago. In *Ex parte Bradstreet*, 7 Pet. 634, the supreme court of the United States issued a *mandamus* to a United States district judge to reinstate a cause which he had dismissed for want of jurisdiction, and to proceed in the trial of the same. In *Re Parker*, the same court by a writ of *mandamus* directed the supreme court of this territory to reinstate a cause which it had dismissed because, in its judgment, it had no jurisdiction, and to proceed to hear the same upon its merits. The same doctrine was announced in 131 U. S. 221, 9 Sup. Ct.

Rep. 708, where, in the same matter, the court commanded the supreme court of said territory to reinstate and hear a case, although the judges who had rendered the judgment of dismissal had gone out of office, and an entirely new set of judges been installed. In *Harrington v. Holler*, 111 U. S. 796, 4 Sup. Ct. Rep. 697, the same court held directly that no appeal would lie from a judgment of dismissal for want of jurisdiction, rendered in the supreme court of this territory, and that the remedy, if any, was by *mandamus*. It will be seen from the above that the supreme court of the United States has from an early date uniformly held to a different doctrine from that contended for by respondent. If we look at the decisions of the courts of last resort in the states, we shall find them to be almost uniformly upon the same side of the question. We shall not attempt to review these latter cases, but the case of *State v. Murphy*, 19 Nev. 89, 6 Pac. Rep. 840, is a most interesting one upon this question. The learned judge of that court, in deciding said case, not only sustained the doctrine as above stated, but entered into a discussion of the reasons therefor, with such success that there seems little chance of escape therefrom. He says that the discretion of the lower court is not controlled by such writ; that the question as to whether or not such court has jurisdiction in the particular matter is a preliminary one; and that the appellate court in granting the writ decides that question for the lower court, and does not compel it to decide it at all,—and at great length elaborates and ably maintains the position contended for by the petitioner in this proceeding. In view of these authorities, we feel bound to hold that the proper remedy, where a cause has been erroneously dismissed for want of jurisdiction, is *mandamus*. The peremptory writ commanding the respondent to set aside said judgment of dismissal, and proceed to hear the cause upon its merits, and finally determine the same, must be awarded, and it is so ordered.

ANDERS, C. J., and DUNBAR, SCOTT, and STILES, J.J., concur.

CITY OF SPOKANE FALLS v. BROWNE *et ux.*

(Supreme Court of Washington. Nov. 12, 1891.)

MUNICIPAL ASSESSMENTS—VALIDITY—APPEAL.

1. Where counsel, supposing that judgment in a cause had been rendered by the court, gives notice of appeal to the supreme court, when in fact the court did not render judgment until afterwards, and appellant therefore treats the first notice as a nullity, he is not deprived of his right to appeal within the time limited.

2. Under Code Wash. § 743, providing that in computing time Sunday must be excluded, where the last day of the six months within which notice of appeal must be filed falls on Sunday, a notice filed on the following day is filed in time.

3. The omission, by an assessor, of dollar marks on an assessment roll, where the roll is in its usual form, does not invalidate the assessment roll.

4. Rev. St. U. S. § 1924, declaring that "all

taxes shall be equal and uniform, and no distinction shall be made in the assessment between different kinds of property," has reference to general taxation only, and was not intended to apply to special assessments for local municipal improvements, and is not violated by Spokane Falls City Charter, § 7, providing that assessments for local improvements shall be levied on real estate only.

5. City ordinance No. 83, which provides that both the land and the improvements thereon shall be subject to assessment for local improvements, violates section 7 of the city charter, and is void.

6. Where property is assessed which should not have been placed on the assessment roll, the court has no power to disregard it, and let the assessment for the amount justly chargeable stand.

7. In an action to enforce the collection of a local assessment by a city it can recover only by showing a strict compliance with the provisions of its charter.

Appeal from superior court, Spokane county; R. B. BLAKE, Judge.

Action by city of Spokane Falls, Wash., against J. J. Browne and Anna W. Browne to enforce the collection of a local assessment. Judgment for defendants. Plaintiff appeals. Affirmed.

H. E. Houghton, Corp. Counsel, and Jones, Belt & Quinn, for appellant. Jones & Voorhees, for respondents.

ON MOTION TO DISMISS.

ANDERS, C. J. Respondents move the court to dismiss this appeal for the alleged reasons that the notice of appeal was not given within the time prescribed by law; that the statement of facts is not certified, as required by law; that the notice, or pretended notice, of appeal was never legally served; and that no transcript has been prepared and filed in this court, as required by law. The argument of counsel for respondents upon the motion was mainly directed to the objection that the notice of appeal was not filed or served in time. It is claimed by counsel that the appeal was taken by giving notice thereof in open court on the 5th day of January, 1891, and that, having abandoned that appeal, appellant could not appeal again by subsequently giving written notice. It appears from an examination of the record that on the day above mentioned the judge who tried the cause announced in open court that he found for the defendant, whereupon counsel for plaintiff, no doubt thinking that judgment in the cause had been rendered by the court, gave notice of appeal to the supreme court. The fact is, however, that the court did not render judgment on said day, but on the 2d day of February, 1891, at which time the court filed its findings of fact and conclusions of law, and ordered the action dismissed at the cost of plaintiff. There being no judgment to appeal from, the first notice of appeal was treated by appellant as a nullity; and we do not think that by so doing appellant should be deprived of the right to appeal from the judgment by which it claims to have been injured. To hold that a party is estopped, by giving a premature and ineffectual notice, from thereafter prosecuting his appeal, would be to deprive him of a legal right upon a mere technicality, unsup-

ported by reason, and contrary to the spirit and policy of the law. We cannot assent to such a doctrine, and therefore hold that the written notice of appeal was properly given, if not barred by lapse of time. This second notice was served on July 25, 1891, but was not filed in the office of the clerk until August 3, 1891. As the six-months limitation expired on the 2d day of August, counsel for respondents insists that the filing of the notice was one day too late. That would be true, under ordinary circumstances, but in this instance the last day of the time limited fell upon Sunday, and, according to the rule of computation prescribed by the legislature, that day must be excluded. See Code Wash. § 743. The notice was therefore served and filed in time. The remaining objections to the statement of facts are not well taken. The certificate to the statement of facts is sufficient, and the amended proof of service of the notice of appeal shows that it was not served on Sunday, as claimed by respondents. The motion to strike the statement is denied.

ON THE MERITS.

This was an action to enforce the collection of a local assessment charged upon the property of respondents for grading Second street in the city of Spokane Falls. The court below rendered judgment in favor of defendants dismissing the action, and for costs, from which the city appealed, and the cause is now here for review. Among other allegations of the complaint, not necessary to be stated, are the following: "*Second.* That between the 29th day of May, 1888, and the 14th day of September, 1888, by virtue and in pursuance of the following ordinance of the said city, plaintiff, to-wit, ordinance No. 155, entitled 'An ordinance to provide for the grading of Second street between the east line of Washington street and the west line of Chestnut street,' passed by the city council of said city May 29, 1888; and an ordinance No. 33, entitled 'An ordinance prescribing the mode of making and collecting assessments for street improvements,' passed by the city council of said city July 7, 1886; and an ordinance amending said ordinance number 33, and numbered ordinance No. 83, entitled 'An ordinance to amend section 2 of an ordinance entitled 'An ordinance prescribing the mode of making and collecting assessments for street improvements,' passed by the city council, and approved July 7, 1886, which said ordinance was passed by the city council of said city September 28, 1887, and approved the same day.—plaintiff did improve and grade said Second street between the limits aforesaid." "*Fifth.* That by virtue of and in accordance with the provisions of said above-mentioned ordinances the above-described real estate was duly assessed as the property of defendant J. J. Browne." "*Seventh.* That the sum of eight hundred and twenty-two and twenty-five one-hundredths dollars is a proper proportion of the value of such improvements and grading, and the material furnished thereon, which is chargeable on said real estate according to the true intent and meaning of the provisions of the

charter of said city relating to grading and improvements of streets and making special assessments therefor." The answer of defendants denies that by virtue of the ordinances mentioned in the complaint, or any of them, the said described lots or parcels of land, or any of them, were ever duly or legally assessed as the property of defendants or either of them; or that ordinance No. 155, or any other ordinance, providing for the said grading of Second street, was ever duly or legally passed by the city council of said city, or was ever duly or legally approved by the mayor of said city. But the defendants allege that said ordinances No. 33 and No. 83 are the only ordinances or authority under or by which the pretended assessment of the lots or parcels of land mentioned in the complaint was made, and aver that said ordinance No. 83 is in conflict with the provisions of the charter of the city, and is therefore invalid, void, and without authority of law. The defendants further allege, in substance, that in making the pretended assessment the assessor wrongfully and unlawfully undertook to assess, include, and extend upon his assessment rolls the value of improvements upon said lots of land; that the acts of said assessor in making said assessment and extending the same upon the assessment roll were invalid, and without the authority of law; and that the said pretended assessment of land in said assessment district was unequal, and that the lots mentioned in the complaint were assessed greatly in excess of the benefits of said land, and in excess of other tracts of land in said assessment district.

It will thus be seen that the defense to the action relied on in the lower court was the alleged insufficiency and illegality of the assessment sought to be collected; and the same objections are raised here. The respondents insist that the assessment was void for two reasons: First, that upon the face of the assessment roll it appears that no value in dollars or cents, or otherwise, was set opposite the lands therein described, or any of them, or extended upon said roll; and, second, that the ordinance of said city, by virtue of which the assessment is alleged in the complaint to have been made, is in direct contravention of the city charter, and consequently void. We are of the opinion that the first objection ought not to be sustained. The roll is in the usual form; and while it is true that the figures in the columns headed "Valuation of real estate," "Valuation of improvements," "Equalized valuation," and "Amount of tax," have no word, mark, or character attached to them indicating that dollars or dollars and cents were meant, we nevertheless think that no one could be in doubt as to the real meaning. It is well known and generally understood that valuation of property is expressed in dollars. In this case the column designated "Amount of tax" is divided by a perpendicular line, leaving a small space on the right of the column sufficient for the insertion of two figures, evidently intended to represent cents; and a larger space on the left of said line, of sufficient size to admit of the inser-

tion of four or five numerals. Manifestly the figures in this column were intended to indicate the amount of the tax in dollars and cents, and must have been so understood by respondents. That the assessor was negligent in the performance of his duties is evident. But we are not disposed to hold that his omission to prefix the usual dollar-mark to the amount of the valuation or the taxes is sufficient to render the assessment roll nugatory. Counsel for respondents, in their brief, cite cases holding a contrary view, but we think our conclusion is supported by a decided preponderance of authority. See *Bird v. Perkins*, 33 Mich. 28; *Cahoon v. Coe*, 52 N. H. 518; *State v. Mining Co.*, 8 Nev. 15; *Chickering v. Falle*, 38 Ill. 342, 344; *Elaton v. Kennicott*, 46 Ill. 202; *Jenkins v. McTigue*, 22 Fed. Rep. 148; *Ensign v. Barse*, 107 N. Y. 329, 14 N. E. Rep. 400, and 15 N. E. Rep. 401; *New Orleans v. Day*, 29 La. Ann. 416.

But respondents' second objection raises a more difficult and serious question. The power of the city to levy assessments for local improvements must be found in its charter. By section 7 of the charter it is provided "that in all assessments and levies to pay the expenses of such improvements the real estate only shall be assessed, excluding from such assessment all improvements thereon, whether the same are affixed to the land or not, and the improvements on such lands shall not be taken or assessed as any part of the land or at all." See Laws 1885-86, p. 302. Section 2 of ordinance No. 33 contains the same provision as to the character of the property to be assessed for street improvements; but that section (2) was so amended by ordinance No. 83 as to provide for including both the land and all improvements thereon in all assessments for the grading of streets. It is contended by counsel for respondents that the latter ordinance, being in contravention of section 7 of the charter, is obviously void. To meet this objection it is urged by appellant's counsel that that portion of the city charter above quoted is itself void, being in conflict with section 1924 of the organic act. (Rev. St. U. S.,) which declares that "all taxes shall be equal and uniform, and no distinction shall be made in the assessment between different kinds of property, but the assessment shall be according to the valuation of the property," but that, notwithstanding the void portion, there still remains sufficient power in said section to carry out the grant therein contained, and that the void part may be stricken out or disregarded, and the remainder will be valid and unobjectionable. But we are unable to agree to the proposition that section 7 is in conflict with the organic act. We think that section 1924 of that act has reference to general taxation only, and was not intended to apply to special assessments for local municipal improvements. This is the doctrine laid down by eminent text-writers, and is abundantly supported by adjudged cases. See *Cooley, Tax'n*, (2d Ed.) 207, 208; *Id. c. 20*, and cases cited. It is further urged that, if the provision of the charter above referred to is unconstitutional,

tional, then ordinance No. 33, as amended by ordinance No. 83, provides the proper and legal mode for assessing property under the provisions of the charter; and that, if that provision is constitutional, then ordinance No. 83 is absolutely void and of no effect, and the second section of ordinance No. 33 stands as though no attempt to amend it had been made; and that, in either event, the assessment should be sustained. The answer to the first proposition of counsel is that, if that portion of the charter claimed to be unconstitutional is disregarded, then there is no provision left in the charter by which the proper manner of making such assessments is pointed out. Section 10 of the charter gives the city power by general ordinance to prescribe the mode in which the charge on the respective owners of lots or land and on lots or lands shall be assessed and determined for the purposes authorized by this act; but that provision evidently refers to the method or "mode" by which property is to be charged generally, and under it the city council would be authorized to adopt a method of assessment according to value or frontage, as might be deemed best. By ordinance No. 33 the city adopted a method of assessment based on the value of the property, and provided that in all such assessments the real estate only should be assessed, and that the improvements thereon should be excluded. That ordinance was in harmony with section 7 of the charter, and was undoubtedly valid. But section 2 was attempted to be repealed by ordinance No. 83; and, if we concede that ordinance No. 33 was not so repealed, but is still in full force and effect, it will be of no benefit to appellant, because the assessment was made, not under that ordinance, but in accordance with the provisions of ordinance No. 83. The latter ordinance is void, because it is in contravention of the provisions of section 7 of the city charter, relative to assessments, and the assessment made under it was therefore without authority of law, and cannot be sustained. But it is suggested that, if property was assessed which should not have been placed upon the assessment roll, this court ought to disregard it and let the assessment stand for the amount justly chargeable against respondents. That would be equivalent to making a new roll and a new assessment, which is clearly beyond our power or province. Were the assessment based upon legal authority, a mere overvaluation of property would not vitiate it; but, being contrary to law, we are unable to uphold it, or to relieve appellant from its effects. The city has brought this action to collect an assessment to pay the expense of an improvement it has made, and which no doubt has been beneficial to respondents, and it can only recover by showing a strict compliance with the provisions of its charter. This, in our opinion, it has failed to do. It follows, therefore, that the judgment of the court below must be affirmed, and it is so ordered.

SCOTT, STILES, HOYT, and DUNBAR, JJ., concur.

FLYNN v. DOUGHERTY. (No. 13,032.)

(Supreme Court of California. Nov. 19, 1891.)

STATUTE OF FRAUDS—AGREEMENT TO CUT STONE—NONSUIT.

1. Civil Code Cal. § 1739, provides that no agreement to buy or sell personal property of the value of \$200 or more is valid unless the same be in writing. Section 1740 provides that an agreement to manufacture a thing from material furnished by the manufacturer is not within the provisions of the last section. *Held*, that plaintiff's contract to cut and deliver to defendant stone for a building according to certain specifications, though not in writing, was valid.

2. The grounds of a motion for a nonsuit must be stated at the time the motion is made.

In bank. Appeal from superior court, city and county of San Francisco; FRS. E. SPENCER, Judge.

Action by one Flynn against one Dougherty on contract. From a judgment of nonsuit plaintiff appeals. Reversed.

Jarboe, Harrison & Goodfellow, for appellant. Chas. F. Wilcox, for respondent.

PATERSON, J. The only question involved in this appeal is whether the contract of the plaintiff "to cut, furnish, and deliver" to defendant "the stone-work of the asylum to be built at Agnew station, according to the plans and specifications of Mr. Jacob Leuzen & Son, architects," is within the statute of frauds. Section 1739, Civil Code. There is no doubt that it is within the provisions of the statute, unless excepted therefrom by section 1740, *Id.*, which is as follows: "An agreement to manufacture a thing from materials furnished by the manufacturer or by another person is not within the provisions of the last section." The plaintiff testified that, "if the stone had been cut according to his bid and the specifications, and had not been used in the construction of the asylum, it would not have been available for other purposes, or have been salable in the general market." On the subject of contracts of sale and contracts for labor there is much conflict of decision, but the weight of authority in this country supports the proposition that, where the seller is to furnish materials and fashion them according to specifications furnished by the purchaser, or according to some model selected, and when, without the special contract entered into by the parties, the thing furnished would never have been put in the particular shape or condition in which it was furnished, then the contract is essentially one for labor, and is not within the statute of frauds. The subject is carefully treated and the authorities fully reviewed in 1 Reed, St. Frauds, c. 9. The evidence in the case before us shows that the work which was to be performed by the plaintiff would have left the material unfit for the general market. The contract is one for labor.—work and labor were the main things. The material upon which the work and labor were to be done was simply the incident. The stone to be furnished was of no value to the defendant until shaped and carved according to the plans and specifications of the architect. Upon the authorities referred to above, we think the court erred in granting the

defendant's motion for a nonsuit. The only grounds stated by the defendant in his motion for a nonsuit were that the contract was one for the sale of goods and chattels, "and that there was no note or memorandum thereof signed by the defendants, nor any acceptance or receipt of the goods, or any part thereof, nor any payment of purchase money, or any part thereof, as required by the provisions of section 1624, subd. 4, of the Civil Code; and on the further ground that plaintiff has failed to show that he has sustained any damage in any sum whatever." The rule is well settled here that a nonsuit cannot stand unless the ground upon which it is supported was called to the attention of the court and the plaintiffs at the time the motion was made. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; DE HAVEN, J.; GAROUTTE, J.; MCFARLAND, J.

HARRISON, J., being disqualified, did not participate in the foregoing opinion.

91 Cal. 664

COOK v. RICE et al. (No. 13,062.)

(Supreme Court of California. Nov. 19, 1891.)

RES JUDICATA—PARTIES.

1. A judgment, though liable to be appealed from, is in force as final, unless suspended by appeal, and is competent evidence in support of a plea in estoppel.

2. In an action against a husband and wife, where the wife had no interest aside from that of her husband, defendants sought to introduce a judgment roll of a prior action in relation to the same controversy by plaintiff against the husband. *Held*, that the objection that the action was not between the same parties was untenable.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Action in trespass by John Cook against D. M. Rice and another. From a judgment for defendants, and an order denying motion for a new trial, plaintiff appeals. Affirmed.

Webb & Sherwood, for appellant. *Gell & Morehouse*, for respondents.

TEMPLE, C. The plaintiff in his complaint avers that on the 2d day of February, 1888, he was lawfully possessed of the E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 4, township 21 S., range 9 E., Mt. Diablo meridian; that he had fencing on the same to the value of \$50, which the defendants on said day maliciously destroyed, to his damage in the sum of \$50. As a separate cause of action, that he has planted and sown on the same tract a crop of grain, in extent about 80 acres, of the value of \$500, which he had fenced and inclosed; that defendants cut down and destroyed his fence, and drove their stock in and upon his grain, to his great and irreparable damage; that they threaten to tear down any fence which he has or shall construct to protect said grain, and, if not restrained, will tear down and destroy his fences, and drive their stock upon his grain, and destroy the same, to his damage in the

sum of \$500; that they are wholly insolvent. He therefore demands judgment for \$300 damages, and that they be enjoined from cutting down or destroying his fences or from wasting his premises. The complaint does not aver any title in the plaintiff, but possession only; and does not deny that the respondents have title to the land, or that their entry was rightful. The answer denies the possession of plaintiff, the alleged trespass, and the damage. In the answer to the last cause of action, defendants admit the possession of plaintiff as to 10 acres of land, which is specifically described, and deny that they have ever in any way entered or trespassed upon the same. They aver, as to the remainder of the land, that the defendants have been in occupation and possession thereof since May, 1886, and that a large portion thereof had been plowed and sown by them, and that plaintiff, while they were so in possession, wrongfully and unlawfully entered with threats, force, and violence, and replewed and resowed and attempted to inclose the same, and to drive the defendants from the premises; and, except as to the said 10 acres, plaintiff has no possession, except the said forcible occupation. They also plead as an estoppel a judgment in favor of D. M. Rice against plaintiff, wherein it was duly adjudged that plaintiff was not possessed or entitled to the possession of any part of the land except the 10 acres specifically described; that plaintiff has, since the institution of said action, acquired no new or further right or title to said land; that the defendant Mrs. D. M. Rice is the wife of the said D. M. Rice, and claims no interest in the land, and her acts are those of a member of the family of the other defendant, and in privity with his title. The appeal is from the judgment and an order refusing plaintiff a new trial.

The land is public land of the United States, and both parties claim as pre-emptioners. The question is whether there was evidence to sustain the verdict and the findings in favor of the defendants. On the trial the defendant D. M. Rice testified that he moved upon the land in May, 1886, with his family, and built a good, comfortable house, barn, and chicken-house. That there was then no one living upon it, and no house or improvement except the small inclosure. There was a volunteer crop of barley on a long strip. In January, 1887, he commenced plowing, and had plowed 8 or 10 acres, when he was enjoined by Mr. Cook, who moved upon the land about 6 months after defendant. He never permitted his stock to run on the small inclosure, nor did he or his wife ever interfere with it. Mr. Cook, while defendant was enjoined from plowing, proceeded to fence and plow a large part of the land, leaving defendant's house outside of his inclosure, by extending to and round it a sort of *cul de sac*. Defendant filed his declaratory statement as a pre-emptioner May 25, 1886. It was shown that both plaintiff and defendant were qualified pre-emptioners; that Mrs. D. M. Rice tore down a portion of the fence with the knowledge of her husband, and without objection made by him. A judgment

roll was put in evidence by defendants in the case of *John Cook v. D. M. Rice*, dated December 27, 1887. It avers possession on the part of plaintiff; that he had growing upon the land a volunteer crop of grain; that defendant unlawfully entered, and ejected plaintiff, and commenced to plow, dig up, and destroy the grain; that, although plaintiff had forbid him so to do, he continued to plow, dig up, and destroy the grain, and, unless enjoined, would continue so to do, to his great and irreparable damage. He demands judgment for \$500 damages, to be restored to the possession of the demanded premises, and for an injunction. The answers specifically denies the possession of plaintiff, the various alleged trespasses and damage, and avers that defendant entered upon the land when unoccupied and uninclosed, as a qualified pre-emptor, under the laws of the United States, and while peacefully in possession he duly made his application to purchase the same. The case was tried September 28, 1887, and the court found that plaintiff was in the actual possession only of the tract specifically described in the answer in this case; that on the 23d of May, 1886, while all the land, except the 10 acres, was unoccupied, the defendant D. M. Rice entered upon the same, and, while in the peaceable possession of all, except the 10-acre tract, filed in the land-office his declaratory statement. It was adjudged that plaintiff recover the 10-acre tract, with damages, and that the restraining order be dissolved. The action was to recover possession, and admitted the possession of defendants, claiming that it was wrongful, because an intrusion upon the prior possession of plaintiff. It was adjudged that, except as to the small inclosure, defendants' possession was rightful, and that plaintiff had not been in possession before the entry of defendants. It must follow that when plaintiff entered, taking advantage of an injunction wrongfully restraining defendants from cultivating the land, he was intruding upon the possession of the defendants, and could not by such entry acquire a new right as against the defendants. Plaintiff objected to the introduction of the judgment roll, and now claims that the court erred in overruling his objections—

1. Because the judgment was not final, as the time for taking an appeal had not expired, and the cause was therefore still pending. It was not necessary that it should be final, in the sense that it was not liable to be reversed on appeal. It was enough that the judgment was in force, not suspended by an appeal or otherwise, and that, while in force, it finally disposed of the controversy. And—

2. It was objected that it was not between the same parties. Substantially it was between the same parties. Mrs. Rice made no claim to the land, and all she did was under the claim of her husband. Had she by her acts taken possession, the right, if any, thus acquired would have been common property, and the right to control and manage in her husband.

The question being whether there was evidence to support the findings, it is not necessary to consider the plaintiffs' evi-

dence. We advise that the judgment and order be affirmed.

WE CONCUR: VANOLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

91 Cal. 405

LUCO v. DE TORO. (No. 12,566.)

(Supreme Court of California. Sept. 26, 1891.)

EXPRESS TRUSTS — REPUDIATION — LIMITATIONS — SUIT FOR PARTITION — EVIDENCE — CONTRACT WITH ATTORNEY.

1. Where O., owning an equitable interest in an undivided tract of unpatented land, employed an attorney to procure a patent thereto for the person through whom O. derived his interest, and agreed to give the attorney a certain portion of the land if he succeeded, the fact that another person employed by O. rendered valuable assistance in obtaining the patent did not affect the attorney's rights under the contract.

2. Such contract creates an express trust, and, when completed, vests in the attorney an equitable interest to his proportion of the land, and renders O. a trustee of the attorney to the extent of such interest. *Beatty, C. J.*, and *McFarland and De Haven, JJ.*, dissenting. 18 Pac. Rep. 886, overruled.

3. The statute of limitations does not begin to run in favor of such trustee till after an unequivocal repudiation of the trust by him, with notice thereof to the attorney. *Brennan v. Ford*, 46 Cal. 8, distinguished.

4. Where O. became administrator for the patentee, his mere refusal to convey to the attorney the interest due the latter is not a repudiation of the trust, since it was impossible for O. to make any conveyance without an order of the probate court, under Code Civil Proc. Cal. §§ 1597, 1598, 1600, which provide that, when a person who is bound by contract in writing to convey any real estate dies before making the conveyance, the court, on presentation of a verified petition, must appoint a time for hearing, and, if satisfied that the petitioner is entitled to a conveyance, must make a decree authorizing and directing the executor or administrator to make a conveyance to the petitioner.

5. Where O. had both actual and constructive notice that the attorney had assigned all his interest in the trust, O.'s refusal to convey to the attorney, if conceded to be a sufficient notice of repudiation of the trust as to the latter, will not be adjudged sufficient notice to the assignee.

6. Where, in an action by the assignee against the personal representative of O. to recover the attorney's interest, defendant contended that both attorney and assignee had abandoned the contract, evidence that until the procurement of the patent the assignee continued to expend large sums of money for that purpose was admissible.

7. In partition, plaintiff may assert any title he may have, legal or equitable. *Watson v. Sutro*, 24 Pac. Rep. 172, 25 Pac. Rep. 64, and 86 Cal. 527, followed.

In bank. Appeal from superior court, San Diego county; *THOMAS N. BUSH*, Judge.

Action by *Juan M. Luco* against *Juan de Toro* for partition of certain land. Judgment for defendant. Plaintiff appeals. Reversed.

I. N. Thorne, H. S. Mulford, Oliver P. Evans, and E. W. McKinstry, for appellant. *Henry M. Smith and Harry L. Titus*, for respondent.

PATERSON, J. Appellant and several other plaintiffs brought this action against respondent and several other defendants

for partition of a tract of land known as the "Rancho Mission" (or "Ex-Mission") of San Diego, a patent to which issued from the United States of America to Santiago Arguello, or his legal representatives, on the 1st day of September, 1876. The original complaint, which was filed August 8, 1882, contained all the allegations required by chapter 4, pt. 2, tit. 10, Code Civil Proc. On December 13, 1886, —after the cause was reversed on the former appeal, (70 Cal. 339, 11 Pac. Rep. 650,) —plaintiffs, by leave of the court, filed an amendment to the complaint, inserting between paragraphs 21 and 22 thereof the following: "Plaintiffs allege that the plaintiff Juan M. Lucio owns an undivided equitable interest in the said rancho of Ex-Mission of San Diego, by reason that on and before the 3d day of February, 1869, said Augustin Olvera was the owner and in possession of an undivided share or interest of more than one-half of said rancho, and that on said day the said Augustin Olvera made and entered into a contract in writing with the said Isaac Hartman, now deceased, in the words and figures, to-wit: 'This agreement, made and entered into this 3d day of February, A. D. 1869, between Isaac Hartman, party of the first part, and Augustin Olvera, party of the second part, witnesseth as follows, to-wit: That the party of the first part, as attorney and counselor at law, undertakes and agrees with the party of the second part to procure a patent from the United States for the lands of the Ex-Mission of San Diego of San Diego county, bounded and described as follows: [Giving the specific boundaries of said rancho.] In consideration whereof the party of the second part agrees to pay the said party of the first part as follows: The sum of one thousand dollars for personal expenses incurred by the party of the first part in said business, but not to exceed in any case said sum of one thousand dollars. In addition to which the party of the second part is also to pay the costs of proceedings to obtain said patent, and to convey to the party of the first part an undivided interest in the lands to be patented of said Ex-Mission as follows: If the patent issues for five leagues, one-half league; if for six leagues, one league; if for seven leagues, one league; if for eight leagues, one and one-half leagues; if for nine leagues, one and one-half leagues; if for ten leagues, one and one-half leagues; if for eleven leagues, two leagues; and whatever amount is patented over and above eleven leagues is to be equally divided between the parties of the first and second parts; that is to say, that the party of the first part is to be entitled to the one undivided one-half of the excess over and above eleven leagues, and the four leagues of land in the immediate vicinity of said Ex-Mission are to remain exclusively for the parties of the second part. In testimony whereof the parties have hereunto, and to another instrument of same tenor and date, set their hands and seals the date first above written. [Seal.] ISAAC HARTMAN. AUGUSTIN OLVERA. Acknowledged in Los Angeles county, February 3, 1869, before JAMES F. LANDER, Notary Pub-

lic. Filed for record in the recorder's office of San Diego county, February 20, 1871.' That the said contract was fully performed by the said Hartman on his part, so that on the 1st day of September, 1876, he procured to be issued a patent from the United States for the rancho of the said Ex-Mission of San Diego, as described in said contract, and to the extent of 58,875.38 acres. That theretofore, to-wit, on or about the 23d day of March, 1869, by his deed of that date, said Isaac Hartman, for a good and valuable consideration, conveyed all his right, title, and interest in said rancho, acquired under and by virtue of the aforesaid contract made by said Olvera with said Hartman, and of said conveyance from said Hartman to said Lucio, he, the said Lucio, became the owner, and was and is entitled to an interest or share, of ——— acres, undivided, in said rancho; and that he has now, and has had since the date of said conveyance, the just and equitable title thereto. That said Lucio, as tenant in common for more than five years prior to the commencement of this suit, had been in possession of said premises, and has paid his proportionate share of all the costs and expenses attending the proceedings taken herein, for the partition of said rancho. That at the time of the death of the said Augustin Olvera, as aforesaid, he held the legal title to more than one-half, undivided, of said rancho, subject to the aforesaid equitable interest of the said Lucio. Wherefore plaintiffs pray that by the decree of this court there be set off to the said Lucio, in severalty, the said 6,083.2743 acres derived to him as aforesaid."

To this amended complaint an answer was filed, in which it is alleged that Augustin Olvera died on the 6th day of October, 1876, and that in June, 1882, the defendant Juan de Toro was duly appointed administrator of the estate of said Olvera, deceased, and that said decedent was at the time of his death seised in fee of 30,000 acres undivided of said Rancho Ex-Mission San Diego, and that his heirs and representatives have ever since been seised in fee of said interest. Further answering, said defendant Toro alleges that the plaintiff's cause of action is barred by the provisions of sections 318, 319, 337, 343, Code Civil Proc. He denies all the allegations of the complaint not admitted by said answer. By this all the material allegations of the complaint were denied, among which is the allegation of full performance by Hartman, on his part, of the contract between him and Olvera. Upon that issue the finding of the court is as follows: "That immediately after the execution of the agreement between Augustin Olvera and Isaac Hartman said Hartman entered upon the performance of the stipulations in said agreement contained on his part to be performed, and after his sale to plaintiff Lucio, as found in finding 2, said Lucio and Hartman continued in the performance of said stipulations, and did so continue by themselves, or their agents and attorneys, to prosecute to a final conclusion the agreements and stipulations in said agreement contained on the part of said Hartman to be performed. That

owing to a quarrel between Hartman and Olvera, about the year 1874, Olvera became dissatisfied with Hartman, and, on behalf of himself and the heirs of Santiago Arguello, the confirmee of said Ex-Mission rancho, employed one A. St. Clair Denver, an attorney at law of Washington city, District of Columbia, to prosecute the claims of said heirs, and of the interest of said Augustin Olvera in and to the Rancho Ex-Mission of San Diego, before the proper department, at Washington city aforesaid; and thereafter, by the joint exertions of said A. St. Clair Denver and the Honorable Cornelius Cole, acting as attorney for Hartman and Luco, a patent was duly obtained, as alleged in the complaint, on the 1st day of September, 1876. That owing to the death of the principal parties to the said agreement, to-wit, Hartman and Olvera, the great lapse of time and uncertainty of recollection of surviving witnesses, under the evidence in this case, it is impossible to determine and measure the extent of performance of plaintiff or his vendor, Hartman, under the agreement aforesaid, and the court finds only that up to the time of the issuance of the patent aforesaid, there had not been a full and complete or substantial performance of that agreement on the part of Hartman or Luco as vendee, but only a partial performance thereof." Finding 5.

The appellant contends that a correct reading of this finding shows that Hartman fully performed, and that upon such performance his estate in equity became indefeasible. Respondent claims that the concluding sentence is a finding of the ultimate fact that there was not a full and complete or substantial performance of the agreement on the part of Hartman or Luco. The finding, in our opinion, is ambiguous and uncertain. Appellant was entitled to an unequivocal finding on the question of performance. If, however, the finding can be construed as a finding in favor of respondent on that subject, it is sufficient to say that, in our opinion, it is not supported by the evidence. We think it is clearly shown that Hartman and Luco fully performed the stipulations to be performed under the agreement. There is no substantial conflict in the evidence as to what was done by Hartman and his assignee, Luco, in procuring the patent. They did all that was necessary to be done in order that the patent might issue for the quantity of land which was finally granted. The fact that Olvera, in conjunction with other parties not parties to the contract with Hartman, deemed it proper to employ Denver to assist in procuring the patent, and that Denver did render valuable services in that connection, in no way affects the right of Hartman or Luco under the contract. Olvera could not by employing other persons defeat the rights of Hartman and Luco under the contract.

Whether the finding be regarded as contradictory and uncertain, or a finding that there was no substantial performance of the agreement on the part of Hartman and Luco, the judgment will have to be reversed, unless the finding that the cause of action was barred by the statute of lim-

itations can be sustained. In their answer the defendants allege that plaintiff's cause of action was barred by the provisions of sections 318, 319, 337, 343, Code Civil Proc., and upon the issues thus raised the court found that the cause of action was barred by the provisions of sections 337 and 343, but made no reference to sections 318 and 319. We cannot agree with appellant in his contention that the findings of the court on these issues are not findings of ultimate facts, but are conclusions of law. It is necessary, therefore, to consider the question as to whether these findings are supported by the evidence. We think they are not.

The court found (finding 7) that after the issuance of letters testamentary to Olvera, and before they were revoked, to-wit, November 5, 1877, the plaintiff demanded of Olvera, as executor, a conveyance to him, Luco, as tenant in common, of 13,904.31 acres of the Mission rancho, under and in accordance with the terms of the contract between Olvera and Hartman; and also found (finding 14) that Olvera in his lifetime, "after the year 1874, and his representatives after his death, always repudiated any obligation under said contract to Hartman, or his assignee, Luco, and claimed to have and hold the whole interest to which he (Olvera) held the legal title when he died, adversely to Hartman or his assignee, free from any claim on the part of either under said contract." But these findings do not show a disavowal of the trust relations created by the contract, and notice to the plaintiff of such disavowal. We are left in ignorance as to the reason why Olvera refused to make the deed requested. It is not found that he refused to make the deed because he denied the existence of such relation of trustee and *cestui que trust*, nor is it found that he so stated to Luco, or that Luco so understood his refusal. Olvera was under no obligation, in fact had no authority, to make the conveyance demanded without an order of the probate court, and it was the duty of the party demanding the deed to apply to the court for the necessary order. Sections 1597,¹ 1598,² 1600,³ 1606, 1607, Code Civil Proc. A repudiation of the trust by Olvera, and notice thereof, cannot, therefore, be predicated upon the facts found. It certainly cannot be said that the mere fact of refusal under the cir-

Section 1597 provides that when a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.

¹ Section 1598 provides that on presentation of a verified petition by any person claiming to be entitled to such conveyance, setting forth the facts upon which the claim is predicated, the court, or judge thereof, must appoint a time and place for hearing the petition, etc.

² Section 1600 provides that if, after a full hearing upon the petition and objections, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made, etc.

cumstances is sufficient to show notice to the beneficiary of such repudiation, and time begins to run against a trust only from the time it is openly disavowed by the trustee, and the adverse claim is clearly and unequivocally made known to the *cestui que trust*. Finding 14 we think is not supported by the evidence; but, assuming that it is, it simply shows a repudiation of any obligation under the contract, and an adverse claim without notice thereof to Hartman, or Lucio, his assignee. The testimony of Forbes shows that there was a quarrel between Hartman and Olvera in 1874, and the court finds that about that time Olvera became dissatisfied with Hartman, but the nature of the quarrel is not stated. The trouble between Hartman and Olvera seems to have been caused by the attempt on the part of the former to have Olvera removed as administrator of the estate. Olvera claimed that Hartman was working against him. This claim could not have referred to the matter of procuring a patent, and the court has found as a fact that Hartman and Lucio continued in the prosecution of the stipulations contained in the agreement. If it be assumed, however, that the quarrel related to and arose out of the matters referred to in the contract, the action of Olvera could not bind Lucio. Hartman had assigned his interest in the contract to Lucio long prior to the time of the conversation referred to, and of this fact Olvera had both actual and constructive notice. Olvera's repudiation could not affect the rights of Lucio unless the latter had notice thereof, and there is nothing in the record to show that he ever gave notice to Lucio of his intention to repudiate the claims of Hartman under the contract. Lucio and Hartman continued to perform the stipulations of the contract on their part to be performed up to the time of the issuance of the patent. Lucio made large expenditures in prosecuting the claim and in procuring the patent. He expended about \$6,000, and gave Bolton, for the assistance rendered in the surveyor general's office, 500 acres of land.

By the terms of the contract between Hartman and Olvera an express trust was created. It is not necessary in the creation of an express trust to use any particular form of words. The relation of trustee and *cestui que trust* is established, and an express trust created, if the language used in the instrument creating the trust expresses the intention that one party shall hold the legal title and the other shall have the beneficial interest. The language of the contract before us is a clear declaration on the part of Olvera that thereafter he would hold the legal title in trust for Hartman, to the extent of the latter's beneficial interest under the contract. Full performance by Hartman created an indefeasible estate in equity, which could not be defeated or divested by Olvera without positive and unequivocal repudiation of the trust relation, and notice of such repudiation to the beneficiary. *Miles v. Thorne*, 38 Cal. 338; *Love v. Watkins*, 40 Cal. 547; *Hearst v. Pujol*, 44 Cal. 235; *Hoffman v. Vallejo*, 45 Cal.

572; *Janes v. Throckmorton*, 57 Cal. 388. In *Hoffman v. Vallejo*, supra, it was held that an agreement like the one before us is not against public policy, and constitutes the attorney the equitable owner of an undivided interest in the lands, and creates the relation of trustee and *cestui que trust*. The statute begins to run against the trust "as soon as it is openly disavowed by the trustee insisting upon an adverse right and interest, which is clearly and unequivocally made known to the *cestui que trust*"; and when, for instance, such transactions take place between the trustee and *cestui que trust* as would, in the case of tenants in common, amount to an ouster of one of them by the other." *Spedel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610. Where there has been full performance by the vendee under a contract to convey the land, an indefeasible estate in equity vests in the vendee, and the possession of the vendor is presumed to be the possession of his *cestui que trust*, the vendee. The statute cannot run against one's own possession. *Wright v. Ross*, 36 Cal. 433. There can be no adverse holding "until the trustee denude himself of his trust by assuming to hold for himself, and notifies the *cestui que trust* of his treachery." *Haynie v. Hall*, 42 Amer. Dec. 427. Respondent claims that the word "repudiate," as used in finding 14, is equivalent to and implies notice. In the case cited (*Hecht v. Slaney*, 72 Cal. 366, 14 Pac. Rep. 88) it was held simply that denial or repudiation is not necessary in order to set the statute of limitations in motion in cases of implied trust. There may be disavowal and repudiation of the trust without knowledge or notice of the same being brought home to the beneficiary. *Miles v. Thorne*, supra. In *Bennett v. Morrison*, 120 Pa. St. 390, 14 Atl. Rep. 264, it was held that "the vendor of land sold under articles of agreement must not only in some way repudiate the agreement, but must take actual possession of the premises, either in person, by an agent, a tenant, or another vendee, in order to break the relation his vendee sustains to him under the agreement, before the statute will commence to run." In *Love v. Watkins*, supra, Mr. Justice TEMPLE said: "The conveyance from the trustee to the *cestui que trust* in such cases is but the execution of the trust; the right to obtain the legal title is but an incident to the estate of the *cestui que trust*. So long, therefore, as the estate exists, so long will the right to acquire the legal title subsist. It is like the right of a tenant in common to compel partition, and is not a cause of action which accrues in the sense of the statute of limitations, and which may be lost by the lapse of time. The trustee and *cestui que trust* have the same title, and do not hold adversely so long as the rights of neither are denied." Although the question presented for consideration in that case was whether a vendee in possession under an executory contract, who had fully performed the agreement on his part, but had not obtained a deed, could compel a specific performance after the lapse of four years from the time when he might have demanded a deed, yet

the doctrine announced by the learned judge is sound in principle and supported by authority. In *Harris v. King*, 16 Ark. 122, it was held that a vendor who had received the purchase money became the trustee of the vendee, and, although actually in possession of the land, held the naked legal title in trust for him, and the statute of limitations was no bar to an action for a specific performance of the contract, if the vendor had done no act inconsistent with the vendee's title, other than simply holding possession. In *Graham v. Nelson*, 5 Humph. 605, it was held that the possession of the vendor before conveyance would be construed for the benefit of the *cestui que trust* where it could be reasonably presumed to be in accordance with the trust, and the statute would not run. In that case none of the parties was in possession of the land. See, also, Ang. Lim. §§ 137, 138; *Hemming v. Zimmerschitte*, 4 Tex. 159; *Lewis v. Hawkins*, 23 Wall, 119; Pom. Eq. Jur. §§ 105, 147, 155, 368, 1010, 1046. In *Rush v. Barr*, 1 Watts, 110, the court said: "The statute of limitations is a most useful one, and ought not lightly to be frittered away; but there are cases to which it does not apply. Whenever the legal title is in one, and the real interest in another, these form but one title, and the statute does not run between them until the trustee disclaims and acts adversely to the *cestui que trust*. * * * And so in all cases where two persons have each an interest in a tract of land of such kind that both their interests form but one title, and by their agreement one is to possess for his own use and the use of the other. In such cases the statute does not run until he in possession disclaims the right and interest of the other, denies his right and refuses possession, and such disclaimer and denial must be such that the other has notice of it. It is not sufficient that it is denied secretly, or an agreement inconsistent with it is made and concealed." See, also, Hill, Trustees, 264, note 3; *Huntly v. Huntly*, 8 Ired. Eq. 250; *Tiff. & B. Trusts*, 715-717. In *Hemming v. Zimmerschitte*, supra, Chief Justice HEMPHILL, speaking for the court, said: "It is an acknowledged principle that vendor and vendee, under an executory contract for the sale of lands, occupy, mutually and respectively, the relation of trustee toward each other, (Sugd. Vend. 160,) so long as they do not indicate by their acts an intention to refuse compliance with the obligations imposed by their contract. In this case, the vendee having performed his obligations, the vendor's subsequent possession or interest in the land was held in trust, and in subordination to the superior equitable right of the vendee; and this possession would continue to maintain its fiduciary character, until the vendor would manifest an intention to claim and enjoy the land as his own." In *Holman v. Criswell*, 15 Tex. 394, the court applied the same rule. In that case, like the one at bar, there had been no actual possession by either party. The court said: "The obligations of the vendee having been already discharged, limitation would not run against the vendee, until the vendor manifested an inten-

tion, by adverse possession or some hostile act, to claim and hold the land as his own."

In this case the transcript shows no words or conduct on the part of Olvera indicating an intention to repudiate the trust; at least, there is nothing in the record to show that Luco had any notice of such an intention. After the assignment by Hartman to the plaintiff, the former could not by any statement to Olvera prejudice the rights of Luco, unless thereafter there was a failure by him and plaintiff to perform the work required by the contract. At the time it was alleged and found that Hartman said he would have nothing further to do with the matter, no cause of action had accrued against which the statute of limitations could be put in motion, and, as we have seen, Hartman and Luco fully performed the conditions of the contract, and the estate of Olvera received the benefit of their work. Nearly all of the cases relied on by respondent are cases of resulting or implied trusts. In such cases it is uniformly held that possession is necessary to prevent the running of the statute. In cases of express trust cited by respondent, it is true the courts rested their decisions upon the ground that the possession of the *cestui que trust* was sufficient to prevent the bar. No authority has been cited holding that in case of an express trust the statute will run against the vendee after full performance because he is out of possession, except *Brennan v. Ford*, 46 Cal. 8; and what was said there on the subject was unnecessary to the decision, which went upon the ground that Brennan's cause of action did not accrue until the delivery of the deed, January 31, 1867, (within four years prior to the commencement of the action.) The actual possession of the vendor, or non-possession of the vendee, is a circumstance, of course, to be considered in determining whether there has been a repudiation of the trust and notice thereof to the vendee. But it is not controlling. The relations existing between vendor and vendee, after full performance, are governed by the same rules as those which exist between ordinary tenants in common, so far as repudiation of title and ouster are concerned. *Speidel v. Henriel*, supra.

Upon the issuance of the patent in September, 1876, the plaintiff became vested with an equitable estate in the land, and not merely a right to the land, as fully as if he had made a contract of purchase, and had paid the full amount of the purchase price. The defendant thereafter held the legal title in trust for him, and the constructive possession which followed the legal title inured to the benefit of the plaintiff, as well as to the benefit of the defendant. The plaintiff could be divested of this estate in the land by transfer or adverse possession, but not by mere lapse of time. The court did not base its decision upon any adverse holding of the defendant, but upon the ground that the action should have been commenced within four years after the plaintiff had acquired the right to a conveyance, or within four years after the repudiation of his claim by

the defendant. It may be conceded that, if the action were merely to procure a deed of conveyance in accordance with the terms of the agreement, the statute of limitations would be a defense, upon the ground that such action, being purely personal, would be barred by lapse of time. It would not follow, however, that even upon such failure the plaintiff would be unable to maintain his action in partition. The deed of conveyance would be only additional evidence of his rights in the land. It is not necessary that the plaintiff in an action for partition should have the legal title to the land. *Watson v. Sutro*, 86 Cal. 527, 24 Pac. Rep. 172, and 25 Pac. Rep. 64. The facts establishing his right to the land can be shown in the suit for partition, and the same result must follow therefrom without regard to the character of evidence by which they are shown. Under our system of procedure, the form of action is disregarded, and the plaintiff seeking relief is required to state only the facts constituting his cause of action. This, however, is not an action "upon" the contract between Hartman and Olvera. That contract is simply a piece of evidence which the plaintiff uses in establishing his right to the land as he would a deed or any other evidence of title. A finding of the court that the contract had been completely executed on the part of Hartman would of itself be a determination that the plaintiff is entitled to the land provided for in the contract. The contract would then cease to be an element in the case, and such finding of complete performance would throw upon the defendant the burden of showing some act upon his part subsequent thereto sufficient in law to divest the plaintiff of his right to the land.

We do not think the amendment to the complaint filed December 13, 1886, stated a new cause of action. The action was originally commenced for a partition of the rancho. The amendment merely stated more particularly the source and evidence of plaintiff's title. That evidence does not constitute the cause of action. We think that in this action for a partition there can be no doubt that the parties may assert any title which they have, legal or equitable. *Gates v. Salmon*, 85 Cal. 593; *Martin v. Walker*, 58 Cal. 596; *Watson v. Sutro*, supra. In equity the plaintiff has a perfect title. At the time this action was commenced he had the legal title to several thousand acres of land, besides the equitable title to the lands in controversy. The court had jurisdiction of the subject-matter, and acquired jurisdiction of the parties.

It is claimed by respondent that the specifications of insufficiency of the evidence are not made with sufficient particularity to entitle appellant to question the findings of the court. We think this point is not well taken.

A number of errors are assigned by appellant, but in one only we think there is merit. The plaintiff offered to prove that he and Hartman expended large sums of money to preserve the estate of Arguello. The offer was rejected, and plaintiff excepted. In view of the fact that defendant

claimed Hartman had abandoned his demand under the contract, it was material and relevant, we think, to show that Hartman and Luco were performing services and expending large sums of money to preserve the estate of Arguello, in order that there would be something to divide after payment of the debts and expenses of administration, and after the patent should be issued. Judgment and order reversed, and cause remanded for a new trial.

We concur: HARRISON, J.; SHARPSTEIN, J.; GAROUTTE, J.

BEATTY, C. J. I dissent. There was nothing in the contract between Olvera and plaintiff's assignor, Hartman, to distinguish it from any other executory contract to sell land. A right of action to enforce specific performance of Olvera's contract to convey accrued, if ever, upon the issuance of the patent in September, 1876, and was barred in four years. This action, as between Luco and De Toro, is in effect nothing more nor less than an action on that contract,—to specifically enforce it,—and it was not commenced until more than six years after the statute had begun to run, and two years after the bar had attached. As to other points discussed in the opinion of the court I express no opinion.

DE HAVEN, J. I dissent from the judgment, and concur in the foregoing opinion of Chief Justice BEATTY.

McFARLAND, J. I dissent from the judgment of reversal, and adhere to former opinion. 18 Pac. Rep. 866.

(91 Cal. 632)

MOORE v. EARL *et al.* (No. 14,106.)

(Supreme Court of California. Nov. 11, 1891.)

WILLS—PROBATE—CITATION TO HEIRS—EXECUTOR'S BOND—SURETY—ESTOPPEL.

1. Recitals, in an order admitting a will to probate, that due proof was made to the satisfaction of the court that notice had been given of the time appointed for proving the will and hearing the petition, and that citations were duly issued and served as required by the previous order of the court, and that notice had been given according to law to all persons interested, warrants the presumption that an order had been regularly made directing the issuance of a citation to the heirs residing in the county, as required by Probate Act Cal. 1851, § 14, providing that, if the heirs reside in the county, the court shall direct citations to be issued and served on them to appear and contest the probate of the will at the time appointed.

2. A recital in an executor's bond that, "by order of the probate court * * * duly made and entered, * * * the above-bounded H. was appointed executor," etc., estops the surety to deny that the order appointing the executor was duly made and entered.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge. Action by F. J. Moore on the bond of C. W. Hathaway as executor and D. W. Earl as surety. Judgment for plaintiff. Defendant Earl appeals. Affirmed.

Johnson, Johnson & Johnson, for ap-

pellant. *Catlin & Blanchard*, for respondent.

VANCLIEF, C. This is an action upon the bond of an executor for the faithful execution of his trust according to law. The plaintiff recovered judgment, and the defendant Earl, who is a surety on the bond, appeals from the judgment, and also from an order denying his motion for a new trial. The defendant Hathaway was appointed executor in May, 1868, and, upon the execution of the bond in suit, letters testamentary were issued to him, upon which he indorsed his official oath as required by law, and thereupon took possession of the estate of the testator of the value of \$16,637, and returned and filed an inventory thereof on May 11, 1868. Upon a final settlement of his accounts in September, 1883, the court found in his hands a balance of \$12,577. This balance, by the decree of distribution, was given to the plaintiff, who brought this suit on the executor's bond to recover the full penalty thereof, which is \$6,000. The only point made for the appellant is that the probate court acquired no jurisdiction to probate the will, or to issue letters testamentary, and therefore that, as to the surety, the executor's bond is void. The only alleged defect in the proceedings, by reason of which it is claimed that the probate court failed to acquire jurisdiction, is that no order of that court, directing the issuance of a citation to the heirs residing in the county, as required by section 14 of the probate act of 1851, is found upon the records or files of the court, except so far as it appears by recital in the order admitting the will to probate. Section 14 of the act of 1851 provides: "If the heirs of the testator reside in the county, the court shall also direct citations to be issued and served upon them to appear and contest the probate of the will at the time appointed." The order admitting the will to probate, and appointing Hathaway executor, recites, among other things, that due proof was made, to the satisfaction of the court, "that notice has been given of the time appointed for proving said will, and for hearing said petition, and that citations have been duly issued and served, as required by the previous order of this court, and it appearing to this court that notice has been given according to law to all parties interested," etc. In the absence of any other record, evidence of an order that a citation issue to the heirs residing in the county, or of its service, I think these recitals sufficient to warrant the presumption that such order had been regularly made, and that the citations had been duly issued and served. It might be otherwise if it appeared of record that an insufficient order relating to the citation had been made, or that the citation issued was not in substantial compliance with the order, or that the mode of service was fatally defective, as, in such case, it would not be presumed that a different order had been made or a different citation issued, or that service had been made in a different mode; but the record does not show, or purport to show, the form or substance of the

order, or of the citation, nor the mode of service; and therefore the presumption that the order to issue and serve the citation was regularly made, and that the citation was regularly issued and served, does not contradict the record in any respect, but is in perfect accord with the recitals of the order admitting the will to probate. *Freem. Judgm. §§ 125, 180; Black, Judgm. § 277; Irwin v. Backus, 25 Cal. 214; Fox v. Minor, 32 Cal. 120.* Again, the bond in suit recites that "by order of the probate court of the county of Sacramento, duly made and entered on the 11th day of May, A. D. 1868, the above-bounden Charles W. Hathaway was appointed executor of the estate of Ferris Jewett Moore, deceased, upon executing a bond," etc. Under the circumstances of this case, both Hathaway, the principal, and Earl, the surety, are estopped by this recital in the bond from denying that the order appointing Hathaway executor was "duly made and entered." *People v. Jenkins, 17 Cal. 500; Fox v. Minor, 32 Cal. 120; Bigelow, Estop. 361, and cases cited; Brandt, Sur. §§ 29, 30; People v. Falconer, 2 Sandf. 83; McClure's Case, 80 Pa. St. 167; Foster v. Com., 35 Pa. St. 148.* I think the judgment and order should be affirmed.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

31 Cal. 636

HARMS v. SILVA *et al.* (No. 13,801.)

(Supreme Court of California. Nov. 14, 1891.)

MORTGAGES.—CERTIFICATE OF ACKNOWLEDGMENT
—SUBSEQUENT INCUMBRANCERS.

Civil Code Cal. § 2957, provides that a mortgage on growing crops is void "as against creditors of the mortgagor and subsequent purchasers and incumbrancers for value and in good faith, unless" accompanied by a certain affidavit and acknowledgment, proved, certified, and recorded in like manner as grants of real property. *Held* that, where plaintiff took a mortgage on growing crops, knowing that defendants held a prior mortgage thereon, but without knowledge that such mortgage was defective for want of the prescribed certificate, plaintiff is not a subsequent incumbrancer in good faith, and defendants' mortgage is valid as against plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Action by George Harms against M. Bruno Silva and L. B. Keating to recover 100 tons of baled hay, or its value. Judgment for defendants. Plaintiff appeals. Affirmed.

Gell & Morehouse and G. W. Roadhouse, for appellant. *Dorn & Parker and Frederick Sherwood*, for respondents.

TEMPLE, C. This action is to recover 100 tons of baled hay, or the value. Defendants had judgment, and plaintiff appeals from it and the order refusing a new trial. The hay was raised by Silva, who on January 21, 1889, mortgaged the same, then a growing crop, to Keating, to secure the sum of \$350, with interest; also "whatever further necessary costs that may be

needed to guard and care for said crops." The mortgage was duly executed, and had attached to it the affidavit required by section 2957 of the Civil Code; but the officer neglected to certify the acknowledgment, and Keating had the mortgage recorded by the county recorder, without the certificate. Afterwards, March 29, 1889, Silva mortgaged the same crop to plaintiff to secure a debt due from Silva to him. Plaintiff took his mortgage with full knowledge of Keating's mortgage, and expecting at the time to obtain a second lien, being unaware of any defect. Plaintiff's mortgage was duly executed, and was recorded on the day it was executed. Each mortgage contains a stipulation giving the mortgagee a right to take possession of the crop when harvested. June 12, 1889, the hay having been cut and baled, the plaintiff attempted to take possession, and did receive and haul away eight bales. Returning for more, he found defendant Keating in possession, whereupon he commenced this action.

The only question in the case is whether Keating's mortgage is void as to plaintiff. Section 2955 of the Civil Code prescribes that chattel mortgages may be made upon certain personal property therein enumerated, and including growing crops. Section 2956 provides a form with which such mortgage must substantially comply. Keating's mortgage does substantially comply with the prescribed form. The next section makes such mortgage void, "as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless" accompanied by a certain affidavit and acknowledgment, proved, certified, and recorded in like manner as grants of real property. The fact that the mortgage, in the absence of a proper record, is expressly made void as to purchasers and incumbrancers for value and in good faith, implies that it is valid as to all others without such record. Plaintiff, having taken his mortgage with full knowledge of Keating's mortgage, is not an incumbrancer in good faith. *Gassner v. Patterson*, 23 Cal. 299, is not in point. As the statute then stood, (St. 1861, p. 197,) it provided that no chattel mortgage should be valid (except as between the parties thereto) unless made, executed, and recorded according to the provisions of that act. As the statute then stood, it might well be said that a chattel mortgage was a privilege to be secured only by a strict conformity to the act. The Code provisions as to those chattels on which a mortgage is permitted puts them, except as to certain specified conditions, on the same basis as mortgages upon real estate. It matters not that plaintiff was a creditor, admitting that he is shown to have been such. He is here claiming as a subsequent incumbrancer only, and has no rights in this matter unless he acquired them by his mortgage. We advise that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCELIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

v.27p.no.20—69

STEVENSON v. COLGAN. (No. 14,605.)

(Supreme Court of California. Nov. 16, 1891.)

CONSTITUTIONAL LAW—LEGISLATIVE POWERS—INVASION BY THE JUDICIARY.

Where an act of the legislature appropriating money to an individual for services rendered the state is valid on its face, courts cannot look into evidence *aliunde* to determine whether it was a gift in violation of Const. Cal. art. 4, § 81, providing that the legislature shall have no power to make any gift of any public money.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Petition by Jonathan D. Stevenson for *mandamus* to compel one Colgan, as state comptroller, to draw a warrant on the state treasurer. Judgment for petitioner. Defendant appeals. Affirmed.

Barham & Boltou, (Attys. Gen. Hart, *amicus curiae*), for appellant. *Geo. A. Wentworth* and *A. P. Van Duzer*, for respondent.

DE HAVEN, J. This is an application for a writ of *mandamus* to be directed to the defendant as state comptroller, and commanding him to draw a warrant on the state treasurer for the sum of \$125, to which amount petitioner claims that he is entitled by virtue of the provisions of an act of the legislature approved March 31, 1891. The act is entitled "An act for the relief of Jonathan D. Stevenson, and to appropriate money therefor," and, so far as necessary to be stated here, it is as follows: "Section 1. The sum of one hundred and twenty-five dollars per month, payable monthly, for the period of twenty-one months, is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, for the relief of Col. Jonathan D. Stevenson: provided, however, that said appropriation shall cease upon the death of said Stevenson, if he shall die before said period has elapsed; the sums paid under the provisions of this act to be accepted by the said Stevenson in full payment and satisfaction of all claims of every kind and nature that he may have, or claim to have, against said state for services or otherwise." The answer of the defendant alleges that petitioner never at any time had or has "any claim of any kind or nature whatsoever against the state of California for services rendered, or for any other thing done, had, or performed by the said Jonathan Stevenson, or for anything of value furnished to the state of California;" and that the appropriation made by the said act of the legislature was intended as a gift to the petitioner. The answer then proceeds in an informal way to allege that, prior to the admission of California as a state, the petitioner expended money and performed services "in surveying and preparing charts of the bay of Suisun and the Sacramento and San Joaquin rivers," and, in substance, avers that this service and expenditure of money constitute the foundation of petitioner's alleged claim against the state, and for which the appropriation contained in the act referred to was made. A demurrer to the answer was sustained by the court below, and thereupon judgment

was rendered in favor of petitioner, as demanded in his petition. The defendant appeals.

Section 31, art. 4, of the constitution, provides that the legislature shall have no power "to make any gift, or authorize the making of any gift, of any public money or thing of value, to any individual;" and section 32 of the same article also declares: "The legislature shall have no power to grant, or authorize any county or municipal authority to grant, any extra compensation or allowance to any public officer, agent, servant, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part." By these provisions of the constitution there is denied to the legislature the right to make direct appropriations to individuals from general considerations of charity or gratitude, or because of some supposed moral obligation resting upon the people of the state, and such as a just and generous man, although under no legal liability so to do, might be willing to recognize in his dealings with others less fortunate than himself. It was because of abuses which had crept into legislation by reason of the unlimited power theretofore exercised by the legislature in determining what individual claims should be recognized by private act, and to relieve in some degree legislators from the importunities of persons interested in securing such appropriations, that the power of the legislature was thus limited by the present constitution of this state. In this view there can be no doubt that if the facts are as alleged in the answer of defendant the act under consideration ought never to have been passed. But these facts do not appear upon the face of the act itself, and the question is thus presented whether it is competent for the court in this or any form of action to receive evidence *alunde* to establish such facts, and thus to impeach and overthrow a law which, upon its face and independent of proof, is presumptively valid. This case, as thus presented, is to be distinguished from those in which it has been held that the court may look into the journals of the legislature for the purpose of determining whether a statute was in fact passed by the requisite votes required by the constitution. In such cases the question is whether the law was in fact enacted, and not whether the legislature in passing the statute properly discharged its duty by the preliminary ascertainment of facts which alone would justify such legislative action.

In our opinion, the question which we have stated as the one for decision here must be answered in the negative. While the courts have undoubted power to declare a statute invalid, when it appears to them in the course of judicial action to be in conflict with the constitution, yet they can only do so when the question arises as a pure question of law, unmixed with matters of fact, the existence of which must be determined upon a trial, and as the result of, it may be, conflicting evidence. When the right to enact a law depends upon the existence of facts, it is the

duty of the legislature before passing the bill, and of the governor before approving it, to become satisfied, in some appropriate way, that the facts exist; and no authority is conferred upon the courts to hear evidence and determine, as a question of fact, whether these co-ordinate departments of the state government have properly discharged such duty. The authority and duty to ascertain the facts which ought to control legislative action are, from the necessity of the case, devolved by the constitution upon those to whom it has given the power to legislate, and their decision that the facts exist is conclusive upon the courts, in the absence of an explicit provision in the constitution giving the judiciary the right to review such action. We therefore hold that, in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice. If the law, when thus considered, does not appear to be unconstitutional, the court will not go behind it, and by a resort to evidence undertake to ascertain whether the legislature in its enactment observed the restrictions which the constitution imposed upon it as a duty to do, and to the performance of which its members were bound by their oaths of office. "If evidence was required, it must be supposed that it was before the legislature when the act was passed; and, if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be equivalent to such finding." Cooley, Const. Lim. *187. This view seems to be sustained by the decisions of the highest courts of other states, and is in harmony with the central idea of the constitution in prescribing the independence and equality of the three great departments of the state. The following are some of the cases which in principle sustain the conclusion we have reached: *Manufacturing Co. v. Shanahan*, (N. Y. App.) 28 N. E. Rep. 358; *Rumsey v. People*, 19 N. Y. 41; *Hovey v. Foster*, 118 Ind. 502, 21 N. E. Rep. 39; *Lusher v. Scites*, 4 W. Va. 11; *De Camp v. Eveland*, 19 Barb. 81.

If experience shall demonstrate that further restriction upon legislative power over the subject of appropriations of public money is necessary, it is within the power of the people to so amend the constitution as to provide that, notwithstanding an appropriation made by the legislature for its payment, the legality of every claim against the state shall or may be the subject of judicial investigation as to the facts upon which it rests. But, in the absence of a plain direction to that effect, the courts are not authorized to institute such an inquiry. As already stated, the act in question does not show upon its face the nature of the claim which the petitioner made against the state, or that the appropriation thereby made is a gift. The statute is unusual in form, and it may be difficult to assign any good reason for the singular provision that the state shall discharge by monthly installments the indebtedness which the act admits, and, in

the event of petitioner's death before it is fully paid, shall be released from the payment of any balance then due; but this does not affect the question of the power of the legislature to so provide, nor authorize the court to declare that the act was enacted in absolute disregard of the constitution. Judgment affirmed.

We concur: GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

91 Cal. 555

MARRINER v. DENNISON. (No. 14,154.)

(*Supreme Court of California*. Nov. 17, 1891.)

On rehearing. For former report, see 27 Pac. Rep. 927.

PER CURIAM. The opinion heretofore filed in the above-entitled cause is hereby modified by striking therefrom that portion which is included under the subdivisions numbered, respectively, 2 and 3.

91 Cal. 655

LILLEY et al. v. PARKINSON. (No. 13,951.)

(*Supreme Court of California*. Nov. 18, 1891.)

OPINION EVIDENCE—MEDICAL BOOKS.

On trial of an action for damages for negligence and unskillfulness of a physician in setting plaintiff's broken arm, it is error to permit plaintiff to read to her medical witnesses, in their examination in chief, extracts from a standard work on surgery, and then to ask them if what was so read corresponds with their own judgment.

Department 2. Appeal from superior court, Contra Costa county; J. P. JONES, Judge.

Action by Sarah E. Lilley against Dr. Parkinson for damages. Judgment for plaintiff. The defendant appeals. Reversed.

Geo. A. Knight and A. C. Hartley, (Knight & Heggerty, of counsel,) for appellant. Eli R. Chase, (C. Ed. Miller, of counsel,) for respondent.

DE HAVEN, J. The defendant is a physician and surgeon, and this action is to recover damages for his alleged negligence and unskillfulness in setting a broken arm of the plaintiff, Sarah E. Lilley. The plaintiff recovered a judgment for \$1,000. The defendant appeals. Upon the trial the plaintiff was permitted, in the examination in chief of medical witnesses called by herself, to read extracts from Agnew's Surgery, shown to be a standard work and authority on that subject, and then to ask the witnesses if what was so read corresponded with their own judgment. The decision of the court in overruling the objection of defendant to this mode of examination was erroneous. The only effect of these questions and answers was to place before the jury the opinion of the author of the book referred to, and it is also apparent that this was the object sought. But it is not permissible, in this manner, to evade the general rule of evidence, which excludes medical books and opinions, and to introduce them as incompetent. *Com. v. St. John*, 117 Mass. 122; *Gallagher v. Railroad Co.*, 67 Cal. 17, 6 Pac. Rep. 569. In the case of *Marshall v. Brown*, 50 Mich. 148, 15 Pac. Rep. 55, *Fisher v.*

Railroad Co., 89 Cal. 399, 26 Pac. Rep. 894; *City of Bloomington v. Shroch*, 110 Ill. 219,—it was held not competent, upon cross-examination of a witness, to read to him extracts from medical books, and ask him whether he agreed in opinion with the author, when it was apparent that the sole object of so doing was to get before the jury the extracts so read as original evidence to sustain the theory of the party so cross-examining the witness. The principle upon which those cases were decided applies with even more force to the facts of this case, where the same forbidden result was accomplished by the manner in which the direct examination of the witnesses for plaintiff was conducted. Judgment and order reversed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

91 Cal. 659

ESTEP v. ARMSTRONG. (No. 13,990.)

(*Supreme Court of California*. Nov. 18, 1891.)

RIGHTS OF HEIRS—RECOVERY OF LAND.

Under Code Civil Proc. Cal. § 1452, providing that an executor or administrator is entitled to the possession of all the real and personal estate of his decedent, and the rents and profits of the real estate until the estate is settled, or until delivered over by order of the court to the heirs or devisees, and that the heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same against any one except the executor or administrator, an heir at law may maintain an action against one not the executor to recover possession and rents of real estate of which the testator died seised in fee, and which his will directed should be converted into money by his executrix as soon as practicable in her judgment, since such direction does not vest title to the land in the executor.

Department 2. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action of ejectment by Amanda C. Estep against James B. Armstrong. Judgment for defendant. The plaintiff appeals. Reversed.

T. H. Osment and J. H. Gove, for appellant. R. W. Crump and Woods Crawford, for respondent.

SHARPSTEIN, J. This is an appeal from a judgment entered against the plaintiff and in favor of the defendant in an action of ejectment. The record consists of the pleadings, findings, judgment, and a bill of exceptions. The court found that the plaintiff, Amanda C. Estep, is the daughter and heir at law of Joseph H. Estep, deceased. That the said Joseph H. Estep was, at the time of his death, seised in fee and possessed of those certain lands and premises in the complaint mentioned known as the "Fitzgerald Tract," describing the same according to the United States survey. That at the time of his death said Joseph H. Estep was the owner of the undivided one-half of all the remainder of the land described, as a tenant in common with the defendant James B. Armstrong, who owned the other undivided half thereof. That the defendant, at the time of the commencement of this action, was, and still is, in possession of cer-

tain of the lands in the complaint described, which lands are fully and particularly described in said finding. That said Joseph H. Estep left a last will and testament, of which a copy is set out in said finding, one clause of which only is material in this case, and that is as follows: "It is my will that, so soon after my decease as practicable in the judgment of my executrix hereinafter mentioned, all my property, whether real, personal, or mixed, be converted into money." That said will was duly admitted to probate by the probate court of Lake county on the 21st day of February, 1876. That plaintiff has never at any time been the owner, or seised in fee or otherwise, or possessed or entitled to the possession, of the lands described in the amended complaint herein, or in any cause or causes of action herein, or of any interest in said lands, or any part thereof, or of any of them. That defendant never at any time did oust or eject plaintiff from any of the lands described in said amended complaint, or in any cause or causes of action set out in said complaint. The bill of exceptions shows that the facts found by the court in the 1st, 2d, 3d, and 4th findings were admitted, and plaintiff then offered evidence to show the value of the rents of the premises, admitted to have been in defendant's possession at the commencement of this action, to which defendant objected, on the ground that such evidence was incompetent, irrelevant, and immaterial, for the reason that plaintiff had shown by her own evidence that she was never at any time the owner of any right to or interest in the land. The court sustained the objection, and plaintiff excepted.

An heir may maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator. Code Civil Proc. § 1452.¹ Does the direction contained in the will, to have all his property converted into money as soon as practicable after the death of the testator, deprive the heir of the right to maintain an action for the possession of the real estate of which the testator died seised in fee? There is no express devise in the will of any of the real estate of which the testator died seised in fee. In *Bergen v. Bennett*, 1 Calnes, Cas. 1, KENT, J., said: "If a man by his will directs his executors to sell his land, this is but a bare authority, without interest; for the land in the mean time descends to the heir at law, who, until the sale, would at common law be entitled to the profits." It was as well settled when this was said, as it is now, that where there is a direction in a will to have land converted into

money the conversion takes place as from the death of the testator. The provision of the Code that, "where a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the death of the testator," is simply declaratory of the common law. It was said by the chancellor in *Haxtun v. Corse*, 2 Barb. Ch. 521, that, "to deprive an heir or distributee of the property which the law gives him in case of intestacy, the testator must make valid and effectual disposition thereof to some other person." "We think," says the supreme court of Indiana, that "it is well settled by the current of American as well as of English decisions that mere direction to an executor to sell lands for the purpose of paying legacies or making distributions does not vest any title to the land in the executor. To cut off the heir at law the estate must be devised expressly or by implication to some other person." *Clendenning v. Lanus*, 3 Ind. 441. The Code, in our opinion, has not changed the law in this respect. The Code does not declare that a direction to convert land into money shall vest the title to the land in the executor. It leaves the law, as it always has been, that the direction in wills to convert land into money, or money into land, is for the benefit of those for whose use the conversion is intended to be made, and that, as to them, it is deemed to have been made from the death of the testator. But the Code does not provide that such a direction in a will shall operate as a devise of the land directed to be converted to the executor. In the absence of any devise of the land, the title vests in the heir on the death of the ancestor, and the heir may maintain an action to recover the possession of it against any person other than the administrator or executor. The findings that the plaintiff is the heir at law of Joseph H. Estep, deceased, and that he died seised in fee of certain of the demanded premises, are in conflict with the finding "that plaintiff has never been the owner, or seised in fee or otherwise, or possessed or entitled to the possession, of the lands described in the amended complaint herein, or in any cause or causes of action herein, or of any interest in said lands, or any part thereof, or of any of them." That is a sufficient ground for reversing the judgment. The court erred in excluding evidence of the value of the rents of the demanded premises while in the defendant's possession. As the heir at law, she was entitled to the rents, issues, and profits of the land so long as she was wrongfully kept out of the possession thereof. Judgment reversed, and cause remanded for a new trial.

We concur: DE HAVEN, J.; MCFARLAND, J.

81 Cal. 654

LANGAN v. LANGAN. (No. 13,593.)

(Supreme Court of California. Nov. 18, 1891.)

DIVORCE—ALIMONY.

1. The court had jurisdiction, in a divorce case, to order defendant to pay plaintiff \$25 per

¹ Code Civil Proc. Cal. § 1452, provides that an executor or administrator is entitled to the possession of all the real and personal estate of his decedent, and to receive the rents and profits of the real estate until the estate is settled, or until it is delivered over by order of the court to the heirs or devisees, and that the heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same against any one except the executor or administrator.

month alimony, though issue of fact had not been joined, and there was pending a demurrer to the complaint.

2. The order was not erroneous because the requirement to pay the amount fixed by it was not expressly limited to such time as the action should be pending.

Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action by Langan against Langan for a divorce. Defendant was ordered to pay \$25 per month alimony to the plaintiff, and from such order he appealed. Affirmed.

Matthews & Morse, for appellant. John E. Sundstrom, (Manuel Eyre, of counsel,) for respondent.

DE HAVEN, J. This is an appeal by the defendant from an order made in an action for divorce, allowing the plaintiff therein alimony. The order is as follows: "The order to show cause having been heretofore submitted to the court for consideration and decision, and now, the court having fully considered the same, it is ordered that the defendant pay to the plaintiff the sum of twenty-five dollars (\$25) per month alimony."

1. This order was made before any issue of fact was joined in the said action for divorce, and while there was pending a demurrer to the complaint, which demurrer was afterwards sustained. The order is not erroneous for this reason. The action for divorce was pending at the time it was made, and the court had undoubted jurisdiction to make it.

2. The order is not erroneous because the requirement to pay the amount fixed by it is not expressly limited to such time as the action in which it is made shall be pending. By necessary implication it ceases to have any operation after the entry of judgment.

3. We cannot say that in making the order upon the facts before it the court committed any abuse of discretion. Order affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

91 Cal. 667

BYRUM v. STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS. (No. 14,183.) (Supreme Court of California. Nov. 18, 1891.)

CHANGE OF VENUE.

In an action for breach of warranty of a harvesting-machine sold plaintiff by defendant, and which plaintiff alleged failed to work, defendant moved for a change of venue to S. county on an affidavit alleging that its principal place of business was in said county, that the contract sued on was made there, and that the breach, if any, did not occur in the county in which the action was brought. On the hearing of the motion plaintiff merely read his verified complaint, showing that he was a resident of the county in which suit was brought, and alleging that the breach of contract occurred there, but not stating where the contract was made or was to have been performed. Held, that the change of venue should have been granted.

Commissioners' Decision. Department 2. Appeal from superior court, Stanislaus county; W. O. MADDIX, Judge.

Action by Martin Byrum against the Stockton Combined Harvester & Agricultural Works. Defendant appeals from an order refusing a change of venue. Reversed.

W. L. DUDLEY, for appellant. W. E. TURNER and L. J. MADDOX, for respondent.

TEMPLE, C. Appeal from an order refusing a change of venue. The plaintiff resides in Stanislaus county, where the action was brought, and is a farmer. He purchased from defendant a Shippee Combined Harvester, which, as he avers, defendant guaranteed would do good and satisfactory work, but which wholly failed to perform as guaranteed, by reason whereof he was damaged. Defendant moved for a change of venue to San Joaquin county, upon an affidavit showing that the principal place of business of defendant is in Stockton, San Joaquin county, and that the contract sued upon was made at defendant's said principal place of business; also that the breach of said contract, if any, did not occur in Stanislaus county. There was also an affidavit of merits. On the hearing of the motion the plaintiff read in answer only his verified complaint. It is there averred that defendant is doing business in the state of California, and, among other counties, in the county of Stanislaus; that, among other things, the business of the corporation was to manufacture and sell a certain kind of machinery, known as the Shippee Combined Harvester, with Shippee and Grattan improvements. A contract is set out whereby defendant sold a machine to plaintiff with a guaranty as to performance, to wit, that said harvester would do and perform good and satisfactory work in the harvesting, cutting, and saving of grain, and would harvest plaintiff's grain in Stanislaus county at a greatly reduced expense, etc. It is shown that, relying upon the representations and guaranty, he purchased the machine, took it to his farm in Stanislaus county, where it wholly failed to perform; that the failure was owing wholly to the faulty manufacture and construction of said machine; "that this action is brought to recover damages sustained by plaintiff, growing out of the breach of contract of defendant as aforesaid; and that said breach occurred in the county of Stanislaus, and the liability of defendant thereon occurred in said county." The complaint does not state where the contract was made, or was to have been performed. The affidavit of defendant states that the contract was made in the county of San Joaquin, where the principal place of business of the corporation is. It is quite immaterial whether the corporation did business in Stanislaus county, if this contract was not made or was not to have been performed there. The affidavit of the moving party is positive to the effect that the contract, the breach of which is the subject of the action, was made in San Joaquin county. This fact is not controverted in the complaint, but it is there stated that the breach occurred in Stanislaus county. This is, however, a mere legal conclusion, probably drawn by the plead-

er from the fact that the failure of the machine to perform was in that county. It is merely an erroneous opinion. It is not stated on either side where the machine was delivered to plaintiff, but as the sale was at Stockton, defendant's principal place of business, the presumption is that it was delivered there. If the machine was, as charged, wholly inadequate and unadapted to perform according to the guaranty, the breach was there and then, and not when it failed to perform on plaintiff's farm in Stanislaus. The order appealed from should therefore be reversed, and defendant's motion to change the place of trial should be granted.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and defendant's motion to change the place of trial is granted.

92 Cal. 1

TROMANS v. MAHLMAN *et al.* (No. 13,149.)
(Supreme Court of California. Nov 19, 1891.)

HOMESTEAD—RESIDENCE ON LAND.

Defendants, husband and wife, were living in S. until August 21, 1883, when they and their children left the city with part of their furniture, and went to the homestead claimed, where they stayed that night. The following morning the husband returned to S., and telegraphed his wife to meet him at O., which she did, and there had executed and recorded a declaration of homestead, when she returned to the alleged homestead. The day following, the wife returned with her children to her husband at S., where they all remained. *Held*, that there was no actual residence on the land, within the homestead law, (Civil Code Cal. § 1263.)

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; NOBLE HAMILTON, Judge.

Action by Joseph Tromans against Henry Mahlman and Mary Jane Mahlman to recover the possession of a house and lot claimed by defendants as a homestead. Judgment for defendants. Plaintiff appeals. Reversed.

Metcalf & Metcalf and Benj. Williams, for appellant. *R. Percy Wright*, for respondents.

BELCHER, C. In June, 1882, one Lee conveyed to the defendant Henry Mahlman a lot of land in the town of Haywards, Alameda county. In May, 1883, Mahlman conveyed the lot as a gift to his wife, the defendant Mary Jane Mahlman. When these conveyances were executed, one Fisk held a mortgage made by Lee on the lot, and both conveyances were made subject to the mortgage. On the 22d day of August, 1883, Mrs. Mahlman executed and caused to be recorded a declaration of homestead on the lot, which was in all respects in accordance with the provisions of section 1263 of the Civil Code. In January, 1884, Fisk commenced an action against the mortgagor, Lee, and Mrs. Mahlman to foreclose his mortgage, and such proceedings were subsequently had that a decree of foreclosure was duly made and entered against the defendants therein. Under this decree an order of sale was issued, and the property was regularly

sold to the plaintiff herein, who in August, 1887, received the sheriff's deed therefor. In December, 1887, the plaintiff commenced this action to recover possession of the lot, alleging in his complaint that he was the owner of the same in fee-simple absolute. The defendants, by their answer, denied that plaintiff was the owner of the lot, or of any part thereof, in fee-simple absolute, or at all. After trial the court found the facts as follows: "(1) That the plaintiff, Joseph Tromans, is not the owner of the tract of land mentioned and described in the complaint herein, or of any part thereof, either in fee-simple absolute or at all. (2) That the defendants, Henry Mahlman and Mary Jane Mahlman, are the owners of said tract of land, and of every part thereof." Judgment was accordingly entered in favor of the defendants, from which, and from an order refusing a new trial, the plaintiff appeals.

It is admitted by counsel for appellant that, since Henry Mahlman was not made a party to the foreclosure suit, the judgment should be affirmed if the demanded premises had become the homestead of defendants before that suit was commenced; but it is contended that the declaration of homestead, which was executed and filed for record by Mrs. Mahlman, did not create a valid homestead, for the reason that she was not at the time actually residing upon the premises. It is objected by respondents that the statement on motion for new trial contains no sufficient specifications of the particulars in which the evidence is alleged to be insufficient to justify the decision of the court, and hence that this point cannot be considered; but we think the specifications should be held sufficient. "The purpose of the statute is apparent. It was to direct the attention of the court and counsel to the particulars relied on by the moving party, to the end that the evidence bearing on the specifications of error might be inserted in the statement, and considered by the court." *Eddelbuttel v. Durrell*, 55 Cal. 279. In *Pralus v. Mining Co.*, 35 Cal. 37, a specification similar to that found here was admitted to be sufficient.

The evidence as to the homestead was as follows: Mrs. Mahlman testified: "I am one of the defendants in this case, and was residing on the land in controversy in this action, which is situated at Haywards, Alameda county, at the time the declaration of homestead which has been spoken of was made and filed for record. There was a dwelling-house on the land then. My father and all the family I had in August, 1883, were living there with me at the time. Cross-examined: My husband was living with me on the place at Haywards on the 22d day of August, 1883. Before that time we were living at 717 Stockton street, in San Francisco. Was not living at 717 Stockton street on the 22d of August, 1883. That is a rooming-house. My furniture was not all there. Took part of the furniture to the place at Haywards. I took all household utensils; everything up to a broom. The furniture was there long before. It was sent over in January, 1883. My husband,

my father, and all my four children went to Haywards on the 21st of August, 1883. My husband stayed there one night, and went to San Francisco the following morning. I stayed there two nights, and then went back to San Francisco. We did not live in the house at Haywards before we went on the 21st of August, 1883. After August 23, 1883, resided continually in San Francisco, until about November, 1886.

* * * My husband went to San Francisco by the morning train on the 22d of August, 1883, and sent me a telegram to meet him at Oakland that day, and I met him there. The declaration of homestead was signed and acknowledged by me at Oakland, and after it was taken to the recorder's office my husband put me into the Haywards train, and he went to San Francisco. I returned to the house at Haywards, and remained there until the following day. I and my children and my father slept in the house at Haywards on the night of the 22d of August, 1883. We all left and returned to San Francisco on the 23d of August, 1883. I took the blankets, sheets, pillow-cases, and pillows back with me to San Francisco. I had no other property but that at Haywards at the time the declaration of homestead was filed. My husband had not filed a declaration of homestead at that time. All the land except that on which the housestands was used as a garden and orchard, and it was all inclosed with a fence. Redirect examination: My idea in making the declaration of homestead was that my children should have a home."

Henry Mahlman testified: "I am one of the defendants in this case. Remember the declaration of homestead, which has been spoken of here, being filed. On the night of the day before it was filed I was stopping in the house at Haywards, with my wife and family. Went there on the 21st of August, 1883. I went alone. My wife and children went the same day, along with her father, Mr. Miller. Went next morning to San Francisco, to attend to business. Had a declaration of homestead made out there, and telegraphed my wife to come to Oakland. She came in the afternoon, and signed and acknowledged the declaration of homestead, which was recorded, and then my wife returned to Haywards. Cross-examination: I rented the house 717 Stockton street, San Francisco, about 1879. Paid the rent to Madison & Burke for the months of August and September, 1883, and right along for two or three years after that. My furniture and things were there in August, 1883. In January, 1883, sent part of the furniture over to the house in Haywards. Only stayed one night there in August, 1883; that was the night between the 21st and 22d of August."

George W. Miller also testified: "I am the father of the defendant Mary Jane Mahlman. Remember going with her to Haywards, and taking the children. I remember Mahlman went there the same evening. Remember going to Haywards before that with an expressman. When I went with my daughter and the children we took supper at the house of a man named Geary, who lived close by. I went

over to the house from Geary's, and made it as comfortable as possible. It was a small house, about 24x12, with two rooms. We all slept there that night. The next day my daughter got a dispatch, and went to Oakland. I remained there with the children. She came back, and stayed with the children and me at the house that night."

It is settled law in this state that to constitute a valid homestead, the claimant must actually reside on the premises when the declaration is filed. *Prescott v. Prescott*, 45 Cal. 58; *Babcock v. Gibbs*, 52 Cal. 629; *Aucker v. McCoy*, 56 Cal. 524; *Pfister v. Dacey*, 68 Cal. 572, 10 Pac. Rep. 117; *Lubbock v. McMann*, 82 Cal. 228, 22 Pac. Rep. 1145. The question, then, is, does the evidence show that Mrs. Mahlman was actually residing on the premises in controversy when she filed her declaration of homestead? We are unable to see how this question can be answered otherwise than in the negative. The obvious purpose of the statute in providing for the selection of a homestead was to thereby make a home for the family, which neither of the spouses could incur or dispose of without the consent of the other, and which should at all times be protected against creditors. To effect its purpose the statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed. Thus this court has many times used and emphasized the word "actually," to show that the residence must be real, and not sham or pretended. In *Babcock v. Gibbs*, supra, the homestead claimants went to their lot in the evening, and spread a blanket for a roof, and slept under it. The next day they filed a declaration of homestead, and commenced the erection of a house, which they completed and moved into in about a month. It was held that they were not actually residing on the premises when the declaration was filed, and hence that no homestead was thereby selected. Here it clearly appears from the evidence that the respondents went to Haywards, not to make their home or place of abode there, but only to spend a night or two, and then return to their home in San Francisco. This was not enough to constitute an actual residence. In our opinion, the judgment and order should be reversed, and we so advise.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

92 Cal. 38
ANDERSON v. STRASSBURGER. (No. 13,519.)
(*Supreme Court of California*. Nov. 21, 1891.)
VENDOR AND VENDEE—CONTRACT TO PURCHASE—
RECOVERY OF PART PAYMENT.

Where one who has a contract by which he can at any time acquire the legal title to land, sells to another who knows of such contract, giving him 10 days to examine the title, and agreeing to refund a part payment if the title does not

prove satisfactory, the failure of the vendor to obtain a conveyance within the 10 days, so that he can convey to the vendee, will not entitle the vendee to rescind the contract and recover the money paid, in the absence of any demand on the vendor for a deed, or offer to complete the purchase, or notice of objection to the title.

Department 2. Appeal from superior court, city and county of San Francisco; W. T. WALLACE, Judge.

Action by one Anderson against one Strassburger. Judgment for defendant. Plaintiff appeals. Affirmed.

T. J. Rogers, for appellant. E. F. Preston, for respondent.

DE HAVEN, J. This action is to recover \$500, received by defendant from plaintiff, "as a deposit and in part payment" for a block of land in the city of San Francisco, which plaintiff agreed to purchase from defendant. The contract contained the following stipulations: "Title to prove satisfactory, or the money to be refunded. * * * Ten days allowed for examination of title and completion of purchase." The court below found, among other things, that at the date of the contract the title to the property agreed to be sold was in the defendant, and was a satisfactory title, and that the plaintiff was not, during the 10 days named in the contract, nor at any other time, ready or willing to pay the remainder of the purchase price; and that, immediately after making the contract, he left San Francisco, where the contract was made, and where the defendant kept a business office, "and during all of said ten days thereafter the plaintiff avoided the defendant for the purpose of preventing and defeating the completion of said contract, and a tender of a deed to him by defendant in pursuance of said contract." Upon these findings judgment was entered for the defendant, and the plaintiff appeals.

The findings are sufficient to support the judgment, and the evidence sustains the findings. It appears that at the date of the contract the legal title to the property which plaintiff thereby agreed to purchase was in one Lees, the defendant being entitled by contract with Lees to a conveyance of the same at any time upon the payment of a certain balance upon the purchase price. This fact was known to plaintiff at the time when he made the purchase. The defendant did not in fact acquire the legal title to the property he agreed to sell plaintiff until more than 10 days after the date of plaintiff's contract to purchase, and because of this fact plaintiff claims the right to rescind the contract and recover his deposit, but we do not think so. The title was at all times potentially in the defendant, and he was not in default, simply because no formal conveyance was made to him by his grantor within the time allowed plaintiff for examination of the title, nor was there any necessity for him to acquire such title in order to carry out his agreement, until plaintiff notified him that he was ready to complete the contract upon his part. The plaintiff was allowed 10 days within which to examine the title, and the agreement, in view of all the facts surrounding the

parties at the time it was made, contemplated that defendant should receive notice of the approval of the title he was to obtain from Lees, or, if not approved as satisfactory, that he should be informed of any objection which after such examination plaintiff might have to the same, and he was entitled to a reasonable time thereafter within which to perfect his title or remedy any defects discovered by plaintiff; and not until the giving of such notice, and an offer by plaintiff to fully perform the contract on his part upon receiving a perfect title, and the refusal of defendant thereafter to convey in accordance with the terms of his agreement, would plaintiff have the right to rescind the agreement and recover the amount paid by him thereon. These views are fully sustained by the cases of *Englander v. Rogers*, 41 Cal. 420; *Dennis v. Strassburger*, 89 Cal. 583. 26 Pac. Rep. 1070; and *Easton v. Montgomery*, (Cal.) 27 Pac. Rep. 280,—and are decisive of all questions involved in this appeal. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

92 Cal. 41

PEOPLE v. HONG QUIN MOON. (No. 20,820.)
(Supreme Court of California. Nov. 21, 1891.)

FALSE PRETENSES — SUFFICIENCY OF EVIDENCE — NEW TRIAL.

1. On a prosecution for obtaining money under false pretenses the prosecuting witness did not testify that he believed the alleged false statements, or that they induced him to pay over the money. There was a substantial conflict in the other evidence, but it seemed to preponderate in favor of defendant. *Held*, that a verdict of guilty should not be disturbed on appeal. PATTERSON, J., dissenting.

2. A new trial on the ground of newly-discovered evidence is properly refused where substantially the same matters set forth in the affidavit were testified to by the witnesses at the trial, the only difference being that a certain statement made by defendant was testified to by witnesses as having been made before the trial, while the affidavit referred to statements made subsequent to the trial.

In bank. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Information against Hong Quin Moon for obtaining money under false pretenses. Judgment of conviction. Defendant appeals. Affirmed.

Lucas F. Smith, for appellant. Carl E. Lindsay and Atty. Gen. Hart, for the People.

PER CURIAM. The defendant was charged with having obtained from one Dong Toy the sum of \$150 by means of false and fraudulent pretenses and representations. The information is sufficient, and there were no errors in the instructions of the court. The jury were instructed that before the defendant could be convicted it must be shown beyond a reasonable doubt that the representations alleged were false, and made with intent to defraud Dong Toy, and that they induced him to part with his money. Dong Toy did not testify that he believed the alleged statement of the defendant, or that it induced him to pay over the money; but in cases of this kind, while the

testimony of the prosecutor is ordinarily the best evidence of the effect which the alleged statements had upon him, it is not essential to a conviction that he should testify expressly that the false pretenses induced him to act as he did. The jury may be fully satisfied on the testimony of others, and from all the circumstances in the case, that the representations did induce him to turn over the property to the defendant. *State v. Thatcher*, 35 N. J. Law, 449. Although the evidence seems to preponderate in favor of the defendant, there is a substantial conflict, and it cannot, therefore, be said that the evidence is insufficient to support the verdict.

The court did not err in its refusal to grant a new trial on the ground of newly-discovered evidence. The witnesses for the defendant testified at the trial to substantially the same matters set forth in the affidavit on motion for a new trial; the only difference being that the statement of the defendant, testified to by the witnesses at the trial, were made in November, 1890, and those referred to in the affidavits were made subsequent to the trial. The judgment and orders appealed from are affirmed.

PATERSON, J., (*dissenting*.) I am unable to concur in the order affirming the judgment. While it is true that in cases of this kind the jury may be satisfied from the testimony of witnesses other than the prosecutor, or from all the circumstances in the case, that the representations induced the injured party to part with his property, yet the fact is one which, like every other element in a criminal offense, must be proved beyond a reasonable doubt. In this case the evidence is so overwhelmingly in favor of the defendant, not only upon that matter, but upon the question as to whether or not the representations alleged were in fact made, that I think the judgment of conviction ought not to be permitted to stand. There are no circumstances, except the fact that money was paid to the defendant, tending to show that he was induced by defendant's representations to pay the money. The evidence tended strongly to show that Dong Toy had lent the defendant the sum of \$40, and, upon the refusal of the latter to pay him that amount, had resorted to criminal proceedings to coerce payment. He sued the defendant in the justice's court for \$150, and attached the laundry he claims to have purchased. Although he visited the laundry at the time he claims to have made the purchase,—December 6th,—and again, several days after the purchase, when he conversed with Hong Sing, one of the proprietors of the laundry, he made no claim thereto. I do not lose sight of the rule, so often applied here, that this court will not interfere where there is a substantial conflict in the evidence; but, after reading the statement of the evidence contained in the record several times, I am unable to see how the jurors, giving to the evidence that fair and impartial consideration which is due in every criminal case, could say they had an abiding conviction as to the guilt of the

defendant,—that his guilt was established to a moral certainty, beyond a reasonable doubt.

92 Cal. 44
SHIRLEY v. SHIRLEY *et al.* (No. 14,216.)
(*Supreme Court of California*. Nov. 23, 1891.)

ADVISORY VERDICT—FINDING BY COURT.

Where the evidence as to whether there was a parol gift is conflicting, the court does not abuse its discretion in disregarding the advisory verdict of a jury, and finding that there was not.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Ejectment by L. F. Shirley against Kate Shirley and H. M. Kutchin. Judgment for plaintiff. Defendants appeal. Affirmed.

Hunsaker, Britt & Goodrich, for appellants. Collier & Watson, (Works, Gibson & Titus, of counsel,) for respondent.

FOOTE, C. This action in ejectment was brought by Mrs. L. F. Shirley, the mother of one Frank B. Shirley, deceased, against his widow and her tenant, H. M. Kutchin. An answer and cross-complaint were filed by the defendants, alleging a parol gift of the premises in controversy by the plaintiff to her son, Frank B. Shirley; that he was dead, and had left by will all his property to his said wife; that he had before his death complied with all the conditions of the parol gift and promise made by his mother; and asking for a specific performance thereof. The contentions thus raised were submitted to a jury upon special issues, all of which were found in favor of the defendant Kate Shirley. The court below declined to accept the advisory verdict of the jury, and rendered a decision upon the issues made directly contrary thereto, and judgment was entered accordingly. The appeal here is taken from that judgment, and from an order refusing a new trial.

The only real contentions here are whether the court was guilty of an abuse of discretion in finding, as it did, upon the allegations of the cross-complaint, and in refusing to admit certain evidence. In a contest of this kind, to establish and enforce a parol gift of land, "the evidence must be clear and definite; and, if there is such a conflict of evidence as makes it uncertain what the material terms of the agreement were, the court will refuse to interfere." *Wat. Spec. Perf.* § 291. The court below adhered to the belief, from the evidence that no such parol gift, as asserted to have been made, and of which specific performance was claimed in the cross-complaint, was intended, and, there having been a conflict of evidence as to the matter, we cannot say that the legal discretion vested in that tribunal was abused.

Neither do we perceive any error in refusing to permit answers to the interrogatories propounded to the witness Morris about a certain letter. It was written by the son of the plaintiff to his sister, and related to matters entirely foreign to those here involved, and even conceding that the alteration was made by the plaintiff, which is not made perfectly clear,

yet we do not see how it could affect the issues here made. Suppose the plaintiff did think that her son had put money into "Silver Terrace" property, instead of loaning it to her, and she had made this addition of the words above quoted in the letter, as expressing her dissent from what he had written, how could that have anything to do with the case here? Certainly it does not relate to her alleged promise and agreement, nor does it touch her credibility as a witness; and even if it had gone to her credibility, in view of all the other evidence in the case, we are unable to perceive that it could have affected the result. The legal title to the property in dispute was, without question, in the plaintiff. There was certainly some evidence that the party under whom the defendant claimed was a tenant at will only, and that he was dead. We cannot say, therefore, that the court below erred in the course pursued. For these reasons we advise that the judgment and order be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

92 Cal. 33

DOBINSON *et al.* v. McDONALD. (No. 14,354.)
(Supreme Court of California. Nov. 20, 1891.)

RELEASE OF CONTRACT—FRAUD—RESCISSIION.

1. Defendant appointed plaintiffs his agents to sell land, and agreed to pay them \$5,000 if they should make a sale, and to pay said commission if he (defendant) should sell within a year. Before the year expired defendant sold through another agent, without plaintiffs' knowledge, and procured from them a release of the contract for \$1,000, by fraudulently representing that he had not sold, and had determined not to sell. Held that, on defendant's sale of the land, he became obligated to pay plaintiffs \$5,000, and, on their discovery of the fraud by which he procured the release, they were entitled to rescind it, and recover the balance of \$4,000.

2. In an action by plaintiffs against defendant for such balance, defendant cannot deduct therefrom the commission paid by him to the agent who made the sale, even though plaintiffs are liable to such agent under an agreement between them and such agent made after their agreement with defendant, since the agent's right to part of plaintiffs' commission could not be established in an action to which he is not a party.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by G. A. Dobinson and others against E. N. McDonald. Judgment for plaintiffs. Defendant appeals. Affirmed.

Stephen M. White and Chapman & Hendrick, for appellant. Lee & Scott, for respondents.

HARRISON, J. In March, 1886, the defendant executed to the plaintiffs the following instrument: "Los Angeles, Cal., 20 Mar., 1886. To Messrs. G. A. Dobinson, J. A. Fairchild, and T. E. Rowan: I hereby appoint you sole agents for the sale of my ranch, containing about four thousand two hundred (4,200) acres, situate in Los Angeles county, California, and being part

of the San Pedro ranch. I will sell said ranch for one hundred and twenty-six thousand (\$126,000) dollars, payable one-third cash, and balance in deferred payments at one, two, and three years, secured by mortgage on land, and drawing interest at 8 per cent. per annum net to me. You will advertise and push the sale of said property at your own expense, and in consideration of your services I will pay you a commission of five thousand (\$5,000) dollars, in the event of a sale of the whole of the ranch at above price, or by your procuring a customer who will buy on said terms. * * * I agree to pay you the commission as above if I should sell or agree to sell said ranch, or part of it, to any one in the twelve months next ensuing, and afterwards until you are notified that this agreement is at an end. You are authorized to accept a deposit and to give a binding receipt to a purchaser on the above terms, and I will furnish abstract of title at my expense. E. N. McDONALD." After the execution of this instrument the plaintiffs under its authority, and until December 1, 1886, acted as the agents for the defendant in endeavoring to effect a sale of said property, expending money, and carrying on negotiations therefor, and used reasonable diligence therein. On the 24th of November, 1886, the defendant gave to one Frye written authority to sell the same property, under which, on the same day, Frye effected a sale thereof to one Boyce, which the defendant by his written agreement ratified and confirmed on the 26th of November, 1886. After this sale had been so ratified and confirmed by him, viz., December 1, 1886, the defendant represented and stated to the plaintiffs that he had changed his intention as to selling said land, and no longer desired or intended to sell the same, but had withdrawn it from market; and also stated and represented to them that he had not sold said land, and did not intend or expect to sell the same, and offered to pay them \$1,000 for the surrender of the above agreement. The plaintiffs, relying upon these representations and statements, and not knowing that he had already sold the land, accepted his offer, surrendered the agreement to him, and received from him \$1,000 as the consideration therefor. The court, in addition to the above facts, finds that these representations and statements by the defendant were false and fraudulent, and were made by him with the intent to deceive and defraud the plaintiffs, and that he fraudulently concealed from them the fact that he had already sold the land; and also finds that the plaintiffs relied upon the said statements and representations, and were induced thereby to accept his said offer of a thousand dollars, and to surrender said agreement. In September, 1888, the plaintiffs learned that, at the time of the said statements and representations, the defendant had already sold the land, and that his representations to them in reference thereto were false, and thereupon they rescinded said surrender, and gave him notice thereof, and demanded from him the remainder of the \$5,000 specified in the agreement, and also offered

to repay to him the \$1,000 received from him, on condition that he redeliver to them said agreement. Upon the refusal to pay said sum or accept said offer this action was commenced to recover from the defendant the sum of \$4,000, with interest from December 1, 1886. The action was tried by the court without a jury, and judgment rendered in favor of the plaintiffs. From this judgment, and an order denying a new trial, the defendant has appealed.

The issues determined by the court below depended almost entirely upon the weight to be given to contradictory and conflicting evidence, and the counsel for the respective parties have presented to this court elaborate briefs, in which that evidence is reviewed, and wherein we are asked to weigh the same, and determine the conflict between the testimony of the plaintiffs and of the defendant, and the corroboration given to either. It would seem hardly necessary at this day to repeat the oft-asserted rule that the determination of the trial court upon such evidence is conclusive in this court, and that after that court, upon a motion for a new trial, has affirmed its former decision, it is a needless consumption of time and labor, as well of counsel as of the members of this court, to attempt here a review of the correctness of such determination, or to ask of us to determine the relative weight to be given to the respective statements of the witnesses.

By the terms of the agreement between the defendant and the plaintiffs, they became entitled to receive from him the sum of \$5,000, if he "should sell or agree to sell said ranch, or part of it, to any one, in the twelve months next ensuing" after March 20, 1886. When, therefore, on the 26th of November, 1886, the defendant sold the ranch through Frye to Boyce, an obligation was created against him, by virtue of his aforesaid contract, to pay to the plaintiffs the sum of \$5,000, for which they had an immediate right of action against him. This obligation could not be extinguished by part performance on the part of the defendant, unless such part performance was expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of an agreement in writing for that purpose. Civil Code, § 1524. The obligation could, however, be extinguished by an agreement on the part of the plaintiffs to accept less than that to which they were entitled, provided such agreement was executed on the part of the defendant. Civil Code, §§ 1521-1523. Such an agreement is, however, subject to all the rules applicable to other agreements. If the consent of the plaintiffs thereto was obtained through fraud, exercised by the defendant, they had the right to rescind the agreement, (Civil Code, § 1689;) provided such rescission was made promptly upon discovering the facts which entitled them to rescind, coupled with an offer to restore to him what they had received from him, (Civil Code, § 1691.) Any false representation, or affirmation of any matter which was material, as an existing fact, distinguished from mere opinion, or intention, or promise, as an inducement

to enter into the agreement, was such a fraud as would authorize a rescission. *Marriner v. Dennison*, 78 Cal. 211, 20 Pac. Rep. 386. Within these principles the facts found by the court below fully sustain the judgment. The false statement by the defendant to the plaintiffs, that he had not sold the property at the time he offered to give them the thousand dollars for a surrender of his agreement, was such a fraud upon them as to entitle them to a rescission of their agreement to surrender it; for it is not to be supposed that, if he had then told them the truth, and informed them that he had already sold the land, they would have accepted the thousand dollars in satisfaction of an obligation against him, which had already matured in their behalf, for the sum of \$5,000.

The claim on the part of the appellant, that he is entitled to a deduction of \$1,250, paid by him to Frye, cannot be maintained. It is conceded by counsel upon both sides, in their briefs, that this amount of money was paid by him to Frye, although we have been unable to find in the record any evidence of more than an agreement on his part to pay it. But, assuming that it was paid by him, he paid it upon an independent agreement between himself and Frye, and not in pursuance of his agreement with the plaintiffs. Whatever right Frye had to a portion of the \$5,000 agreed to be paid to plaintiffs by the defendant was derived under an agreement with them subsequent to their agreement with the defendant, and could be established only in an action to which Frye was himself a party. The defendant was not authorized to administer upon the assets of the plaintiffs in his hands, and disburse the same in payment of such claims against them as he might consider just. The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

Ex parte HOLMQUIST. (No. 20,840.)

(*Supreme Court of California*. Nov. 13, 1891.)

LIQUOR LICENSE — CONSTITUTIONALITY OF ORDINANCE.

1. Order No. 1589 of the city of San Francisco, as amended by order No. 1845, relative to liquor licenses, provides for the payment of a specified license fee, and declares a violation of the order a misdemeanor punishable by a fine of not more than \$1,000, or by imprisonment for not more than six months, or both. Pen. Code Cal. § 435, provides that any person carrying on a business for which a license is required by the laws of the state, without the license so prescribed, is guilty of a misdemeanor. Section 19 prescribes, as a punishment for misdemeanors not otherwise provided for, imprisonment for not more than six months, or a fine not exceeding \$500, or both. *Held* that, though the punishment provided by the ordinance conflicted with that prescribed by the statute, this portion of the ordinance could be rejected, and that providing for the license could stand, as they were not dependent on each other.

2. So, too, portions of the ordinance in conflict with the provisions of the Code of Civil Procedure relative to evidence may be rejected.

3. The provisions of the ordinance making the issuance of a license dependent upon the permission of a majority of the board of police com-

missioners, and the approval of adjacent property owners, is not in violation of the federal constitution, there being no question of interstate commerce.

MCFARLAND, J., dissenting.
Ex parte Christensen, 24 Pac. Rep. 747, 85 Cal. 208, followed.

In bank. Original proceeding for writ of habeas corpus instituted against the chief of police of San Francisco county. Prisoner remanded.

Alfred Clark, for petitioner. Davis Lunderback, for respondent.

PER CURIAM. This case is not, in any material respect, different from Ex parte Christensen, 85 Cal. 208, 24 Pac. Rep. 747, and upon the authority of that case the petitioner herein is remanded to the custody of the chief of police of the city and county of San Francisco.

92 Cal. 14

JANIN V. LONDON & SAN FRANCISCO BANK.
(No. 13,387.)

(Supreme Court of California. Nov. 19, 1891.)

BANKS—PAYMENT OF FORGED CHECK—LIABILITY TO DEPOSITOR.

1. Where a bank allowed over three months to elapse before it returned to a depositor a forged check drawn on his account and payable to "currency or bearer," that it had paid without requiring the bearer's indorsement or identification, and there was no evidence that the bank could have retrieved its loss if notified of the forgery, the depositor's neglect within a reasonable time after the return of his canceled checks to examine them, and give notice of the forgery, was not a defense to an action to recover the money paid on such check; and hence the bank was not prejudiced by an erroneous instruction to the effect that the depositor was not guilty of negligence in failing to examine the checks and bank-book, and that he became bound to give notice of the forgery only after he had discovered it. PATERSON, J., dissenting.

2. The jury were properly instructed to find for plaintiff unless defendant was deprived of an opportunity to save itself from loss by his failure to examine the checks and bank-book, and to give notice of the forgery.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Janin against the London & San Francisco Bank to recover money deposited by plaintiff with defendant, and paid by the latter on a forged check. From a judgment for plaintiff, defendant appeals. Affirmed.

Winans, Belknap & Godoy and John B. Harmon, (Jarboe, Harrison & Goodfellow, of counsel,) for appellant. W. H. L. Barnes, (H. L. Gear, of counsel,) for respondent.

DE HAVEN, J. The plaintiff was a depositor in the bank of defendant, and the controversy in this action grows out of the payment by defendant of a check for \$16,700, purporting to have been signed by plaintiff, and for which amount defendant claims that it is entitled to debit the account of plaintiff. The complaint alleges that this check was a forgery. This is denied in the answer; and as another and separate defense it is averred, in substance, that the plaintiff is estopped to deny the genuineness of said check, be-

cause of his negligence in not examining his balanced pass-book and returned checks, including the one in dispute, within a reasonable time, and giving notice that such check was forged, "by reason of which laches defendant was prevented from tracing out the forger of said check or said signature, if it was a forgery, and proceeding against him, for a period of nearly five months, and until all trace of said forger was lost." The defendant also avers that the account between itself and plaintiff had become a stated one. The check was paid on May 29, 1878, and on September 4, 1878, the defendant returned to plaintiff his pass-book, showing the statement of his account at that date, and that he was charged with the amount of this check, which was also returned to him as one of the vouchers. On December 11, 1878, another statement of plaintiff's account was rendered by defendant, in which appeared the balance shown by the previous account. The evidence also tended to show that plaintiff did not at once examine the check in dispute when it was returned to him with his balanced pass-book on September 4, 1878, nor until some time in the month of December, 1878, and that he first intimated to defendant a doubt of its genuineness about December 28, 1878, but did not give notice that he actually claimed it to be a forgery until February 1, 1879. The verdict of the jury in favor of plaintiff must be deemed, on this appeal, to have conclusively established the fact that the check was a forgery, as there was evidence sufficient to establish such a finding, and it is not claimed that there was any error in the instructions of the court, so far as they relate to that particular point. It is well settled that a bank in receiving ordinary deposits becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and it is not entitled to debit his account with any payments except such as are made by his order or direction. Crawford v. Bank, 100 N. Y. 50, 2 N. E. Rep. 881; Bank v. Risley, 111 U. S. 125, 4 Sup. Ct. Rep. 322. All unauthorized payments, such as upon forged checks, are therefore made at the peril of the bank, and it is not justified in charging them against the depositor's account unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless by his subsequent conduct in relation to the matter he is upon equitable principles estopped to deny the correctness of such payments. This view of the law cannot be well questioned, and finds abundant support in the decisions of courts. Shipman v. Bank, 126 N. Y. 318, 27 N. E. Rep. 371; Hardy v. Bank, 51 Md. 562; Weinstein v. Bank, 69 Tex. 38, 6 S. W. Rep. 171; Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. Rep. 637.

It is not claimed in this case that plaintiff was guilty of any prior negligence which induced the defendant to pay the check in dispute, and we are therefore to consider only the one general question, whether, upon the evidence before it, the court committed any error to the preju-

dice of the defendant in giving or refusing instructions relating to the defense of estoppel, and this we proceed to do. The plaintiff was in no manner responsible for the action of the defendant in paying the check. In making such payment it parted with its own money, and not that of plaintiff; and the loss consequent thereon was its own, and should not be transferred to the plaintiff, unless, from all the circumstances in the case, it appears reasonably probable that, but for his alleged negligence, the defendant could have protected itself. The defendant has not in fact discharged its indebtedness to plaintiff, and should not be permitted to debit him with any amount as an offset there-to unless it appears that by reason of the negligent conduct of plaintiff it has omitted to take proceedings which it otherwise would and could have taken to indemnify itself from loss. This seems to us clear upon the plainest principles of justice. The balancing of the pass-book in September, and charging the plaintiff therein with the amount of this check, and its return to him at the same time, constituted a statement of the account between himself and the defendant; and it thereupon became the duty of the plaintiff to examine the same within a reasonable time, and give to defendant, without unreasonable delay, notice of any objection which he had to it; and, unless such objection was made within a reasonable time, it became an account stated, and there was imposed upon the plaintiff the burden of showing that the check with which he was debited was a forgery; and, in addition to this, if the circumstances attending the entire transaction were such as to make it reasonably probable that the bank had suffered prejudice by plaintiff's unreasonable acquiescence in the account as stated, he would not be permitted to open the account by proof of its incorrectness.

Upon the trial the court instructed the jury, in substance, that, if they found that the check in dispute was a forged one, they must find for the plaintiff, unless it was shown that plaintiff's failure to examine his checks deprived the defendant of an opportunity to save itself from loss on account of the money paid thereon; and they were further instructed that, if "the plaintiff was guilty of negligence in respect to his treatment of his checks, including the disputed check, after he received them at the September balancing and the December balancing, or by reason of his making the discovery of the forgery, or of the facts which put him on inquiry respecting it some months before he gave any notice to the bank of such discovery, whereby the bank was or may have been injured, they may find for the defendant." So far, this was a correct statement of the law, and, with other instructions given, conveyed to the jury with sufficient clearness the law as we have declared it. But the court also gave the following: "In considering the fact that Mr. Janin's bank-book was balanced, and that the bank's statement of the balance was apparently acquiesced in for a considerable length of time, I instruct you that the plaintiff was under no contract

to the bank to examine with diligence his returned checks and bank-book. In contemplation of law, the book was balanced and the checks returned for the protection of the depositor, not for the protection of the bank; and when Mr. Janin failed to examine it, the only consequence was that the burden of proof was shifted. Mr. Janin then became bound to show that the account was wrongly stated. This right he has preserved so long as the claim was not barred by the statute of limitations." This instruction, although supported by the authority of *Weisser v. Denison*, 10 N. Y. 68, is not, in our opinion, entirely correct, and is in conflict with other instructions referred to. When considered in connection with a portion of another instruction given, to the effect that it "was sufficient to give notice when the forgery was discovered," this clearly implied that plaintiff could not be charged with negligence in not examining his checks within a reasonable time, and that the jury were only to consider whether he was guilty of unreasonable delay in giving notice after he made the examination and discovered the forgery. This is not the true rule. This error, however, will not, in view of the undisputed evidence, justify a reversal of the judgment. Conceding that the plaintiff was guilty of negligence in not earlier examining his checks, discovering the forgery, and giving notice thereof, there is nothing in the evidence from which it can be reasonably inferred that the defendant sustained any loss thereby, or that its position with reference to the check, because of not having earlier notice, was in any manner changed to its disadvantage, and the court would have been justified in so charging the jury. The check was paid on May 29, 1878; and it was not until September 4, 1878, that it was returned to plaintiff. The check was payable to "currency or bearer," and when paid the person who presented it was not identified, or required to indorse it. This case was tried in 1885, and there is nothing in the evidence pointing to the fact that, if notice had been given on the very day the check was returned, the defendant would have been in any better position to discover the forger, or the person who uttered it, or to avail itself of any of the coercive measures known to the law by which to retrieve its loss, than it was at the time it received notice. If plaintiff was negligent, it was not shown that the defendant suffered any damage thereby, and for that reason such negligence cannot be allowed as a defense to plaintiff's right to recover in this action.

There may be some general language in the case of *Bank v. Morgan*, 117 U. S. 115, 6 Sup. Ct. Rep. 657, which would seem to imply that it is not necessary that the evidence should tend to show that any pecuniary benefit would have accrued to the defendant if reasonable notice had been given it; but this general language is limited by the facts of that case, and the more specific rule which the court announced, viz.: "Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his

clerk, then the bank was thereby prejudiced, because it was thereby prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution." In the case of *Continental Nat. Bank v. National Bank*, 50 N. Y. 576, cited by appellant, it is said that the arrest and detention of a swindler are powerful means of coercing restoration of property, and that the loss of this means in relying upon the declaration of another would estop such person from denying the truth of the statement upon which reliance was made. But this language is to be considered in connection with the particular facts then before the court, from which it appears that the declaration held to be an estoppel was the direct admission of the genuineness of the check afterwards claimed to be forged, and that, "had the teller of the certifying bank disclaimed the forged certificate and pronounced it a forgery when presented, the holder of the check would have had ample time to arrest the swindler at the Bank of the State of New York before he had received the money on the gold checks, and before he went to the subtreasury with his gold certificates." *White v. Bank*, 64 N. Y. 322. The distinction between such a case as that and one like this, in which there is nothing in the evidence to indicate that all trace of the forger was not lost before the check in controversy was returned to plaintiff, months after its payment, is a marked one; and in *White v. Bank*, just cited, what we conceive to be the rule applicable to the facts in this record is thus stated "In the case at bar it is the merest conjecture, with scarcely a possibility to support it, that the defendant, or those from whom it received the bill, could at any time after the transmission of the foreign bill of exchange to Baltimore have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. Estoppels cannot be based upon mere conjectures, even if a proper foundation is laid for them in other respects." There is nothing in *Bank v. Keene*, 53 Me. 103, in conflict with this. In that case, and upon its peculiar facts, it was held proper to instruct the jury "that, if the plaintiffs, relying on the defendant's admission, were induced to refrain from obtaining security from Judson by his arrest or by an attachment of his property, and they thereby sustained an injury, then the defendant would be estopped from denying his signature." But, of course, to justify such an instruction, there must be some evidence tending to show the facts upon which it is predicated. In this case the burden of proof to show that I sustained damage or injury by the negligence of plaintiff was upon the defendant, and this it was required to show by evidence having some reasonable tendency to establish such fact. In order to justify the submission of any question of fact to the jury the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational,

well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference the court may properly refuse to submit the question to the jury, and in our opinion the evidence in this case was not such as would have warranted the jury in finding as a fact that the delay of plaintiff in giving it notice that the check in question was a forgery, lost to it any rights or remedies which otherwise it might have resorted to, in order to save itself from the loss incurred by its own mistake or negligence in the first instance, and which it now asks the plaintiff to bear, and therefore the error we have pointed out in the instruction of the court was without prejudice to the defendant. Judgment and order affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; GAROUTTE, J.; MCFARLAND, J.

HARRISON, J., being disqualified, did not participate in the foregoing opinion.

PATERSON, J., (*dissenting*.) I concur in the views of Mr. Justice DE HAVEN on the main questions of law discussed in the opinion, but think that the question whether the defendant sustained any loss by reason of the plaintiff's failure to notify the defendant earlier of the discovery of the forgery should have been left to the jury. The evidence shows that the plaintiff had notice of the forgery several months prior to the time when he informed the officers of the bank of the fact, and, when asked why he had not before spoken of the matter, he replied that he had been working up the case himself. It seems to me that, whatever may be said of the duty of a depositor to examine his checks promptly, it must be conceded that when he has discovered the fact that his signature has been forged, or is informed of circumstances which would put him upon inquiry as to the fact, it is his duty to report the matter immediately to the officers of the bank. If he has willfully withheld from the bank any information he may have had, he ought to be estopped from claiming that the bank could not have protected itself. Under the decision of the majority it seems to me a dishonest depositor will be enabled without peril to himself to perpetrate a fraud upon the bank. If he discover that he has been negligent in examining his checks he will nevertheless be entitled to recover unless the bank can show that it was prejudiced by his negligence. Now he will know that the longer he withholds notice of the forgery from the bank, the more difficult it will be for the bank to prove that it could have detected and arrested the forger, and therefore the easier it will be for him to recover. This, it seems to me, is putting a premium upon laches, and encouraging a dishonest depositor even to assist the forger in covering up his tracks. There is no doubt in my mind that Mr. Janin acted in the utmost good faith, but it is a question of fact which should be left to the jury whether his long delay in giving the bank notice of the forgery did or did not prejudice the bank. The latter was enti-

tled to immediate notice of plaintiff's discovery, and it does not follow that because plaintiff failed to detect the forger the officers of the bank also would have failed to do so. The arrest and detention of a forger is often a strong and effectual means for the restoration of the money, and, although it may be a difficult question to determine in certain cases whether the injured party has been deprived of or delayed in the exercise of this coercive power by the negligence of the depositor, it is for the jury, reasoning to practical results from all the circumstances, to say whether it is fairly probable that the defendant could and would have taken effective measures to protect itself. *Continental Nat. Bank v. National Bank*, 50 N. Y. 575; *Voorhis v. Olmstead*, 46 N. Y. 113. In *Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, the court said: "If the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank. An inquiry as to the damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgeries might be proper if this were an action by it to recover damages for a violation of his duty; but it is a suit by the depositor, in effect, to falsify a stated account, to the injury of the bank, whose defense is that the depositor has, by his conduct, ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively, exercising it. * * * It seems to us that if the case had been submitted to the jury, and they had found such negligence upon the part of the depositor as precluded him from disputing the correctness of the account rendered by the bank, the verdict could not have been set aside as wholly unsupported by the evidence. In their relations with depositors, banks are held, as they ought to be, to a rigid responsibility; but the principles governing those relations ought not to be so extended as to invite or encourage such negligence by depositors in the examination of their bank-accounts as is inconsistent with the relations of the parties, or with those estab-

lished rules and usages sanctioned by business men of ordinary prudence and sagacity, which are, or ought to be, known to depositors." See, also, *Hardy v. Bank*, 51 Md. 562; *Bank v. Keene*, 53 Me. 103. It is true that was the case of an altered check, and this is a case of forged signature, but the principles announced by Mr. Justice HARLAN are as applicable on the question before us to one case as to the other. A banker is not bound to know the handwriting of the body of the check, but is bound to know the depositor's signature. He is not bound to detect a skillful alteration, which can only be known to the drawer of the check; and the latter is therefore bound to detect the alteration at the earliest opportunity, and inform the bank thereof. In these and many other respects the principles applicable to the two cases are different; but when it appears that the plaintiff's negligence contributed to the injury the question whether the bank was prejudiced by the failure of the plaintiff to exercise ordinary care is as material in one case as in the other, and must be determined by the same rules. I do not claim, as intimated in the opinion above quoted, that the law would presume the bank was prejudiced by the long delay and negligence of the depositor in failing to detect and report the forgery. That is a question, I think, which should be left to the jury. *Dana v. Bank*, 132 Mass. 156.

It is claimed by respondent that there is no evidence tending to show that the bank was prevented from tracing and discovering the forger, or from exercising its right to recover the money, through reliance on plaintiff's implied admission of the correctness of the account rendered. On the other hand, it is claimed by appellant to be clearly shown by the evidence that the bank was misled to its prejudice through such negligence. The fact that the bank did not require the signature of the stranger to whom the money was paid, that it took no evidence as to his identity, and made no effort to detect the forgery at any time, but constantly insisted that the check was genuine, although possessed of evidence tending to show that Hooper was the forger, are matters for the consideration of the jury. So also the fact that the plaintiff allowed long periods of time to elapse between the occasions when he presented his bank-book to be balanced, and that he frequently asked the teller of the bank for his balance, instead of consulting his bank-book; that he neglected to examine the book with the return checks for several months after September 4, 1878; that he had expressed surprise at the smallness of the balance, as shown by the books of the bank; and his failure to notify the bank until February, 1879, eight months after he began to doubt the genuineness of the check,—are all matters to be considered by the jury in determining the questions at issue. The court cannot say, it seems to me, that as a matter of law, under such circumstances, the plaintiff is entitled to recover. I am unable to see any force in the suggestion that the officers of the bank took no steps at the time

the check was paid to identify the person who presented it. Unless the paying teller has a suspicion as to the genuineness of the signature of a check payable to bearer, he is not called upon to make and preserve evidence as to such identity, and, if such precautions had been taken in this case, that fact would have been conclusive evidence that the bank had notice of facts which put it upon inquiry. In such a case, of course, the bank would have no defense, even if the depositor was guilty of negligence. It is said that there is no evidence from which it can be reasonably inferred that the plaintiff's delay prejudiced the defendant; but the inability of the defendant to produce such evidence may have been caused by the lapse of time between the time when plaintiff, acting as a prudent man, ought to have discovered and given notice of the forgery, and the time when such notice was in fact given. This is peculiarly a question for the jury under proper instructions from the court.

1. 211

PEOPLE V. WHITELEY.¹

(Supreme Court of California. Oct. 3, 1883.)

LARCENY—VERDICT—DEGREE OF CRIME—PRELIMINARY HEARING—EVIDENCE.

1. A verdict finding a defendant "guilty as charged" is a sufficient finding of the degree of the crime when she is charged with grand larceny.

2. On an appeal from a conviction of grand larceny, the fact that the record contains a commitment signed, "James Lawler, Judge of the Police Judge's Court No. 2 of the City and County of San Francisco," is sufficient to show that an examination was had before a police magistrate.

In bank. Appeal from superior court, city and county of San Francisco.

Information for grand larceny against Adeline Whitely. Verdict of guilty, judgment thereon, and order refusing new trial. Defendant appeals. Affirmed.

C. H. Wolff and H. M. Swain, for appellant. The Attorney General, for the People.

PER CURIAM. We think it appears that the examination was before a police magistrate. The commitment is signed by "James Lawler, Judge of the Police Judge's Court No. 2, of the City and County of San Francisco." The defendant was charged with the crime of grand larceny, and the jury, by their verdict, found her "guilty as charged." This was a sufficient finding of the degree. Judgment and orders appealed from affirmed.

64 Cal. 42

CHESTER V. BAKERSFIELD TOWN-HALL ASS'N.²

(Supreme Court of California. July 27, 1883.)

RES ADJUDICATA—STRIKING OUT EVIDENCE—APPEAL—BOND.

1. A judgment in an action of ejectment, to which the holder of the legal title was not a party, is not a bar to an action by him to quiet title.

¹ This case, filed October 3, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

² This case, filed July 27, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

2. Unless evidence is clearly immaterial and irrelevant, a motion to strike it out on that ground should not be granted.

3. One undertaking is sufficient upon an appeal, both from the judgment and order denying a new trial.

Department 2. Appeal from superior court, Kern county.

Action by George H. Chester against the Bakersfield Town-Hall Association to quiet title to land. Judgment for plaintiff. Defendant appeals. Affirmed.

The defendant had previously obtained judgment against Julius Chester in an action of ejectment (55 Cal. 98) to recover possession of land of which the premises in controversy formed part, but to which action the plaintiff herein was not a party.

Flournoy, Mhoon & Flournoy and W. J. Tuska, for appellant. Stetson & Houghton and C. C. Cowgill, for respondent.

PER CURIAM. The plaintiff alleges in his complaint that he is the owner in fee simple of certain premises described in his complaint, and that at the time of the filing of said complaint he is, and for more than three years immediately preceding the filing thereof has been, in the actual, quiet, and exclusive possession of said premises, and that the defendant claims some right, title, or interest therein adverse to the plaintiff, and that said claim of the defendant is without any right, etc.; wherefore plaintiff prays to have said claim determined, etc. The defendant in its answer denies that the plaintiff is the owner, or that he and those under whom he claims have been for more than three years, or then were, in actual, peaceable, quiet possession of said premises, but alleges that the defendant has been in the open, notorious, exclusive, and adverse possession, with claim of title, ever since the 9th day of November, 1871. The defendant also alleges that the plaintiff is estopped both by judgment and *in pais*. The facts which it is claimed constitute said alleged estoppels are set out at length in said answer. The court found, upon sufficient evidence, that on the 23d day of October, 1869, one Thomas Baker, who then claimed to own said premises, conveyed the same by deed to the plaintiff, who, on the 3d day of January, 1872, conveyed to Julius Chester, who, on the 18th day of September, 1878, conveyed to one Fisher, who, on the 29th day of June, 1880, conveyed to the plaintiff. On the 12th day of December, 1877, said Baker obtained a patent of said premises from the state. The findings as to the foregoing facts are not attacked. But counsel for appellant in their brief rely (1) on an estoppel *in pais*; (2) by judgment; and (3) on the statute of limitations as a bar to the action. Upon each of these issues it is claimed that the evidence is insufficient to justify the findings of the court.

We are satisfied that there are not uncontroverted facts sufficient to constitute an estoppel *in pais*.

The judgment in the case of Association v. Chester, 55 Cal. 98, which was commenced more than a month after said Julius had conveyed the premises to Fisher, who subsequently conveyed to the plain-

tiff herein, cannot operate as a bar to this action.

As to the bar of the statute of limitations, it is sufficient to say it was not established by evidence free from substantial conflict. No objection was made to the testimony of Julius Chester until after it was all in, and then a motion was made to strike out a part of it on the ground that it was irrelevant and immaterial. A motion to strike out on that ground ought not to be granted unless the evidence is clearly irrelevant and immaterial. The evidence which the court refused to strike out is not, in our opinion, clearly of that character. The court seems to have found the facts which the counsel for defendant sought to elicit from the witness Brundage, by questions to which objections were made by plaintiff's counsel and sustained by the court. It is therefore clear that if said rulings were erroneous, the defendant was not prejudiced thereby. The practice of filing but one undertaking where appeals are taken, as in this case, both from the judgment and order denying a new trial, is about as well settled as any question of that kind can be, and we do not think that it should now be treated as an open one. Judgment and order affirmed.

Hearing in bank denied.

ROSE *et al.* v. RICHMOND MIN. CO. OF NEVADA. (No. 1,082.)¹

(Supreme Court of Nevada. Jan. Term, 1882.)

RECORD ON APPEAL — ASSIGNMENT OF ERRORS — MINING CLAIMS — CONTESTS — LOCATION — APPEARANCE — DOCKET FEES — PATENTS.

1. Where a judgment is appealed from on the sole ground that it is not supported by the findings of facts, it is not necessary that the statement on appeal should contain the evidence.

2. Where the conclusions of law based on the findings of fact are specifically excepted to and assigned as errors, a general statement that the judgment is not supported by the findings is unnecessary, under Civil Prac. Act Nev. § 332, (1 Comp. Laws § 1393,) requiring the errors relied on to be specified.

3. Under Comp. Laws Nev. § 1674, (St. 1873, p. 50,) providing that in actions to determine the right of possession of a mining claim, where an application for a patent has been made to the United States by either of the parties, it shall only be necessary to confer jurisdiction on the court to try the action that it appear that an application for a patent has been made, and that the parties to the action are claiming the mine, a complaint alleging that plaintiffs are the owners and possessed of the mine in controversy, and that defendant adversely claims the mine and right of possession, and has filed an application for a patent, is sufficient, as it need not allege that plaintiffs contested defendant's application, nor that such application is void.

4. Where the clerk advances the docket fee and places the case upon the docket, defendant cannot object that the fee was not paid in advance by plaintiffs, as required by 2 Comp. Laws Nev. §§ 2766, 2767.

5. Defendant waives the issuance of summons by appearing and filing a demurrer and answer.

6. It cannot be objected in the suit to deter-

¹ This case, filed January term, 1882, is now published by request of the Pacific Reporter, volume 17, Nevada Reports, v. 27 p. no. 20. The case covers all cases in vol.

mine the right of possession of a mining claim that plaintiffs' protest to defendant's application for a patent does not show "the nature, boundaries, and extent" of plaintiffs' location. Such objection should have been made in the land-office when the protest was filed.

7. Where both plaintiff and defendant are in possession of different portions of the same lode, plaintiff can, under section 1674, supra, maintain an action to determine the right of possession to the entire lode.

8. Under 14 St. U. S. p. 252, § 4, providing "that no location shall exceed 300 feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode," a location is not wholly void because the locator claims in good faith a discovery interest, when in fact the same lode had previously been located on by others at another point. It is voidable only as to the excess of the discovery interest.

9. Under Rev. St. U. S. § 2326, providing that, where an adverse claim is filed during the period of publication of an application for a patent to a mining claim, all proceedings shall be stayed till the controversy shall have been settled by a court of competent jurisdiction, and that a failure on the part of the claimant to prosecute his suit in the proper court with diligence to final judgment shall be a waiver of his claim, a patent issued after the filing of such adverse claim and the institution of the suit, but before final judgment, is void, though the clerk of the court in which the suit is pending certifies that no proceedings have been had therein for three years. The court, and not the land department, has jurisdiction to determine the question of due diligence in the prosecution of the suit.

10. Where a claimant protests, as required by Rev. St. U. S. § 2326, against the issuance of a patent to a certain lode, on the ground that he has a valid prior location of the same lode, he is not bound to protest against a second application by the same party under a different name for a patent to the same lode, and a patent granted upon such second application is void.

11. Where a patent is issued without any authority of law, its validity may be attacked in any proceeding.

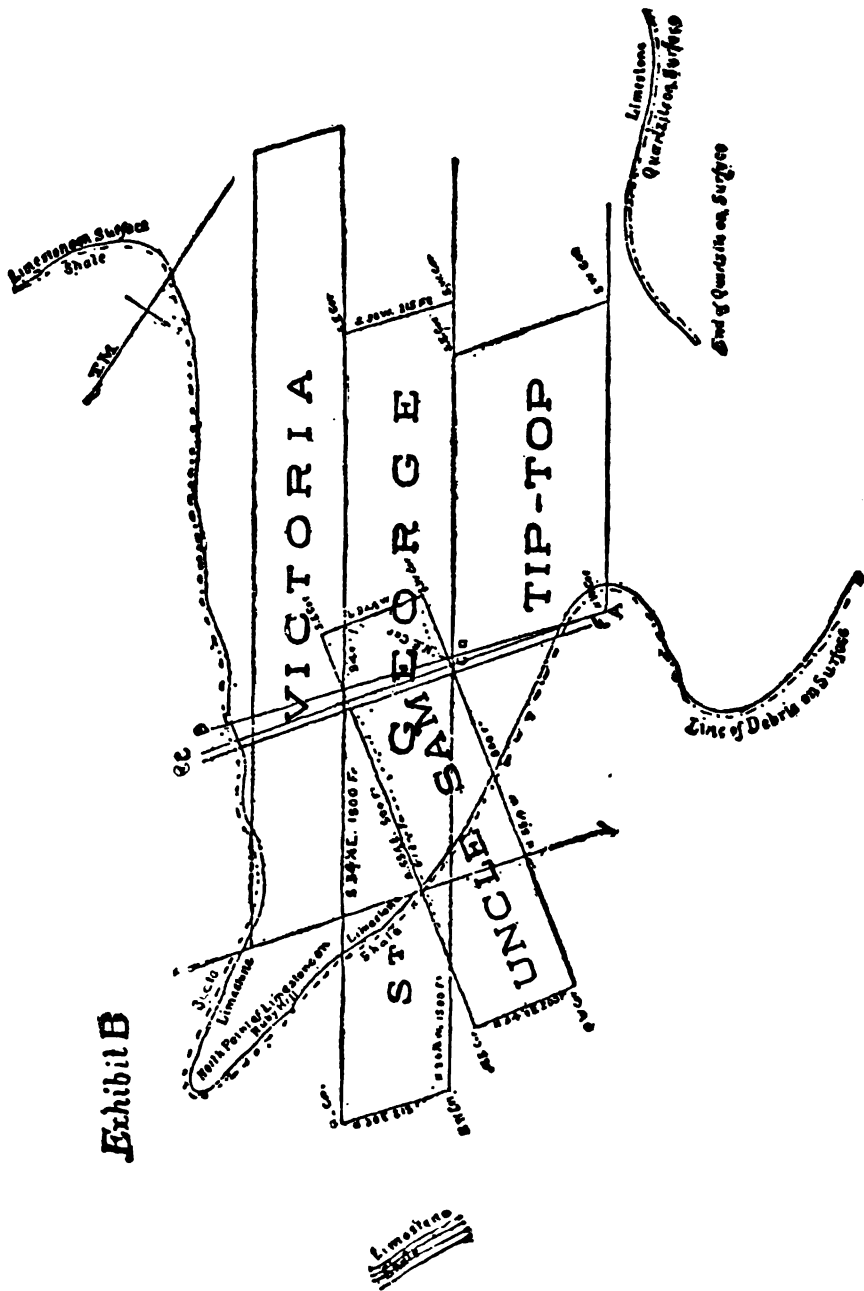
12. Where a patent is absolutely void, its holder cannot be adjudged to hold it in trust for the party entitled to the land. It is of no effect whatever.

Appeal from district court, Eureka county.

Suit by E. H. Rose and others against the Richmond Mining Company of Nevada, to determine the right of possession and ownership to a mining claim. Judgment for defendant. Plaintiffs appeal. Reversed.

Baker & Wines, William M. Stewart, William F. Herrin, and W. S. Wood, for appellants. Robert M. Clark, Wren & Cheney, and Crittenden Thornton, for respondent.

HAWLEY, J. This action was brought by appellants to determine the right of possession to certain mining ground. The cause was tried before the court without a jury. A judgment was rendered in favor of respondent. No motion for a new trial was made. The appeal is taken from the judgment. Appellants claim that upon the facts found by the court the judgment should have been in their favor. The following diagram shows the relative positions of the Tip Top, St. George, and Victoria locations, relied upon by respondent, and of the Uncle Sam location, upon which appellants rely:



From the findings of the court it appears that the mining ground in controversy is situated on Ruby hill, in the Eureka mining district; "that along and through the hill, for a distance slightly exceeding a mile, and extending in a north-westerly and south-easterly direction, is a zone of limestone, in which at different places throughout its length mineral is found;" that underlying this zone on the southerly side is a well-defined, unbroken foot-wall of quartzite, which has a general dip to the north-east; that on the northerly side of this zone of limestone is a hanging-wall of shale; and that this zone of limestone

is a vein or lode of rock in place, bearing gold, silver, lead, and other valuable minerals; that the Uncle Sam mining claim was located upon this zone of limestone on the 14th day of January, A. D. 1872, by E. H. Rose and two other persons; that they included in said location 800 linear feet of said zone, 200 linear feet having been located for a discovery claim; that they recorded the notice of location in due time, and marked the boundaries of the claim before the St. George was located; that several years prior to the location of the Uncle Sam claim said zone had been discovered, and a large number of mining

claims located upon it; that Rose knew of the existence of said locations, and that work was being prosecuted thereon; that at the time of the location of the Uncle Sam, and for a long time prior and subsequent thereto, it had been the custom and usage of the larger portion of the miners upon this zone or lode to include in their locations 200 feet for a discovery claim; that it was not known or believed at the time of the location of the Uncle Sam that the belt or zone of limestone running through Ruby hill constituted but one zone or lode; that the locators of the Uncle Sam believed there was no other valid existing location upon the ground included within the surface boundaries of their location; that a mining claim called the "Phillips" was located on the 23d day of September, A. D. 1871, by Phillips and others, upon the identical ground afterwards located by the Uncle Sam; that the Phillips claim and location was abandoned prior to the location of the Uncle Sam; that Rose, prior to the location of the Phillips, had discovered the ore within the limits of the Uncle Sam location; "that Rose and his associates made the Uncle Sam location in good faith, and in accordance with the customs and usages of the majority of the miners in said mining district, and they and their grantees have ever since remained in the actual possession of said Uncle Sam location as located, to the extent of annually sinking a shaft thereon, maintaining, and at times occupying, a cabin thereon, and * * * excavating drifts and tunnels thereon; * * * that Rose and his co-locators did the amount of work required to hold said mining claim under the laws of the United States, and their successors in interest continued to do the necessary work to hold said claim after succeeding to the interest of Rose and his co-locators up to the time of this trial;" that none of said work was done within the surface limits of the St. George, but was done within the surface lines of the Uncle Sam location; that the St. George claim was located on the 20th day of March, 1873, subsequent to the location of the Uncle Sam; "that from and after the date of the location and discovery of the St. George mining claim and lode herein, * * * the Richmond Mining Company of Nevada has been actually in possession of the said lode, as in the said patent described, and has been engaged in mining and extracting the precious metals therefrom, and * * * in sinking winzes and running drifts, tunnels, and levels at a great depth below the surface of the earth, and none of the excavations made by either party came in conflict with any of those made by the other;" that respondent, on the 1st day of August, 1873, made an application, through the local United States land-office at Eureka, for a patent to the St. George mining claim; that on the 29th day of September, 1873, and within the period allowed by law for publication of notice, Rose and his associates filed a protest in said land-office, which showed the boundaries and extent of their claim, against said application; that on the 21st day of October, 1873, they filed the

complaint in this action in the office of the clerk of the district court of Eureka county; that at that time they did not pay the docket fee required by the statute of this state, (2 Comp. Laws, § 2766;) that the docket fee was advanced and paid by the clerk to the county treasurer, in his regular monthly settlement, on the 3d day of November; that respondent regularly appeared in said action, and filed a demurrer and answer; that it did not at any time move to dismiss said action or file a plea in abatement therein; that after said cause was at issue it was regularly placed upon the calendar for trial; that thereafter it remained on the calendar until the March term, 1874, but was not tried, for the reasons that negotiations were pending for a settlement of the matters in controversy; that at the March term, 1874, the cause was continued upon motion of counsel for respondent, and thereafter the cause was not placed upon the calendar, nor any proceedings had, until the March term, 1880; that negotiations for a settlement were still pending, and Rose and his associates were led to believe from representations made to them by the officers and agents of the Richmond Mining Company that it would abandon all claim to that portion of the Uncle Sam west of the west end line of the Tip Top claim, or that it would purchase the Uncle Sam claim, and it was owing to these facts that the prosecution of the suit was delayed; that in the month of September, A. D. 1876, the Richmond Mining Company made application to the land-office at Eureka for final entry and payment for the St. George claim, and presented a certificate of the clerk of the district court to the effect that this action had not been placed upon the calendar, nor had any proceedings been had therein, after the March term, 1874; that the officers of the land department upon this certificate decided that this action had not been prosecuted with due diligence, and for this reason that the Richmond Company was entitled to a patent; that these proceedings were had without notice to plaintiffs, and at a time when they and their attorneys believed from the representations made by the officers and agents of the Richmond Company, as before stated, that a settlement would be agreed upon, and that there was no necessity for a trial; that the ruling of the officers of the land-office at Eureka was approved by the commissioner of the general land-office at Washington, D. C.; that plaintiffs were notified of his decision, and informed that they would have 60 days within which to appeal from the decision of the secretary of the Interior; that they did not take any steps in the matter, and did not appeal from the decision; that thereafter, on the 7th day of May, 1877, the government of the United States issued a patent to the St. George claim and lode to the respondent; that on the 30th day of April, 1874, the government of the United States issued to the respondent a patent to the Tip Top claim and lode; that on the 18th day of October, 1878, the respondent made an application for a patent to the Victoria claim, which had

been located subsequent to the location of the Uncle Sam, and procured a patent therefor from the United States on the 28th day of February, 1880; that no protest was filed against said application by the owners of the Uncle Sam claim; that the Tip Top, St. George, Victoria, and the Uncle Sam claim are each upon the same vein or lode; that at the time of the trial of this action the Albion Consolidated Mining Company was the owner of the Uncle Sam claim, and this action is prosecuted for its benefit by the consent of the plaintiffs.

All that portion of the mining ground, within the limits of the Uncle Sam location, on the easterly side of the line A C on the diagram, belongs to the respondent by virtue of the Tip Top location and patent. We have been thus particular in stating the facts, in order that some of the questions which we will have occasion to discuss may be the more clearly comprehended. The real controversy upon this appeal involves the validity of the Uncle Sam location, owned by appellants, and of the St. George and Victoria locations and patents, owned by respondent. There are, however, numerous preliminary questions to be first disposed of. The case upon every point fairly bristles with legal and technical objections, urged by respondent. If any of the objections are well taken, the judgment should be affirmed. If none of them are tenable, the judgment must be reversed. The various questions presented have been elaborately argued, with marked ability. From the interest thus manifested, as well as the importance of some of the questions involved, and the peculiar facts of the case, we deem it to be our duty to decide all the points that have been made; but in so doing we shall not attempt to answer all the reasons advanced by counsel. It is enough to state our opinion upon the points discussed, and to give the reason for our decision thereon.

1. It is claimed by respondent that the statement on appeal is defective, because it does not contain any evidence, or specify any error which occurred at the trial. This objection is without merit. No question is raised by appellants as to the sufficiency of the evidence to support the findings of fact. They do not rely upon any alleged error committed by the court during the progress of the trial. The statement does contain some, if not all, of the documentary evidence, and it was unnecessary to insert any more of the evidence taken at the trial in order "to explain the particular errors or grounds specified" in the statement on appeal. The statement is sufficient to authorize this court to determine whether the findings of facts support the judgment of the district court, provided there is a proper specification of errors, as required by section 332 of the civil practice act, (1 Comp. Laws, § 1393.)

2. We are of the opinion that this provision of the statute has been substantially complied with. It is true, as claimed by respondent, that in the assignment of errors it is not said in direct terms "that the judgment is contrary to the findings, or that, upon the findings, the judgment

should have been for appellants;" yet such is the evident meaning and effect of the language used. We believe it has been the usual practice, in cases like this, to make the general statement that the judgment is not supported by the findings, and to add a specific statement of "the particular errors" relied upon. But the general statement, the absence of which it is claimed is fatal without the particular specifications, would, according to many of the authorities cited by respondent, be insufficient. It must be remembered that no objections are urged as to the sufficiency of the findings. They are not complained of by either party, but are accepted as correct by both, and must be so treated by this court. The only grounds, therefore, that could have been assigned as error were the alleged erroneous conclusions of law reached by the court upon the undisputed facts set forth in the findings. Every conclusion of law of which complaint is made is separately specified as an error upon the part of the court. The form of the specifications may be subject to criticism, but the substance is there. Appellants have pointed out with great distinctness the specific errors which they claim the court committed in its conclusions of law, in such a manner as to enable this court to readily understand the grounds upon which they rely for a reversal. The specifications are given "with such fullness as to aid the court in the examination of the transcript;" and this court is not left, as was the court in *Squires v. Foorman*, 10 Cal. 298, and other cases cited by respondent, "to grope its way through the record in search of possible errors." The statement on appeal and the assignment of errors come within the rule announced by the decisions in *Barrett v. Tewksbury*, 15 Cal. 356, and *Hutton v. Reed*, 25 Cal. 478; and this court has never, in any of its decisions, suggested that any further specification was necessary.

3. Respondent contends that the complaint does not state facts sufficient to constitute a cause of action. In deciding this question it is important to determine the nature of this action, for upon the character of the pleadings—especially of the complaint—depends the solution of many questions that have been elaborately and learnedly argued by counsel. The complaint alleges "that the plaintiffs are, and ever since the 20th day of January, A. D. 1872, have been, the owners of, seised and possessed of," the mining ground in controversy, "together with all the veins, lodes, and ledges throughout their entire depth, the top or apex of which lies within said surface boundaries; that defendant, unjustly and adversely to plaintiffs, claims an estate in fee, in and to said premises, and the right of possession thereof, and the right of extracting and converting to its own use all the mineral bearing rock, ore, and earth therein contained, and has filed in the United States land office an application for a patent thereto, under the name of 'St. George Ledge and Mine,'" and closes with the usual prayer. We will not follow counsel in that portion of their argument which is

based upon the theory that this is a suit brought under the provisions of section 256 of the civil practice act. In our opinion, the sufficiency of the complaint must be determined by the provisions of section 1674 of the Compiled Laws (St. 1873, p. 50) and section 39 of the civil practice act. Section 1674 reads as follows: "In all actions brought to determine the right of possession of a mining claim or metalliferous vein or lode, where an application has been made to the proper officers of the government of the United States, by either of the parties to such action, for a patent for said mining claim, vein, or lode, it shall only be necessary, to confer jurisdiction on the court to try said action, and render a proper judgment therein, that it appear that an application for a patent for such mining claim, vein, or lode has been made, and that the parties to said action are claiming such mining claim, vein, or lode, or some part thereof, or the right of possession thereof." The objections to the complaint, under section 1674, are stated as follows: "There is no allegation that the claim or application of the defendant for a patent is without right, or invalid, or void, or that the plaintiffs ever filed any adverse claim to the defendant's application for a patent. It does not appear from the complaint that any contest ever was initiated or was pending in the land-office at the date of the commencement of this action." The complaint is not defective, either under section 256 or section 1674, because it does not allege the particulars of defendant's claim, and prove that it was invalid. *Mining Co. v. Marsano*, 10 Nev. 379; *Golden Fleece G. & S. Min. Co. v. Cable Con. G. & S. Min. Co.*, 12 Nev. 320. In the case last cited, *BEATTY, J.*, in delivering the opinion of the court, said: "A review of the question is, however, wholly unnecessary in this case, which is governed by the provisions of section 1674 of the Compiled Laws, * * * and evidently designed to supplement section 2326 of the Revised Statutes of the United States. * * * Under these laws the pendency of a contest in the land-office, with respect to a mining claim, gives our district courts jurisdiction to determine the right of possession as between the adverse claimants. The contestant, whether he is in or out of possession, must commence his action to determine the right within thirty days after filing his adverse claim. It would be absurd to hold that, if he happens to be the party in possession, and therefore presumably entitled to the possession, judgment must go against him, in favor of a party out of possession, unless he not only proves his own right affirmatively, but disproves the claim of the defendant by negative testimony. The only sensible construction of the law is that each party must prove his claim to the premises in dispute, and that the better claim must prevail." It is claimed that this decision is in favor of the respondent upon the point that the pendency of the contest in the land-office must be alleged. The complaint in that action averred that plaintiff had filed an adverse claim to the defendant's application for a patent; hence the statement in the opinion that

the pendency of the contest in the land-office gave the court jurisdiction, which is true; but the question here involved was not presented in that case, and the court did not decide that such an allegation was absolutely essential in order to give the court jurisdiction. Section 1674 does not make the filing of the protest a jurisdictional fact to be alleged in the complaint, and in this respect it differs from the statute considered by the court in *Berry v. Cammet*, 44 Cal. 352, which is also relied upon by respondent. It has, we believe, been the general practice in this state, in suits of this character, to allege the pendency of the contest in the land-office; and the act of congress (Rev. St. § 2326) has reference to cases where an adverse claim is filed, but it does not attempt to confer any special jurisdiction upon the state courts. In 420 Min. Co. v. Bullion Min. Co., 9 Nev. 248, we said: "Congress did not, by the passage of this act, * * * confer any additional jurisdiction upon the state courts. The object of the law, as we understand it, was to require parties protesting against the issuance of a patent to go into the state courts of competent jurisdiction, and institute such proceedings as they might, under the different forms of action therein allowed, elect, and there try 'the rights of possession' to such claim, and have the question determined. The acts of congress do not attempt to confer any jurisdiction not already possessed by the state courts, nor to prescribe a different form of action. * * * We are of opinion that when the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes, that apply to such actions in our state courts, irrespective of the acts of congress." Section 1674 was evidently passed to supplement the act of congress, as stated in the *Golden Fleece Case*; and it designates the jurisdictional facts that are necessary to be alleged in the complaint. The complaint in this action substantially conforms to the language of the statute, and we are of opinion that, tested by the statute and the previous decisions of this court, it states facts sufficient to constitute a cause of action to determine the right of possession to the mining ground in controversy.

4. The claim of respondent that this action was not commenced in time is not well taken. The complaint was filed within 30 days after the filing of the protest, as required by the statute. It is true that the plaintiffs did not pay the docket fee, (2 Comp. Laws, §§ 2766, 2767,) but it was advanced and paid by the clerk in his next regular monthly settlement with the county treasurer. The findings are silent as to whether any summons was issued or not. They show, however, that the defendant regularly appeared and filed a demurrer and answer to plaintiffs' complaint, and did not at any time move to dismiss the action or file a plea in abatement. From these facts it is apparent that it cannot now be claimed that the action was not commenced in time. The defendant, by demurring and answering, waived the issuance of summons. 1 Comp. Laws, § 1085;

Iowa Min. Co. v. Bonanza Min. Co., 16 Nev. 64. Respondent cannot take advantage of the fact that the clerk, instead of the plaintiffs, paid the docket fee. The clerk had the right to refuse to put the case upon the docket unless the docket fee was paid by the plaintiffs. By entering it upon the docket he became personally responsible, and assumed the payment of the fee, and, having paid it, as he did, the rights of plaintiffs were preserved. The case stands precisely the same as if the summons had been issued, and the docket fee paid by plaintiffs on the day the complaint was filed.

5. The claim of respondent that the protest does not show "the nature, boundaries, and extent" of the Uncle Sam location and lode is untenable. This objection is one that should, if relied upon, have been made in the land-office when the protest was filed. It is questionable whether any objection could be urged against the protest after the commencement of the suit, especially in a case where no plea has been interposed to its sufficiency. But it is apparent that the protest does sufficiently show "the nature, boundaries, and extent" of the Uncle Sam claim and lode. The respondent, in its application for a patent to the St. George location and lode, claimed 215 feet in width upon the surface. The Uncle Sam location claimed 200 feet in width upon the surface. The protest avers "that the so-called 'St. George' lode or vein, whereof a patent is applied, is identical with the Uncle Sam vein and lode," and refers to the diagram to show "the nature and extent of the conflict." The protest, in its description of the "nature, boundaries, and extent" of the Uncle Sam location and lode, is as clear, definite, and specific as was the application presented by respondent for a patent to the St. George. If the protest is defective, so is the application. It would be absurd, in the first instance, to decide that the application was sufficient when it only claimed 215 feet in width on the surface; and then, in the next breath, declare that the protest was insufficient because it did not claim the entire width of the lode on the surface. It is a conceded proposition that there is but one lode within the limits of the respective locations. It therefore necessarily follows, notwithstanding the fact that each party only claimed 200 feet in width on the surface, that whichever party has the better right to the possession of the lode will be entitled to its entire width and entire depth, although it may in its downward course so far depart from a perpendicular as to extend outside the vertical side lines of the surface location.

6. It is strenuously insisted that appellants cannot maintain this action, because, as respondent argues, the court found as a fact that it was in the actual possession of the mining ground in controversy at the time the action was commenced. This argument is principally based upon the ground that this action must be governed by the provisions of section 256 of the civil practice act; but it is also claimed that the same rule must prevail under the provisions of section

1674, notwithstanding the fact that it does not confine the rights of plaintiffs, as does section 256, to a party in possession. We do not think the argument of respondent could be sustained even if the fact was, as it claims it to be, that it was the only party in the possession of the mining ground in controversy. *Golden Fleece G. & S. Min. Co. v. Cable Con. G. & S. Min. Co.*, 12 Nev. 321. The facts, however, show that both parties were in possession of different portions of the "big lode," and the character of their possession is particularly defined. Under the statute, the party having the better right to the possession of the lode must prevail, and is entitled to maintain this action. It being admitted, as we have before stated, and will have occasion again to repeat, that there is but one lode, and that the Uncle Sam location upon this lode is prior in point of time to the St. George, it must follow that, if the location of the Uncle Sam was valid in its inception, and its owners have not waived, lost, or abandoned their rights, but have at all times complied with all the requirements of the law, appellants were and are the only parties legally in possession of the lode in controversy, and that respondent is not entitled to the "nine points of law" that are claimed for it, and that often follow from the actual possession of property. This must be true. If, at the time the St. George location was made, there was a prior, existing, and valid location upon this portion of the lode, and such location has ever since been legally maintained, then the subsequent location of the St. George upon this portion of the lode was absolutely null and void, and respondent did not and could not acquire any rights whatever by virtue of its location upon or its possession of this portion of the lode. A party cannot locate a valid claim to a mining claim or lode already located and legally possessed by others. In *Belk v. Meagher*, recently decided by the supreme court of the United States, (104 U. S. 279,) WAITE, C. J., in delivering the opinion of the court, said: "Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocater seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant. Locations can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence, a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done. * * * The right to possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location."

7. Is the Uncle Sam location invalid? It is claimed by respondent that the locators of the Uncle Sam, by claiming a discovery interest, committed a fraud upon the government, and that by reason thereof their entire claim is illegal and void. The act of congress under which this location was made provides "that no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode." 14 St. U. S. p. 252, § 4. Appellants contend that the term "discovery," as used in this act, is susceptible of more than one construction, and that the courts are justified in defining its meaning to be "a discovery made within the limits of the claim located." We are of opinion that a broad and liberal interpretation should be given to this statute. It must be construed with reference to the intent and object that congress had in view at the time of its passage, and in determining this question it is proper to consider the condition of the country and the general character of the mineral deposits, veins, and lodes. The object was evidently to encourage the location and development of mining claims. It was intended that the adventurous and enterprising prospector, who explored the mineral regions in search of the hidden treasure, should be rewarded by the government with at least "an additional claim for discovery." The mineral lodes, in many mining districts, were concealed from public view. They did not always "crop out" upon the surface of the earth. There were no landmarks to definitely determine the length, width, distance, or course of the lode when discovered. It required much time, money, and labor, and in many cases protracted and expensive litigation, to settle these disputed questions. The facts of this case present a fair history of the condition of many of the mining districts in this state, and eliminate from the case every question as to any intended fraud upon the government. They show that Rose was the first discoverer of the ore body at the point of his location, and that he and his associates made the location in good faith, honestly believing that the location was not upon any lode that had been previously discovered by others. Subsequent developments established the fact that they were mistaken, and the owners of the Uncle Sam have been legally deprived of all that portion of their location on the easterly side of the line A C, within the boundaries of the Tip Top claim; and it also appears from the diagram that over 200 feet of the Uncle Sam location, on the westerly end, extends beyond the limestone shale into the country rock. The fact that Phillips made a prior location to the same ground is not entitled to any consideration, because this location was abandoned prior to the location of the Uncle Sam.

In illustration of the evil results that would flow from sustaining respondent's construction of the law, let us suppose that A., in 1870, located a mining claim on the easterly end of Ruby hill, including 200 feet for a discovery interest; that B.,

two months thereafter, went to the westerly end, a distance of over one mile, and made a location upon a body of ore, and, believing it to be upon an entirely distinct lode from the one upon which A. had made his location, claimed 200 feet for discovery; that for years afterwards numerous other parties came upon the hill, and made divers other locations between the claims of A. and B., each claiming 200 feet for discovery, and for 10 or more years the various claims thus located were worked and developed upon the theory and belief that each was upon a separate and distinct vein or lode; and, after this lapse of time, the expenditure of several hundred thousand dollars, and long-protracted and expensive litigation, it was ascertained, as it finally was on Ruby hill, (Eureka Con. Min. Co. v. Richmond Min. Co., 4 Sawy. 302,) that there was but one lode, a zone of limestone containing precious metals, varying in width from 500 to 1,500 feet. The courts would have to say to B. and all the subsequent locators who made locations on this great mineral zone—although their claims did not in any manner conflict with any previous locations made upon the lode—that their locations were absolutely void because the developments brought about by time, labor, money, and litigation had established the fact that they were all upon the same lode, originally discovered and located by A. To so declare would not only make invalid most of the early locations on Ruby hill, but would, in its effect, entirely upset and destroy in many cases the titles to mining property in the various mineral districts of this and other states and territories. Nevertheless, if the law so directs in plain and unequivocal terms, it is the bounden duty of the courts to follow its mandates, although by so doing it would result in great and manifold injustice. The responsibility would rest upon congress, not upon the courts. But we are of opinion that such is not the meaning, object, or intent of the law, and that such a construction is not warranted either by the letter or spirit of the statute. The most that could possibly be claimed against the validity of the Uncle Sam location would be that it was voidable to the extent of the excess of 200 feet, and the owners of the claim could determine from which end or ends this excess should be taken. Nothing more than this result would follow from the reasoning of BEATTY, J., in *Golden Fleece G. & S. Min. Co. v. Cable Con. G. & S. Min. Co.*, supra, where an alien joins in making a location; or from the views expressed by the supreme court of Idaho in *Atkins v. Hendree*, 1 Idaho, 95, where it was claimed that the locators had purposely included a greater number of feet than the law allowed, and the court said that "all the benefit that a subsequent locator can claim is that he shall be entitled to maintain his right to the excess." There is not any principle decided or reason given in either of these decisions inconsistent with the construction contended for by appellants, that the statute intended to give 200 feet to the discoverer of the lode within the limits of

his claim; and we are not prepared to say that such a construction is not warranted by the language of the statute. But, under the facts of this case, it is only necessary to decide that the Uncle Sam location is not entirely void; that, if voidable at all, it is only as to the excess of the discovery interest.

8. Is the St. George patent void? The provisions of the act of congress, to which we have already referred, and upon which this and other questions, to be hereinafter discussed, must be determined, read as follows: "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure to do so shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land-office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land-office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess." Rev. St. U. S. § 2326. The language of this statute is clear, plain, and explicit. When a patent is issued in pursuance of its provisions, it would furnish the highest and best evidence of title which a party could obtain. In such a case, as was said by FIELD, J., in *Eureka Con. Min. Co. v. Richmond Min. Co.*, 4 Savy. 319, "a patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is ironclad against all mere speculative inferences." But it is equally as clear and as well settled that if the statute has not been complied with, and a patent is issued without authority of law, no substantial title is acquired. The position taken by respondent, that the officers of the land department of the government had jurisdiction to declare the adverse claim of appellants waived by a failure on their part to prosecute this suit with reasonable diligence, cannot be sustained.

When this suit was commenced the dis-

trict court acquired jurisdiction to try every question involved in the case, including the question of diligence in its prosecution. Congress did not intend that the land department should take any action until the controversy was finally determined in the state courts. The department is not authorized to interfere with the proceedings in the courts. The statute declares the steps that must be taken, and by following its directions no conflict of authority can ever arise between the land department and the courts. By departing from them endless confusion and expensive and unnecessary litigation will be bound to follow. Secretary of the Interior Schurz, in overruling the decision of the commissioner of the land-office in *Iowa Min. Co. v. Bonanza Min. Co.*, gave a clear exposition of the act of congress. He said: "This statute provides in plain terms that a failure on the part of an adverse claimant to prosecute his suit to judgment with reasonable diligence shall be a waiver of his claim, but it does not provide, either in terms or by necessary implication, that you shall decide what constitutes reasonable diligence while suit is pending in court. There can be no question but what the state court of Nevada has acquired jurisdiction over this cause, and it is equally clear that the object of the law was to require parties claiming an adverse interest in land included in an application for patent to try the right of possession, and have the controversy determined by the state courts, before a patent was issued. 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause.' *Elliott v. Peirson*, 1 Pet. 340. The question of diligence in the prosecution of a pending suit is as much a question for the determination of the court as any other question of law or fact which may arise in the progress of the case, and one which, after the court has acquired jurisdiction, should be left for its determination. I do not think it was the intention of congress that you should decide what constitutes reasonable diligence in the prosecution of a suit pending in a court of competent jurisdiction, for such a proceeding would necessarily interfere with matters which the court alone should determine. Under such a practice it might occur in which you would hold that reasonable diligence had not been exercised, and issue a patent, while the court might hold otherwise, and give judgment for the adverse claimant, and the result would be a conflict of authority and a confusion of titles. * * * I am of opinion that the proper practice in cases of this character is for the defendant, if, in his opinion, the suit is not prosecuted with reasonable diligence, to move the court to dismiss the case for want of prosecution, and, if the motion is granted, cause the judgment to be certified to your office, when a patent can be issued without conflict with the jurisdiction of the courts or the rights of the parties in interest." *Sickels, Min. Dec. 290*; *Copp, Mineral Lands*, 219. Equally plain and explicit is the opinion of Secretary Chandler in *City Rock v. King of the West*: "The plain meaning of this section is that all contests which

may arise in the disposal of the mineral lands shall be tried and determined, if tried at all, in a court of competent jurisdiction; that the adjudication and determination of that court shall be final, and a patent for the tract in controversy shall issue to the successful party or parties upon showing further compliance therewith." After stating the objections raised by the protest, he adds: "Both of these objections go to the merits of the case, and not to the form of the claim. It is unquestionably your duty, as well as mine, when an adverse claim is presented for consideration, to examine it, and determine whether the claimant has substantially set forth, under oath, its 'natural boundaries, and extent,' but if a compliance with the law is shown in these particulars, and a suit has been instituted to determine the rights of the parties, I am of the opinion that we can proceed no further with the investigation. It is the duty of the court in which the suit is pending to determine all other questions relating to the controversy." *Sickels, Min. Dec. 296, Copp, Mineral Lands, 219.* The facts of this case, as well as the decisions of the different secretaries of the interior, show the expediency, wisdom, and propriety of congress making provision, as it did, to have this question, and all others arising in the action, settled and determined in the state courts. The certificate issued by the clerk, "to the effect that this action had not been placed upon the calendar, nor had any proceedings been had therein from the March term, 1874," was true upon its face; but this fact, without showing the cause of the delay, conveyed to the officers of the land department an absolutely false impression, and induced them, in an *ex parte* proceeding, to decide that the plaintiffs had not prosecuted the suit with reasonable diligence; whereas the truth was, as established at the trial, that defendant was responsible for the delay in the prosecution of the suit.

The necessity of giving courts of justice final jurisdiction to review the action of the land department, even in cases where its officers have jurisdiction to act, is very clearly and forcibly stated by the supreme court of the United States in *Johnson v. Towsley*, 13 Wall. 72, wherein it was decided that "the land-office, dealing as it does with private rights of great value in a manner particularly liable to be imposed upon by fraud, false swearing, and mistakes, exemplifies the value and necessity of this jurisdiction." But in this case the officers of the land department had no jurisdiction to determine the question at issue. At the time the St. George patent was issued there was a valid and pending contest in the court to determine the right of possession to the mining ground and lode in controversy, and the act of congress expressly declares that in such cases "all proceedings * * * shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." The action of the land department was in violation of this provision of the statute. The government of the United States, under the circumstances, had no more au-

thority than a mere stranger to issue the patent. Its officers had no jurisdiction to perform any act, and it could not legally issue a patent while a valid contest was pending in the state courts. A patent issued without authority of law is void. *U. S. v. Chapman*, 5 Sawy. 528; *Polk's Lessee v. Wendal*, 9 Cranch, 87; *Stoddard v. Chambers*, 2 How. 285; *Morton v. Nebraska*, 21 Wall. 660; *Sherman v. Bulck*, 93 U. S. 216. In *Polk's Lessee v. Wendal*, 9 Cranch, 99, the facts showed that the state of North Carolina attempted to grant lands which she had no title or authority to grant. The court declared the patent void. MARSHALL, C. J., in delivering the opinion, said: "There are cases in which a grant is absolutely void,—as where the state has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law." In *Stoddard v. Chambers*, 2 How. 318, the facts showed that a patent had been issued at a time when the lands therein granted were expressly reserved from sale. MCLEAN, J., in delivering the opinion of the court, said: "No title can be held valid which has been acquired against law; and such is the character of the defendant's title, so far as it trenches on the plaintiff's. * * * The issuing of a patent is a ministerial act, which must be performed according to law. * * * It is true, a patent possesses the highest verity. It cannot be contradicted or explained by parol; but if it has been fraudulently obtained, or issued against law, it is void. It would be a most dangerous principle to hold that a patent should carry the legal title, though obtained fraudulently or against law. * * * The patent of the defendant, having been for land reserved from such appropriation, is void." From the views already expressed it is apparent that the district court was correct in its conclusions that the "St. George patent was issued without authority of law, while the land embraced in the application was reserved from sale as effectually as though there had been a special act of congress excluding it, and that, therefore, it is absolutely void."

9. Is the Victoria patent valid? There is, as we have before stated, but one lode within the boundaries of the Uncle Sam, St. George, and Victoria locations. This lode was the coveted prize for which these locations were made, and for which the patents to the St. George and Victoria were issued. The apex of this lode is within the surface ground claimed by the Uncle Sam location, and throughout the argument it was conceded that, if the owners of this location have in all respects complied with the law, they will be entitled to the entire width of the lode. To repeat the facts: When respondent made its application for the St. George claim it included the identical lode which was afterwards embraced in its application for a patent to the Victoria. The owners of the Uncle Sam claim protested against this application, and brought an action in the state court, within proper time, to determine which party had the better right to

the lode. They did not protest against the second application of respondent for a patent to the same lode under the name of the "Victoria." FIELD, J., in *Eureka Con. Min. Co. v. Richmond Min. Co.*, 4 Sawy. 318, declared that under the act of congress of 1872, "when one is seeking a patent for his mining location, and gives proper notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections, and present them, or he will afterwards be precluded from objecting to the issue of the patent. While, therefore, the general doctrine of relation applies to mining patents so as to cut off intervening claimants, if any there can be, deriving title from other sources, * * * the doctrine cannot be applied so as to cut off the rights of the earlier patentee, under a later location, where no opposition to that location was made under the statute. The silence of the first locator is, under the statute, a waiver of his priority." These views are relied upon by respondent, and claimed to be conclusive in its favor in support of the validity of the Victoria patent. But it will readily be seen by an examination of that decision that the question at issue here was not presented in that case, and the language of the eminent judge who delivered that opinion was not intended to, and does not, apply to a case like the present. It seems to us that substantially the same reasons exist against the validity of the Victoria patent that exist against the St. George, and that, if the court below was correct in declaring the St. George void, it necessarily follows, by every method of sound reasoning known to the law, that it was wrong in the conclusion reached that the Victoria patent was valid. At the time the Victoria patent was issued there was, as we have several times declared, a valid and pending contest between the respondent and appellants in the state court to determine the right of possession to the identical lode for which this—as well as the St. George—patent was issued. During the pendency of this contest the lode was reserved from sale.

In replying to the question asked by the surveyor general of Colorado, "Was the resurvey of the Crown Point lode, made after the filing of said adverse claim, and prior to the final disposition of the said application by this office, legal?" the commissioner of the general land-office said: "I would state that, after an application has been made for patent for a given mining claim, such claim is virtually withdrawn from the market, pending the final disposition of the case." *Sickels*, Min. Dec. 116.

The application of J. B. Haggin for patent to the Hurricane lode was dismissed by the commissioner "upon the ground that a great portion of the land applied for was included in the pending application of Andre Chavaune, and hence, at the date of Haggin's application, the same was not in market." *Id.* 243. If the portion of the lode in controversy was reserved

from sale, then no patent could issue for it until this suit is settled and determined by the courts.

A party, after applying for a patent to a mineral lode under a given name, cannot, after a contest is raised in the courts, and while it is pending, make a second application, under another name, to the same lode, and, after obtaining a patent therefor, stand in the doorway of the "Temple of Justice" and say to the adverse claimant, who regularly appeared and protested against the first application, "You cannot enter these halls to defend your rights, because you did not protest against my second application." If a party could legally make a second application for the same lode, he could continue without limit. As soon as one protest was filed he could immediately make another application to the same lode under a different name, and require the adverse claimant to protest against each application, and to bring a separate and distinct action in each case, and make the same proofs, in order to determine the identical questions at issue in the first suit. If this be the law, then a wealthy applicant could, in many cases, soon exhaust the purse, as well as the patience, of the adverse claimant, if he should unfortunately be limited in his means, however strongly he might be intrenched in the justice and right of his case. We do not believe that the act of congress requires such vain, useless, and expensive proceedings. It points out with unusual clearness the mode that each party must pursue; and when the parties have once regularly brought themselves within its provisions their respective rights must be heard and determined in the manner therein designated. Under the facts of this case no patent could be legally issued by the government of the United States to that portion of the lode in controversy until the question as to which party has the better right to the possession of the lode is disposed of by the courts, and then the party having such better right is, by pursuing the provisions of the statute, entitled to the patent. If this portion of the lode is not reserved from sale until the contest is disposed of, then the provisions of the act of congress are a delusion and a snare "that keep the word of promise to our ear and break it to our hope." Numerous other reasons have been assigned by appellants against the validity of the Victoria patent, some of which only go to the extent of making it voidable instead of void; but, in our opinion, the views we have expressed are correct, and they are conclusive of the case. It follows therefrom that the Victoria patent, in so far as it attempts to convey to respondent any portion of the lode covered by the valid portion of the Uncle Sam location, is—like the St. George—absolutely null and void.

10. In cases where a patent is issued without authority of law there is no necessity to resort to a court of equity to have it declared void. The question of its invalidity can be raised and determined in any proceeding, either in law or equity. The authority of the court to declare the St. George and Victoria patents void under the pleadings in this action is too well

settled to require discussion. See authorities heretofore cited in discussing the invalidity of the St. George patent; also *Patterson v. Tatum*, 3 Sawy. 173; *Patterson v. Winn*, 11 Wheat. 380; *Cooper v. Roberts*, 6 McLean, 93.

11. The only remaining question is as to the form and character of the judgment which the district court should be directed to render in this case. Appellants claim that they are entitled to a decree adjudging respondent to be the holder of the St. George and Victoria patents in trust for them, and to an order requiring it to convey to them all rights acquired thereunder, and have cited a great number of authorities which they claim warrant such a course to be pursued. In *Johnson v. Towsley*, 13 Wall. 85, the supreme court of the United States said that if, for any reason "recognized by courts of equity as a ground for interference in such cases, the legal title has passed from the United States to one party, when in equity and good conscience, and by the laws which congress has made upon the subject, it ought to go to another, 'a court of equity will,' in the language of this court in the case of *Stark v. Starr*, 6 Wall. 402, 'convert him into a trustee of the true owner, and compel him to convey the legal title.'" "The relief given in this class of cases," as was said by the court in *Silver v. Ladd*, 7 Wall. 228, "is founded on the theory that the title which has passed from the United States to the defendant inured in equity to the benefit of plaintiff, and a court of chancery gives effect to this equity, according to its forms, in several ways." But this course is only pursued in cases where the officers of the government were authorized to act, and by an erroneous construction of the law, or a misapplication of the facts, issued the patent to the wrong party. This is not such a case. We have decided that both of these patents were absolutely void; that they were issued without authority of law at a time when the land and executive department of the government had no jurisdiction to act in the premises. The lode was reserved from sale. Neither of the parties to this suit was entitled to a patent until the pending contest was finally settled and determined in the courts. If this be true, then the patents, in so far as they pretend to convey any portion of the lode within the limits of the Uncle Sam location, have no valid existence in the law. Respondent acquired no rights thereunder, and has none to convey. The judgment of the district court is reversed, and the cause remanded, with instructions to the district court to render a proper judgment in favor of the plaintiffs in this action and against the defendant, in compliance with the views we have expressed, for all that portion of the mineral lode in controversy westerly of the westerly end line of the Tip Top claim, designated by the line A C on the diagram; and order the injunction against defendant to this portion of the lode to be made perpetual; and a judgment in favor of plaintiffs for their costs. A judgment should also be rendered in favor of defendant for all that portion of the lode easterly of the line A C.

ROSE *et al.* v. RICHMOND MIN. CO. OF NEVADA.¹ (No. 1,089.)

(Supreme Court of Nevada. Jan. Term, 1882.)

SUPERSEDEAS BOND—AMOUNT.

On an application to fix the amount of the bond to cause the writ of error to the supreme court of the United States from a judgment of the state supreme court to operate as a *supersedeas*, in a case where the possession of a mine was determined, the probable value of the undeveloped ores contained in the ground, and which, but for the *supersedeas*, would naturally be worked, will be taken into consideration, and, where the evidence shows that it is probable that there is a large amount of such ore, the bond will be fixed to cover the damages sustained by reason of the delay in working the mine.

E. H. Rose and others recovered judgment against the Richmond Mining Company of Nevada, for the possession of a mine. Defendant sued out a writ of error to the supreme court of the United States, and applied to the chief justice of the supreme court of Nevada to fix the amount of the bond required in order to make the writ of error operate as a *supersedeas*. The bond was fixed at \$425,550, and was not given.

Wren & Cheney, R. M. Clark, and Crittenden Thornton, for appellant. *Stewart & Herrin, W. S. Wood, and Baker & Wines*, for respondents.

LEONARD, C. J. On the 16th day of March, 1882, the judgment of the district court herein, in favor of the defendant, was reversed by the supreme court, and the cause remanded, with instructions to the district court to render a proper judgment in favor of the plaintiffs and against the defendant, in compliance with the views expressed by the court in its opinion, for all that portion of the mineral lode in controversy westerly of the westerly line of the Tip Top claim designated upon the diagram inserted in the opinion by the line A C; and with further instructions to order the injunction against defendant as to this portion of the lode to be made perpetual, and a judgment in favor of plaintiffs for their costs. Subsequently the mandate of the supreme court was obeyed by the district court, and the judgment thereupon became final. The defendant, the Richmond Mining Company of Nevada, being desirous of taking the cause to the supreme court of the United States, by writ of error which shall operate as a *supersedeas* and stay execution, makes application to me as chief justice for a citation and for the approval of such security as is required by law upon the issuance of the same. By reason of the extreme views entertained by counsel for the respective parties in relation to the amount of security that ought to be required in order to render it "good and sufficient," five witnesses were examined upon each side, and from the testimony it becomes my duty to fix the amount of security that must be given.

The statute (1 U. S. St. at Large, 85;

¹This case, filed Jan. Term, 1882, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 17, Nevada Reports.

Desty, Fed. Proc. § 1000) provides that "every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States, or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid." The statute also provides that writs of error from the supreme court to a state court, in cases authorized by law, shall be issued in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States. The twenty-ninth rule of the supreme court of the United States is as follows: "*Supersedeas* bonds in the circuit courts must be taken with good and sufficient security that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make good his plea. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, * * * indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal." I must be controlled by the foregoing statutes and rule, and further on shall have occasion to ascertain their meaning when applied to a case like the one in hand.

The court below found, and such were the facts, that each party was in actual possession of portions of the lode in dispute,—that is to say, to the extent of the underground workings of each; and that, in addition, plaintiffs had such possession of the entire ground as is given by the doing of all work required by law to hold mining claims. The court also found that at the time of the trial the Albion Consolidated Mining Company was the owner of the Uncle Sam claim,—the ground in dispute,—and that this action was prosecuted for its benefit by consent of the plaintiffs. Under the judgment entered the Albion Company is entitled to the possession, in law and fact, of all the ground in dispute. It is entitled to all the benefits and privileges which an absolute ownership and right of possession give. Its rights are to work the ground unmolested, as it may wish, and to appropriate the proceeds of its labor and expenditure. If the entire possession is refused by the defendant, it is entitled to such process as will enable it to enjoy the fruits of its judgment. *Kershaw v. Thompson*, 4 Johns. Ch. 609; 2 *Daniell's*, Ch. Pr. 1062; *Herm. Ex'ns*, 529 et seq., *Freem. Ex'ns*, §§ 469, 470; *Mont-*

gomery v. Tutt, 11 Cal. 190. Until such rights are enjoyed the judgment is not executed, and, if a *supersedeas* is obtained, their enjoyment will be postponed until there shall be a final decision of the supreme court of the United States. Conceding that the Albion Company has the actual possession of a part of the ground in dispute, still the right of possession as to any part is denied by a prosecution of the writ of error, and, if defendant's claim of error is correct, the Albion Company, in law, is a trespasser to the extent of its possession. Whether, under such circumstances, that company could legally work upon any part of the ground in dispute, after *supersedeas*, if no injury should be done thereto, I shall not stop to inquire; but that it would not be permitted to do permanent injury to the property I have no doubt. Should it develop new ground and open new ore bodies, it could not appropriate the ores. The object of the *supersedeas* is to keep the property substantially as it is until judgment of the supreme court. For all practical purposes, then, the effect of the *supersedeas* will be the same as to all parts of the disputed ground. If the Richmond Company had actual possession of the whole claim, a *supersedeas* would undoubtedly enable it to retain the same. It will enable that company to retain all possession it now has, and, as before stated, the Albion Company will not be permitted to do permanent injury to the estate. Under such circumstances, the Richmond Company cannot complain if the Albion Company ceases work, even though it may continue, where no injury can result in case the present judgment should be reversed or modified. Surely, I cannot presume the Albion Company will make any developments during the pendency of the writ of error, since it is not in law bound to do so; and, if any should be made, the work would be done at the risk of a total loss if there are good grounds for the writ. At any rate, should the Albion Company expend money upon the disputed ground in case of *supersedeas*, it would take all the risk of its total loss upon itself. Such being the case, the Richmond Company cannot complain if I act upon the presumption that the Albion Company will not, at its own risk, make further developments while the *supersedeas* remains operative. If I am right so far, then I must proceed upon the hypothesis that, when security is given which shall have the effect of a *supersedeas*, no other ores will be disclosed until after final decision, even though they exist and might be exposed before a final disposition of the case. My action, then, cannot be influenced by the fact that in a proper case the supreme court of the United States, after appeal or writ of error taken, may and will interfere and require additional security upon a *supersedeas*; that is to say, when, "after security has been accepted, the circumstances of the case or of the parties or of the sureties upon the bond have changed, so that security which, at the time it was taken, was 'good and sufficient,' does not continue to be so. There is nothing shown to me whereby I can

conclude that the circumstances of the case will change pending the writ of error,—that is to say, that developments will be made and other ore bodies disclosed, if they exist; but, on the contrary, there is much to convince me that work will be discontinued in the disputed ground in case of *supersedeas*. I must assume, then, that, as the security is now fixed, so it will remain.

The next question that requires consideration is whether I can and should take into account merely the ores actually in sight, or, in addition, may and should include, as a part of the basis of my calculations, reasonable and fair probabilities of the existence of ore deposits other than those now known, in fixing the amount of "good and sufficient security" for damages and costs. In my opinion, to do justice I must include the element of reasonable probability, and, in law, such is my duty. I recognize the fact in the outset that this conclusion brings difficulties with it, and that the proper sum to be set down as "good and sufficient security" in this regard will at last be somewhat uncertain; but these circumstances do not alter the case. As to the ore in sight, a reasonable discretion must be exercised in determining the amount and value, because the evidence upon both points is painfully conflicting, and the estimates of the respective parties are widely different. It is conceded that some ore bodies contain a great amount of waste, while in others but little is found. Ore body "B" may contain much or little waste, still it is admitted to be my duty to balance the testimony on these questions as best I can. Why is it not incumbent upon me, then to conclude from the great mass of testimony upon the point whether or not it reasonably appears that there are other ore bodies in the ground in dispute, which, during the pendency of the writ of error, would be exposed and worked if there should not be a *supersedeas*? The statute declares that the security must be sufficient to cover all damages and costs which the Albion Company will suffer and may recover by reason of the writ if the judgment of this court is affirmed. If other ore bodies exist, although their present whereabouts are now unknown, which, but for the *supersedeas*, the Albion Company might and would develop and utilize, the damage will be just as great as it would be if they were in sight. The bare possibility of finding ore in undeveloped ground, without evidence of a reasonable probability of its existence, would not justify me in requiring security to cover such possibility. But, on the other hand, I can find no justification in refusing to require security sufficient to cover reasonable probabilities. If by some test now unknown it were possible to ascertain with reasonable, but not infallible, certainty as to the existence or non-existence of ore bodies in the ground in dispute, would it be denied that in this proceeding evidence showing the result of such test should be received and considered? If science or experience shows, as a general rule, that in a certain locality one result follows certain conditions, why should

not evidence of the existence or non-existence of such conditions be admitted and acted upon with other facts in ascertaining whether or not, in the case in hand, it is reasonably certain that the result will accord with the general rule? Suppose the property in dispute in this case was timber land; that it would be very valuable if a certain railroad should be built, but otherwise of little value,—can it be doubted that evidence establishing with reasonable certainty that the road would be completed long before a decision could be had in the supreme court ought to be received and considered important in estimating the damages that plaintiff would sustain? True, in such case it might be argued that the completion of the road would be a change of circumstances which, under the rule laid down in *Jerome v. McCarter*, 21 Wall. 31, would justify the supreme court in requiring additional security if the amount first fixed was insufficient. But that fact does not militate against my conclusion in this case, because here, in all reason, there will be no change of circumstances if there is a *supersedeas*. Besides, if I interpret *Jerome v. McCarter* correctly, it is the duty of the chief justice to act upon existing facts, although they do not amount to absolute demonstration beyond the possibility of a doubt. It is my duty to require security according to those facts as they are presented, and the supreme court of the United States will presume that I so acted.

If the object of this proceeding was to establish a definite amount which the Richmond Company should actually pay the Albion Company as damages for delay in case of affirmance, it might and should be urged that evidence of the probable existence of other ore bodies in the ground in question ought to be considered with great caution; but even in that case it would, in my opinion, be admissible, and in arriving at a proper result it should be given weight according to the facts and circumstances proven. But in fixing the amount of security on appeal or in error it was not expected or intended that it should be established with the accuracy of a verdict or judgment. It should be ample to protect the respondent in error against all damages which it is reasonable to believe will result from the writ. In *Catlett v. Brodie*, 9 Wheat. 553, the court said: "The word 'damages' is here used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to if judgment is affirmed. Whatever losses he may sustain by the judgment not being satisfied and paid after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security. Upon any suit brought on such bond it follows, of course, that the obligors are at liberty to show that no damages have been sustained, or partial damages only, and for such amount only is the obligee entitled to judgment." Under the statute and rule of the supreme court above quoted, as well as the decided cases, I have no doubt that the amount of security in this case, if the

writ is to operate as a *supersedeas*, is left to my legal discretion.

In *Jerome v. McCarter*, *supra*, it is said, "This is a suit on a mortgage, and therefore, under this rule, (29, a case in which the judge who signs the citation is called upon to determine what amount of security will be sufficient to secure the amount to be recovered for the use and detention of the property, and the costs of the suit, and just damages for the delay and costs, and interest on the appeal. All this, by the rule, is left to his discretion. In *Black v. Zacharie*, 3 How. 495, it was held that in such a case the justice taking the security was the sole and exclusive judge of what it should be. Since then, in *Rubber Co. v. Goodyear*, 6 Wall. 156, and *French v. Shoemaker*, 12 Wall. 94, remarks have been made by judges announcing the opinion of the court which, if considered by themselves, would seem to indicate that this discretion could be controlled here upon an appropriate motion. The precise point involved in this case was not, however, before the court for consideration in either of those cases, and, we think, was not decided. We all agree that if, after the security has been accepted, the circumstances of the case or of the parties or of the sureties upon the bond have changed, so that security which, at the time it was taken, was 'good and sufficient,' does not continue so, this court may, upon a proper application, so adjudge, and order as justice may require. But upon facts existing at the time the security was accepted the action of the justice, within the statute, and within the rules of practice adopted for his guidance, is final; and we will presume that when he acted every fact was presented that could have been. So, while we agree that, in a proper case, after an appeal or writ of error taken here, this court may interfere and require additional security upon a *supersedeas*, it will not attempt to direct or control the discretion of a judge or justice in respect to a case as it existed when he was called upon to act, except by the establishment of rules of practice. If we can be called upon to inquire into the action of the justice in respect to the amount of the security required, we may as to the pecuniary responsibility of the sureties at the time they were accepted." In cases like this, where the property follows the event of the suit, "indemnity is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on appeal." In this case, in ascertaining the amount of indemnity that ought to be required, the value of the ore in the disputed ground is not to be included, because, upon affirmance, the property will follow the event of the suit; but, inasmuch as under the judgment entered the Albion Company has a present right of possession of all the ground, together with all other rights that follow complete ownership, the value of the ores contained therein, which, but for the *supersedeas*, could, and naturally would, be worked during the pendency of the writ of error, must be taken into consideration

in providing good and sufficient security for just damages on account of delay. I desire to be corrected if I am wrong in concluding that my duty requires me to fix the amount of security so as to cover damages for delay in working all ores in the disputed ground, including not only those which are in sight, but also such as, in my best judgment, from the evidence before me, although uncovered, with reasonable probability and certainty do exist therein; and to the end that all rights may be protected I shall separate the different items that will make up the aggregate security required, in order that the writ may operate as a *supersedeas*.

(1) As to the ore in sight. Upon this point the testimony is voluminous, and, as before stated, extremely conflicting as to amount and value. I cannot undertake the task of giving it in detail, or even in substance. The ore exposed includes what is represented upon "Exhibit A," as ore body "B," Albion cave, and ore N. W. of the line A C, (the dividing line between the ground in dispute and the Richmond Company's ground,) between points 20 and 21. For this, estimating the amount of ore at 5,000 tons, of the gross value of \$73 per ton, exclusive of lead, I shall require security in the sum of \$55,000.

(2) For deterioration of property, necessary expenses in preserving it, etc., Mr. E. N. Robinson, the superintendent of the Albion Company, testified upon this item, and his estimate was about \$36,360 a year. He was positive that the company's loss would amount to that sum. There is no evidence against his. He gave the items that made up the aggregate sum, and I am unable to say his statement is incorrect. He estimated four years' delay. I shall adopt three years and a half, making a total, for this item, of \$127,260.

(3) Security is requested on account of capital expended by the Albion Company up to the present time,—that is to say, interest on that sum. I do not think this should be required in addition to that stated in items 1 and 4.

(4) Damages for delay in working the ground in dispute, outside of ores in sight, and realizing the probable profits therefrom.

In the court below it was found as a fact, and is the testimony before me, that this mining ground is situated on Ruby hill, in the Eureka mining district; that along and through the hill, for a distance slightly exceeding a mile, and extending in a north-westerly and south-easterly direction, is a zone of limestone, in which, at different places throughout its length, mineral is found; that, underlying this zone, on the southerly side, is a well-defined, unbroken foot wall of quartzite, which has a general dip to the north-east; that on the northerly side of this zone of limestone is a hanging wall of shale, and that this zone of limestone is a vein or lode of rock in place, bearing gold, silver, lead, and other valuable minerals. It is shown to my satisfaction, and in fact it is hardly disputed, that this zone, north-west of the line A C, is of the same character as on the south-east side, where the mining claims of the Richmond

and Enreka Companies are situated. At the extreme eastern point of this zone, a short distance east of the Jackson mine, the foot and hanging walls, the quartzite and shale, come together. At the Jackson the zone is narrow. As it extends towards the north-west it becomes wider as a rule, until it reaches the ground in dispute, where it is as wide as on the Richmond side, if not wider. The mines on this zone are the Jackson at the east; then, going north-westerly, are the Phenix, the K K, the Eureka Consolidated, the Richmond, and the one in dispute. The Jackson, containing 800 feet, has produced \$2,100,000, or a little more than \$2,600 per foot. The Phenix, containing 600 feet, has produced \$1,200,000, or \$2,000 per foot. The K K, containing 800 feet, has produced \$2,700,000, or \$3,375 per foot. The Eureka Consolidated, containing 1,200 feet, has produced \$17,500,000, or a little less than \$14,600 per foot. The Richmond, containing 1,100 feet, has produced \$18,000,000, or about \$16,365 per foot. The ore bodies south-east of A C are irregular in form, in width and thickness, varying from 150 feet to a few inches thick. As a general rule, Mr. Wescoatt says, they are connected by larger bodies of low grade ore, sometimes by small seams. Immense ore bodies have been found and worked out south-east of A C, and they were traced continuously up to and beyond that line. Ore body "B" is north-west, or on the Albion side, of the line A C. The Albion cave is on the same side, and west of "B," along the line A C, there is ore, evidently, for a distance of 100 or 150 feet. The witnesses for the Albion Company all stated that at A C the ore bodies continued, and that there was no evidence of their giving out; that there were boulders and waste there, and at "B," as there had been in the Richmond and Eureka. One or more witnesses testified that boulders were favorable to a continuance of ore. Two witnesses, who put in the timbers on the Richmond side of A C and at B, stated that for some distance along A C they were obliged to put up planking to keep the ore from falling or caving down on the Albion side. It is admitted that the timbers between A C and B are badly crushed by reason of the superincumbent weight. They are more or less crushed further west along the A C line. Mr. Robinson testified that the cause of the crushing was "the large amount of ore falling away from the roof onto the timbers; that it must be ore, because the limestone which encases the ore could not possibly move in the manner in which this material moves, very slowly, but constantly, thereby crushing the timbers." "Then, again," he said, "we have the evidence of its being ore from the fact that above these crushed timbers, where we gained access, where we crawled through timbers for sixty or seventy feet, we noticed large masses of ore on the roof overhanging the timbers, from which other ore broke away." Other witnesses corroborated these statements. Between points 24 and 25 on the north-east side of B, a distance of 40 feet, no excavations have been made, and no person can

know that the ores do not extend in that direction. The witnesses for the Richmond Company all agree that, in their opinion, the ore bodies found on the south-east of line A C did not extend to the north-west beyond that line, except at B, points 20 and 21 and the Albion cave. At least, I do not remember any other point. They gave reasons why they thought the ground in dispute contained no ore of any consequence except at the places mentioned; while those who testified for the Albion side gave theirs for thinking absolutely opposite. My impressions were generally favorable to the witnesses who testified, but the judgment of one side or the other must be wrong. In my opinion the reasons for concluding that the ore bodies which have extended with occasional slight interruptions from beyond the line between the Eureka and Richmond mines, a distance of more than thirteen hundred feet, do not stop at A C or at B, or at the Albion cave, greatly preponderate over the opposite theory. There are certain acknowledged evidences of the presence of ores in that zone, which have been followed with success in each mine. Every witness on the Albion side stated that those evidences were visible in the disputed ground. Ores have been found far away from the line A C and the Albion cave,—in small quantities, to be sure, but enough to give promise of better results upon further development. All those witnesses testified that the Albion ground was prospectively as valuable as the Richmond. All the evidence shows that there may be ore found anywhere in that zone, at least above the sixth level of the Richmond, which corresponds nearly with the first level of the Albion. Above the sixth level of the Richmond very little prospecting has been done on the Albion side, and, for good reasons, only a small part of the mine has been prospected at all. I have neither time nor space to make further mention of the testimony than to say that reports were made from the company in Eureka to the corporation in London, in relation to the ores in sight, as follows: "In view of the delay in rendering the decision in the Albion Case, which was heard in November last, and the company being meanwhile restrained by injunction from removing ore from this part of the mine, where it is abundant, it is in contemplation to shut down, temporarily, one of the large furnaces." Mr. Rickard also testified that Mr. Harris, then foreman for the Richmond Company, stated that if he could take out the ore in sight in the disputed ground he could, with that and what he got from the men working on tribute, run the three furnaces, capable of working about sixty tons each daily, for four or five months. I mention these two facts last stated only for the purpose of showing that, when the statements were made, it is probable at least that the persons making them—employees of the Richmond Company—thought favorably of the prospects.

In view of all the facts it will be strange indeed if future events shall show that, with the exception of the ore in sight, the extreme north-west limit of these ore

bodies has been reached. It will be passing strange if that limit shall prove to be just on the line A-C, with the exception of the ore bodies now exposed. In my opinion, it will be fair, to the Richmond Company at least, to conclude that there is the strongest probability that the ground in dispute is and will prove to be as valuable at least as the average of the lode from the Jackson on the east; and that, during the pendency of the writ of error, the Albion Company could and would work the 380 feet extending to the northwest boundary of the Victoria claim. I shall proceed upon this theory, and estimate the period of delay to be three years and a half. The average gross product per foot of all the mines from the Jackson to the Richmond, inclusive, up to the present time, is about \$9,220. Upon the same basis the gross product of the 380 feet during the period of delay would be \$3,503,600, one-half of which, according to the evidence, would be net,—that is to say, \$1,751,800. From this I subtract the

gross value of the ore in sight, which has been fixed as 5,000 tons, at \$73 per ton,—\$365,000,—leaving \$1,386,800 as the net value of the ores not exposed in this portion of the ground in dispute, and which would be worked during the delay. The legal interest upon this sum, averaging the longest and shortest time of delay, will be 17½ per cent.,—\$242,690,—which, added to the amounts before fixed, makes a total of \$424,950. This sum, with \$600 for costs, making in all \$425,550, is fixed as the amount of security required in order that the writ of error herein may be a *supersedeas*.

In conclusion I will say that, although the power and responsibility of passing upon the questions here presented are vested in me alone, I have counseled with my associates upon the question as to whether probable damages on account of delay in working the undeveloped ground should be included, and I am authorized to say that they fully concur in my conclusion.

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